

# DISTRIBUTION & AGENCY

## Switzerland



# Distribution & Agency

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Distribution & Agency covers the main points of law and regulation governing relationships between suppliers and manufacturers, and distributors and commercial agents, worldwide. Written by local experts in key jurisdictions, topics covered include: regulations governing direct distribution; potential restrictions, financial and tax considerations on foreign businesses' operations; distribution structures available to suppliers; regulation of relationships between suppliers and distributors; restrictions on the distribution of competing products; relevant consumer protection laws; restrictions on contractual choice of law, courts or arbitration tribunals; and dispute resolution, mediation and arbitration procedures and processes.

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## DIRECT DISTRIBUTION

### Ownership structures

May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes.

May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes.

What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The best suited and most common legal entities for an importer owned by a foreign supplier are the corporation (AG or SA) and the limited liability company (GmbH or Sàrl).

Legal entities such as corporations and limited liability companies are governed by the Swiss Code of Obligations .

The minimum share capital is 100,000 Swiss francs for the corporation and 20,000 Swiss francs for the limited liability company. The entities are established when the founding members – one founder is sufficient – declare by notarial deed that they are forming a corporation or limited liability company, adopt the articles of association and appoint the members of the governing bodies.

### Restrictions

Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Swiss legal entities must be able to be represented by a Swiss resident (citizenship is irrelevant) with sole signatory power or two Swiss residents with collective signatory power. These persons are registered with the commercial register.

Additional restrictions apply with regard to real estate. The Federal Act on the Acquisition of Real Estate by Persons Abroad restricts the acquisition of real estate in Switzerland by foreigners. Nevertheless, real estate used for permanent commercial purposes, such as manufacturing or retail premises or offices, may be acquired.

### Equity interests

May the foreign supplier own an equity interest in the local entity that distributes its products?

Generally, yes. Restrictions may apply if the local entity owns real estate in Switzerland.

## Tax considerations

What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Switzerland is a confederation of 26 cantons (states) with currently about 2,200 municipalities. A distinction is to be made between direct federal, cantonal and municipal taxes. The Swiss cantons set their own corporate tax rates. This system leads to a certain degree of tax competition between the cantons and municipalities and, therefore, to relatively low tax rates.

The Confederation, cantons and municipalities all levy taxes on the profits. For the Confederation the rate is 8.5 per cent. There are significant differences between the tax rates of different cantons and municipalities. For example, the canton of Zug offers attractive tax rates; the total tax burden on the profits (ie, including federal, cantonal and municipal taxes) amounts to less than 15 per cent.

All cantons levy taxes on the equity. Here again, there are significant differences between the tax rates of different cantons and municipalities. In the canton of Zug, the tax rate on the equity amounts to less than 1 per thousand.

Furthermore, companies whose turnover exceeds the threshold of 100,000 Swiss francs per year are usually subject to value-added tax (VAT) and must therefore register with the Federal Tax Administration. The ordinary VAT rate is 7.7 per cent. A reduced VAT rate of 2.5 per cent applies to goods such as foodstuffs, pharmaceuticals or print products (books, newspapers, journals, etc).

Dividends paid are subject to a 35 per cent withholding tax. Swiss residents will be able to obtain a full refund of the withholding tax. Shareholders residing outside of Switzerland can receive relief from Swiss dividend withholding tax insofar as this is provided for in a double taxation treaty.

There is no specific transfer pricing legislation in Switzerland and there are no particular documentation requirements in this respect. Nevertheless, general Swiss tax law provisions require that transactions among related parties must be at arm's length and commercially justified.

## LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

### Distribution relationships

What alternative distribution relationships are available to a supplier?

Swiss contract law is based on the principle of freedom of contract, which allows parties to define the conditions that will govern their contractual relationship at their own discretion. Swiss law is very liberal and particularly attractive for suppliers. Mandatory provisions protecting distributors are rare.

Therefore, a supplier may choose from many possible distribution structures and tailor this structure to its needs. The following distribution structures are frequently used:

- Distribution or wholesale agreements, under which distributors or wholesalers purchase products from suppliers and resell them in their own name and account to their customers. Distributors or wholesalers bear the marketing and sales risks.
- Franchise relationships, under which franchisees distribute products and services independently, but under a distribution concept provided by the supplier (franchisor). In exchange for a franchise fee or other forms of compensation, franchisees receive ongoing assistance, training and advice from the supplier (franchisor) and

may use the latter's labels, trademarks, know-how, equipment or other items or intellectual property rights. The franchisor usually reserves the right to issue directives and, thus, to maintain a significant degree of control over the business activities of the franchisee. However, franchisees bear the marketing and sales risks.

