

# Switzerland

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- 1** What are the legal sources that set out the antitrust law applicable to vertical restraints?

The relevant legislation in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (ACart). In addition, the Swiss Competition Commission (ComCo) issued a notice regarding the competition law treatment of vertical agreements on 18 February 2002 (Verticals Notice). Both legal sources are available in English on ComCo's homepage (see [www.weko.admin.ch/publikationen/00213/index.html?lang=en](http://www.weko.admin.ch/publikationen/00213/index.html?lang=en)). Currently, an amended version of the Verticals Notice is in an advanced stage of preparation, but has not been adopted yet (Draft Notice).

- 2** List and describe the types of vertical restraints that are subject to antitrust law. Are those terms defined and how? Is the concept of vertical restraint itself defined in the antitrust law?

According to article 5 ACart, three types of unlawful agreements are to be distinguished in terms of the intensity of the restraint of competition:

- agreements that do not significantly affect competition: such agreements are lawful;
- agreements that significantly affect competition: such agreements may be justified on grounds of economic efficiency;
- agreements that eliminate effective competition: such agreements are unlawful.

Article 5 para 4 ACart defines types of vertical agreements which are presumed to lead to the elimination of effective competition. According to this provision, agreements between undertakings on different market levels regarding minimum or fixed prices as well as clauses in distribution agreements regarding the allocation of territories, provided distributors from other territories are prohibited from sales into these territories, are presumed to eliminate effective competition. Although no precedents do exist so far, the rules' objective in article 5 para 4 ACart are widely held to declare unlawful prohibitions of passive sales into exclusive territories (ie absolute territorial protection).

The concept of vertical restraints itself is defined in article 1 Verticals Notice. Vertical agreements include binding or non-binding agreements and concerted practices between two or more enterprises at different levels of the market, which concern the commercial terms on which the relevant enterprises may purchase, sell or distribute goods or services.

- 3** Are there particular rules or laws applicable to the assessment of vertical restraints in specific sectors of industry? If so, please briefly identify the sectors and the relevant sources.

In the motor vehicle sector, there is a special Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade of 21 October 2002 (to be found on ComCo's homepage as referred to in question 1).

- 4** Is the only objective pursued by the law on vertical restraints economic, or does it also seek to protect other interests?

The main objective pursued by the law on vertical restraints is the protection of competition. However, there also is a Notice of 19 December 2005 regarding agreements with limited market effects meant to provide a safe harbour for small and medium-sized enterprises (SME Notice).

- 5** What entity or agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Do governments or ministers have a role?

In Switzerland, only federal administrative bodies have the power to implement the ACart, ie the ComCo and its Secretariat. The main administrative body enforcing the ACart is the ComCo. It is independent of the Federal Government (article 19 para 1 ACart). The ComCo is the sole administrative body having power to issue decisions prohibiting anti-competitive vertical restraints and to impose fines (article 53 para 1 ACart).

The Secretariat of the ComCo conducts investigations and preliminary investigations and prepares the ComCo's decisions (article 23 para 1 ACart). The Secretariat has no power to open investigations without the consent of a member of ComCo's presiding body (article 27 para 1 ACart).

- 6** What is the relevant test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction?

The Swiss antitrust law applies to vertical restraints whose effects are felt in Switzerland, even if they originate in another country (article 2 para 2 ACart).

- 7** To what extent does antitrust law apply to vertical restraints in agreements concluded by public or state-owned entities?

Swiss antitrust law applies equally to vertical restraints in agreements concluded by public or state-owned entities (article 2 para 1 ACart). However, to the extent that particular provisions establish an official market or price system or that provisions entrust certain enterprises with the performance of public-interest tasks,

by granting them special rights, such provisions take precedence over the provisions of the ACart (article 3 para 1 ACart).

- 8** Are there any general exceptions from antitrust law for certain types of vertical restraints? If so, please describe.

The ComCo regards vertical agreements other than those explicitly listed in article 3 Verticals Notice usually as non-material restrictions of competition, provided the market share of all the enterprises involved does not exceed a threshold of 10 per cent on any of the relevant markets (article 4 para 1 Verticals Notice).

- 9** When assessing vertical restraints under antitrust law does the relevant agency take into account that some agreements may form part of a larger, interrelated, network of agreements or is each agreement assessed in isolation?

