Dear clients and business partners,

In its recently published ruling dated 30 June 2014 in the matter of Jura Elektroapparate AG, Switzerland’s Competition Commission (COMCO) confirmed its practice - as founded on the case of Electrolux AG/V-Zug AG in 2011 - regarding the judgement of measures by manufacturers to impede resellers (dealers) in their efforts to engage in online trading. At the same time, COMCO addressed further relevant questions in the relationship between manufacturers and resellers concerning price setting and other restraints.

Although COMCO’s investigations in the matter of Jura Elektroapparate AG culminated in a mutually agreed ruling with no sanctions, the case highlights the investigative tools (including coercive measures) available to COMCO.

In the present issue of Legal News, we will outline the main insights gained from the above case and, at the same time, point out the measures and potential inconveniences that a company under investigation by COMCO can expect to face.

Daniel Bachmann, attorney-at-law, Partner, Legal Services, daniel.bachmann@ch.ey.com

1. Details of the COMCO investigation

After receiving reports from consumers and dealers, in November 2011 COMCO instigated an investigation against Jura Elektroapparate AG (“Jura”), which essentially focussed on the following alleged practices by Jura:

- An attempt by Jura to influence resale prices by requiring resellers to obtain its prior approval for planned advertising activities and, by extension, the advertised prices for Jura coffee machines, while also offering them the prospect of a promotional bonus in the event that they comply.

- Jura’s refusal to honour warranty claims for coffee machines parallel-imported via sales channels not officially authorised by Jura.

- Agreements reached between Jura and dealers obliging the latter not to sell Jura coffee machines over the Internet.

When the investigation was opened, Jura was given an opportunity to respond to the accusations and was ordered to disclose the relevant documents, contracts, etc. Witnesses and other persons with pertinent information were questioned in spring and early summer 2012.

Questionnaires were also sent to competitors and around 100 specialist retailers of Jura coffee machines. At the end of June 2012, an (unannounced) search was made of the Jura headquarters, resulting in the seizure of physical and electronic data.

In the period from autumn 2012 to late autumn 2013, the investigation continued with requests for information, interviews with third parties, examinations of parties to the case, and questionnaires to customers and Jura itself. At the proposal of the COMCO Secretariat, after more than two and a half years, the investigation was concluded in June 2014 with a mutually agreed ruling.

2. Vertical restraints on competition – Legal basis

The term vertical restraints on competition is used, as in the case of Jura, to denote competition-restricting agreements between market participants at different levels of the market (typically between manufacturer and reseller).

Pursuant to Art. 5 para. 4 of Switzerland’s Cartel Act (CartA), the following are (“severe”) vertical restraints on competition that are particularly frowned upon: resale price maintenance and agreements in distribution contracts on the allocation of territories which absolutely exclude sales by outside distributors into these territories (market foreclosure). It is assumed that these restraints on competition are designed to eliminate competition. While a distributor may certainly be given exclusive rights to a specific territory, the bounds of permissibility are exceeded if these rights go so far as to rule out passive sales, i.e. dealers from another territory filling unsolicited orders from customers in an exclusive sales territory.

COMCO practice regarding restrictions on online trading and other vertical restraints on competition

Daniel Bachmann, attorney-at-law, Partner, Legal Services, daniel.bachmann@ch.ey.com
In the cases of severe vertical restraints on competition mentioned above, if suspicions of attempts to completely eliminate competition can be refuted, or if other vertical restraints on competition are in place, Art. 5 para 1 CartA provides that these must be examined as to whether they represent a possible significant restraint on competition which is not justified on grounds of economic efficiency.

If vertical agreements are reached under a selective distribution system, this offers the companies involved greater scope. Selective distribution systems restrict dealer eligibility in terms of specific essential qualities required for the product being sold (e.g. customer information, service, retail locations, etc.), as is the case with the distribution of premium coffee machines.

3. COMCO ruling

In the concrete case under discussion, COMCO reached the following conclusions:

- **Influence on resale prices:** As it could not be proven that the dealers had actually complied with or been guided by any price setting by Jura, it could not be assumed that competition had been eliminated or even only significantly impeded. More-over, since Jura undertook to refrain from influencing prices in future, the investigation into accusations of unlawful pricing agreements was closed.

- **Warranty restrictions:** The warranty restrictions imposed by Jura on coffee machines bought by a customer from an authorised dealer were deemed permissible by COMCO. Accordingly, no objections were raised to the refusal to honour warranty claims in respect of coffee machines bought from a non-authorised (abroad) dealer.

**Restrictions on online trading:** In keeping with its previous practice, COMCO viewed the restrictions which Jura imposed on online trading by its authorised dealers as tantamount to preventing passive sales and hence as a vertical restraint on competition. That said, COMCO did not deem this to constitute a sanctionable territorial foreclosure within the meaning of Art. 5 para. 1 CartA. The Commission did, however, conclude that it constituted at the minimum a significant (vertical) restraint on competition pursuant to Art. 5 para. 1 CartA, but it refrained from issuing a declaratory ruling since Jura agreed to discontinue the criticised practice.

4. Conclusion

The following conclusions can be drawn from the above observations:

- Even if a COMCO investigation does not result in a sanction or a formally declared finding of a restraint on competition, it can lead to considerable inconvenience (e.g. an office search) and a protracted investigation, draining the company's management and capital resources.

- Under a selective distribution system, it is permissible to refuse to honour warranty claims in respect of goods which the final customer purchased from a non-authorised dealer.

- A ban on online trading imposed by a supplier on resellers constitutes a prevention of passive sales and therefore has the potential to eliminate or, at the minimum, significantly restrict competition.