

# Update

## Newsflash April 2017

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### **Agreements pursuant to Article 5 (3) and (4) CartA are in principle significant restraints of competition according to Article 5 (1) CartA**

**The Swiss Federal Supreme Court has published its GABA decision and sets the bar for the future assessment of agreements pursuant to Article 5 (3) and (4) CartA.**

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#### **Publication of the Swiss Federal Supreme Court's written reasoning of its GABA decision**

The Federal Supreme Court published its reasoning for its decision on GABA on 28 June 2016 which set out the principle criteria for assessing and sanctioning horizontal price, volume and territorial agreements, as well as vertical agreements on minimum or fixed prices and agreements on absolute territorial protection pursuant to Article 5 (3) and (4) CartA.

#### **Potential effects on the Swiss market suffice for the application of the Swiss Cartel Act**

In light of the Effects Doctrine set forth in Article 2 (2) CartA, the Federal Supreme Court considered the Cartel Act applicable to all situations, provided that they *may* have effects in Switzerland. It is neither necessary nor permissible to examine the significance of the effects. This means that agreements or unilateral behavior of market-dominant companies, even outside Switzerland, can be covered by the Cartel Act, regardless of how plausible any effects in Switzerland are.

#### **Agreements pursuant to Article 5 (3) and (4) CartA in principle significantly restrict competition**

Such agreements in principle, by virtue of their object, significantly restrict effective competition pursuant to Article 5 (1) CartA. They, therefore, constitute unlawful restrictive agreements, provided that they cannot be justified on grounds of economic efficiency. There is no need for an actual impact on competition. A potential impairment is already sufficient. So-called bagatelle cases are exempted. However, the Court does not provide further explanation as to the respective threshold. In particular, since the Federal Supreme Court is content with *potential* adverse effects on competition, it is unclear to what extent quantitative criteria can at all be taken into account.

#### **The Federal Supreme Court confirms that agreements pursuant to Article 5 (3) and (4) CartA are subject to direct sanctions**

The Federal Supreme Court confirms that agreements pursuant to Article 5 (3) and (4) CartA can be sanctioned regardless of whether the statutory presumption of the elimination of

effective competition has been rebutted. If an infringement has been established, the Federal Supreme Court assumes as a rule an objective breach of the duty of care and, therefore, fault.

#### **Article 5 (4) CartA is modelled on EU Competition Law**

The Federal Supreme Court finally concluded that even without an explicit reference

Article 5 (4) CartA was designed by the Swiss legislator to ensure that the Swiss regulation on vertical agreements is in line with EU Competition Law. However, whether the EU Block Exemption Regulations are applicable to vertical agreements under Swiss Competition Law remains uncertain.

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

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