

Exclusive Dealing/Single Branding in Switzerland

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This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to “exclusive dealing” and “single branding” as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Legal Basis and Specific Elements

By way of general comment it should be noted that there are only very few published cases in Switzerland in which the Swiss Competition Commission (**SCC**) pursued an allegation of exclusive dealing under the provisions relating to dominant firms of the Swiss Cartel Act (there may be additional unpublished cases of which we are not aware), and relevant *dicta* by the SCC in other cases (notably cases concerning refusals to deal) are equally scarce. On the whole, the SCC's comments and *dicta* do not constitute reliable precedents (they are often unclear and not comprehensively reasoned). It is for those reasons that we have answered "N/a" to a number of questions rather than setting out the (untested) views of individual scholars as found in the literature.

1. Please provide the main relevant texts (in English if available) of your jurisdiction's laws and guidelines on exclusive dealing/single branding.

The main provisions governing the treatment of exclusive dealing are set out on the one hand in Articles 7(1) and 7(2)(a) and (c) of the Swiss Cartel Act (**LCart**) and on the other hand in the Notice on the Competition Law Treatment of Vertical Agreements (**Verticals Notice**). The relevant provisions of the LCart read as follows:

Article 7(1): Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent

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other enterprises from entering or competing in the market or when they injure trading partners.

Article 7(2)(a) and (c): The following in particular may constitute unlawful practices: refusal to deal (e.g. refusal to supply or buy goods) [or] the imposition of unfair prices or other unfair conditions of trade

In addition to Article 7 LCart (which sets out which practices are unlawful for undertakings having a dominant position), the Verticals Notice (which will enter into force on January 1, 2008) sets out the conditions under which particular types of vertical agreements may, as a rule, be justified on grounds of economic efficiency. As such, it also deals with the question of legitimacy of exclusive dealing arrangements albeit in the area of Article 5 LCart which applies to unlawful horizontal or vertical agreements. Below, we have therefore included references to the relevant provisions of the Verticals Notice. It should, however, be noted that the Verticals Notice is not designed to apply to dominant undertakings and stricter rules than those which are set out in the Verticals Notice are therefore likely to apply in relation to dominant undertakings entering into or maintaining exclusive relationships.

2. Please list your jurisdiction's criteria for an abuse of dominance/monopolization based on exclusive dealing.

In order to be abusive, the following criteria have to be fulfilled:

- a) The LCart must be applicable (notable areas which are excluded from the ambit of the LCart are (1) provisions which establish an official market or price system, (2) provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights and (3) effects on competition resulting exclusively from laws governing intellectual property).
- b) The accused must be an undertaking.
- c) The undertaking must be dominant on a particular market for goods or services.
- d) The undertaking must have abused its dominant position e.g. through exclusive dealing practices without offering any fair and proportionate consideration in return.
- e) There must not be any legitimate business reasons which might explain the allegedly abusive behaviour.

Exclusive Purchasing and Supply Arrangements

3. How does your jurisdiction define single branding or exclusive dealing? For example: Must a firm require that all purchases come from it or that all sales go to it? Can something less than "all purchases" or "all sales" be considered single branding or exclusive dealing? Please specify (providing actual percentages, as relevant).

N/a for dominance cases but Art. 6 of the Verticals Note indicates that more than 80 % may be sufficient.

4. Is the duration of the arrangement relevant to your assessment? Yes/No

N/a for dominance cases but Art. 12 of the Verticals Notice suggests that in the context of vertical non-compete arrangements a period of more than 5 years is generally problematic.

a. If so, please explain how and why, providing examples.

N/a

5. Must the firm's use of such arrangements cover a substantial portion of the market? Yes/No

N/a for dominance cases but Art. 13(2) of the Verticals Notice implies that a distribution network covering less than 30 % of the relevant market does not usually lead to foreclosure problems

a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met?

N/a

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/No

N/a

a. If so, how and why?

N/a

7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, e.g., an "English Clause" (requiring e.g., the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, e.g., the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)? Yes/No

N/a

a. If so, please explain and provide examples.

N/a

Presumptions and Safe Harbours

8. Are there circumstances under which a firm's use of single branding or exclusive dealing arrangements is presumed illegal? Yes/No

Yes

a. If so, please identify the circumstances.

Under Article 5(4) LCart, the (illegal) elimination of effective competition is presumed in cases of agreements between enterprises at different levels in the market regarding fixed or minimum prices, as well as in the case of agreements in distribution contracts regarding the allocation of territories in so far as sales by other distributors into these territories are not permitted.

There is no corresponding provision for dominant undertakings.

b. Is the presumption rebuttable? Yes/No

Yes

i. If so, what must be shown to rebut the presumption?

It is unclear exactly what needs to be shown to rebut the presumption but according to Article 10((2) of the Verticals Notice it is **not sufficient** merely to prove the existence of competition between suppliers of different brands ("inter-brand competition"). It should in any event be noted that if the presumption is successfully rebutted, the agreement will automatically and invariably constitute a significant restriction of competition within the meaning of Article 5(1) LCart. The latter can, however, be justified provided there are grounds of economic efficiency which can be advanced.

