

# Legal Compass

## Competition law

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## Revision of the Vertical Notice - More flexibility for distribution structures, but be aware of the "Swiss Finish"

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### Introduction

On 14 December 2022, the Swiss Competition Commission ("ComCo") published its revised notice on the treatment of agreements between undertakings at different market levels ("Vertical Notice"), together with updated explanations ("Explanatory Notes"). In doing so, the ComCo aims at taking into account of developments in the EU, but also of recent case law and case practice in Switzerland.

The revised Vertical Notice entered into force on 1 January 2023. This article intends to raise awareness on the most important innovations and the need for action from a Swiss competition law perspective.

### 1. In a nutshell: congruence with EU rules....

With the publication of the Vertical Notice and Explanatory Notes, the ComCo intends to inform companies which conducts and agreements are permitted in the context of vertical agreements and which are not.

After the new EU Commission's Vertical Block Exemption Regulation ("Vertical Block Exemption Regulation") entered into force in the EU on 1 June 2022, the ComCo intended to establish congruence of the Swiss regulation with the revised EU rules.

The main changes in the revised Vertical Notice and the Explanatory Notes, which allow a manufacturer more flexibility in the organisation of its distribution network, can be summarised as follows:

- **Allocation of exclusive territories or customer groups up to five distributors:** In the context of exclusive distribution systems, it is now possible for a manufacturer to allocate a territory or customer group exclusively to itself or up to five distributors and to prohibit active sales into this exclusively allocated territory or to the exclusively allocated customer group by other distributors.
- **Combination of exclusive distribution and selective distribution, including protection of territories with selective distribution:** It is now also possible for a manufacturer to combine a selective distribution system with an exclusive distribution system by introducing a selective distribution system in certain territories and an exclusive distribution system in other territories. The exclusive distributor and its customers may be prohibited from active and passive sales to unauthorised distributors in a territory where a selective distribution system is operated.
- **Prohibition of active sales by indirect customers:** The Vertical Notice allows the manufacturer to prohibit active sales by its direct customers as before. In addition, active sales to exclusively allocated territories or customer groups by the direct customers of the distributors, i.e. also at the lower distribution level, can now be prohibited.

- **Exchange of information in dual distribution systems:** With regard to so-called dual distribution systems, i.e. when the manufacturer is also in competition with its customers, the Vertical Notice also newly regulates that an exchange of information between the manufacturer and its customers is covered by the notice if this exchange directly concerns the implementation of the vertical competition agreement or is necessary to improve the production or distribution of the contract goods or services.
- **Regulations in the area of online distribution:** The revised Vertical Notice also brings changes in the online distribution sector. In this area, the ComCo adopts the provisions of the Vertical Block Exemption Regulation as well. Thus, the exemption provisions applicable in dual distribution do not apply to online intermediary services if the provider of the online intermediary services is a competitor on the relevant market for the sale of the intermediated goods or services.

Then - also analogous to the Vertical Block Exemption Regulation - the prevention of the effective use of the internet for the sale of the contract goods or services by the distributor or its customers is now expressly deemed to be a qualitatively serious competition agreement. This includes, in particular, restrictions on online sales or online advertising that de facto prohibit a distributor from using the internet for the sale of the contract goods or services as well as restrictions that prevent the use of one or more online advertising channels (e.g. search engines or price comparison services), as well as the establishment or operation of an own online shop.

Restrictions on online sales with regard to the way in which the contract goods or services are to be sold online, with regard to the use of certain online sales channels, e.g. online marketplaces, or the specification of quality standards for online sales are, however, generally unproblematic. This is provided that such restrictions are not indirectly aimed at preventing the effective use of the internet for the sale of the contract goods or services by the distributor or its customers.

- **Different prices for online and offline sales:** The requirement that the distributor pays a different wholesale price for products sold online than for products sold offline (so-called dual pricing system) also generally does not constitute a qualitatively serious vertical restraint of competition. The prerequisite for this is that the difference in the wholesale price is proportionate to the differences in the investments and costs borne by the supplier for achieving sales in the individual channels.
- **Quantity requirements for bricks-and-mortar shops:** In line with the Vertical Block Exemption Regulation, the Explanatory Notes explicitly state that manufacturers are allowed to require their distributors to operate at least one bricks-and-mortar shop. In addition, distributors may be required to sell contract goods or services offline to an absolute minimum extent determined by value or quantity, but not by the share of their total turnover. This requirement may be the same for all distributors or may vary according to objective criteria such as the size of the distributor compared to other distributors or its geographical location.
- **Rules concerning wide and narrow parity obligations:** Following the previous practice, the Vertical Notice now explicitly states that the obligation of a distributor of online intermediary services (e.g. online booking platforms for hotels) not to offer, sell or resell goods or services using competing online intermediary services at more favourable conditions (so-called wide parity obligations) qualifies as a qualitatively serious restraint of competition.

