

Cooperation Agreement between the Swiss and European competition authorities

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This article summarises the main elements of the bilateral agreement that is about to be concluded between Switzerland and the European Union concerning cooperation in competition law matters. This cooperation agreement would enable the Swiss Competition Commission and the EU Commission to better coordinate their enforcement activities, in particular by exchanging protected and confidential information. The Cooperation Agreement will have far-reaching consequences once concluded. A major change to the current situation is the transmission of information and documents between the authorities even if the concerned company does not consent to the transmission, without any right of appeal. However, information submitted before the competition authorities under a leniency application may not be transferred without the consent of the applicant.

Need for a cooperation agreement

Other than the Free Trade Agreement of 1972 between the EU and Switzerland and the OECD Guidelines of 1995, there are to date no bilateral or multilateral agreements in place between the Swiss Competition Commission (hereafter referred to as “Comco”) and foreign competition authorities on the exchange of information or any other kind of cooperation.

On an informal basis, the Comco and its Secretariat cooperate with various antitrust authorities in Europe, specifically the EU Commission and the German Bundeskartellamt, as well as with the US antitrust authorities. However, this cooperation does not go beyond the exchange of non-confidential information unless the parties to the proceeding have explicitly consented to the exchange of confidential information.

Regarding air transportation, the Swiss Cartel Act (“CartA”) provides for a specific regime with regard to investigations in the air transportation industry. Accordingly, the Comco may cooperate in this respect with the EU Commission on a formal legal basis.

The Comco has for years already indicated that in light of its involvement in the investigation of international cartels, it would be very helpful to have the possibility of an information exchange with the EU Commission and other competition authorities. Without any cooperation and exchange of information, the Comco is often left to wait for a decision of the EU Commission in parallel cases in order to ascertain the extent of the subject matter and the conduct to be investigated, which is why investigations against international cartels may take

longer in Switzerland than in the EU.

In view of the need for a cooperation agreement, Switzerland and the EU started to negotiate, in March 2011, an agreement on cooperation and exchange of information between their competition authorities. After a second round of negotiations during the summer of 2011, the EU Commission published its proposal on the conclusion of an agreement between the EU and Switzerland concerning cooperation on the application of their competition laws (COM(2012) 245 final) (“Cooperation Agreement”) on June 1, 2012.

The Cooperation Agreement needs to be adopted by the EU Council and the EU Parliament as well as ratified by the Federal Council and approved by the Federal Parliament. Pursuant to Swiss law, such an agreement could also be subject to a public referendum. In view of the current tense bilateral relations between the EU and Switzerland, it is rather difficult to assess when the Cooperation Agreement could enter into force.

Coordination of enforcement activities

Under the Cooperation Agreement, the Comco and the EU Commission are required to notify each other with respect to their enforcement activities – defined as any application of competition laws by way of investigation or proceeding – if these may affect important interests of the other party. In particular, a notification will occur if enforcement activities take place against undertakings incorporated or organised under the laws of the other party, if a significant part of the enforcement activities takes or took place in the territory of the

other party, or if the enforcement activities in question involve conduct believed to have been encouraged, required or approved by the other party.

The Cooperation Agreement also allows the Comco and the EU Commission to coordinate their enforcement activities when they pursue enforcement activities in common issues. In particular, the Cooperation Agreement enables the authorities to coordinate the timing of their dawn raids. However, the Comco will not conduct dawn raids on behalf of the European competition authorities and vice-versa.

To avoid possible conflicts between the parties, the Cooperation Agreement also contains non-binding provisions on conflict avoidance (negative comity) and the possibility to request the beginning or the expansion of enforcement activities (positive comity).

Exchange of information

The main element of the Cooperation Agreement is the intended exchange of specific, case-related information between the Swiss and European competition authorities. The EU and the Swiss competition authorities can share views and exchange information related to the application of their respective competition laws if certain requirements are met.

They may discuss any information, including information obtained by investigative process, insofar as necessary to carry out the cooperation and coordination. When such information contains personal data, it may only be transmitted if the EU Commission and the Comco investigate the same or related conduct or transaction.

Pursuant to the Cooperation Agreement, “information obtained by investigative process” corresponds, with regard to Switzerland, to information obtained pursuant to Art. 40 and 42 CartA. This means that, from a Swiss law perspective, an information exchange is possible even if the competition authorities have not opened a formal investigation (Art. 27 CartA) but merely a preliminary investigation (Art. 26 CartA), in which case even the Swiss Administrative Procedure Act does not fully apply.