9. Is there a "safe harbour" from a finding of liability under your single branding/exclusive dealing provisions? Yes/No

No

a. If so, please explain, including its terms.

N/a for dominance cases but Art. 15(2) of the Verticals Notice stipulates that vertical agreements are generally considered to be justified if the market share of the supplier does not exceed 30 %, provided, however, that certain other conditions are also fulfilled (it is therefore not entirely legitimate to refer to it as a "safe harbour" provision).

Effects

10. Must a market foreclosure effect be shown for an abuse? Yes/No

No

a. How is market foreclosure defined in your jurisdiction?

N/a

b. Which factors are taken into account to assess a market foreclosure effect (level of dominance, percentage of market demand/purchases or supply covered by the arrangement, existence of alternative sources of supply, entry barriers, scale economies, possibility and practicability of switching, others)? Please specify the factors considered, including, as relevant, the percentage of demand/supply covered.

N/a

- c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?**

N/a

- 11. Must other effects, e.g., on consumer welfare, be shown for an abuse? Yes/No**

No

- a. If yes, please specify what must be demonstrated and the evidence required.**

N/a

Justifications/Defences

- 12. What justifications/defences are available to the dominant firm, e.g., an efficiency, meeting competition or objective necessity defence? Please specify.**

A defendant to an allegation of exclusive dealing can raise the defence of "legitimate business reasons". Legitimate business reasons are primarily those which are based on economic or industrial theory. In addition, the defendant can advance "objective justifications" for behaviour which has the effect of restricting competition but which was entered into with an objectively justified goal. For example, the use of neutral means (e.g. tenders) can have the effect of restricting competition but they are considered to be objectively justified. Equally, any behaviour which would also be displayed by non-dominant firms is considered to be justified [cf. Flughafen Zürich AG (Unique) - Valet Parting, RPW 2006/4, S. 625, Rz. 99 f.].

- a. If there is an efficiencies defence, what efficiencies are considered (e.g., relationship-specific investments, facilitating innovation, reduced transaction costs)? How are claims of improved service quality or reputation assessed?**

N/a for dominance cases but Art. 15(4) of the Verticals Notice sets out a number of justifications which can be advanced by undertakings which are party to an allegedly unlawful vertical agreement. They are the protection of investments for the discovery of new products or product markets as long as it is limited in time; ensuring the uniform quality of the contract goods; the protection of bespoke investments which are of little or no value outside the contractual arrangement (hold-up problem); avoiding inefficiently extensive promotional efforts (e.g. consulting services) which can result if a manufacturer or dealer | distributor profits from the promotional efforts of another manufacturer or dealer | distributor (free-rider problem); avoiding a double price increase, which can result if both the manufacturer as well as the dealer | distributor are dominant (problem of double margins); improved transfer of relevant know-how; and securing financial resources (e.g. loans), which are not otherwise provided on the capital markets. It is likely that the same or

similar justifications can be advanced by dominant undertakings which are subject to a charge of abuse of a dominant position through exclusive dealing.

- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defence without consideration of harm?**

N/a

- c. Is there a meeting competition defence? Yes/ No.**

N/a

- i. If yes, please explain.**

N/a

- d. What is the standard of proof applicable to these defences? What type of evidence is required to demonstrate that the defences are met?**

As a general rule, in administrative proceedings the SCC has to prove the constituents of a breach of Article 7 LCart on the balance of probabilities whereas in civil and criminal proceedings the standard is commonly acknowledged to be "beyond reasonable doubt" ("*nach richterlicher Überzeugung muss jeder vernünftige Zweifel ausgeschlossen sein*").

The burden of proof is generally on the party trying to derive a benefit from the facts to be proven. This means that in administrative proceedings, the burden of proof is on the SCC whereas in civil proceedings it is on the claimant. However, in both cases it is upon the defendant to prove the existence of any defences or justifications [cf. Schweizerischer Buchhändler- und Verleger-Verband, Börsenverein des Deutschen Buchhandels e.V./ Wettbewerbskommission, RPW 2007/1, S. 129, Rz 10 ff.].

Enforcement

- 13. Please provide the following information for the past ten years (as information is available):**

Please note that our answers below refer only to published cases.

- a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).**

One of which we are aware [cf. TicketCorner, RPW 2004/3, S. 778].

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.**

One of which we are aware.

- c. **The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's exclusive dealing/single branding rules (i.e., "clearance decisions").**

None to our knowledge.

- d. **Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.**

There is one case of which we are aware where an appeal against a finding of abuse based on exclusive dealing was brought to the Swiss Competition Appeals Commission. The latter overturned the SCC's decision and held that the appellant was not dominant and therefore that there was no abuse within the meaning of Article 7 LCart.

- 14. Does your jurisdiction allow private cases challenging exclusive dealing/single? Yes/No**

Yes

- a. **Please provide a short description of representative examples, as available.**

N/a

- 15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the English translation of the decision, an executive summary or the press release of the case.**

N/a

- 16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant.**

N/a