In contrast, parity obligations that relate to the conditions offered in direct sales channels of the distributor (for example, the hotel itself) of goods or services (so-called narrow parity obligations) are not considered qualitatively serious and thus permissible. In this context, however, it should be noted that a new provision in the Federal Act against Unfair Competition (UCA) has come into force as of 1 December 2022. According to this provision, an operator of an online booking platform for accommodation services (i.e. namely for hotels) acts unfairly if it uses general terms and conditions of business that directly or indirectly restrict the setting of prices and offers of accommodation

establishments by means of parity clauses, especially with regard to price, availability or conditions.

- **Tacit extension of non-competition clauses:** As before, vertical non-competition clauses are qualified as an agreement that significantly restrict competition if their duration is indefinite or exceeds five years. However, following the EU rules, the Explanatory Notes now clarify that this rule does not apply if non-competition clauses can be tacitly extended beyond a period of five years, provided that the distributor has an effective and reasonable notice period or a renegotiation option at reasonable cost.

## 2. ...but with a Swiss Finish

In recent years, Swiss case law has selectively led to a stricter assessment of distribution agreements under Swiss competition law. The revised Vertical Notice now incorporates these restrictions, which affect essential aspects of distribution structures. Accordingly, careful attention must be paid to this "Swiss Finish" in the future.

**Stricter practice with regard to non-binding price recommendation:** A deviation from the EU rules in the sense of a more restrictive assessment applies with regard to price recommendations. Until recently, it was assumed that an unlawful vertical price agreement existed if pressure was exerted on a distributor or customer or incentives were created to make him comply with the price recommendations. According to recent Swiss case law however, "intensive communication" and a high degree of compliance with the price recommendations are sufficient to consider price recommendations expressly declared as non-binding to be unlawful. The exertion of pressure or the creation of incentives is thus only one possible criterion for the ComCo to also focus on non-binding price recommendations.

The Explanatory Notes summarize this stricter practice. In the introduction, it is stated that price recommendations which are neither an agreement nor a concerted practice are unproblematic under Swiss antitrust law. However, according to the ComCo, it is sufficient for a concerted practice that there is a "feeling" between the companies (concerted action) and a corresponding market behaviour (success of the concerted action; degree of compliance) as well as a causal connection between the concerted action and the behaviour. A coordination can already result from a particularly intensive communication. Likewise, a vertical price agreement exists if the price recommendations would actually have the effect of minimum or fixed prices as a result of the degree of compliance. The fact that even price recommendations expressly marked as non-binding are actually followed by a significant proportion of suppliers or customers can thus already be sufficient to bring the price recommendations into the focus of the competition authorities. In addition, the ComCo mentions that the fact that price recommendations are not made generally available but only to the suppliers or customers, that price recommendations are not expressly declared as non-binding or that the price level is significantly higher than in neighbouring countries can also lead to the price recommendations being taken up.

**Potential impact of export bans is sufficient for the application of Swiss Cartel Act:** A further tightening concerns export bans to Switzerland, i.e. in particular the restriction of passive sales. Also based on stricter Swiss case law, the ComCo now assumes that agreements affecting competition concluded between companies outside of Switzerland can already be covered under the Swiss Cartel Act if these agreements may only have potential effects on the Swiss market.

Thus, if a manufacturer from Germany agrees with its distributor in France that this distributor may not supply the products to further distributors and/or end consumers in Switzerland, this is already problematic due to this tightening.

## 3. Necessary examination for compliance and implementation of necessary actions

The above changes show that, at the latest with the enactment of the revised Vertical Notice, companies are well advised to review their existing distribution agreements, in particular with respect to the "Swiss Finish".

This is particularly important in view of the fact that the term "distribution agreement" is understood comprehensively. It includes not only actual distribution agreements, but also individual contractual clauses on the purchase, sale or resale of contractual products in other agreements. These include, in particular, franchise, licence or technology transfer agreements.

Companies have a transitional period of one year to adapt their existing contracts to the new rules. During 2023, the new notice will not apply to those agreements affecting competition that are currently in force and meet the criteria of the previous notice on the treatment of vertical agreements under competition law of 28 June 2010.

In addition, it is important for companies to examine to what extent they can use the newly created flexibilities in the organisation of their distribution network.

If you have any questions, please do not hesitate to contact the antitrust experts at Eversheds Sutherland Switzerland.

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