

Update

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Cooperation Agreement between Switzerland and the EU on competition law enters into force

On 17 May 2013, Switzerland and the European Union ("EU") signed an Agreement concerning cooperation on the application of their competition laws ("Agreement"). Both the Swiss Parliament (on 20 June 2014) and the European Council (on 21 October 2014) have now approved the Agreement and it will enter into force on 1 December 2014. As the first of its kind, the Agreement allows for the exchange of certain confidential information between the Swiss Competition Commission ("ComCo" including its Secretariat) and the European Commission ("Commission") without the consent of the undertakings concerned.

First "second generation" Agreement

The ComCo and the Commission had to rely exclusively on informal cooperation. In the absence of a cooperation agreement, the authorities were able to share confidential information with each other only if the undertakings concerned issued a waiver. The Agreement that will enter into force on 1 December 2014 is the first of a "second generation" providing for the transmission of certain information **without consent** of the undertakings concerned. The aim of the Agreement is a closer cooperation between the ComCo and the Commission. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the ComCo and the Commission seek to combat cross-border anticompetitive practices more effectively. By contrast, the EU's "first generation" cooperation agreements concluded with the US, Canada, Japan and South Korea do not allow for the exchange of confidential information without consent of the undertakings concerned.

Key elements of the Agreement

The Agreement covers anticompetitive agreements, abusive practices of dominant undertakings as well as merger control. Cooperation is envisaged particularly in the following areas:

- > **Notification and coordination of enforcement activities:** The competition authorities may inform each other of enforcement activities and coordinate investigation procedures (e.g. parallel dawn raids);
- > **Exchange and use of information:** The competition authorities may transmit certain information even without the consent of the undertakings concerned and may use this information for the enforcement of their respective competition laws.

Amendment of the Swiss Cartel Act ("CartA")

For the purposes of implementing the Agreement, a new Article 42b has been inserted into the CartA laying down the general requirements for sharing information with a foreign competition authority. Information may only be transmitted based on an international agreement or with the consent of the undertakings concerned. The additional requirements mirror to a large extent those contained in the Agreement.

Information exchange in case of leniency & settlements

Without the consent of the undertakings concerned, the exchange of information is subject to narrow restrictions. The competition authorities must investigate the same or related conduct. Information obtained under **leniency** or

settlement procedures must not be exchanged if the undertakings concerned have not agreed. The same applies to information which has been received in breach of procedural rights, such as legal professional privilege and the right against self-incrimination. The competition authorities are entitled but not obliged to exchange information.

Limitation of use and protection of individuals

The use of the information exchanged is limited to the enforcement of the competition laws of the EU and Switzerland. Like the exchange of information, the use of information is restricted to the same or related conduct. Proceedings for imposing sanctions on individuals are generally excluded from the scope of the Agreement.

Areas not regulated

The substantive provisions of the parties' competition laws remain unaffected by the Agreement. No common institution will be set up. The Agreement allows for cooperation between the ComCo and the Commission only. However, the Commission is entitled to inform the competition authorities of the EU Member States and the EFTA Surveillance Authority. The Agreement does not regulate cross-border administrative assistance. Investigative measures on behalf of the other party are therefore not authorised. The competition authorities may nevertheless request each other to carry out enforcement activities on a voluntary basis.

Right to appeal and other open questions

A right to appeal against the exchange of information has been deliberately omitted from the Agreement. The revised CartA (Article 42b Par. 3) merely sets out that the undertakings concerned are to be consulted before the transmission of information. Whether or not the exclusion of an ex ante-legal remedy against an unlawful transmission of information is compatible with the Swiss Federal Constitution and the ECHR will be for the courts to decide. Given that the conditions for the exchange of information under the CartA are not totally identical to the ones of the Agreement, uncertainties are inevitable. By the same token, it is unclear at what procedural stage information may be exchanged. Moreover, there is neither an express provision on the protection of information in the case of late, incomplete or withdrawn leniency applications nor in the case of unsuccessful settlement negotiations. Likewise, the Agreement is silent on the admissibility of evidence gained from information exchanged between the parties in

violation of procedural rights. Clarification will also be needed as regards the retroactive application of the Agreement to investigations opened before its entry into force but still pending and a possible right of access to documents in preparation of civil antitrust litigation.

Outlook und Conclusion

The Agreement and the amendment of the CartA become effective on **1 December 2014**. In view of the improved investigative tools at the disposal of the competition authorities, undertakings must brace themselves for a more **rigorous antitrust enforcement**. The Agreement will also have a significant impact for legal practitioners, namely regarding the design of compliance programmes, the use of leniency procedures, the initiation of settlement negotiations and the cooperation with competition authorities' requests for information and investigative measures. Finally, "forum shopping" for access to the files of potentially damaged third parties may be one of the consequences of the Agreement. In Switzerland, the restrictive access regime of ComCo has not yet been tested in court.

We are glad to provide you with additional information if you are further interested in this subject.

Your Contacts

Zurich

Marcel Meinhardt
marcel.meinhardt@lenzstaehelin.com

Astrid Waser
astrid.waser@lenzstaehelin.com

Telephone +41 58 450 80 00

Geneva / Lausanne

Benoît Merkt
benoit.merkt@lenzstaehelin.com

Adrien Alberini
adrien.alberini@lenzstaehelin.com

Telephone + 41 58 450 70 00

Our Offices

Zurich

Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01
zurich@lenzstaehelin.com

Geneva

Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
geneva@lenzstaehelin.com

Lausanne

Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
lausanne@lenzstaehelin.com

www.lenzstaehelin.com

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