- Commercial agency agreements, under which commercial agents undertake to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf, without, however, entering into an employment relationship with their principals. Commercial agents are usually remunerated by means of sales commissions based on the transactions that were facilitated or concluded during the agency relationship. In principle, the principals bear the marketing and sales risks.
- Commission agreements, under which commission agents sell the products in their own name but for the account of the supplier. In return, they are entitled to commissions. Commission agents are rather rare in Switzerland.

## Legislation and regulators

What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The Swiss Code of Obligations (CO) regulates Swiss contract law. The First Division of the CO (articles 1 to 183 CO) contains general principles of Swiss contract law. These principles also apply to agreements governing distribution relationships.

Some distribution-related contracts, namely commercial agency agreements and commission agreements are specifically governed in the Second Division of the CO.

However, the CO does not explicitly govern numerous other kinds of distribution-related contracts, for example, distribution, wholesale and franchising agreements. They are considered to be 'innominate contracts', to which other provisions relating to nominate contracts; for example, agreements for the sale of goods, commercial agency agreements, employment agreements or lease agreements may apply by analogy. For instance, certain employment provisions may apply by analogy to certain franchising agreements. Commercial agency-related provisions, notably the entitlement to a goodwill indemnity pursuant to article 418u CO, might apply by analogy to certain distribution agreements.

The general principles set forth in the Swiss Civil Code (eg, the duty to act in good faith and the prohibition of an abuse of law) also apply to distribution-related contracts. Moreover, parties to distribution-related contracts must comply with the Federal Cartel Act and the Federal Unfair Competition Act. Numerous further laws may apply to parties to distribution-related contracts; for example, tax laws, product safety and liability laws or sector-specific laws (eg, in the foodstuffs or pharmaceutical markets).

As to industry self-regulatory constraints, reference should be made to the Code of Conduct of Swiss Distribution, the former Swiss Franchise Association. The Code of Conduct is binding upon members of Swiss Distribution and contains, for example, rules on pre-contractual disclosure.

## Contract termination

Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

Generally, no. The freedom of contract entails the freedom of terminating distribution relationships. Parties to distribution relationships can freely (and should) agree in their agreement on the applicable notice periods and on whether any specific cause is required. These agreements can, for example, also combine fixed terms with premature termination rights. Swiss courts tend not to interfere with such contractual termination rights.

However, there are a few exceptions, in particular minimum notice periods for commercial agency agreements: where a commercial agency agreement is concluded for an indefinite period and has lasted for more than one year, it may be terminated by giving two months' notice expiring at the end of a calendar quarter. This notice period cannot be shortened in the agreements.

Moreover, a supplier who holds a dominant position on a market may be obliged to continue a distribution relationship based on the Federal Cartel Act.

Swiss contract law provides that either party may terminate a long-term contract with immediate effect at any time for good cause, even if this termination right is not included or explicitly excluded in an agreement. Any circumstance that renders the continuation of the distribution relationship in good faith unconscionable and unreasonable for the party giving notice constitutes such good cause. Ongoing violations of a distributor's exclusivity rights by the supplier or a lasting failure of the distributor to distribute or pay for the goods are possible examples of these circumstances.

### Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Such entitlement to mandatory compensation ('goodwill indemnity' or 'compensation for clientele') may exist in particular under commercial agency agreements (article 418 of the CO):

If an agent's activities have resulted in a substantial expansion of the principal's customer base and considerable benefits accrue after the end of the agency relationship to the principal from business relations with customers acquired by the agent, the agent is entitled to a goodwill indemnity, provided this is not inequitable. However, the agent has no entitlement where the agency relationship has been dissolved for a reason attributable to the agent. The goodwill indemnity can amount up to the agent's net annual earnings from the commercial agency relationship.

Article 418u CO may apply by analogy to distribution agreements, meaning that distributors can also be entitled to a goodwill indemnity under certain circumstances. An analogous application of article 418u CO to distribution agreements requires that a distributor be integrated to a large extent into a supplier's distribution organisation, so that the distributor finds itself in an agent-like position and disposes of only limited economic autonomy.

