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Competition Commission Secretariat

Hallwylstrasse 4, CH-3003 Bern

By email to: weko@weko.admin.ch

Bern, September 2, 2022

**SwissHoldings Statement**

**Consultation procedure** **on the revision of the Verticals Notice - Consultation drafts of the Verticals Notice (VertBek) and the VertBek explanatory notes**

Dear Prof. Dr. Ducrey

Dear Dr. Graber

Dear Ladies and Gentlemen

*SwissHoldings, the association of industrial and service companies in Switzerland, comprises 61 member companies, the majority of which are listed on the SIX Swiss Exchange. The listed members of our association together account for around 66 percent of total market capitalization.*

On July 5, 2022, the Competition Commission (WEKO) published drafts for a revised Verticals Notice (E-VertBek) together with associated explanations (E-VertBek explanations) and invited you to submit your comments for consultation. We thank you for the invitation to comment on the above-mentioned consultation. We are pleased to submit our comments as follows:

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| **Summary** |
| The E-VertBek and the E-VertBek Explanatory Notes available for consultation contain generally welcome adjustments, which are intended to ensure consistency with the EU competition rules in the vertical area. For a number of points, the E-VertBek and the E-VertBek Explanatory Notes provide for stricter rules or loopholes from that are not absolutely necessary in our view (e.g. tacit extension of non-competition clauses, stricter evaluation criteria of non-binding price recommendations; cf. on this below). This "Swiss Finish" means that in antitrust distribution practice, contracts with an impact on Switzerland would also have to be examined in accordance with the stricter Swiss rules in the future. |

1. **European compatibility of Swiss competition rules in the vertical sector**

According to its introductory recital VII, the E-VertBek is intended to enable alignment with European law and, in particular, with the EU rules in the vertical area (cf. also the WEKO's consultation letter of 5 July 2022). SwissHoldings supports the alignment of the E-VertBek and the E-VertBek explanatory notes with the new European Vertical Block Exemption Regulation and the Vertical Guidelines, which have been in force since June 1, 2022, and in particular shares the thrust towards Euro-compatible competition rules for Switzerland.

It is a concern of SwissHoldings that especially in this area stricter special regulations for Switzerland (" Swiss Finish ") should be omitted .

1. **Tacit extension of the five-year period for non-competition clauses**

The EU Commission has clarified in the new Verticals Guidelines (para. 248) that non-compete agreements concluded for a period of five years may also be tacitly extended beyond this period and fall within the scope of the block exemption, provided that there are reasonable possibilities for termination and renegotiation. Neither in the E-VertBek nor in the E-VertBek explanatory notes is there an equivalent to this clarification in the Vertical Guidelines.

The absence of such a parallel regulation in Switzerland could lead to legal uncertainties and it is not comprehensible why a more liberal regulation modeled on the European Vertical Guidelines should be omitted.

1. **Admissibility of recommended retail prices**

Art. 4 let. a of the Vertical Block Exemption Regulation and the Vertical Guidelines (para. 188) provide guidance on the permissibility of price recommendations, provided that such recommendations do not have the effect of fixed or minimum selling prices as a result of the exercise of pressure or the granting of incentives .

In contrast, the previously existing explanations on price recommendations in the E-VertBek have been largely removed. In the future, this practice-relevant topic will only be dealt with in the E-VertBek explanatory notes. Materially, the E-VertBek explanatory notes (para. 8) deviate from the current European standard and provide for "pressure" or "granting of incentives" only as a possible criterion for assessing the permissibility of price recommendations. The special case dealt with in the Federal Court ruling in the case of "Pfizer" is given undue weight in the E-VertBek explanatory notes. The criteria derived from this, "coordination", for example in the form of "particularly intensive communication", and "coordination success" do not appear to be so generalizable and are not appropriate for application in corporate practice. In the vast majority of distribution networks, relatively intensive communication is conducted for the benefit of business success, while the manufacturer generally has no knowledge of the actual degree of compliance with price recommendations on the part of its distribution partners (i.e. the "success of coordination").

SwissHoldings would welcome it if the current European standard were taken as a basis for the evaluation of non-binding price recommendations in the consultation drafts (cf. above) and a stricter special Swiss regulation were omitted in this area.

1. **Qualification of agency relationships**

In contrast to European vertical guidelines, neither the E-VertBek nor the E-VertBek explanatory notes contain any information on the legal qualification of agency or commercial agent relationships in the area of vertical agreements or distribution systems. In order to increase legal certainty in this respect, SwissHoldings would support if the Competition Commission were to include guidelines in this regard in the E-VertBek explanatory notes based on the current vertical guidelines. .

We thank you for the opportunity to comment and for considering our position. We are at your disposal for any explanations or information on our comments.

Kind regards

**SwissHoldings**

Office

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