

Kluwer Competition Law Blog

Competition Law Cooperation Agreement EU/Switzerland

David Mamane (Schellenberg Wittmer) · Tuesday, July 31st, 2012

Switzerland and the European Union are about to conclude a [Cooperation Agreement in the field of competition law](#). This new Cooperation Agreement goes beyond the previous cooperation agreements of the EU with other jurisdictions. It will enable the Swiss and EU Competition authorities to closely coordinate their enforcement activities and in particular to exchange protected and confidential information.

The EU has already concluded so-called ‘first generation’ bilateral cooperation agreements with the United States of America, Canada, Japan and South Korea. The Cooperation Agreement with Switzerland may be qualified as a ‘second generation’ cooperation agreement due to the fact that the scope of the information exchange is broader and information can be exchanged even against the will of the concerned companies, and in some cases outside of a formal investigation.

Current situation

Currently, the Swiss and European competition authorities have only limited possibilities to coordinate their enforcement activities, even in the case of parallel investigations with an international reach. Coordination is currently possible only on the informal basis of waivers issued, e.g. by leniency applicants. Otherwise, cooperation is strictly limited to the exchange of non-confidential, public information.

The Swiss Competition Commission has for years already pointed out that in light of its involvement in the investigation of international cartels (e.g. the airfreight and the freight forwarding investigations) it would be very helpful to have the possibility of an information exchange with the European Commission. Switzerland and the EU have been in negotiations since March 2011 and in June 2012 the European Commission published the proposal for a council decision, which would conclude the agreement. Before entering into force, the Cooperation Agreement needs to be affirmed by the European Council and the European Parliament, as well as ratified by the Swiss Federal Council and approved by the Swiss Parliament. In Switzerland there also exists the possibility of a public referendum against the Cooperation Agreement.

Coordination of enforcement activities

Under the Cooperation Agreement, the Swiss and the European competition authorities *are required to notify each other* with respect to their enforcement activities (any application of competition laws by way of investigation or proceedings) if these may affect important interests of the other party of the Cooperation Agreement. In particular, a notification of the other competition

authority will occur if undertakings 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. To *avoid possible conflicts* between the parties, the Cooperation Agreement contains non-binding provisions on conflict avoidance (negative comity) and the possibility of requests to initiate enforcement activities (positive comity); see Art. V and VI of the Cooperation Agreement.

The Cooperation Agreement also allows the Swiss and European competition authorities to *coordinate their enforcement activities* when they pursue enforcement activities in related matters. Particularly, the Cooperation Agreement enables the authorities to coordinate dawn raids and they no longer have to rely on a waiver of a leniency applicant. However, the Cooperation Agreement does not serve as a basis for the Swiss competition authorities to conduct dawn raids *on behalf of* the European competition authorities and vice-versa.

Information exchange in general

The core element of the Cooperation Agreement is the intended exchange of specific, case-related information between the Swiss and European competition authorities. Pursuant to Art. VII para. 2 of the Cooperation Agreement, the European 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.

With regard to the Swiss procedure, this applies to ‘information obtained by investigative process’ (Art. II para. 6 let. B Cooperation Agreement) under Art. 40 Cartel Act. Therefore, with regards to the Swiss procedure, an information exchange is possible even if the competition authorities have not opened a formal investigation (Art. 27 Cartel Act) but merely a preliminary investigation (Art. 26 Cartel Act), in which case even the Swiss Administrative Procedure Act does not fully apply. At this stage of the procedure, the parties have no access to the file and cannot even judge what kind of information could be transmitted abroad.

Transmission of information without the consent of the parties

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 following conditions apply:

* **Information already in possession:** The exchange is limited to information *already in possession* of the respective authority. This limitation underlines that the Cooperation Agreement is not a basis for the collection of information solely on behalf of the other foreign authority. Rather, the information qualifying for being shared with the foreign authority must have been collected within the framework and for purposes of domestic proceedings.

* **Information that contains personal data:** Personal data may only be transmitted if the European and Swiss competition authorities investigate the same or related conduct or transaction. This limitation also applies if the company concerned consents to the transmission of the information. Swiss law on data protection goes further than some data protection laws of EU Member States, as it also applies to companies and not only to natural persons. The Cooperation

Agreement does not regulate this aspect. It must thus be feared that data provided to the European competition authorities may not be granted the level of personal data protection that meets the standards of the Swiss data protection law.