The parties to an agency or distribution agreement cannot validly exclude an entitlement to a goodwill indemnity in their agreement.

### Transfer of rights or ownership

#### Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Generally, yes. Prohibitions to assign distribution-related rights to third parties are very common. Assignments in violation of these prohibitions are null and void.

Clauses prohibiting distributors or agents from selling their businesses to third parties are not enforceable as such. However, it is common to stipulate extraordinary termination rights with immediate effect in the case of such transfers of ownership (change of control clauses).

## REGULATION OF THE DISTRIBUTION RELATIONSHIP

### Confidentiality agreements

Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Generally, no. Confidentiality agreements can also provide for contractual penalties or liquidated damages in the case of breaches of confidentiality. However, Swiss courts may reduce the amounts of these penalties and damages if they consider them excessive.

In addition, it should be kept in mind that violations of confidentiality obligations may also qualify as a misdemeanour under the Swiss Criminal Code .

### Competing products

Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Restrictions on the distribution of competing products in distribution agreements are enforceable only if they comply with the Federal Cartel Act and, in particular, the Competition Commission 's (COMCO) Notice regarding the Competition Law Treatment of Vertical Agreements (the Verticals Notice).

According to the Verticals Notice, distribution agreements with non-compete obligations for an indefinite period or a fixed period exceeding five years are deemed to significantly restrict competition and are likely to be considered unlawful. This also applies to post-contractual non-compete obligations, with a few narrow exceptions.

### Prices

May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Restrictions on the distribution partner's price-setting freedom are only enforceable if they comply with the Federal Cartel Act and, in particular, the Verticals Notice.

Under the Cartel Act, agreements between suppliers and distributors regarding fixed or minimum prices (resale price maintenance (RPM)) are generally prohibited. RPM clauses are vigorously prosecuted by COMCO. Parties to distribution agreements containing RPM clauses may be fined with up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years. In practice, these fines are mostly imposed on the suppliers.

An exception to the prohibition of RPM exists with regard to commercial agency agreements. In principle, principals under commercial agency agreements can determine the prices for the transactions, which are facilitated or concluded by agents on their behalf. However, for that purpose, it is important that agents do not bear any significant risks.

May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Suppliers may influence resale prices to a limited extent by setting maximum resale prices or by communicating non-

binding resale price recommendations.

Specifically with regard to resale price recommendations, it must be safeguarded that these suggested resale prices do not become tantamount to fixed or minimum prices owing to the exercise of pressure by the supplier or economic incentives, which cause the distributor to comply with the suggested prices. Resale price recommendations are less problematic if they are publicly accessible and expressly non-binding.

In the case of a selective distribution system, suppliers may also set high qualitative requirements to be complied with by all authorised distributors (eg, demanding a luxury retail environment). This will generally lead to higher costs on the part of the authorised distributors and thereby result in higher prices.

Minimum advertised price policies are likely to be qualified as an unlawful form of RPM and could give rise to turnover-based administrative penalties.

**May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?**

Generally, yes. However, some exceptions may exist, in particular with regard to online platforms. In 2015, COMCO prohibited online travel agencies from obliging hotels not to offer lower prices on other platforms. Further exceptions may apply in the case of a dominant position.

**Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?**

In principle, sellers are allowed to charge different prices for different customers. However, the Federal Cartel Act prohibits sellers with a dominant position on the relevant market from discriminating between trading partners in relation to prices or other conditions of trade. Such abuses of dominance may be fined with up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years.

### **Geographic and customer restrictions**

**May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?**

Geographic areas and categories of customers can be restricted if the restriction complies with the Federal Cartel Act and, in particular, the Verticals Notice.

Under the Cartel Act, clauses contained in distribution agreements regarding the allocation of territories are prohibited to the extent that sales by other distributors into these territories are not permitted.

According to the Verticals Notice, a supplier may generally restrict active sales efforts by the distributor into an exclusive geographic territory or to an exclusive customer group reserved to the supplier itself or allocated to another distributor, provided that these restrictions do not limit passive sales; responses to unsolicited orders from customers from other geographic territories or other categories of customers must still be possible.

In principle, internet sales are considered to be passive sales, unless a website or marketing efforts 'actively' target customers from another exclusive territory.

