

# Notice on the Assessment of Vertical Agreements (Verticals Notice) \*

## Decision of the Competition Commission of 12 December 2022

The Competition Commission issues the following general notice :

- I. According to Article 6 of the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (CartA; SR 251), the Competition Commission may define in general notices the conditions under which individual types of agreements affecting competition are generally considered justified for reasons of economic efficiency within the meaning of Article 5 (2) CartA. If there is a need for greater legal certainty, it may also publish other principles of the application of the law in general notices by analogy with Article 6 CartA.
- II. Certain types of vertical agreements may increase economic efficiency within a production or distribution chain by facilitating better coordination between the undertakings concerned. In particular, they can help reduce the parties' transaction and distribution costs and optimise their sales and investments.
- III. The likelihood that such efficiency enhancing effects will be more important than anti-competitive effects caused by restraints in vertical agreements depends on the market power of the undertakings involved in the agreement and, in particular, on the extent to which these undertakings face competition from other suppliers of goods or services which their customers consider to be interchangeable or substitutable on the basis of the characteristics, prices and intended use of the products (interbrand competition). The Competition Commission assumes that, in general, a vertical agreement leads to an improvement in production or distribution, provided that none of the undertakings involved has a share of more than 30% of the relevant market and the agreement is not significant in principle or qualitatively severe.
- IV. Within the framework of the 2003 revision of the CartA, Article 5 (4) of the CartA introduced new offences with the aim of preventing price fixing and foreclosure of the Swiss market and promoting intra-brand competition. According to Article 5 (4) LCart, the imposition of minimum or fixed resale prices (price agreement; resale price maintenance) as well as contractual clauses that partition a territory by prohibiting passive sales to distributors or final customers are presumed to lead to the elimination of effective competition.

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\* This is an unofficial translation, initially generated with AI tools and carefully reviewed, provided without any guarantee of accuracy or liability. It is therefore recommended that users of this translation also refer to the official texts in French, German or Italian. To simplify the reading of the text, this translation refers to 'agreements' without the qualifier 'in the field of competition' or 'affecting competition', except where the word 'agreement' is used in connection with Article 4(1) of the CartA.

- V. In the 2003 revision of the Cartel Act, the legislator expressed its view that the fixing of minimum and fixed prices as well as contractual clauses partitioning a territory in vertical agreements have the potential to be particularly harmful. The Competition Commission has substantiated this assessment in its previous decisions and has already issued corresponding criteria for the assessment of vertical agreements in its Notice on vertical agreements of 2 July 2007 (Verticals Notice 2007), in particular with regard to the rebuttal of the presumption of the elimination of effective competition (Article 5 (4) CartA), significance (Article 5 (1) CartA) as well as the grounds for justification (Article 5 (2) CartA). The Competition Commission specified these criteria in its Notice on vertical agreements of 28 June 2010 (Verticals Notice 2010). The Verticals Notice 2010 was amended on 22 May 2017 based on the ruling of the Federal Supreme Court in *Gaba*.<sup>1</sup>
- VI. This notice is based on the 2010 Verticals Notice (of 22 May 2017), which was aligned with Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102/1) and the Commission Guidelines on Vertical Restraints (OJ 2010 C 130/1). The European regulations were replaced by Commission Regulation (EU) No 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2022 L 134/4) and the corresponding Guidelines on Vertical Restraints (OJ 2022 C 248/1), which entered into force on 1 June 2022.
- VII. The present notice takes into account the decision-making practice of the courts and of the Competition Commission as well as the developments in European law - taking into account the legal and economic conditions prevailing in Switzerland. This ensures that as far as possible the same rules as in the European Union will continue to apply in Switzerland in the area of vertical agreements, to avoid an isolation of the Swiss markets and to ensure legal certainty. In this sense, the European rules (cf. recital VI) also apply to Switzerland by way of analogy.
- VIII. Article 12 of this Verticals Notice specifies the agreements which are presumed to lead to the elimination of effective competition pursuant to Article 5(4) CartA. Article 13 Verticals Notice makes it clear that the rebuttal of the presumption is based on an overall view of the market (intrabrand and interbrand competition on the relevant market).
- IX. Article 14(a) of the Verticals Notice clarifies that agreements pursuant to Article 5(4) CartA, for which the presumption is rebutted, fulfil in principle the criterion of significance pursuant to Article 5(1) CartA. For all other vertical agreements, Article 14(b) of the Verticals Notice provides that both qualitative and quantitative criteria are considered, both criteria being weighed in an overall assessment on a case-by-case basis. Article 15 of the Verticals Notice indicates which vertical agreements are considered qualitatively severe due to their nature.

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<sup>1</sup> ATF/BGE 143 II 297, *Gaba*.

For such agreements, lower quantitative requirements are sufficient to qualify them as a significant restriction of competition than for agreements that are not qualitatively severe.