The ComCo explicitly makes an exception to the general de minimis rule where competition on the relevant market is restricted by the cumulative effect of several similar vertical distribution networks existing alongside each other, provided the relevant suppliers and dealers are in fact competing or could compete with each other (No. 4 para 2 Verticals Notice).

- 10** Under what circumstances does antitrust law apply to agency agreements in which an undertaking agrees to perform certain services on a supplier's behalf in consideration of a commission payment?

In Swiss antitrust law, there are no special provisions regarding agency agreements. Although there are no judicial precedents, it is likely that the Swiss authorities would apply similar principles as in European competition law.

- 11** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Swiss antitrust law does not apply to effects on competition that result exclusively from laws governing intellectual property (article 3 para 2 ACart). However, according to the same provision, this exception does not apply to import restrictions based on intellectual property rights.

- 12** Under what circumstances does antitrust law apply to agreements between a parent and a related company?

Antitrust law applies to agreements between a parent and a related company as long as the related company does not belong to the same group. If a parent company effectively controls its affiliated companies, eg by the majority of capital or of voting shares, the whole group as such is regarded as an independent economic entity. The Swiss ACart does not apply to group-internal relationships (group privilege). However, it should be noted that in a recent publication a member of the Secretariat cast doubt on whether or not the group privilege will be further accepted.

- 13** Can the legality under antitrust law of a given vertical restraint change over time?

The legality of a given vertical restraint may change over time due to a change in the market position of a supplier for instance. However, any such increase in a given market share would have

to be considerable because exceeding the 10 per cent de minimis threshold (article 4 Verticals Notice) does not necessarily alter the antitrust assessment.

- 14** Briefly explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In Switzerland, certain types of vertical restraints are never permissible as they are considered as per se unlawful. These vertical restrictions are fixed or minimum resale prices as well as absolute territorial protection. These types of restrictions (cf article 5 para 4 ACart) may be directly sanctioned with fines and cannot be justified as having only a limited market effect on the basis of the SME Notice (cf No. 3 para 2 lit b).

Other vertical agreements that significantly affect competition in the market for certain goods or services are unlawful, unless they can be justified on grounds of economic efficiency (article 5 para 1 ACart). Consequently, there is no rule of reason analysis to be undertaken but rather an efficiency test. According to article 5 para 2 ACart, an agreement is deemed to be justified on grounds of economic efficiency:

- when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.

The list of criteria for the efficiency test in article 5 para 2 ACart is exhaustive. Further justification grounds such as general political considerations, cultural aspects or public health cannot be taken into consideration within the framework of article 5 para 2 ACart. According to article 8 ACart, agreements affecting competition whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.

The conditions under which vertical agreements affecting competition are generally deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications (article 6 para 1 ACart), eg for agreements on research and development or on specialisation.

- 15** Is there a block exemption or safe harbour which provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please briefly explain the manner in which this block exemption/safe harbour functions.

The Verticals Notice is meant to provide certainty to companies, but concentrates rather on the illegality than on the legality of vertical restraints under specific conditions. The Verticals Notice thus falls far short of providing a safe harbour (similarly the Draft Notice).

In Section A, the Verticals Notice sets out the definitions of vertical agreements and selective distribution systems. The rules follow in Section B.

According to article 3 Verticals Notice, vertical agreements are regarded by the ComCo as being material restrictions of competition in the sense of article 5 para 1 ACart if they have as their subject matter the following:

- direct or indirect fixing of prices or minimum sales prices for the resale of the relevant goods or services by the dealer;
- direct or indirect restrictions on the geographic area or the customer groups for distribution by the dealer;
- restrictions on sales to end users insofar as imposed on dealers within a selective distribution system;
- restrictions on cross supplies between authorised dealers within a selective distribution system, even if they act on different market levels;
- restrictions on the supplier to sell components or spare parts to anyone (end users, repair workshops, etc.) other than the dealer that is party to the agreement;
- non-compete clauses that are agreed to for more than five years or for more than one year after termination of the vertical agreement.

In article 5, the Verticals Notice sets out the framework for assessing the justification of a restriction according to article 5 para 2 ACart. This may be particularly the case if an agreement permits a more efficient system of distribution and the restriction of competition is necessary in order to achieve this goal (for examples see below questions 17–27).

- 16** What are the consequences of an infringement of antitrust law for the validity, or enforceability by one of the parties, of a contract containing prohibited vertical restraints?