*** Information concerning leniency applicants and parties to settlement agreements:** The transmission of information is not permitted with regard to information provided by leniency applicants or by parties to a settlement agreement, *unless a written consent exists*. Several uncertainties remain, however. Firstly, a settlement can occur at many stages of a procedure and there seem to be no rules in the Cooperation Agreement on what should happen to information that has been discussed and/or exchanged prior to the settlement. Secondly, it is unclear whether the initiation of settlement talks itself blocks the discussion or transmission of information, or whether only the signature of the settlement agreement, which may occur much later in the process, will block the information exchange. Thirdly, it also remains unclear whether the information already discussed or transmitted may be used by the competition authorities if at a later stage of the procedure the parties conclude a settlement agreement and refuse to consent to an information exchange between the authorities.

*** Procedural rights and legal privilege:** 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 European Union. Accordingly, an exchange of information protected by legal professional privilege or affecting a person's right against self-incrimination is not permissible if these 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 the banking secrecy. The question arises whether the data of bank customers qualify as personal data and thus whether the data transmission should be allowed as long as the competition authorities of the parties are investigating the same or related conduct or transaction. However, in light of the far-reaching consequences such a data transfer may have, a clear and therefore reliable regulation would certainly be necessary.

*** No right to appeal:** Given the far-reaching scope of the information that may be exchanged and in light of the criminal nature of competition law fines, it is surprising that the Cooperation Agreement does not foresee any right to appeal a decision to exchange information if there is no consent by the party. While this would be standard in procedures subject to the Swiss Act on International Mutual Assistance in Criminal Matters, the Cooperation Agreement leaves the parties unprotected.

Usage Restrictions

The Cooperation Agreement does not only restrict the information exchange as such but also includes limitations with regard to the *use of discussed and transmitted information* (Art. VIII of the Agreement): If a company explicitly consents to the information exchange, the discussed or transmitted information may be used for the purpose of generally *enforcing the receiving party's competition laws by its competition authority*. If an explicit consent has not been issued, 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 impose sanctions on natural persons (Art. VIII para. 4 of the Cooperation Agreement). However, it cannot be excluded that the transmitted information, which is used to establish the unlawful behavior, would also result

in indirect effects on an individual.

Protection of the exchanged 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. However, the confidentiality of the information is by no means granted in an absolute manner:

(1) The authorities may, *inter alia*, disclose information necessary for 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 (Art. IX para 1(b) and (d) of the Cooperation Agreement);

(2) The European Commission may disclose information transmitted by the Swiss competition authority *to the competent authorities of the Member States and to the EFTA Surveillance Authority* in order to fulfill its information obligations (Art. X para 1 of the Cooperation Agreement).

Conclusion

The Cooperation Agreement will have far-reaching consequences, once concluded. Notably, the fact that the competition authorities may exchange information and transmit documents without the consent of the company concerned, without a right to appeal, and even outside of a formal investigation, is of significance. The Cooperation Agreement will in particular have to be taken into consideration in the preparation of dawn raid situations, as well as the assessment of multi-jurisdictional leniency applications (i.e. whether to include Switzerland). Furthermore, given that this is the first ‘second generation’ cooperation agreement, the Cooperation Agreement may also serve as a model for future similar agreements. Therefore, other jurisdictions might watch with interest how the Cooperation Agreement will work in real life.

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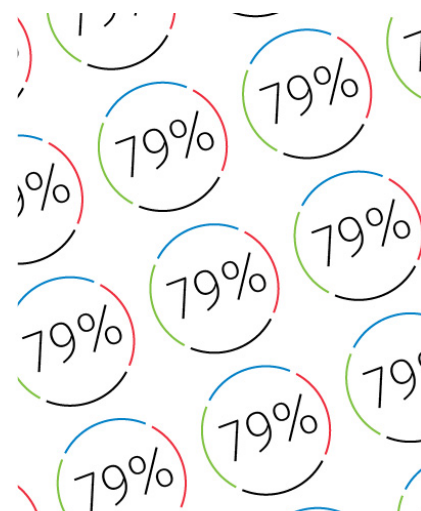
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