

PESTALOZZI



ATTORNEYS AT LAW

ACC / Pestalozzi: Competition Law Update 2023

Zurich, 5 July 2023

Fabian Martens, Competition & Trade

Short Welcome

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A wide-angle photograph of a modern, open-plan office. Numerous employees are seated at long, light-colored desks, working on laptops. The office has a high ceiling with exposed ductwork and linear lighting fixtures. Large windows on the left side provide natural light. The overall atmosphere is professional and collaborative.

1. Competition law in labour markets

1. Competition law in labour markets

The practice so far

- General **exemption of labour law** from competition law:
 - Cartel Act 1962: The Swiss Cartel Act is not applicable to *"agreements, decisions and measures to the extent that they exclusively relate to the employment relationship"* (Art. 1 para. 2 CartA 1962).
 - Cartel Act 1994: No more explicit exemption of employment relationships, but the law remains unchanged: *"... the notion of the undertaking makes clear that (...) employees fall outside of the scope of application of the Cartel Act. The explicit exemption in the current Cartel Act [...] is no more necessary. Even without such explicit exemption provision, the [Cartel Act 1994] does not apply to the labour market..."* (BBL 1995 I 468, 533 et seq.)

1. Competition law in labour markets

Why an exemption of the labour market?

- Differences between the markets for products/services and labour?
- Imbalance of power between employer and employee ("Monopsony")?
- Protection of the "Labour peace"?
- Human rights?

Result: Some room for interpretation

1. Competition law in labour markets

Recent Developments

- New appetite of Swiss and foreign competition authorities for labour markets:
 - *"A specification of the applicable antitrust rules for labour markets is overdue"* (Andreas Heinemann, former president of ComCo, June 2020: Kartellrecht auf Arbeitsmärkten, WUW Nr. 07-08, 371 et seq.)
 - *"The labour market is becoming increasingly important for competition authorities worldwide."* (ComCo Secretariat, press release, 5 December 2022)

1. Competition law in labour markets

Recent Developments in Switzerland

- Pre-investigation in labour market of banks by ComCo Secretariat (December 2022)
 - First assessment of labour market agreement by Swiss competition authorities
 - Information exchange between banks regarding salaries of certain groups of employees (trainees, young professionals)
 - Unlawful agreements?
- Salaries as "prices" under Art. 5 para. 3 and 4 CartA?
 - Harmonisation of (maximum?) salaries as a type of price fixing
- No collective employment bargaining between employer and employee representatives

Das Sekretariat der WEKO untersucht den Arbeitsmarkt im Bankensektor

Bern, 05.12.2022 - Eine grosse Anzahl von Banken in der Deutschschweiz haben regelmässig Informationen über die Löhne von verschiedenen Kategorien ihrer Angestellten ausgetauscht. Weil dieses Verhalten kartellrechtlich problematisch sein könnte, wurde eine Vorabklärung eröffnet.

1. Competition law in labour markets

Recommendations going forward

- Carefully analyse agreements that touch upon labour markets:
 - First test: Agreement in line with general principles of competition law?
 - Second test: Agreement falls under the labour law exemption?
- Avoid coordination of practices with (competing) undertakings, e.g.
 - Salary agreements
 - Maximum salaries
 - Minimum salaries?
 - Salary recommendations?
 - Employment/labour *terms* agreements?

1. Competition law in labour markets

Recommendations going forward

- Avoid (horizontal) no-poaching agreements
 - By nature, similar assessment to non-compete agreements
 - Horizontal no-poaching agreements typically unlawful
 - But: ancillary restraints doctrine (e.g. sale of business, 2-3y)
- But: Non-compete obligations in employment agreements (Art. 340 et seq. CO) remain valid under Swiss law
 - Validity under Swiss labour law (exempt from competition law)
 - Limited to scope of business, geographic scope, time limit
 - Do not: restrict employee's "freedom to poach"

1. Competition law in labour markets

Recommendations going forward

- Generally do not share sensitive information regarding your employees with competitors
 - But: employees may exchange salaries among each other
- Train your recruitment staff in competition law in recruiting procedures

1. Competition law in labour markets

Excursus: Developments abroad

- US: FTC rejection of non-compete clauses in employment agreements (January 2023)
- Main contents
 - Rescission of all existing non-compete clauses (note: wide interpretation, including clauses with the same effect, such as NDA)
 - Exemption: non-compete in corporate transactions
 - Compliance date within 180 days
- Status: Pending



FTC Notice on Proposed Rulemaking, 5 January 2023
[Subchapter J, Part 910, to chapter I in title 16 of the Code of Federal Regulations](#)