A contract containing prohibited verticals restraints (a per se violation or a substantial restriction that cannot be justified) is null and void based on Swiss civil law (article 20 Code of Obligations).

- 17** Briefly explain how restricting the buyer's ability to determine its resale price is assessed under antitrust law.

Restricting the buyer's ability to determine its resale price by fixed or minimum prices is a per se violation under Swiss antitrust law and can be directly sanctioned by imposing a fine. In return, imposing a maximum sale price or recommending a sale price by the supplier is possible, provided that they do not amount to a fixed or minimum sale price as a result of pressure of, or incentives offered by, any of the parties.

- 18** Briefly explain how restricting the territory into which a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to customers in certain territories?

A supplier may restrict active sales by the buyer of its products into the exclusive territory reserved to the supplier or granted by the supplier to another buyer, provided that the buyer remains able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted.

- 19** Briefly explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to certain customers?

A supplier may restrict active sales by the buyer of its products to a customer group exclusively reserved to the supplier or granted by the supplier to another buyer, provided that the buyer remains

able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted.

- 20** Briefly explain how restricting the uses to which a buyer puts the contract products is assessed under antitrust law.

A supplier may restrict the buyer's ability to sell components supplied for the purposes of incorporation to third parties who would use them to manufacture the same type of products as those produced by the supplier.

- 21** Briefly explain how agreements establishing 'selective' distribution systems are assessed under antitrust law.

Restrictions on cross supply between authorised dealers within a selective distribution system, also when dealers at different levels of the market are involved, are deemed to be material restrictions of competition. However, authorised dealers within a selective distribution system may be restricted in their freedom to resell the relevant goods or services to unauthorised dealers.

- 22** Briefly explain how restricting the buyer's ability to source the supplier's products from alternative sources is assessed under antitrust law.

Any direct or indirect obligation of a buyer to purchase from the supplier or from another company designated by the supplier more than 80 per cent of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market are regarded as non-compete obligations (explicitly so the Draft Notice, currently by way of analogy to the Verticals Block Exemption Regulation No. 2790/1999, VBER). Such non-compete obligations that are agreed to for a duration of more than five years or for more than one year after termination of the vertical agreement are deemed to be material restrictions of competition.

- 23** Briefly explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed under antitrust law.

Restrictions of the members of a selective distribution system not to sell different brands are possible, as long as the restriction is not targeted at the brands of particular competing suppliers.

- 24** Briefly explain how requiring the buyer to purchase from the supplier a certain amount, or minimum percentage of its requirements, of the contract products is assessed under antitrust law.

An obligation of the buyer to purchase from the supplier more than 80 per cent of his requirements of the contract products, based on the value of his total purchases in the previous calendar year, is regarded as non-compete provision (cf question 22).

- 25** Briefly explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

Provided that the buyer's market share does not exceed 30 per cent on the relevant market, he may restrict the supplier not to supply the contract products to other buyers (exclusive supply obligation; explicitly so the Draft Notice, currently by way of analogy to the VBER). Beyond the 30 per cent market share threshold, an individual assessment has to be undertaken whether

or not the restriction can be justified.

Members of a selective distribution system must not be restricted to actively or passively sell to consumers. Suppliers must not be restricted either to sell components or spare parts to final consumers or repair workshops.

- 26** Briefly explain to what extent, if any, franchise agreements incorporating licences of intellectual property rights, relating to trademarks or signs and know-how for the use and distribution of products, are assessed differently from 'simple' distribution agreements under antitrust law.

There are no special provisions for franchise agreements.

- 27** Briefly explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most favoured customer or warranting to the buyer that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law.

There are neither special provisions nor precedents regarding the assessment of most-favoured-customer clauses under Swiss antitrust law. It is likely that the authorities will follow the assessment under European competition law.

- 28** Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify any particular categories of agreement?

Agreements can be notified to the agency before the respective vertical restriction of competition takes effect (article 49a para 3 ACart). Such a notification seems to be advisable in case the agreements in question entail a considerable investment, such as, eg, the introduction of a new distribution system.

- 29** If there is a formal notification procedure, how does it work, what type of ruling does the agency deliver at the end of the procedure, and what time period is normally required to obtain it? Is a reasoned decision published at the end of the procedure?

By notification of vertical restrictions of competition prior to their taking effect, the notifying company does not run the risk of getting fined (see article 49a para 3 lit a ACart). If the agency does not respond within five months of the notification, the notified restrictions of competition are deemed to be lawful. In return, if the company is informed by the agency of the opening of a procedure under article 26 to 30 ACart within those five months, and if it then continues the restriction of competition, a possible fine is not waived any longer.

