

Competition law: Swiss Competition Commission issues revised vertical notice

The Swiss Competition Commission issued its revised notice on the treatment of vertical agreements under competition law. It will enter into force on January 1, 2023. The revised Notice is based on the EU Verticals Block Exemption Regulation, but contains a "Swiss Finish" in key aspects.

Published: 16 December 2022

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EXPERTISE	Competition and Regulated Markets	

Revised Vertical Notice

On December 14, 2022, the Swiss Competition Commission ("ComCo") published its revised Notice on the Treatment of Vertical Agreements under Competition Law ("Vertical Notice") including revised explanatory notes (German Version: [link](#)).

The revised Vertical Notice will enter into force on January 1, 2023. Existing contracts must be adapted to the new rules within a transition period of one year.

New rules for vertical agreements

As of June 1, 2022, the new Vertical Block Exemption Regulation ("Vertical Block Exemption Regulation") applies in the EU.

With the revised Vertical Notice, the ComCo intends to create congruence in principle with the EU Commission's Vertical Block Exemption Regulation. However, it also takes into account Swiss practice and case law and therefore contains a "Swiss Finish" in essential aspects.

The "Swiss Finish" was already apparent in the consultation draft, which was largely adopted. It already provided, among other things, for facilitation of exclusive and selective distribution, adjustments to dual distribution and changes to online distribution. For a summary of the consultation draft, see our July 2022 Newsflash.

The revised explanatory notes also clarify that, as in the EU, vertical non-compete agreements concluded for a period of five years but tacitly extended beyond this period will in principle not pose any problems in the future, provided that there are adequate termination or renegotiation options. This innovation, which is very welcome in EU sales practice, has also been adopted in the revised explanatory notes.

Deviations from EU practice

The revised Vertical Notice provides for stricter regulations than in the EU, particularly with regard to price recommendations, export bans and restrictions on passive sales. In this way, the ComCo wants to take into account the situation in Switzerland, which it considers legally and economically different from that in the EU.

For example, the requirements for unlawful resale price maintenance are set much lower in the Vertical Notice than in the EU. Even an intensively communicated price recommendation can qualify as an impermissible vertical price agreement without additional pressure or incentives.

The vertical notice is also strict with regard to export bans to Switzerland. Unlike in the EU, Swiss antitrust law also covers agreements concluded outside Switzerland that may have potential effects on the Swiss market. For example, export bans on distributors in the European Economic Area that lead to the exclusion of passive sales to distributors or end consumers in Switzerland fall under Swiss antitrust law and are fundamentally problematic. In addition, according to the Verticals Notice, exclusive purchase commitments in Switzerland that directly or indirectly lead to an exclusion of passive sales into Switzerland may already qualify as absolute territorial protection agreements.

Summary and Outlook

Although the Vertical Notice is largely based on the legal situation in the EU, it deliberately provides for stricter rules on key issues.

Contracts with an impact on Switzerland must therefore continue to be examined for compliance with the "Swiss Finish" in antitrust distribution practice.

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

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