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Competition Law: Revision of the Swiss Vertical Notice

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Following the revision of the Vertical Block Exemption Regulation in the European Union, the Swiss Competition Commission is now also proposing to amend its Vertical Notice and Guidelines. Although the proposed amendments are based on the new EU distribution rules, they still depart from them on key issues, resulting in a “Swiss Finish”.

Background

After the EU has revised its Vertical Block Exemption Regulation (“VBER”) as of 1 June 2022, also the Swiss Competition Commission (“ComCo”) proposes to amend its Vertical Notice to reflect the latest developments. To this end, ComCo this week published a Draft of its new Vertical Notice and Guidelines (“Draft”). Interested parties may comment on the Draft until 2 September 2022.

The main changes to the current vertical notice can be summarised as follows:

Broader options in exclusive and selective distribution

In line with the VBER, companies will have more options for structuring their distribution systems in the future.

For example, shared exclusive distribution, whereby a territory or customer group is exclusively allocated to up to five distributors and these are protected from active sales by other distributors into this territory or to this customer group, shall be permissible.

In addition, the Draft also enables the passing on of active sales bans to lower distribution levels within a distribution system (i.e. to impose such active sales bans on the customers of the distributor).

Finally, a particularly important change relates to the possibility to operate in parallel an exclusive distribution system in certain territories and a selective distribution

system in other territories and to protect the selective distribution system from sales by exclusive or free distributors from other territories by means of a passive sales ban.

Changes regarding dual distribution

The Draft is also aligned with the VBER with regard to constellations in which a company distributes its products both itself via its own distribution network and via independent distributors (“dual distribution”). In particular, the exchange of information between the dual distribution partners shall only fall under the Vertical Notice if such exchange is both directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services by the parties. Unlike the EU Commission’s vertical guidelines, however, the Draft does not specify types of information that may or may not be shared.

Changes in the online sector

Regarding the online domain, the Draft adopts the EU rules pertaining to online intermediation services, and states, in particular, that vertical agreements in this area are not to benefit from the dual distribution privilege if the provider of the online intermediary services is a competitor on the relevant market for the sale of the intermediated goods or services.

Moreover, in analogy to the VBER, the Draft declares certain restrictions on online sales or online advertising, which, among other things, de facto prohibit the distributor from using the internet for the sale of the contract goods or services, as a qualitatively severe restriction of competition.

In contrast, restrictions on the manner in which the contract goods or services are to be sold online as well as restrictions on the use of certain online sales channels (e.g. online marketplaces) are in general considered unproblematic.

Finally, so-called dual pricing systems (requirement that the distributor pays a different wholesale price for products sold online than for products sold offline) are now in general considered unproblematic, provided that the difference in price is reasonably proportionate to the differences in investments and costs in the respective channels.

Broad parity obligations are problematic

In line with previous practice, the Draft now expressly states that so-called broad parity obligations, which oblige the buyer of online intermediation services (such as hotel booking platforms) not to offer its products to end consumers on competing online intermediation services at more favourable conditions, are in principle

problematic. So-called narrow parity obligations, on the other hand, which prohibit undercutting only on the direct channels of the buyer (e.g. the hotel itself), shall remain permissible.

No change for non-compete clauses?

In its vertical guidelines, the EU Commission has clarified that vertical non-compete obligations that are concluded for a duration of five years but are tacitly renewable beyond this period are in principle unproblematic, provided that there are adequate possibilities for termination or renegotiation. In its Draft, ComCo has so far not adopted this change, which would have been welcomed in practice.

Stricter requirements for resale price maintenance

While the EU Commission provides guidance in its guidelines on various circumstances in which resale price maintenance may be permissible, ComCo adheres to its practice, which has recently been tightened.

For example, resale price recommendations may not only be problematic from a Swiss competition law perspective if they lead to fixed or minimum resale prices as a result of the exertion of pressure or the granting of incentives by one of the companies involved. The Draft now only mentions pressure or the granting of incentives as a possible criterion for establishing a vertical agreement on resale prices. However, according to the Draft, the necessary coordination could also result from a particularly intensive communication of price recommendations.

Outlook

While the Draft is largely based on the revision in the EU, it sometimes deliberately deviates from it on key issues. Therefore, the existing “Swiss finish” in the rules regarding distribution would persist. This means that also in future, distribution contracts with an impact on Switzerland would have to be examined under the stricter Swiss competition law regime. It remains to be seen whether the envisaged Swiss regulation will come closer to the EU regulation as a result of the consultation process.

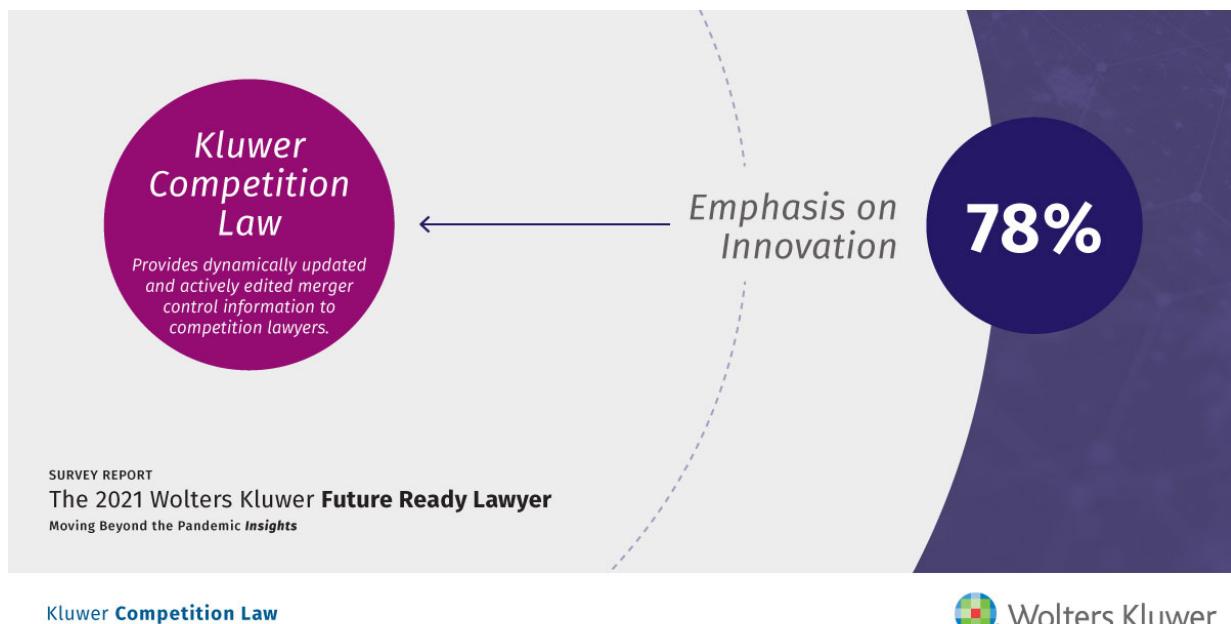
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