Exclusive territories, also limited to active sales efforts, are generally not permitted in the case of selective distribution

systems.

### If geographic and customer restrictions are prohibited, how is this enforced?

Unlawful geographic restrictions, in particular prohibitions imposed by suppliers on foreign distributors to respond to unsolicited orders from Swiss-based customers (ie, prevention of parallel imports), are an enforcement priority of COMCO and vigorously prosecuted. Parties to distribution agreements containing an allocation of territories to the extent that passive sales by other distributors into these territories are not permitted may be fined with up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years. In practice, these fines are mostly imposed on the suppliers.

Unlawful customer restrictions may be prohibited by COMCO but cannot trigger direct turnover-based fines. These fines can be imposed only if the unlawful restrictions are maintained despite a decision of COMCO that specifically prohibits these restrictions.

In addition, unlawful geographic and customer restrictions can lead to private actions. However, private enforcement of competition law rules in Switzerland is rare.

## Online sales

### May a supplier restrict or prohibit e-commerce sales by its distribution partners?

In principle, e-commerce sales are considered to be passive sales, unless a website or marketing efforts 'actively' target customers from another exclusive territory. Therefore, suppliers cannot restrict or prohibit e-commerce sales outside the territory exclusively allocated to a distributor. 'Invasion fees' or similar amounts payable by the distributor in the case of (passive) sales into the exclusive territory of another distributor are generally unlawful.

However, in the context of a selective distribution system, suppliers may set qualitative requirements to be complied with by all authorised distributors. These requirements should be equivalent to the criteria requirements applicable to brick-and-mortar shops

### May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?

Generally, yes. Territorial restrictions imposed on the supplier are likely to be lawful. Therefore, claims to invasion fees or similar amounts payable by the supplier are likely to be enforceable.

## Refusal to deal

### Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Based on the principle of freedom of contract, undertakings can freely choose their contractual partners and decide on which terms they are willing to conclude a contract. Therefore, a refusal to deal with particular customers is generally lawful.

However, there are important exceptions. A refusal to deal may amount to an abuse of a dominant position under the

Federal Cartel Act, if a supplier holds a dominant position on a relevant market.

### Competition concerns

Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Typically, distribution or agency agreements do not fall under the Swiss merger control rules. If concluded between competitors, distribution or agency agreements may rather give rise to concerns under article 5 of the Federal Cartel Act (ie, the statutory provision governing anticompetitive agreements).

However, it cannot be excluded that distribution or agency agreements may under (very) exceptional circumstances fall under the merger control rules. This could be the case if these agreements allow one undertaking (eg, the supplier) to exercise a decisive influence over the activities of the other undertaking (eg, the distributor). In such a case, an acquisition of control in terms of the Merger Control Ordinance would exist. Nonetheless, even franchising agreements, which typically provide a franchisor with far-reaching rights to issue directives and, thus, to maintain a significant degree of control over the business activities of the franchisee, do usually not fall under the merger control regime.

Moreover, the establishment of a joint venture in connection with a distribution or agency relationship could also trigger merger control obligations, for example, if two undertakings set up a joint venture for the joint commercialisation of goods or services. If two or more undertakings establish a new joint venture, the joint venture is reviewable if it performs all the functions of an autonomous economic entity on a lasting basis and if business activities from at least one of the controlling undertakings are transferred to the joint venture.

Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Under the Federal Cartel Act, all agreements that eliminate effective competition or significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency are prohibited. These agreements are null and void.

To set out under which conditions agreements affecting competition are justified on grounds of economic efficiency, COMCO issued the Verticals Notice, which follows the European Vertical Block Exemption Regulation. In addition, COMCO also published short explanatory guidelines on the Verticals Notice. In the motor vehicles sector, a separate notice and guidelines exist.

The Verticals Notice and the accompanying explanatory guidelines address, inter alia, RPM, exclusivity rights granted in relation to geographic territories or customer groups, selective distribution systems (ie, 'closed' systems of authorised distributors selected on the basis of certain requirements), non-compete obligations or certain restrictions in the e-commerce sector.

In addition, the Cartel Act also addresses abusive conduct by dominant undertakings, such as refusals to deal, discrimination of trading partners, and tying and bundling practices.

