

Competition - Switzerland

FCC consults on its vertical agreements communication review

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June 10 2010

The Swiss Federal Competition Commission (FCC) has undertaken a consultation for the review of its 2007 communication on vertical agreements. This communication, which is not binding on the judicial bodies, sets the criteria according to which the FCC examines vertical restraints in practice in light of the Cartel Act. According to the FCC, this new text confirms its determination to combat the isolation of Swiss markets and the maintenance of high prices in Switzerland due to competition restrictions.

The reform has two main aims. First, it seeks to take into account recent important decisions by the FCC on vertical agreement which dealt with:

- an unlawful ban on parallel imports through a vertical agreement;(1)
- published recommended prices and resale price fixing agreements between manufacturers and distributors of three medical drugs; and(2)
- a vertical agreement setting resale prices in the market for cutting tools.(3)

Second, the reform aims to reflect the new EU Blocking Exemption Regulation on Vertical Agreements and its accompanying guidelines (published in April 2009) which came into force in June 2010.

The main changes to the 2007 communication concentrate on the following areas:

- Advertising in the media or on the Internet will be considered a passive sale, even if it reaches clients reserved by the supplier or in the exclusive territory of another reseller.(4)
- The new wording on agreements that are legally presumed to eliminate effective competition describes in more detail the two legal presumptions set forth in Article 5 (4) of the Cartel Act (ie, agreements setting fixed or minimum prices or allocation of absolute territory protection).(5)
- With respect to the agreements which are legally presumed to eliminate effective competition, the draft communication states that in order to rebut the legal presumption, both inter-brand and intra-brand competition should be taken into account; under the 2007 communication, the FCC considered that the sole fact that inter-brand competition existed was insufficient to rebut the presumption.(6)
- The provisions on price recommendations have been reworded to harmonize Swiss law with EU law.(7)
- The new wording states that the evaluation of the significant restrictions to competition should be made globally and on a case-by-case basis, taking into account qualitative as well as quantitative criteria.(8)
- Similarly to the new EU rules, the draft provides for a safe harbour if both parties to the agreement have market shares below 30% and if there is no restriction by object.(9)
- The draft communication provides for a transition period of one year.(10)

The deadline for comments on the draft to reach the FCC was June 8 2010.

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Endnotes

(1) See the FCC's *Gaba* decision (December 2009).

(2) December 2009.

(3) May 2009.

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(4) Paragraph 3.

(5) Paragraph 10.

(6) New paragraph 11.

(7) New paragraphs (m), (n) and 12-2.

(8) Paragraph 12.

(9) Paragraph 15.

(10) Paragraph 18.

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