- X. Article 16 of the Verticals Notice clarifies that vertical agreements not falling under Article 12 or Article 15(b) to (f) of the Verticals Notice generally do not lead to a significant restriction of competition if the market share threshold of 15% is not exceeded and the agreement does not have a cumulative effect on the market with other agreements (minor cases). If the market share threshold of 15 % is exceeded or if the agreement has a cumulative effect on the market with other agreements and the market share threshold of 5 % is exceeded, the competitive harm will be assessed on a case-by-case basis.
- XI. If the presumption of elimination of effective competition is rebutted and if there is an agreement that significantly restricts competition, it must be examined whether the vertical agreement can be justified on grounds of economic efficiency. Article 18 of the Verticals Notice describes the conditions under which vertical agreements are generally considered to be justified on grounds of economic efficiency within the meaning of Article 5(2) CartA. If there are no efficiency grounds, the agreement is unlawful. Unlawful agreements under Article 5(4) CartA are subject to sanctions under Article 49a CartA, even if the presumption of the elimination of effective competition was rebutted.
- XII. This notice does not bind the civil courts, the Federal Administrative Court and the Federal Supreme Court in their interpretation of the CartA.

## **A. Definitions**

### **Article 1 Vertical agreements affecting competition**

Vertical agreements affecting competition are enforceable or non-enforceable agreements and concerted practices (see Article 4 (1) CartA) between undertakings at different levels of the market which have as their object or effect the restriction of competition and relate to the conditions under which the undertakings concerned may purchase, sell or resell certain goods or services.

### **Article 2 Active sale**

Active sale is the targeting of customers through visits, writings, emails, phone calls or other forms of direct communication or through targeted advertising and promotion, offline or online, for example through print or digital media, including online media, price comparison services or search engine advertising, by targeting customers in specific territories or from specific customer groups, by operating a website with a top-level domain corresponding to specific territories or by offering language options on a website that are customary in specific territories, provided that these languages differ from those that are customarily used in the territory in which the customer is established.

### **Article 3      Passive sale**

Passive sales are sales made in response to unsolicited requests from individual customers, including the supply of goods to or provision of services for such customers, which have not been initiated by targeting the relevant customers, customer groups or customers in the relevant territories and which include sales made as a result of participation in public procurement procedures or private call for tender.

### **Article 4      Exclusive distribution systems**

Exclusive distribution systems are distribution systems where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group.

### **Article 5      Selective distribution systems**

**1** Selective distribution systems are distribution systems where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

**2** Purely qualitative selective distribution is a distribution system in which dealers are selected exclusively on the basis of objective qualitative criteria that are based on the requirements of the product in question.

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### **Article 6              Cross-supplies**

Cross-supplies is the reciprocal supply between traders operating at the same or at different market levels within a selective distribution system.

### **Article 7      Non-compete obligations**

A non-compete obligation is:

- (i) any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services; or
- (ii) any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year.

## **Article 8                      Know-how**

Know-how is a package of non-patented practical information, resulting from experience and testing by the supplier and which is

- (i) secret, i.e. not generally known or not easily accessible,
- (ii) substantial, i.e. significant and useful to the buyer for the use, sale or resale of the contract goods or services, and
- (iii) identified, i.e. described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of “secrecy” and “substantiality”.

## **Article 9                      Online intermediary services**

Online intermediary services allow undertakings to offer goods or services,

- (i) to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings, or
- (ii) to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings and final consumers, irrespective of whether and where the transactions are ultimately concluded.

## **B.      Rules**

### **Article 10                      Scope**

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**1** This notice applies to vertical agreements affecting competition.

**2** This notice does not apply to vertical agreements between competitors. However, it shall apply where competitors enter into non-reciprocal vertical agreements and

- a) the supplier is active at an upstream level as a manufacturer, importer, or wholesaler and at a downstream level as an importer, wholesaler, or retailer of goods, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods, or
- b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

**3** The exceptions under paragraph 2 letters a and b do not apply to the exchange of information between the supplier and the buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions.

**4** The exceptions under paragraph 2 letters a and b do not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services.

**5** The application of this notice does not preclude a situation from being qualified, in whole or in part, as a horizontal restraint of competition under Article 5 (3) CartA or from being covered by Article 7 CartA. In this case, the facts must be assessed independently of the present notice in accordance with the relevant provisions of the CartA.

**6** This notice does not apply to vertical agreements containing provisions relating to the assignment of intellectual property rights to the buyer or the use of such rights by the buyer, provided that such provisions are the primary object of the agreement and do not directly relate to the use, sale or resale of goods or services by the buyer or its customers.

