

The Swiss Competition Commission prohibits books resale price maintenance (Sammelrevers)

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Part 1 ; Part 2

In 2005 the Swiss Competition Commission (the "SCC") prohibited retail price maintenance in relation to certain books written in German, the so-called "*Sammelrevers*". The prohibited arrangement consisted of an agreement between the publishers and the booksellers according to which the latter promised to respect retail sales prices fixed by the former for the relevant books. The agreement also provided for measures designed to preclude bookshops from departing from the publishers' retail prices. Ninety percent of the books written in German and sold in Switzerland have been subject to this agreement since it was implemented in 1993.

In Switzerland, anticompetitive agreements are subject to the provisions of Art. 5 of the *Act on Cartels* ("*Acart*"). Art. 5 *ACart* distinguishes between two types of anticompetitive agreements : those that lead to the suppression of effective competition and are hence unlawful, and those that significantly affect competition and are unlawful unless they are justified on grounds of economic efficiency.

Art. 5 para. 3 *ACart* lists three types of horizontal agreements that are presumed to lead to the elimination of effective competition, among them agreements to fix prices, whether directly or indirectly. The Art. 5 para. 3 *ACart* presumption can be rebutted by establishing that there remains sufficient competitive pressure on the relevant market. If the presumption is successfully rebutted, the contested agreement is still subject to scrutiny under Art. 5 para. 1 *ACart*. According to this provision, the effect of which is similar to that of Art. 81 EC, agreements that significantly affect competition in the relevant market, and which are not justified on grounds of economic efficiency, are unlawful.

In a previous decision, published in 1999 in relation to the same agreement (the "*Sammelrevers*"; see RPW/DPC 1999/3, p. 454 ff.), the SCC held that the retail price maintenance was unlawful because it constituted an agreement falling under Art. 5 para. 3 *ACart* and was, therefore, presumed to lead to the elimination of effective competition. However, two parties (the "*Schweizer Buchhändler- und Verlegerverband*" and the "*Börsenverein des deutschen Buchhandels e. V.*") appealed the SCC's ruling before the Swiss Supreme Court (*Schweizerisches Bundesgericht*). Their appeal was partially successful. The Swiss Supreme Court eventually held, in 2002, that the Art. 5 para. 3 presumption had been successfully rebutted by the appellants (see BGE 129 II 18). The Court therefore remanded the case to the SCC and ordered the SCC to examine whether the contested agreement could be justified on grounds of economic efficiency.

In reaching its latest decision (see RPW/DPC 2005/2, p. 269 ff.), the SCC conducted an in-depth investigation to determine whether the contested agreement gave rise to economic efficiencies. Among other possibilities, it analyzed whether the retail price maintenance facilitated a diminution of the free-rider problem, a reduction of distribution or production costs, or a more rational exploitation of resources. The SCC also considered whether the agreement led to the availability of a greater variety of books, to the provision of better customer service, to an increase in the number of selling points, or to the promotion of the dissemination of technical or professional know-how. None of these efficiencies could be

ascertained. The SCC therefore prohibited the agreement, this time based on Art. 5 para. 1 ACart.

In its decision, the SCC asserted that it was aware of the status of the "book" as a cultural good. However, it emphasized that it was not competent to authorize an agreement based on cultural or educational grounds. After mentioning the rules applicable to the resale of books in different European and non European countries (Germany, Austria, the UK, Ireland, the USA, Australia, Canada, France, Sweden, Norway, Finland, the Netherlands, Belgium, Spain, and Greece), the SCC also noted the possible application of Art. 8 ACart. According to this provision, the parties to an agreement that has been declared unlawful by the SCC or by one of the appellate bodies may request an exceptional authorization from the Federal Council (the Swiss Government). The Federal Council may authorize the contested agreement if the Parties establish that the agreement is necessary in order to safeguard a compelling public interest not related to antitrust matters, such as a cultural one.

The most recent decision of the SCC has again been challenged by the two parties mentioned above. The appeal is presently pending before the Competition Appeals Commission ("REKO WEF").

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