

Update

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Tightening of Swiss cartel law: Per se significance of hard core restraints

The Swiss Federal Supreme Court upheld that hard core agreements on prices, quantities and territories according to article 5 paragraph 3 and 4 of the Cartel Act constitute in principle per se significant restraints of competition. Horizontal and vertical hard core restraints may now only be justified on grounds of economic efficiency.

Background of the ruling

On June 28, 2016, the Federal Supreme Court has rejected Gaba's appeal and decided that a contractual clause prohibiting a licensee to export into other territories constitutes an illegal agreement which significantly restricts competition.

Significance in principle

The Federal Supreme Court has decided that agreements on price, quantity and territory according to article 5 paragraph 3 and 4 Swiss Cartel Act *in principle* significantly restrict competition. The significance of the competition restraint is assumed for hard core agreements due to their quality without the need to examine quantitative effects, such as market shares. Significance is only absent – according to the Federal Supreme Court's oral debate on this ruling – in case of minor effects on competition, such as "bagatelle offences" which were not further defined.

Therefore, horizontal and vertical hard core agreements are only permissible if they can be justified on the grounds of economic efficiency.

Direct sanctions for significant hard core agreements

In its judgement, the Federal Supreme Court also held that direct sanctions may be imposed for hard core agreements according to article 5 paragraph 3 and 4 Swiss Cartel Act that significantly restrict but do not eliminate competition. This question had been disputed for a long time in Swiss doctrine.

With its judgement in the Gaba case, the Federal Supreme Court has tightened Swiss cartel law and ultimately decided that in principle also in Switzerland a mere restriction by object can be prohibited and sanctioned. Actual effects, i.e. the elimination or significant restriction of effective competition do no longer need to be proven. Contrary to the Competition Commission's and its own prior practice, the Federal Supreme Court introduces through this extensive interpretation of the Swiss Cartel Act exactly those legislative changes, which the Swiss Federal Parliament has recently rejected as part of the failed revision of the Cartel Act which proposed a partial per se prohibition of cartels.

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

Your contacts

Zurich

Marcel Meinhardt
marcel.meinhardt@lenzstaehelin.com
Tel: +41 58 450 80 00

Astrid Waser
astrid.waser@lenzstaehelin.com
Tel: +41 58 450 80 00

Geneva / Lausanne

Benoît Merkt
benoit.merkt@lenzstaehelin.com
Tel: +41 58 450 70 00

Our offices

Geneva

Lenz & Staehelin
Route de Chêne 30
CH-1211 Genève 6
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Zurich

Lenz & Staehelin
Bleicherweg 58
CH-8027 Zürich
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

Lausanne

Lenz & Staehelin
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com

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