## **Article 11 Relationship with the SME Notice**

This Notice takes precedence over the Notice on agreements with limited effect on the market Effect (SME Notice).<sup>2</sup>

## **Article 12 Presumptions**

**1** The elimination of effective competition is presumed under Article 5 (4) CartA if vertical agreements have the following object:

- a) setting minimum or fixed prices, i.e. restricting the buyer's ability to set its own selling price;
- b) allocation of territories to the extent that sales into these territories by non-resident distributors are excluded (absolute territorial protection). This includes in particular the restriction of the territory into which the buyer may passively sell the contract goods or services, unless an exception pursuant to Article 15 letters b to d applies.

**2** Article 5 (4) CartA also covers vertical agreements which indirectly lead to minimum or fixed prices or absolute territorial protection.

**3** Article 5 (4) CartA also covers vertical agreements in the form of recommendations which are based on an agreement or concerted practice and have as their object or effect the setting of minimum or fixed prices or an absolute territorial protection.

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<sup>2</sup> Decision of the Competition Commission of 19.12.2005 (BBI 2006 883), available at [www.weko.admin.ch](http://www.weko.admin.ch).

## Article 13 Rebuttal of the presumption

The rebuttal of the presumption of elimination of effective competition requires an overall assessment of the market, taking into account intra-brand and inter-brand competition. The decisive factor is whether there is sufficient intra-brand or inter-brand competition on the relevant market or whether the combination of the two leads to sufficient effective competition.

## Article 14 Significant restriction of competition

When examining the question of whether there is a significant restriction of competition within the meaning of Article 5 paragraph 1 CartA, the following must be considered:

- a) When the presumption is rebutted, vertical agreements pursuant to Article 5 (4) CartA (see Article 12 of this Verticals Notice) generally fulfil the significance criterion pursuant to Article 5 (1) CartA.
- b) For all other vertical agreements, both qualitative and quantitative criteria must be considered. These two criteria are weighed in a case by case, an overall assessment. In this context, a qualitatively severe agreement (see Article 15 of this Verticals Notice) may be significant despite minor effects from a quantitative point of view. Similarly, an agreement which has quantitatively significant effects may substantially affect competition even if it is not severe from a qualitative point of view.

## Article 15 Qualitative severe agreements

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Vertical agreements which are not covered by Article 5 (4) CartA are considered qualitatively severe if they have the following object:

- a) [...] <sup>3</sup>
- b) where the supplier operates an exclusive distribution system, the restriction of the territory into which, or of the customers to whom, the exclusive distributor may actively or passively sell the contract goods or services, except:
  - (i) the restriction of active sales by the exclusive distributor and its direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors;
  - (ii) the restriction of active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services

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<sup>3</sup> As amended on 22.5.2017 (cf. recital V.).

- (iii) the restriction of the exclusive distributor's place of establishment;
- (iv) the restriction of active or passive sales to end users by an exclusive distributor operating at the wholesale level;
- (v) the restriction of the exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- c) where the supplier operates a selective distribution system:
  - (i) the restriction of the territories into which, or of the customers to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except:
    1. the restriction of active sales by members of the selective distribution system and by their direct customers into a territory or to a customer group reserved for the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;
    2. the restriction of active or passive sales by members of the selective distribution system and by their customers to unauthorised distributors located within the territory in which the selective distribution system is operated;
    3. the restriction of the place of establishment of the members of the selective distribution system;
    4. the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level;
    5. the restriction on the possibility of actively or passively selling components supplied for re-use to customers who would use those parts for the manufacture of the same type of goods as those manufactured by the supplier;
  - (ii) the restriction of cross-supplies between members of the selective distribution system operating at the same level of trade or at different levels of trade;
  - (iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level, without prejudice to paragraphs (c)(i)(1) and (3);
- d) where the supplier operates neither an exclusive distribution system nor a selective distribution system, the restriction of the territory into which, or of the customers to whom, the buyer may actively or passively sell the contract goods or services, except:
  - (i) the restriction of active sales by the buyer and its direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors;
  - (ii) the restriction of active or passive sales by the buyer and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services

