

Competition Update

November 2019

Low fines for vertical price fixing against Swiss ski manufacturer Stöckli after leniency application

The Swiss Competition Commission fined Stöckli Swiss Sports with decision from August 19, 2019 for vertical price fixing with its dealers.

Introduction

The Swiss Competition Commission ("ComCo") fined Stöckli Swiss Sports ("Stöckli") with decision of August 19, 2019, a Swiss manufacturer of Skis and other sport products, for vertical price fixing. The fine was rather low at around CHF 140,000, as Stöckli had filed a leniency application and entered into an amicable settlement with ComCo.

The settlement decision is one of several in which manufacturers themselves reported vertical infringements. Furthermore, it underscores ComCo's strict approach vis-à-vis hard-core vertical agreements. It also sheds light on how ComCo views restrictions of selective (online) distribution in Switzerland.

Factual Background

Stöckli maintains a selective distribution system with independent dealers. In parallel, Stöckli is vertically integrated and runs its own 16 Stöckli branded stores. According to most of the distribution contracts Stöckli dealers were i.a. obligated not to

1. undercut Stöckli's recommended resale prices ("RRP") and thus Stöckli's Swiss resale prices with regard to Stöckli Skis;
2. communicate prices over the internet;
3. sell Stöckli skis over the internet;
4. make or tolerate any cross deliveries of Stöckli ski.

Proceeding and Decision of ComCo

The Secretariat of the ComCo carried out a market observation in February 2018 based on consumer complaints.

In May 2018, the Secretariat of the ComCo opened a pre-investigation. During the pre-investigation, Stöckli submitted several distribution agreements. A market survey showed that 88% to 95% of the dealers respected the recommended resale price and therefore the minimum Swiss resale prices for Stöckli skis. In addition, Stöckli dealers responded to ComCo's questionnaire that they did not feel free to set an independent resale price.

Against this background, ComCo opened a formal investigation in October 2018. The investi-

gation focused on vertical restrictions for Stöckli Skis, excluding other Stöckli products, such as cloth and bikes. After opening the investigation, Stöckli filed a leniency application. The decision does not reveal why the leniency application was not submitted during the pre-investigation, which could possibly have settled the proceedings without any sanctions.

In its investigation, the WEKO qualified the obligation of Stöckli dealers not to sell under the recommended resale prices as a vertical hardcore restriction (Art. 5 para. 4 CartA). Despite the existence of inter-brand competition (Stöckli's market share amounts to 10 to 20%), according to the Gaba decision of the Federal Supreme Court such clauses significantly restrict competition (Art. 5 para. 1 CartA) regardless of the actual effects of such clauses.

As efficiency justifications were not eminent, Stöckli entered into a settlement with the Secretariat of the ComCo. The settlement obligates Stöckli not to:

- › set minimum or fixed prices to its dealers (neither directly nor indirectly) and to clearly indicate that their recommended resale prices are not binding;
- › prohibit dealers communicating resale prices over the internet;
- › restrict internet sales of its dealers in Switzerland, although it is allowed to define quality standards regarding internet sales and

to require the dealers to have at least one physical point of sale;

- › restrict cross supplies within its selective distribution system between Stöckli dealers in Switzerland, or from foreign Stöckli dealers to Swiss Stöckli dealers;
- › limit passive sales of foreign distributors to Swiss Stöckli dealers or to impose an obligation on foreign distributors to limit passive sales of foreign dealers to Swiss consumers.

The amicable settlement together with the leniency application resulted in a fine reduction of 70%. In the view of ComCo, the manufacturer Stöckli played a leading role in the anti-competitive distribution agreements and therefore Stöckli was not granted full immunity.

Concluding remarks

The decision confirms the strict approach of ComCo with regard to vertical price fixing following the Gaba decision of the Federal Supreme Court. Companies must be aware that the Gaba prejudice also has an impact on distribution agreements that were concluded long before the Federal Court decision. Therefore, there is a considerable risk of sanctions also for older distribution agreements containing hardcore agreements.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice. This article was originally published in the Newsletter of the International Law Office – www.internationallawoffice.com.

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