During a preliminary investigation, the undertakings under investigation have no access to the file and cannot even judge what kind of information could be transmitted abroad. The undertakings under investigation are therefore unprotected at this stage of the procedure.

Provided that both competition authorities investigate the same or related conduct, the Cooperation Agreement allows for the transmission

of information and documents between the authorities even if the concerned company does not consent to the transmission.

This is a major change compared to the present status, as well as an extension in comparison with similar cooperation agreements concluded by the EU.

The exchange of information without the consent of the parties must fulfill particular requirements. First, the exchange of information is limited to information already in possession of the respective authority. Hence, the information qualifying for being shared with the foreign authority must have been collected within the framework and for the purpose of domestic proceedings.

Secondly, the transmission of information is not permitted with regard to information provided by leniency applicants or by undertakings to a settlement agreement, unless a written consent exists.

Finally, information shall not be discussed or transmitted, if using the information in question would be prohibited according to the procedural rights and privileges guaranteed under the respective laws of Switzerland or the EU.

Accordingly, an exchange of information protected by legal professional privilege or affecting a person's right against self-incrimination is not permissible if those rights have not been validly waived.

However, the Cooperation Agreement does not seem to preclude the transfer of information subject to specific Swiss blocking statutes, such as banking secrecy.

This raises the question whether data of bank customers subject to banking secrecy would qualify as personal data within the meaning of the Cooperation Agreement and thus only be transmitted as long as the competition authorities of the parties are investigating the same or related conduct or transaction. A clear and therefore reliable regulation would certainly be necessary.

Most importantly, the text of the Cooperation Agreement does not provide for any right of appeal against an exchange of information between the competition authorities to which an undertaking does not consent.

In light of the criminal nature of competition law fines and given the far-reaching scope of the information that may be exchanged under the Cooperation Agreement, it is rather surprising that the Cooperation Agreement does not foresee any right of appeal against a decision authorising an exchange of information, especially as this would be standard in procedures subject to the Swiss Act on International Mutual Assistance in Criminal Matters.

Hence, even if an appeal against an exchange of information cannot be excluded on the basis of the

Swiss Administrative Procedure Act, the Cooperation Agreement leaves the undertakings unprotected in this regard and it is difficult to anticipate at this stage how the procedural rights of the undertakings, such as the right of appeal, will be implemented under Swiss law.

Use of discussed or transmitted information

The Cooperation Agreement also includes indications on the use of discussed and transmitted information. If an undertaking has explicitly agreed to the information exchange, the discussed or transmitted information may be used for the purpose of enforcing the receiving party's competition laws by its competition authority.

On the other hand, if the company has not issued an explicit consent, the exchanged information may only be used for the enforcement of the receiving party's competition laws with regard to the same or related conduct or transaction and for the purpose defined in the request. Furthermore, no information discussed or transmitted shall be used to prove an infringement that leads to impose sanctions on natural persons.

Protection and confidentiality of information

The exchanged information must be kept confidential by the receiving competition authority based on its respective legislation. In general, the respective information shall not be disclosed to a third party or another authority.

This does not prevent the disclosure of information by the authorities for the purpose of, *inter alia*, obtaining a court order in relation to the public enforcement of the party's competition law, disclosure to other companies under investigation to defend themselves within the investigation or insofar as it is indispensable for the exercise of the right of access to documents and disclosure to courts in appeal procedure.

In such cases, the receiving competition authority shall ensure that the protection of business secrets remains fully guaranteed.

Moreover, the EU Commission may have to disclose to the competent competition authorities of the EU Member States confidential information transmitted by the Comco in order to fulfill its lawful obligations under EU regulations n° 1/2003 and 139/2004. The EU Commission may as well disclose information to the EFTA Surveillance

Authority in order to fulfill its obligations under the EEA Agreement.

This may create legal uncertainty as the EU Member States competition authorities as well as EFTA Surveillance Authority are formally not legally bound to keep the transmitted information confidential.

Conclusion

As already explained, the Cooperation Agreement will have far-reaching consequences for undertakings in their day-to-day compliance with competition law. The Cooperation Agreement will in particular have to be taken into account in the preparation of dawn raid situations and in the assessment of multi-jurisdictional leniency applications (i.e. whether or not to include Switzerland).

Finally and as regards the more general framework of the current system of bilateral agreements between the EU and Switzerland that is widely questioned by the EU, the negotiation of the Cooperation Agreement between the EU and Switzerland demonstrates that new bilateral agreements can emerge in areas of common interests.

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