

SWISS INVESTMENT REPORT* 8

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

Import Rules in Switzerland

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Import Rules in Switzerland

I. Introduction

This article intends to explain the rules to imports into Switzerland which may be of concern to foreign business people, especially in China. The subjects covered include the limitations to parallel imports, the application of the Cassis de Dijon principle in Switzerland, the exceptions to the general principles of the WTO agreement on tariffs and trade and the rules applicable to the import of agricultural products. The features of the main bilateral agreements with the European Union will also be briefly explained. Finally, we will take a look at the current negotiations on a free trade agreement between Switzerland and China.

II. Parallel Import Restrictions

A parallel import is a non-counterfeit product which, after having been manufactured or sold with the agreement of the intellectual property owner in a first country, is eventually imported into a second country without the permission of the intellectual property owner. Parallel importing is regulated quite differently in various jurisdictions.

Parallel imports are generally permissible in Switzerland. In the area of copyrights and trademarks, international exhaustion prevails: this means that a product sold in one country with the agreement of the intellectual property right holder can be freely sold in another country. However, some restrictions remain in the field of patents. On 1 July 2009, Switzerland introduced the principle of regional exhaustion into Article 9(a) of the Swiss Federal Patent Act. Under the new rule, patent protected products sold in the European Economic Area (EEA: countries of the European Community plus Iceland, Norway and Liechtenstein) with the consent of the patent holder can be imported to Switzerland freely. If the patent has only a minor significance for the functionality of the goods, these will even be subject to global international exhaustion. Furthermore, international exhaustion applies on means of production and investment goods for the agricultural sector.

The most important limitation to the newly introduced principle is that national exhaustion still applies to products for which the prices are fixed by the state, whether in Switzerland or abroad. For such products, the patent holder may object to parallel imports. The most conspicuous case is pharmaceuticals, for which the state sets maximum prices in most EEA countries and in Switzerland. The purpose of national exhaustion is to avoid that parallel importers benefit from the maximum prices. Apart from drugs, it is still not clear which other goods may be considered as being subject to regulated prices in Switzerland or abroad.

It must be noted that the principle of regional exhaustion has been introduced unilaterally by Switzerland. No corresponding treaty has been signed with the EEA. Thus, some member states of the EEA may still forbid parallel imports coming from Switzerland.

III. The Application of the Cassis de Dijon Principle in Switzerland and its Exceptions

With the entry in force of the revised Swiss Federal Law on Technical Barriers to Trade (THG) on 1 July 2010, the "Cassis de Dijon" principle has been introduced in Switzerland. In practice, this means that products which are legally in circulation in the EEA can be lawfully manufactured and marketed in Switzerland, or imported from the EEA into Switzerland, without additional controls, even if they do not comply with Swiss regulations on technical, security or other requirements. This has significantly simplified cross-border movement of goods.

The legal basis for the application of the Cassis de Dijon Principle is the articles 16a - 16e THG and the Regulation concerning the Placing of Products based on Foreign Rules (VIPaV). Article 16a para. 1 THG provides that products which do not comply with the Swiss technical rules can nevertheless be commercialized in Switzerland if they satisfy the technical rules of the EU or of a member state of the EEA and legally circulate in an EU or EEA member state.

However, the Cassis de Dijon Principle is not applicable to the following products according to Article 16a para. 2 THG¹:

- Products which require compulsory admission, such as pharmaceuticals or vehicles;
- Notifiable substances according to the regulations on chemicals;
- Products which require an import permit, such as certain plants or animals;
- Products banned for import, such as narcotic drugs; and
- Edibles and other products listed in Article 2 VIPaV.

The Cassis de Dijon Principle has been introduced by Switzerland on a unilateral basis to facilitate trade with European countries. The EU does not apply the Cassis de Dijon Principle with relation to Switzerland or Swiss products.

IV. Exceptions to the General Principles of the WTO Agreements

Switzerland being a member of the World Trade Organization (WTO), is subject to and can enjoy, amongst others, the national treatment principle and the most favored nation principle with relation to other member states. The national treatment principle prohibits discrimination between imported and domestically produced goods with respect to internal taxation or other government regulation. The national treatment principle prohibits any governmental measure affecting the sale, offering for sale, purchase, transportation or distribution of a foreign product in a less favorable way than goods produced locally. The most favored nation principle forces the member states of the WTO to grant trade advantages given to the "most favored nation" equally to all other member states.

¹ An exhaustive list of the exceptions can be found at:
http://www.seco.admin.ch/themen/00513/00730/01220/04172/index.html?lang=de&download=NHzLpZeg7t,lnp6I0NTU04212Z6ln1acy4Zn4Z2qZpnO2YUq2Z6gpJCFeyJ5f2ym162epYbg2c_JjKbNoKSn6A

However, Article 20 of the General Agreement on Tariffs and Trade (GATT) lists exceptions to the rules of this agreement, in particular to the above-mentioned national treatment and most favored nation principles. Generally speaking, a measure violating the rules of the GATT is justified if it is:

- necessary to protect public morals;
- necessary to protect human, animal or plant life or health;
- relating to the importation or exportation of gold or silver;
- necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT;
- relating to the products of prison labor;
- imposed for the protection of national treasures of artistic, historic or archaeological value;
- relating to the conservation of exhaustible natural resources;
- undertaken in pursuance of obligations under any intergovernmental commodity agreement;
- involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry; or
- essential to the acquisition or distribution of products in general or in local short supply.