The rules set forth in the Cartel Act are enforced by COMCO and its Secretariat. The Secretariat investigates conducts investigations and disposes of far-reaching investigative powers, including the right to conduct dawn raids and

summon witnesses. On the basis of the outcome of investigations, COMCO renders its decision, prohibits unlawful conduct and imposes fines. It may also approve an amicable settlement concluded between the Secretariat and the undertakings concerned.

Parties to distribution agreements containing RPM clauses or an unlawful allocation of territories to the extent that passive sales by other distributors into these territories are not permitted may be fined up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years. The same fines can be imposed on undertakings that abuse their dominant position on a specific market.

COMCO may prohibit also other anticompetitive clauses contained in distribution agreements, but this does not lead to direct turnover-based fines. These fines can be imposed only if such restrictions are maintained in spite of a decision of COMCO, which specifically prohibits the restrictions.

In addition, anticompetitive agreements or abuses of dominance can lead to private actions. Private parties hindered by unlawful anticompetitive conduct from entering or competing in a market are entitled to request the elimination of or desistance from the anticompetitive conduct, damages and the surrender of unlawfully earned profits. However, private enforcement of competition law rules in Switzerland is rare.

## Parallel imports

Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Parallel or 'grey market' imports are difficult to prevent under Swiss law. Indeed, COMCO vigorously fights against any unlawful attempts to prevent parallel or grey market imports.

Distributors and agents may require the supplier respectively principal to act against other distributors or agents, which actively target the exclusive territory of another distributor or agent. However, if – as is usually the case – parallel imports are the result of passive sales (ie, the fulfilment of unsolicited orders by distributors located in another territory) there are no viable means to prevent these parallel or grey market imports.

Even in the case of a 'leakage' within a lawful selective distribution system (ie, a 'closed' system of authorised distributors selected on the basis of certain requirements), there are generally no viable ways to prohibit an unauthorised distributor from selling the products in Switzerland. Swiss intellectual property laws do not allow the proprietor of IP rights to oppose further commercialisation of the goods, if these goods have been placed on the market with the proprietor's consent anywhere in the world in the case of trademark or copyright protected goods or in the European Economic Area in the case of patent protected goods (with a few exceptions, for example, pharmaceuticals).

## Advertising

What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

Based on the principle of freedom of contract, the supplier and distributor may agree to divide or to pass the advertising costs entirely to one party. Swiss courts do generally not interfere with these rules.

The Federal Unfair Competition Act imposes restrictions regarding the advertisement of products. Generally, any behaviour that may be considered deceptive or violates the principle of good faith and that affects the relationship between competitors or between suppliers and customers is unlawful. This includes, for example, incorrect or

misleading statements about a competitor's products or own products, and incorrect or misleading comparisons.

## Intellectual property

How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

Most importantly, suppliers should develop a suitable IP protection strategy. In principle, suppliers are well-advised to protect inventions by means of patents in accordance with the Federal Patent Act and to register trademarks and designs with the Federal Institute of Intellectual Property in accordance with the Federal Trademark Act and the Federal Design Act .

Protection of IP rights in Switzerland from abroad is relatively simple. For example, Switzerland is party to the Madrid international trademark system, the Hague international design system, the Patent Cooperation Treaty and the European Patent Convention.

In the case of a (threatened) infringement of its IP rights, a supplier may request the competent court, inter alia, to prohibit an imminent infringement or remedy an existing infringement, or both. Prior to the initiation of ordinary proceedings, it is also possible to obtain an (ex parte) preliminary injunction in summary proceedings. Furthermore, an action for damages, the surrender of unlawfully earned profits or a reasonable royalty may be brought in accordance. The supplier may also file a criminal complaint.

The Swiss Trademark Act explicitly states that trademarks registered in the name of the distributor without the consent of the supplier, or trademarks that remain entered in the Swiss trademark register after the withdrawal of this consent, are not protected.

As to the protection of trade secrets and know-how, it is important to implement adequate contractual, organisational and technical measures to prevent unauthorised access to and use of such trade secrets and know-how. This included, for example, the conclusion of strict confidentiality agreements (reinforced by contractual penalties) prior to exchange of trade secrets. Breaches of trade secrets may also qualify as a misdemeanour under the Swiss Criminal Code.

