



EU/Switzerland: Exchange of information and documents between competition authorities

1. Introduction

The European Union and Switzerland will be able to officially exchange information and documents in the area of competition policy. On May 17, 2013 they signed an agreement concerning cooperation on the application of their competition laws. The agreement will enter into force two months after it receives the European Parliament's and the Swiss Parliament's approval, i.e. presumably in the course of the year 2014. According to the agreement, the two competition authorities will be able to exchange information they have obtained in their investigations, also in the absence of consent and against the will of the undertakings involved. Up to now information exchange was only possible with an express consent of the undertaking (on the basis of so called "waivers").

2. Nature of the agreement

The EU has concluded so far bilateral cooperation agreements with third countries (US, Canada, Japan and South Korea). All these agreements are so-called "**first-generation**" agreements; they contain various instruments of cooperation in the area of competition policy, however, they exclude the possibility to exchange confidential information without consent of the involved undertakings.

So far, there is a special regime in the area of air **transportation industry**. Apart from that, there are no bilateral or multilateral agreements between Switzerland and the EU on the exchange of information in place in the area of competition law. However, to a certain degree the authorities exchange information already now. Such cooperation is usually based on personal relations between employees of the Secretariat of the ComCO and case handlers at the DG Comp (EU Commission). The effectiveness of this cooperation is thereby very limited. Such cooperation should theoretically not go beyond the exchange of nonconfidential information. Furthermore, the exchange of information is subject to strict regulations protecting business secrets and personal data under Swiss

and EU law and blocking statutes (e.g. banking secrecy).

The new cooperation agreement is a so-called "**second-generation**" agreement, which allows the exchange of confidential information between competition authorities without the consent and against the will of the undertakings involved.

3. Exchange of information

The agreement distinguishes between oral discussions on the one hand and the transmission of documents and written information on the other hand.

The competition authorities may **discuss orally any information**, and exchange factual circumstances obtained in investigations, as necessary to carry out the cooperation and coordination provided for under the agreement.

What the transfer of documents and written information concerns the following conditions have to be met:

- the exchange is limited to data that is **already in the possession** of the authority. Therefore, one authority may not the other authority with investigative measures.
- When the information contains **personal data**, it may only be transmitted if the EU Commission and the Swiss authority investigate the same or a related conduct or concentration.
- The competition authorities may transmit information in their possession to each other upon **express written consent** of the undertaking which provided the information.
- In the **absence of such consent**, a competition authority may transmit information only if **both competition authorities are investigating the same or related conduct or transaction**. In the case of Switzerland an information exchange is already possible in the so called *preliminary investigation* ("*Vorabklärung*") which is not a formal procedure – the undertakings involved have no access to the file! Furthermore, the **request** for such

information shall be made **in writing** and shall include a general description of the subject matter and nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request; and the competition authority receiving the request shall determine, in consultation with the requesting competition authority what information in its possession is relevant and may be transmitted.

- Furthermore, the transmission of information is not permitted with regard to information obtained from **leniency applications** or from undertakings in negotiations related to a **settlement agreement**, unless upon written consent.
- Finally, information shall not be transmitted, if using the information in question would be prohibited according to **procedural rights** and **privileges** guaranteed under the respective laws.

Under certain conditions the EU Commission may even transfer the information received from the Swiss authority to the **competition authorities of the EU Member States**.

The above described exchange of information between Swiss and EU competition authorities raises some **serious concerns**.

- Regarding data protection for example, the agreement provides no answer to the question whether data of **bank customers** subject to banking secrecy would qualify as personal data within the meaning of the agreement and thus only be transmitted as long as the competition authorities of the parties are investigating the same or at least a related conduct or transaction.
- It also raises some concerns regarding corporate **trade secrets** – according to the agreement business secrets may be transmitted to foreign competition author-

ities, also in the absence of consent and in the absence of any awareness that such an information exchange takes place.

- Furthermore, the agreement does not foresee any right to **appeal against a decision to exchange information**.
- Last but not least, there are no rules regarding the assessment and application of **evidence** that has been **obtained illegally** (“fruits of the poisonous tree”).

4. Scope of discretion of competition authorities regarding exchange of information

The decision to transmit information is always in the discretion of the transmitting authority; there is **no obligation** to do so. The agreement stipulates precisely that authorities are not obliged to transmit documents if it infringed their national interests or if it is unduly burdensome.

In practise this discretionary clause may create legal **uncertainty and risks** for Switzerland. Due to disparity of force between the EU Commission and ComCO there is a certain concern that the Swiss authority will regularly transmit documents to the EU Commission whereas the EU Commission will be rather reluctant to satisfy such requests from the Swiss authority. Thus, com-

panies operating in Switzerland have to take into account that information gathered by the Swiss competition authority may be transmitted to the EU Commission and to the authorities of the EU member states.

5. Further content of agreement

The agreement contains provisions on the **notification of enforcement activities** which significantly affect the important interest of the other party. In particular, a notification of the other competition authority will occur if undertakings having their seats in the jurisdiction of the other authority are involved, if a significant part of the activities took place in the territory of the other party, or if the activities in question involve conduct believed to have been encouraged, required or approved by the other party. The European Commission and the Swiss Competition Commission will **coordinate their enforcement actions**, in particular the timing of **dawn raids**.

To avoid possible conflicts between the parties, the agreement contains non-binding provisions on conflict avoidance (**negative comity**) and the possibility of requests to initiate enforcement activities (positive comity).

6. Conclusion

The agreement aims to strengthen cooperation between competition authorities. The provisions are, however, incomplete and raise some serious **constitutional concerns**. Once concluded, it will have far reaching consequences. Notably, the fact that the competition authorities may exchange information and transmit documents **without the consent or the awareness of the undertakings** concerned, without prior hearing and **without a right to appeal**, is alarming. The agreement will in particular have to be taken into consideration in the preparation of dawn raid situations, as well as the assessment of leniency applications (for instant whether to include Switzerland). Furthermore, due to disparity of force between the EU Commission and Swiss competition authority it is to be feared that exchange of information will be asymmetric in practice.

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