Executive Summary (english)

This expert opinion shows that, from a legal perspective, retail companies are covered by the extended market dominance concept of article 4 para 2 CartA ("relative market power"). The empirical economic study establishes that the criteria of economic dependency are met by a considerable part of the manufacturers.

Legal results. With respect to the analysis of the market power of retail companies the following results can be derived:

- **The definition of market dominance includes the relative market power of the retail sector**. The concept of market dominance of article 4 para 2 CartA was extended by the revision of the Cartel Act of 2003 and now includes the so-called "relative market power“. Thus, the Cartel Act includes economic dependencies of manufacturers on retailers.
- **Manifestations of the relative market power in the retail sector**. Two manifestations of the relative market power, respectively, of the underlying economic dependency, are of importance in the retail trade sector: (i) Turnover-based dependency: This manifestation is the result of the operationally economic importance that the sales channel of a specific retail company has for a manufacturer, and (ii) investment-based dependency: This manifestation is the result of specific investments that a manufacturer made with regard to a contractual relationship with a particular retail company. In both cases the economic dependency of the manufacturer must not be self-inflicted: the law does not provide protection against "cluster risk" that is deliberately assumed by a manufacturer.
- **Control against abuse is applicable to retailers with relative market power**. In accordance with article 7 CartA, the abuse of a market dominant position by companies with relative market power is prohibited. These companies are disciplined in accordance with the control against abuse of market dominance.

Empirical study. The following parameters apply to this study:

- **Data collection period**. Beginning of the survey: March 10th, 2014; end of the survey: May 5th, 2014.
- **Participants in the data collection**. Members of the Swiss brand manufacturers association "Promarca", companies of the Swiss retail trade market and consumer protection organisations.
- **Return rate.** 49 valid responses of Promarca members (50% of the invitations to participate).
- **Examination method.** For statistical analysis, the results were evaluated without weighting.

Economic results. With regard to the business relationship between manufacturers and retailers, the criteria of economic dependency developed by the Swiss Competition Commission (Comco) are met in many cases.

- In terms of the "turnover-based dependency" of manufacturers on retailers the study shows the following:

  – *1st legal criterion* (share of total turnover). The manufacturer achieves a share of more than 30% of its total turnover with the trade channels of a particular retailer.

  > *This criterion is met, with one exception. Taking into consideration all product groups, with one exception, more than 30% of the turnover is achieved with the main retailer.*

  – *2nd legal criterion* (no bargaining power). The manufacturer does not have sufficient bargaining power to prevent the retailer from unilaterally enforcing contract terms.

  > *The criterion of insufficient bargaining power is met in most cases. The negotiations leading to amendments of contracts were predominantly initiated by the retailers (in the ratio 21:6). In 29% of the cases, unilateral adjustments were imposed without any negotiations. In 31% of the cases, the both partners initiated the negotiations. The clauses to enforce the contract are largely symmetrical. The exception is contract penalties, which apply to a large majority of manufacturers, but not to retailers.*

  – *3rd legal criterion* (no alternative outlets). There are no alternative trade channels within or outside of the relevant market available to the manufacturer; in other words, the manufacturer's economic existence would be endangered if he were to lose the retailer's trade channel.

  > *The requirement of the lack of alternative trade channels is fulfilled to a large extent. On average, 22% of the manufacturers believe that the loss of the turnover with the main retailer cannot be compensated. About 75% of the manufacturers expect that only 30%, or less, of such a loss could be compensated. As a result, 4% of the manufacturers state that such a loss of turnover would lead to the bankruptcy of the company.*

- In terms of the "investment-based dependency" of manufacturers on retailers the study shows the following:

  – *1st legal crite*rion (specific investments). The manufacturer makes specific investments regarding a retailer's trade channel or private brand.

The investment-based dependency is quantitatively, i.e. measured by turnover figures, fulfilled in many cases. The manufacturers are investing in a substantial amount – on average in the amount of 65% of the total turnover per year – in the contractual relationship with their main retailer. In this context, it is significant that at the same time, up to 80% of the turnover is generated with said main retailer.

– *2nd legal criterion* (contractual amortisation). The manufacturer did not conclude an exclusive and/or long-term contract with the retailer, which would allow the manufacturer to amortise its specific investments.

The criterion is met in the majority of cases. More than 62% of the manufacturers have supply contracts with a contractual period of only one year or less remaining. For less than 20% of the manufacturers, the remaining contractual period is two years or longer. On average, the manufacturers presume a probability of 75% that a contract will be extended at equal conditions. This expectation might indeed affect the decision to make specific investments during an ongoing contract. Overall, the existence of shorter than average remaining contractual periods will remain as a strong indicator of economic dependencies.

– *3rd legal criterion* (switching costs). The costs of switching to other trade channels within or outside of the relevant market are so high that switching would endanger the economic existence of the manufacturer.

This requirement is fulfilled for a large number of manufacturers. Prohibitive costs with regard to switching trade channels are regarded as the cause for the lack of alternatives by 40% of the manufacturers.

1. A significant part of the manufacturers is economically dependent on one of the two major retailers. These retailers are therefore dominant according to article 4 para 2 CartA in relationship to the respective manufacturers.

2. In these cases, the retailer is subject to the control against abuse according to article 7 CartA. This provision prohibits abusive behaviour, in particular exploiting a dominant position to the detriment of other contracting parties, i.e. the manufacturers.