1. Competition law in labour markets

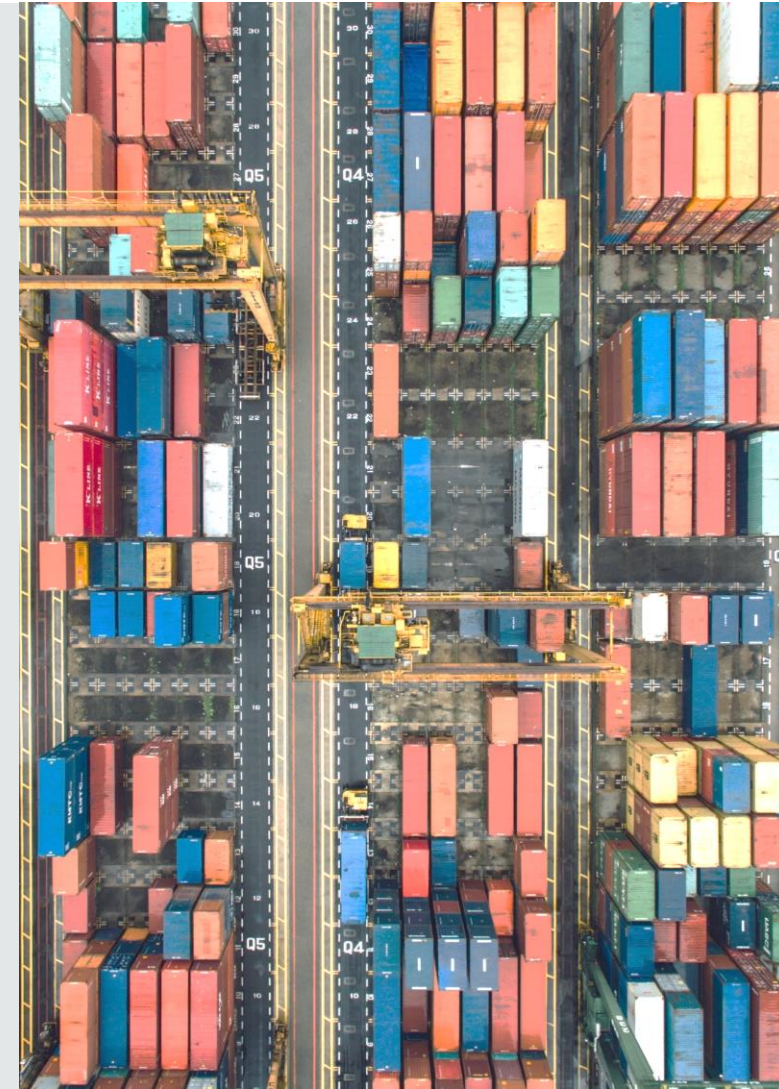
Excursus: Developments abroad

- US: FTC / DOJ
 - [Antitrust Guidance for Human Resource Professionals \(October 2016\)](#)
- UK Competition and Markets Authority (CMA)
 - [Employers advice on how to avoid anti-competitive behaviour \(February 2023\)](#)
- OECD
 - [Hearings](#) regarding competition issues in labour markets (June 2019, February 2020)

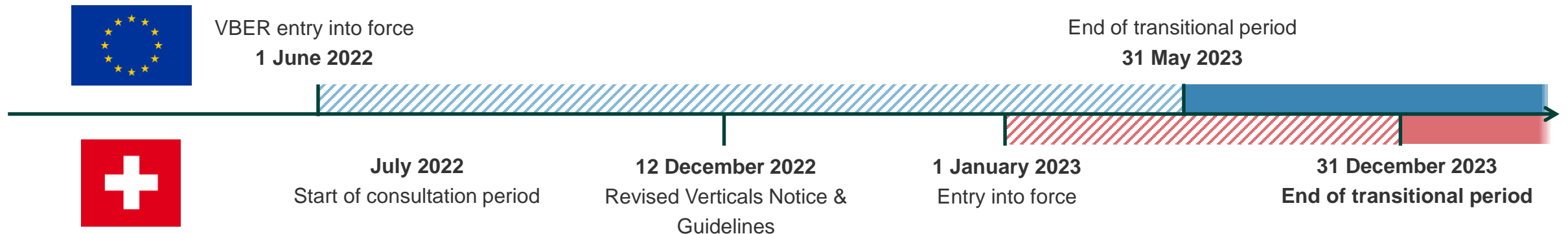




2. Updated distribution law



2. Vertical agreements: updated distribution law



- **Swiss Vertical Restraints Notice & Guidelines entered into force 1 January 2023**
 - Immediate application to all *new* distribution agreements
 - Application to *pre-existing* agreements: **1 January 2024**
- **Some action required: "Checklist" (non-exhaustive)**

2. Vertical agreements: updated distribution law

Dual distribution relationships

- Generally still permitted (market shares < 30%), but:
- Individual case assessment for hybrid platforms (i.e. platform operators also selling on their platform)
- No "unnecessary" or "unrelated" information exchange

