

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

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Introduction

The Swiss Competition Commission ("ComCo") fined Stöckli Swiss Sports ("Stöckli"), a Swiss manufacturer of Skis and other sport products, for vertical price fixing with its dealers with CHF 140'000. The fine was rather low, as Stöckli had filed a leniency application, albeit after ComCo having opened the investigation, and a settlement was reached.

The settlement decision is one of several in which manufacturers had made use of the vertical leniency application regime in Switzerland and underscores ComCo's rigid approach vis-à-vis hard-core vertical violations. 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. sell below the recommended resale price, which was identical to the Swiss retail prices for Stöckli skis sold in the Stöckli stores;
2. communicate prices over the internet;
3. sell Stöckli skis over the internet;
4. make or tolerate any cross deliveries of Stöckli ski between Stöckli dealers.

Some contracts also provided for a contractual penalty in case the independent dealer violated the first obligation.

Proceeding and Decision of ComCo

As in many vertical cases in the past, the Secretariat of ComCo started its pre-investigation in February 2018 based on *consumer complaints*. Consumer had noted that Stöckli dealers were not allowed to grant discounts on skis.

On this basis, ComCo opened a pre-investigation in May 2018. During the pre-investigation, Stöckli submitted several distribution agreements and a market survey showed that 88% to 95% of the dealers respected the recommended retail price and therefore the minimum Swiss retail 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 investigation focused on vertical restrictions for Stöckli Skis, excluding other Stöckli products, such as cloth and bikes. Only during this formal investigation, Stöckli filed its leniency application. It is relevant to know in this context, that ComCo may only close a formal investigation with a formal decision, including a settlement decision.

In ComCo's view, the contractual obligations of the Stöckli dealers had the goal to restrict competition in Switzerland. It qualified the obligation of Stöckli dealers not to sell below the recommended resale prices as a vertical hard-core restriction. 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, regardless of their actual effects.

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

- set minimum or fixed prices to its dealers (neither directly nor indirectly) and to clearly indicate that the recommended retail prices are not binding;
- prohibit to dealers communicating resale prices over the internet;
- restrict internet sales of its dealers in Switzerland, although it is allowed to require the dealers to have at least one point of sale or define quality requirements regarding internet sales;
- restrict cross supplies within its selective distribution system between Stöckli dealers, be they in Switzerland or abroad;
- 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 settlement together with the leniency application resulted in a fine reduction of 70%. In the view of ComCo, the manufacturer Stöckli had a leading role in the anti-competitive distribution agreements.

Concluding remarks

The decision confirms the strict approach of ComCo with regard to vertical price fixing. After the Gaba decision, no actual effects of price fixing agreements on competition need to be established and a justification on grounds of economic efficiency is usually very difficult. Some of the problematic distribution contracts dated back to 2003, long before the new and stricter Gaba regime was decided. Companies should bear in mind that old agreements might contain per se restrictions, which can be sanctioned by ComCo and that selective distribution agreements are no exception to this.