THOUVENIN rechtsanwälte

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Distribution Newsletter Switzerland

Swiss Competition Commission confirms a strict approach to the prevention of parallel imports

The Swiss Competition Commission ("**ComCo**") recently took actions against both the Australian producer of warning beacons and its exclusive Swiss importer. The warning beacons are used by the Swiss military police for the temporary signalling of streets. In respect of a further sizable order of warning beacons by the Swiss army's procurement agency, a competitor of the exclusive Swiss importer made an attempt to import the Australian warning beacons via a distributor in Poland. The attempt remained fruitless as the Australian producer denied the delivery to the Polish distributor on request of the Swiss importer and hence inhibited the intended subsequent parallel import by the competitor.

In its examination, the ComCo concluded that the Australian producer's and the Swiss importer's actions constituted an unlawful allocation of territories and restriction of passive sales. Fines were imposed on both parties, together with the approval of an amicable settlement in which the parties committed themselves to abstain from an unlawful allocation of territories in the future.

The decision of the ComCo is not yet final.

1 Legal framework on parallel imports

The Federal Act on Cartels and other Restraints of Competition ("CartA") provides for the presumption that specific kinds of vertical agreements eliminate or significantly restrict effective competition and are thus unlawful. The elimination of effective competition is presumed *inter alia* with regard to vertical distribution agreements with an allocation of territories provided such allocation amounts to an absolute territorial protection and excludes passive sales and parallel import.

The presumption of the antitrust violation through absolute territorial protections can be rebutted if there is sufficient *intra*brand and/or *inter*brand competition in the relevant marked (see Verticals Notice of 28 June 2010, issued by the ComCo). In this regard, the ComCo takes both qualitative as well as quantitative criteria into account. However, agreements providing for an *absolute* territorial protection - by a prohibition of passive sales for instance - are considered to be qualitatively significant restrictions of competition to such an extent that even a quantitative minor effect does not alter their unlawful character.

2 Definition of terms

In order to understand the subtleties of either permitted or prohibited vertical agreements, the meaning attributed to terms like passive sales, parallel imports and even vertical agreements is pivotal.

'Vertical agreements' are not only binding agreements between suppliers and distributors, but also non-binding agreements and concerted practices among parties at different levels of production that have a restraint of competition as their object or effect.

'Passive sales' mean responding to *unsolicited* requests from individual customers (end customers and other distributors) or from a specific group of customers in a specific territory that the supplier allocated exclusively to other distributors or reserved to itself. Also sales triggered by *general* advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups, but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are passive sales. In this regard, Internet sales are passive sales too, expect the sales effort was directed on purpose to customers outside the allocated territory.

In contrast, 'active sales' refer to sales triggered by actively approaching individual customers (end customer and other distributors) through, for instance, direct mails or visits, in a specific territory or targeted at a specific group of customers.
Finally, in this context 'parallel imports' are understood to refer to an import of a non-counterfeit product from another country without the permission of the supplier.

3 Takeaway messages

- Supplier may only prevent distributors from actively promoting sales into territories reserved exclusively for himself or other distributors, i.e. passive sales must remain allowed.
- A distributor must not be prevented from selling in territories which have not been granted to others on an exclusive basis.
- Considering the above, refusing to supply to distributors who are exporting the product to Switzerland is likely to breach Swiss competition laws.

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