

Update

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Legal Privilege under Swiss Competition Law

As of 1 May 2013, the protection available under the concept of legal privilege has been expanded and harmonized in Switzerland. The new law eliminates long-lasting uncertainties on privilege issues in competition cases and investigations.

Expanded scope of legal privilege

Whilst in Switzerland the scope of legal privilege was expanded step by step over the past few years in many fields of law, competition law investigations and proceedings did not benefit. Even last year, the Federal Criminal Court confirmed that legal privilege could only be invoked with respect to correspondence in external counsel's possession.

As of 1 May 2013, the federal procedural laws have been harmonized regarding legal privilege in Switzerland, including cartel proceedings.

According to the new law, legal privilege extends to any document produced in the course of the (core) professional activity of an independent attorney. It applies irrespective of when such document was created, i.e. before or after the investigation was launched, and irrespective of where such document is located, be it in the custody of the attorney himself, the client or any other third parties. The privileged nature of a document may be invoked by the attorney, the client, but also third parties having such document in custody.

The term "document" is defined broadly. It includes not only written correspondence, such as letters or e-mails, but also other records, legal memoranda, meeting notes, strategy papers, draft contracts, draft settlements etc. The only condition is that such documents are prepared in the framework of an attorney-client relationship.

The scope of legal privilege is still limited to independent attorneys admitted to the Bar that are allowed to professionally represent parties in Swiss courts. Hence, the protection of legal professional privilege does still not cover in-house counsel work products.

Impact on Cartel Investigations

The modifications to the law increase the parties' rights during inspections of the competition authorities. Privileged documents may not be seized and must not be handed over to the authorities. The authorities may only take a brief look at a document in order to verify the privileged nature of a document. In case of a dispute, sealing of the documents can be requested. In case of sealing, the competition authority may only access such sealed documents after the Federal Criminal Court or the Swiss Federal Supreme Court have ordered the unsealing. In practice, only a few unsealing procedures were initiated given that the inspection of seized documents regularly takes place in the presence of an external counsel and privileged documents may be identified on a rolling basis.

Conclusion

The extension of the scope of the legal privilege brings a long-awaited clarification regarding the rights of defence of the parties.

In order to effectively protect privileged documents, it is advisable to clearly label them as attorney-client correspondence (e.g. labelled as "privileged", "legally privileged" or "privileged attorney correspondence"). This will facilitate the

classification during an investigation and the electronic search of documents in the offices of the competition authority. It does, however, not constitute a precondition to benefit from protection.

Please do not hesitate to contact us in case of any questions.

Your Contacts

Zurich

Marcel Meinhardt
marcel.meinhardt@lenzstaehelin.com

Astrid Waser
astrid.waser@lenzstaehelin.com

Telephone +41 58 450 80 00

Geneva / Lausanne

Benoît Merkt
benoit.merkt@lenzstaehelin.com

Rayan Houdrouge
rayan.houdrouge@lenzstaehelin.com

Telephone + 41 58 450 70 00

Our Offices

Zurich

Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01

Geneva

Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01

Lausanne

Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01

www.lenzstaehelin.com

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