Technology transfer agreements fall under the category of 'innominate contracts' and are commonly used in Switzerland. It is important to make sure that these technology transfer agreements comply with competition law rules.

## Consumer protection

What consumer protection laws are relevant to a supplier or distributor?

Switzerland does not have a specific consumer protection law. Consumers are protected through several laws, including the Federal Unfair Competition Act, the Ordinance on the Indication of Prices , the Federal Product Safety Act and the Federal Act on Consumer Credits .

Furthermore, certain provisions protecting consumers can also be found in the Swiss Code of Obligations (CO) (eg, revocation rights in door-to-door sales and similar contracts) or the Swiss Civil Procedure Code (eg, mandatory jurisdiction rules).

## Product recalls

Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

The Federal Product Safety Act stipulates several post-market obligations of the manufacturer or distributor of products that are intended for consumers. The manufacturer or distributor must take adequate measures to recognise the potential risks arising from the use of its product, to prevent such danger and to trace back the product. The measures may include, for example, a product recall.

In principle, in accordance with principle of freedom of contract, parties to a distribution agreement are free to allocate 'internally' obligations in connection with carrying out recalls and the bearing of the costs thereof to one of the parties. However, towards the authorities and consumers, these internal agreements cannot be invoked as a defence in the case of a non-compliance with obligations under the Product Safety Act.

## Warranties

To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

The supplier may agree to limit or even fully exclude any warranties to its distribution partners. However, a limitation or exclusion of warranties obligation is void if the supplier has fraudulently concealed the failure to comply with the warranty from its distribution partner. This applies to warranties provided by the distribution partners to downstream customers, even if these downstream customers are consumers.

In principle, downstream customers do not benefit from any warranties provided by the supplier if they have not purchased products directly from the supplier. These warranties exist only if the supplier explicitly grants them. Otherwise, the downstream customers have to hold their own contractual counterparty (ie, the distribution partner) accountable, which may again take recourse to the supplier.

However, the supplier and the distribution partner may be liable towards customers based on the Federal Product Liability Act, regardless of the existence of a direct contractual relationship with the person who suffered harm. Liability under the Product Liability Act is mandatory.

## Data transfers

Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

In Switzerland, the Federal Data Protection Act (FDPA) restricts the exchange of information on customers and end-users. Personal data may only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law. The collection of personal data and, in particular, the purpose of its processing must be evident to the data subject.

Under the current FDPA, not only data pertaining to natural persons, but also data pertaining to legal entities falls under the FDPA.

Suppliers and distributors should also pay attention to cross-border disclosure of personal data. In this regard, personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, for example, owing to the absence of legislation that guarantees adequate protection. As a result of the Schrems II decision, the Swiss-US Privacy Shield no longer serves as a sufficient guarantee for data transfers to the United States.

## What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

Personal data must be protected against unauthorised processing through adequate technical and organisational measures (TOM). Such TOMs are further governed in the Data Protection Ordinance .

### Employment issues

## May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

In accordance with the principle of freedom of contract, a supplier may approve or reject the individuals who manage the distribution partner's business, if this right is stipulated in the distribution agreement.

Similarly, the distribution agreement may also stipulate that the supplier shall be entitled to terminate the distribution relationship if it is not satisfied with the management of the distribution partner.

An exception may apply with regard to commercial agency agreements, at least if the statutory minimum notice period of two months is not complied with. If a termination owing to the non-satisfaction with the management of the distribution partners does not respect the two-month notice, 'qualified' circumstances tantamount to a good cause for a termination with immediate effect should exist.

## Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

An agent may be treated as an employee of the principal if the characteristics of an employment relationship exist. This requires that the agent is subordinated to the principal in a manner similar to an ordinary employee (ie, obliged to perform its work in strict compliance with the principal's general directives and specific instructions). Furthermore, to be qualified as an employee of the principal, the agent should not bear any entrepreneurial risks.

If a commercial agency relationship is (re)qualified as an employment relationship, the principal has to comply with numerous mandatory employment law provisions, including the protection against abusive termination, paid vacation or the obligation to make social security contributions.

As to distribution relationships, it is rather unlikely that a distributor is treated as an employee of the supplier, as distributors act as resellers and, therefore, bear significant entrepreneurial risks. However, an exception may apply with regard to franchisees. In the case of a strong subordination of franchisees to the franchisor, certain protective provisions of Swiss employment law may apply by analogy.