- (iii) the restriction of the exclusive distributor's place of establishment;
  - (iv) the restriction of active or passive sales to end users by a buyer operating at the wholesale level;
  - (v) the restriction of the buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- e) the prevention of the effective use of the Internet for the sale of the contract goods or services by the buyer or its customers, as this constitutes a restriction of the territory into which or of the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer the following:
  - (i) other restrictions on online sales or
  - (ii) restrictions on online advertising that are not aimed at preventing the use of an entire online advertising channel;
- f) the restriction, agreed between a supplier of components and a buyer who reuses those components, of the supplier's ability to sell the components as spare parts to end users, repairers, wholesalers or other service providers whom the buyer has not entrusted with the repair or servicing of its goods;
- g) direct or indirect non-compete obligations which are valid for an indefinite period or for a period of more than five years; the limitation to five years does not apply if
  - (i) the contract goods or services are sold by the buyer in premises and on land owned by the supplier or rented or leased by the supplier from third parties not connected with the buyer, and
  - (ii) the non-compete obligation does not extend beyond the period during which the buyer uses such premises and land;
- h) direct or indirect obligations causing the buyer not to manufacture, purchase, sell or resell goods or services after the termination of the non-compete obligation; this does not apply if all of the following conditions are fulfilled:
  - (i) the obligations relate to goods or services that compete with the contract goods or services;
  - (ii) the obligations are limited to premises and land from which the buyer has conducted its business during the contract period;
  - (iii) the non-compete obligation is indispensable to protect know-how transferred to the buyer by the supplier;
  - (iv) the duration of the obligations is limited to a maximum of one year after the termination of the agreement;
- i) direct or indirect obligations causing the members of a selective distribution system not to sell the brands of particular competing suppliers;
- j) direct or indirect obligations causing a purchaser of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services.

## Article 16 Insignificance due to market shares

**1** Vertical agreements which do not fall under Article 12 or Article 15 letters b to f of this Verticals Notice do not normally lead to a significant restriction of competition if no undertaking party to the agreement exceeds a market share of 15% on a relevant market affected by the agreement.

**2** If competition in a relevant market is restricted by the cumulative effect of vertical agreements concluded by different suppliers or distributors for the sale of goods or services (cumulative foreclosure effect of parallel networks of vertical agreements having similar effects on the market), the market share threshold referred to in paragraph 1 shall be reduced to 5%. Individual suppliers or distributors with a market share not exceeding 5 % are normally not considered to contribute significantly to the cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to be present if less than 30 % of the relevant market is covered by parallel (networks of) vertical agreements having similar effects on the market.

## Article 17 Insignificance of a purely qualitative selective distribution

Vertical agreements which have as their object purely qualitative selective distribution do not lead to a significant restriction of competition, provided that three cumulative conditions are met:

- (i) the nature of the product in question must require selective distribution, i.e. such a distribution system must be a requirement to maintain the quality and ensure the correct use of the product in question;
- (ii) the resellers must be selected on the basis of objective criteria of a qualitative nature. These criteria must be defined uniformly, made available to all potential resellers and applied in a non-discriminatory manner;
- (iii) the criteria established must not go beyond what is required.

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## Article 18 Justification

**1** If there is a vertical agreement that significantly restrict competition, it must be examined whether it is justified under Article 5 (2) CartA. If there are no efficiency reasons, the agreement is unlawful.

**2** Vertical agreements shall normally be deemed to be justified without a case-by-case examination if the supplier's share of the relevant market on which it offers the contract goods or services, and the buyer's share of the relevant market on which it acquires the contract goods and services does not exceed 30 % in each case. This rule does not apply to agreements pursuant to Article 12 and Article 15 of this Verticals Notice as well as agreements which have a cumulative effect on the market.

**3** Vertical agreements significantly that are not covered by paragraph 2 are subject to a case-by-case assessment. A justification ground exists if a vertical agreement increases economic efficiency within the meaning of Article 5 (2) CartA - for example, through a more efficient distribution structure in the sense of an improvement of products or production processes or a reduction of distribution costs - and the restriction of competition is necessary for this purpose.

**4** Undertakings can, within the framework of the justifications referred to in Article 5 (2) CartA, invoke in particular the following:

- a) temporary protection of investments for the development of new geographic or product markets ;
- b) ensuring the uniformity and quality of the contract products ;
- c) protection of contract-specific investments that cannot be used outside the business relationship or can only be used at a high loss (hold-up problem) ;
- d) avoiding a sub-optimal level of sales promotion measures (e.g. customer advice) which may occur when one producer or distributor is able to divert the promotional efforts of another producer or distributor to their own benefit (free rider problem) ;
- e) avoiding double price mark-ups, which can arise if both the producer and the trader have market power (double marginalisation problem) ;
- f) achieving economies of scale in distribution ;
- g) promoting the transfer of essential know-how ;
- h) securing financial commitments (e.g. loans) that are not made available by the capital market.

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## **Article 19      Publication**

This notice shall be published in the Federal Gazette (Article 6 (3) CartA).

## **Article 20      Repeal of the previous notice**

This Notice repeals, upon its entry into force, the Notice on the assessment of vertical agreements of 28 June 2010<sup>4</sup>.

## **Article 21              Transitional period**

For the period from 1 January 2023 to 31 December 2023, this Notice shall not apply to agreements which entered into force before 1 January 2023 and which fulfil the criteria of the repealed Notice but which do not fulfil the criteria of this Notice.

## **Article 22              Entry into force**

This Notice shall enter into force on 1 January 2023.

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<sup>4</sup> Decision of the Competition Commission of 28 June 2010 (BBI 2017 4543).