Internet sales restrictions

- Do not: Generally ban internet sales, online advertising, or the use of price comparison websites.
- Do not: Oblige your distributor to geo-block.
- You may generally: Require brick-and-mortar shops, dual-price, ban platforms

2. Vertical agreements: updated distribution law

Agency relationships

- Review especially agreements with combined agents / distributors:
complex assessment of cost/risk bearing

Non-compete obligations

- Generally more lenient regulation (e.g. allowing automatic renewal), but:
- Make sure agreements / non-compete obligations are not unlimited term
(but limited term, with the option of automatic renewal)

Advertising prices

- Generally unchanged, but:
- Do not restrict advertising prices (minimum prices)



3. Horizontal information exchange

3. Horizontal information exchange

The ASCOPA decision (Federal Administrative Court, December 2022)

- Information exchange in the luxury cosmetics segment
- Exchange of price-related information in the luxury cosmetics segment
 - Gross price lists of manufacturers towards sellers ("sell-in")
 - Turnover figures
 - Advertising spending figures
- Recommendations regarding general terms and conditions
 - Minimum order requirements
 - Delivery costs
 - Return policies
 - Payment conditions

3. Horizontal information exchange

The ASCOPA decision

- Procedure
 - Different qualifications: from hardcore cartel (fines >CHF 100M) to "unlawful agreement" without direct sanction
 - Only one lawsuit to Federal Administrative Court
- Decision
 - Information exchange is not (yet) a price agreement or concerted practice (i.e. Art. 5 para. 1 and not Art. 5 para. 3 CartA)
 - Unlawful, but no direct sanctions (Art. 49a CartA)

3. Horizontal information exchange

The ASCOPA decision

- Court confirmed criteria for assessment of information exchange:
 - Frequency of the exchange: The more frequent, the higher the risk of an alignment of business strategies
 - Age of information: Future data (strategies!) or current data at higher risk than historic data (6 weeks? 3 months? 12 months?)
 - Aggregation level: Information shall not be company-specific, even if only indirectly related to companies. Instead, it should be aggregated.
 - Publicity of information: Public information can be exchanged with less risk, however even public information that may only be retrieved at high costs / efforts may not be considered public

3. Horizontal information exchange

Consultation of ComCo Secretariat re data platforms (RPW 2023/1, 113 et seq.)

- Joint venture for data processing in sport industry
- Platform for agreements between sellers and vendors: highly sensitive data re products, prices, recommended resale prices, orders, level stock etc.
- Must be safeguarded to effectively prevent access to data, e.g.:
 - Avoid information sharing via third party, e.g. a common supplier
 - Prevent information access for vertically integrated parties
 - Policy regarding information management if employees change jobs
 - Control access by shareholders to information
- Conclusion (Secretariat ComCo): "*The current structure of the data platform does not effectively prevent the exchange of sensitive data.*"

3. Horizontal information exchange

Recommendations

- "Information exchange" comes in many forms: e.g. industry benchmarking, industry associations, exchange through third parties (hub-and-spoke), technical access to information (platforms)
- Avoid information exchange regarding future behavior (often risk of qualification as an agreement)
- If possible, focus on proper aggregation of information
 - Structure the information exchange through a neutral third party as "black box"
 - Consider technical, structural, organisational aspects, such as protection of data, and exclude potential access to data, etc.
 - Document your efforts and the considerations
- Rely less on "soft" criteria, e.g. age of information, frequency, etc.
- Do not rely on efficiency justifications
- Make a proper risk-benefit analysis



4. Recommended resale prices

4. Recommended resale prices

Pfizer decision (Supreme Court decision 147 II 72)

- Leading case regarding recommended resale prices in very specific circumstances:
 - "Hors liste" pharmaceuticals for erectile dysfunction
 - "Intense communication" for years
 - Price recommendations by manufacturers, automatic transfer into cash systems of sellers (via wholesaler)
 - Very high compliance levels by pharmacies
 - No pressure or incentives to comply with price recommendations
- Supreme Court confirmed a concerted practice of unlawful resale price maintenance:
direct sanctions

4. Recommended resale prices

Consultation of ComCo Secretariat (RPW 2023/1, 113 et seq.)

- Facts
 - The data platform in the sports market industry also allowed the suppliers to submit recommended resale prices to their retailers.
 - Retailers could choose to automatically include the recommended price list into their cash registers if they explicitly confirm the non-binding character of the price list and their freedom to set their own resale price (checkbox).

4. Recommended resale prices

Consultation of ComCo Secretariat

- Assessment by ComCo Secretariat: "Likely" insufficient to prevent a concerted practice
- Transmission of actual purchase prices (*Einstandspreise*) may be possible, even if repeated and directly included in the cash register, if the independent price setting of seller is safeguarded. E.g.:
 - Include option for seller to set its own price at the time of the import of the price data;
 - within its own cash system;
 - by definition of a margin or a multiplier to the purchase price.

5. Questions?





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