The supplier can reduce the risk of an application of employment law provisions by limiting the level of control and influence that it exercises over agents, distributors or franchisees, and making sure that the latter bear an entrepreneurial risk (eg, by being responsible to provide the necessary infrastructure and hire supporting staff at their own costs). It is also common practice to obtain a confirmation from the competent social security authority that the agent has been recognised as self-employed.

Moreover, employees of a distributor or agent may potentially also become employees of the supplier if the supplier terminates the distribution relationship and (re)integrates the distribution of its products vertically. In such a case, the

provisions on the transfer of a (part of an) undertaking may apply. If there is such a risk, that risk should be addressed in the distribution or agency agreement, for example, by including a suitable indemnification clause.

## **Commission payments**

### **Is the payment of commission to a commercial agent regulated?**

Pursuant to the CO, and subject to deviating rules in the commercial agency agreements, commercial agents are entitled to the commission on all transactions concluded during the commercial agency relationship. Further, agents are entitled to a commission on transactions concluded during the commercial agency relationship without the agent's involvement but with customers acquired by the agent. In addition, agents to whom a particular territory or customer group has been allocated exclusively are also entitled to the commission on all transactions concluded during the agency relationship with customers belonging to that territory or customer group.

At the end of the commercial agency relationship, the agent is generally entitled to commission on orders placed by a customer acquired by the agent during the commercial agency relationship only if these orders are placed before the end of the commercial agency agreement.

Special entitlements to commission or compensation exist if agents assume liability for customers' payment obligations or are empowered by the principal to collect payments from customers.

## **Good faith and fair dealing**

### **What good faith and fair dealing requirements apply to distribution relationships?**

The duty to act in good faith and the prohibition of an abuse of law pursuant to article 2 of the Swiss Civil Code also apply in distribution relationships. For instance, information exchanged between the parties during contract negotiations must be accurate and must not be misleading. Important information shall not be suppressed.

## **Registration of agreements**

### **Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?**

No, there is no such requirement. However, the registration of intellectual property licence agreements in the patent, trademark or design register may be advisable from a licensee's perspective, since this registered licence will prevail over later rights acquired in the relevant patents, trademarks or designs by third parties. In addition, licence agreements without registration are generally not considered bankruptcy-proof.

## **Anti-corruption rules**

### **To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?**

Anti-bribery laws also apply to distribution relationships. According to the Swiss Criminal Code, active and passive bribery of private individuals constitutes a misdemeanour. Active bribery consists in promising or giving, and passive bribery consist in demanding or accepting from, for example, an employee or agent of a third party in the private sector an undue advantage so that the person carries out or fails to carry out an act in connection with his or her official

activities that is contrary to his or her duties or dependent on his or her discretion.

### **Prohibited and mandatory contractual provisions**

Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Some distribution-related contracts, in particular commercial agency agreements, are specifically governed in the Swiss Code of Obligations. Most agency law provisions are non-mandatory (ie they only apply if the parties do not agree on a different solution). However, there are some mandatory rules such as the minimum two-month notice period as from the second year of the relationship, the entitlement to a goodwill indemnity and the entitlement to special compensation if the agents assume liability for customers' payment obligations or undertake to comply with post-contractual non-compete obligations.

With regard to other kinds of distribution-related contracts (eg, distribution, wholesale and franchising agreement not explicitly governed by the CO), less prohibited or mandatory contractual provisions exist. In these cases, the entitlement to a goodwill indemnity pursuant to article 418u CO or the inalienable right to terminate a distribution agreement with immediate effect for good cause may become of particular importance.

If the parties to a distribution agreement do not address certain issues, the general principles of Swiss contract law set forth in the First Division of the CO (articles 1 to 183 CO) apply. These principles will be deemed to be included even if they are not explicitly mentioned in the distribution agreement.

## **GOVERNING LAW AND CHOICE OF FORUM**

### **Choice of law**

Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Generally, no. The Federal Act on Private International Law provides the parties to a distribution contract with the possibility to choose the law governing the agreement. This choice of law should be in writing. The parties' freedom to choose the governing law might, however, be limited. Certain mandatory rules of countries other than the chosen one can apply notwithstanding the parties' will. For example, the relevant competition law applies where the concerned activities have an impact, regardless of the parties' choice of law.