V. Restrictions on the Import of Agricultural Products

In Switzerland, the import of most agricultural products requires the prior approval of the Swiss authorities. Such authorization is valid for an undetermined period of time and is non-transferable. An importer needs a separate approval for each category of imported products and must specify the respective approval number with every customs registration. Only natural and legal persons having their domicile or seat in Switzerland can obtain such approval.

The import custom duties are calculated by taking into consideration the supply and market conditions for similar local products. Hence, if certain foodstuffs are sold on the Swiss market for a price relatively high for international standards (because Swiss farmers are not able to produce them for cheaper), the authorities will set high tariffs in order to ensure the competitiveness of domestic products².

In some cases, agricultural goods that have been produced using methods that are illegal in Switzerland can be imported if they comply with international obligations. However, generally speaking, it is essential for importers of agricultural goods to consult the requirements for the specific product they wish to import. Particular requirements and customs duties apply to each kind of agricultural product. Genetically modified agricultural products can strictly only be imported if they meet the requirements of the Swiss legislation on this subject.

The WTO's Agriculture Agreement allows governments to support their rural economies, but preferably through policies that cause less distortion to trade. The basic rule for market access in the Agriculture Agreement is "tariffs only". Thus, the only restriction to market access which may be taken by Switzerland is tariffs. Any other measures such as quotas are not allowed.

² This principle is stated at least implicitly in Article 17 of the Swiss Federal Act on Agriculture.

VI. The Bilateral Agreements between Switzerland and the European Union

The European Union and its 27 Member States are by far Switzerland's most important trading partners. The 1972 Free Trade Agreement ("FTA") between Switzerland and the EU created a free trade zone for industrial products originating in the states parties to the agreement. The FTA prohibits the setting of limits on the volume of goods that can be traded (quotas) as well as tariffs and measures that would have the same effect. The agreement applies exclusively to industrial products, not to agricultural products. The case of processed agricultural products such as chocolate or pasta, which are considered both industrial and agricultural, is treated separately in Protocol 2 of the FTA.

The EU and Switzerland have also entered into the Agreement on Dismantling Technical Barriers to Trade (also known as the "Mutual Recognition Agreement", MRA). This agreement is meant to prevent Swiss companies from suffering disadvantages on the European market due to non-tariff trade barriers. The MRA calls for the mutual recognition of conformity tests for most industrial products. In certain defined areas, a single conformity test is sufficient for the product to be marketed in both Switzerland and the EU.

VII. Towards a Free Trade Agreement between Switzerland and China

There are three priority instruments of Swiss market opening policy: the membership in the WTO, the conclusion of bilateral agreements with the EU and the negotiation of free trade agreements (FTA) with partners outside the EU.

Free trade agreements have become a significant instrument of Swiss foreign economic policy since the 1990s as such agreements are proven to have an important influence on the economy: growth rates of exports/imports with free trade partners are considerably higher than overall trade growth.

China is now Switzerland's third largest supplier of goods worldwide and the fourth market for Swiss exports (after the EU, the USA and Japan). That is why

the negotiations of an FTA with China are a top priority on the Swiss foreign economic policy agenda. The negotiations on the Switzerland-China FTA were officially launched in Davos on 28 January 2011. The third round of negotiations, which has just been completed at the beginning of November 2011 in Montreux, included exchanges of information on respective regulatory systems and FTA practices with regard to trade in goods and in services, rules of origin, customs procedures and trade facilitation, technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS), trade remedies, intellectual property rights, competition and dispute settlement. Switzerland's foremost objective in the FTA negotiations is to ensure legally secured, non-discriminatory access for Swiss companies to the Chinese market and vice versa and to eliminate or lower tariff and non-tariff barriers to trade. The next round of negotiations is likely to take place in the first quarter of 2012 in China. It is hard to foresee when these negotiations will result in the signing of an agreement, but a reasonable estimate is that signing may take place in 2013.

Should you have questions regarding the information provided in this document, please do not hesitate to contact Dr. Paul Thaler (paul.thaler@wenfei.com).

We may be reached under the following addresses:

Zurich

Wenfei Attorneys-at-Law Ltd.
Mainaustasse 19
CH-8008 Zurich, Switzerland
T +41 43 210 8686
F +41 43 210 8688

苏黎世

瑞士文斐律师事务所
Mainaustasse 19 号
CH-8008 瑞士文斐律师事务所
电话: +41 43 210 86 86
传真: +41 43 210 86 88

Beijing

Wenfei Attorneys-at-Law Ltd.
Room 901,
Beijing Silver Tower,
No. 2, Dong San Huan Bei Lu
Chaoyang District
Beijing 100027 P.R.C
T +86 10 6468 7331
F +86 10 6460 3132

北京

瑞士文斐律师事务所北京代表处
中国北京朝阳区东三环北路 2 号
北京南银大厦 901 室
邮编 100027
电话: +86 10 6468 7331
传真: +86 10 6460 3132

Shanghai Cooperation:

Wenfei Consulting
Room 501, Tower 3,
X2 Creative Park,
No.20 Cha Ling Bei Lu,
Shanghai 200032
T +86 21 5170 2370
F +86 21 5170 2371

上海合作单位:

文斐商务咨询(上海)有限公司
中国上海市茶陵北路 20 号
X2 徐汇创意空间 3 幢 501 室
邮编 200032

电话: +86 21 5170 2370
传真: +86 21 5170 2371

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