- 30** If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

Besides the notification possibility and the ensuing opposition proceedings (cf questions 28 and 29), companies may seek guidance from the Secretariat. According to article 23 para 2 ACart, the duties of the Secretariat include advising companies on matters relating to the application of the law. However, officials of the Secretariat have recently indicated in public speeches that the Secretariat is reluctant to further provide guidance, allegedly due to shortage of staff.

### Update and trends

An amended version of the Verticals Notice is in an advanced stage of preparation and is likely to be issued during the first half of 2007.

- 31** Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

Private parties can explicitly complain to the agency. According to article 26 para 1 ACart, the Secretariat may conduct preliminary investigations at the request of enterprises concerned. If there are signs of an unlawful restraint of competition, the Secretariat will open an investigation with the consent of a member of the ComCo's presiding body (article 27 para 1 ACart). In return, if there are no such signs, the Secretariat will close the preliminary investigation without any further consequence. The approximate time period for such a preliminary investigation may be considerable and extend over a couple of years.

- 32** How frequently is antitrust law applied to vertical restraints by the agency?

Swiss antitrust law is quite often applied to vertical restraints since Swiss authorities are particularly concerned about the allegedly higher prices in Switzerland compared to its neighbouring countries. However, the number of decisions does not match the number of (preliminary) investigations the Secretariat conducts. In 2002, the Swiss authorities reported some 120 cases regarding vertical agreements. Based on 76 cases that had been closed by the time the annual report 2003 was published, not a single unlawful vertical agreement had been found. Either the ACart was not applicable, or there were no competition problems, or, in some cases, there was an amicable settlement. In the years 2004 and 2005, the Swiss authorities conducted approximately 70 and 90 (preliminary) investigations respectively. Based on the published statistics, it is not possible to allocate these cases to specific types of restraints, but a considerable percentage of these cases have been related to vertical restraints.

- 33** Is the agency empowered to impose penalties itself or does it need to have recourse to the court system or another administrative or government agency? What sanctions and remedies can the agency impose when enforcing the antitrust law prohibition of vertical restraints?

The ComCo is empowered to impose penalties itself (article 18 para 3, article 53 ACart). The Secretariat, in return, conducts the investigations and makes proposals to the ComCo (see article 23 para 1 ACart). The ComCo may impose a fine of up to 10 per cent of the respective companies' turnover in Switzerland in the previous three business years. The amount of the sanction is dependent on the duration and severity of the unlawful behaviour. A remedy may consist in reaching an amicable settlement, which will be decided by the ComCo on a proposal from the Secretariat (article 30 para 1 ACart).

- 34** Briefly, what investigative powers does the agency have when enforcing the antitrust law prohibition of vertical restraints?

Parties to vertical agreements are required to provide the competition authorities with all relevant information and to produce all necessary documents (article 40 ACart). The competition author-

ities also may hear third parties as witnesses and require the parties to the investigation to make statements (article 42 para 1 ACart). The competition authorities may even order searches and seize exhibits (article 42 para 2 ACart).

**35** Please give an indication of the level or nature of any sanctions or remedies imposed in particular cases. Can any recent trends in the imposition of sanctions or remedies be identified?

Up to now, there have not been any sanctions for vertical restraints in Switzerland. As far as remedies are concerned, the authorities are particularly interested in removing any obstacles to parallel imports and in scrutinising price recommendations having – allegedly – the effect of fixed prices.

**36** Can sanctions or remedies be imposed on companies having no branch or office in your jurisdiction?

The ACart applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country (article 2 para 2 ACart). Consequently, sanctions or remedies may be imposed on foreign companies. If these foreign companies have no branch or office in Switzerland, an enforcement possibility

may be the attachment of claims the foreign companies may have against Swiss or Swiss-based companies.

**37** To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private enforcement is possible under Swiss antitrust law. The right to sue, however, is limited to a person impeded by an unlawful restraint of competition from entering or competing in a market. Such a person may request removal or cessation of the obstacle (eg conclusion of contracts at market terms), damages and reparations, and the remittance of illicitly earned profits (article 12 para 1, 13 ACart). Up to now, the instrument of private enforcement has not been used very frequently. This is mainly due to the high burden of proof and the substantial cost risk.

**38** Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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