### **Choice of forum**

Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Generally, no. Pursuant to the Lugano Convention and the Federal Act on Private International Law, the parties to a distribution agreement are generally free to choose the Swiss or foreign court or arbitration tribunal that shall resolve existing or future disputes arising out of the distribution agreement. In principle, a contractual choice of courts or arbitration tribunals should be in writing (ie, signed by all parties).

## Litigation

What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

In principle, disputes between suppliers and distribution partners are resolved by the ordinary Swiss courts. In most cantons, there are two instances on the cantonal level. In the cantons of Zurich, Bern, Aargau and St. Gallen, commercial courts will act as sole cantonal instance for claims above 30,000 Swiss francs.

The procedures depend on the amount in dispute. In principle, the ordinary procedure applies to disputes with an amount in dispute exceeding 30,000 Swiss francs. A mandatory conciliation hearing before a conciliation authority generally precedes court proceedings. Faster summary proceedings apply, for example, in the case of an application for a preliminary injunction.

In their decisions, Swiss courts can oblige a party to pay a specific amount of money to the other party or order injunctive relief (ie, specific performance of certain contractual obligations). Declaratory relief, including negative declaratory relief, is available under certain circumstances.

Generally, the Swiss Civil Procedure Code obliges the parties to cooperate during the taking of evidence. This includes, for example, the disclosure of sufficiently specified documents or testimony from the other party. Unlike in some countries with extensive pretrial discovery rules, 'fishing expeditions' or motions for the disclosure of broad categories of documents are not admissible in Switzerland.

Foreign businesses are generally not restricted in their ability to make use of these courts and procedures and can expect fair treatment. From a supplier's perspective, the advantage of litigation in Switzerland is that Swiss courts will most likely not apply any mandatory rules existing in other jurisdictions. Therefore, a choice of Swiss courts facilitates the enforcement of the clauses stipulated in the agreements, in particular owing to the liberal character of the Swiss Code of Obligations. Nonetheless, at least the courts of other European countries must recognise and enforce judgements of Swiss courts on the basis of the Lugano Convention.

## Alternative dispute resolution

Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes. Switzerland is a very arbitration-friendly venue and is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In principle, under the Federal Act on Private International Law all pecuniary claims may be submitted to arbitration.

Advantages of resolving a dispute by arbitration in Switzerland include the confidentiality of arbitration proceedings and the very limited possibility of challenging international arbitration awards before the Swiss Supreme Court.

## UPDATE AND TRENDS

### Key developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

In September 2020, the Swiss parliament adopted the new Federal Data Protection Act (FDPA). The revised FDPA includes numerous adaptations to the EU's General Data Protection Regulation (GDPR), but retains its own basic concept and also deviates from the GDPR in various aspects. It is not yet known when the revised FDPA will enter into force, but it is expected that this will be in 2022.

In December 2017, the Fair Price Initiative was filed. The initiative aims at introducing the concept of relative market power into Swiss law. It would extend the rules governing abuses of dominance set forth in the Federal Cartel Act to undertakings with relative market power. An undertaking has relative market power if another undertaking does not have sufficient and appropriate alternatives and is, therefore, dependent upon such an undertaking. The Swiss parliament is currently discussing a counter-proposal to the Fair Price Initiative.

### Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Swiss parliament and government have adopted far-reaching measures to combat the economic consequences of the covid-19 pandemic. These measures include facilitation regarding short-time work, credits guaranteed by the Swiss Confederation and hardship support programmes. The measures are permanently developed and amended further, based on the development of the pandemic.

## LAW STATED DATE

### Correct as of

Give the date on which the information above is accurate.

11 January 2021.

## Jurisdictions

	<b>Canada</b>	Lapointe Rosenstein Marchand Melançon LLP
	<b>China</b>	Ribeiro Hui
	<b>Finland</b>	ADVOCARE Law Office
	<b>Germany</b>	Taylor Wessing
	<b>India</b>	Chadha & Co
	<b>Netherlands</b>	Russell Advocaten
	<b>Portugal</b>	Victoria Associates
	<b>Sweden</b>	Advokatfirman Fylgia KB
	<b>Switzerland</b>	MLL Meyerlustenberger Lachenal Froriep Ltd
	<b>Turkey</b>	Moroğlu Arseven
	<b>USA</b>	Plave Koch Plc