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Switzerland's Competition Law Relationship with the EU

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Overview

- The Cooperation Agreement with the EU
 - History of the Agreement
 - Exchange of Information
 - Restrictions of Use of Information
 - Protection and Confidentiality
 - Limitations of the Agreement
 - Swiss Experience with the Agreement
- Article 42b of the Swiss Cartel Act



The Cooperation Agreement with the EU

- Switzerland has concluded an **Agreement with the EU Concerning Cooperation on the Application of their Competition Laws**.
- The Cooperation Agreement entered into force on **1 December 2014**.
- It was the **first** time the EU concluded an agreement with a third country that enables the two competition authorities to **exchange evidence** they have obtained in their respective investigations (a so-called "**second generation**" agreement).
- The EU had already concluded **bilateral cooperation agreements** before, namely with the US (1991), Canada (1999), Japan (2003) and South Korea (2009).
- All these agreements are so-called "**first generation**" agreements; they contain various instruments of cooperation in the area of competition policy but **do not allow** the competition authorities to **exchange information and documents** obtained in the course of their investigations, **unless** they have obtained **express waivers** from the source of the information.



The Cooperation Agreement with the EU

History of the Agreement

- In 2006 and 2007 **preliminary exploratory** talks between the EU and the then president of COMCO took place.
- In December 2008 a **fact-finding report** was issued.
- From August 2010 on the Swiss Federal Council held a **mandate to negotiate** with the EU.
- From March 2011 to April 2012 **negotiations** between Switzerland and the EU took place.
- On 17 May 2013 the Agreement was **signed**.
- On 20 June 2014 the **Swiss Parliament** gave its **approval** to the Agreement and inserted **Art. 42b** into the Swiss Cartel Act, which contains general rules on disclosure of confidential data to foreign competition authorities.
- On 1 December 2014 the Agreement **entered into force**.



The Cooperation Agreement with the EU Exchange of Information (Art. 7)

The Agreement contains a legal base for the **exchange of information** between the EU and Switzerland:

- The competition authorities of the EU and Switzerland **may discuss** any information necessary to carry out the cooperation and coordination of their competition laws. This includes the discussion of information obtained by investigative process (Art. 7 para. 2).
- The competition authorities **may transmit** information when the undertaking which provided the information has given its **express consent in writing** (a so-called “waiver letter” Art. 7 para. 3).



The Cooperation Agreement with the EU Exchange of Information (Art. 7) / 2

The Agreement contains provisions to **safeguard the undertaking's interests**:

- In case there is **no express consent** of the undertaking concerned, the competition authorities may only transmit information obtained by investigative process, subject to the **following conditions**
 - there is a **request** of the other **competition authority**
 - both competition authorities are investigating the **same or related conduct or transaction**
 - the **request** shall be made **in writing**
 - the **requested competition authority** shall **determine what information is relevant** and may be transmitted

(Art. 7 para. 4)



The Cooperation Agreement with the EU Exchange of Information (Art. 7) / 3

The Agreement contains **exceptions to the competition authorities' right to exchange information**:

- In case the information was obtained under the **leniency** or **settlement** procedure, the authorities are **only allowed to discuss or transmit information** if the undertaking which provided the information has given its **express consent in writing** (Art. 7 para. 6).
- Furthermore, the authorities shall not discuss, request or transmit information if using such information would be prohibited under the applicable **procedural rights** and **privileges** (e.g. the right against *self-incrimination* and the legal *professional privilege*).



The Cooperation Agreement with the EU Restrictions of Use of Information (Art. 8)

The Agreement **restricts the use** of the information:

- Discussed or transmitted information shall be used by the other competition authority
 - only for the **purpose of enforcing its competition laws**
 - with regard to the **same or related conduct or transaction**
 - only for the **purpose defined in the request**
 - **not to impose sanctions on natural persons**



The Cooperation Agreement with the EU Protection and Confidentiality (Art. 9)

The Agreement **ensures protection and confidentiality** of the information:

- The competition authorities have to treat the **fact** that a **request** has been made or received as confidential.
- They have to **keep the information** obtained **confidential** according to their respective legislation.
- In particular, they have to **oppose any application** of a third party or another authority **for disclosure** of the information received.
- However, this does not prevent disclosure for the purpose of:
 - obtaining a **court order in public enforcement** of the competition laws
 - disclosure to **undertakings against whom the information may be used**
 - disclosure to **courts in appeal procedures**
 - disclosure for the **right of access to documents**
- In such cases, the **receiving competition** authority has to ensure the **protection of business secrets**.



The Cooperation Agreement with the EU

Limitations of the Agreement

The Cooperation Agreement between the EU and Switzerland

- does not regulate the **cooperation** with the **National Competition Authorities (NCAs)** of the EU Member States
- does not provide a legal base for **mutual legal assistance** (e.g. for investigations carried out for the other competition authority)
- does not contain any **harmonization** of the **substantive law** (there is no *acquis communautaire*)
- And there are **no common institutions of Switzerland and the EU.**



The Cooperation Agreement with the EU

Swiss Experience with the Agreement

After a little more than two years since the Cooperation Agreement with the EU entered into force, we can summarise **our experience** as follows:

- In several **antitrust investigations** COMCO has contacted the Directorate-General Competition of the European Commission in Brussels in order to **discuss** substantive and procedural aspects.
- However, a **transmission of information** has not yet taken place.
- **In assessments of concentrations** with simultaneous notifications in Berne und Brussels, we no longer need a waiver of the parties in order to discuss substantive and procedural aspects. Such discussions often take place in order to avoid contradictions.
- COMCO is participating in the subgroup Banking & Payment of the European Competition Network (ECN).
- **In general, the Agreement facilitates the enforcement of the Swiss Cartel Act in matters that also fall under the EU competition law.**



Article 42b of the Swiss Cartel Act

Article 42b of the Swiss Cartel Act contains general rules on disclosure of confidential data to foreign competition authorities:

- The provision was **inserted** on 20 June 2014 by the Swiss Parliament **together with** its approval of the Cooperation Agreement between Switzerland and the EU.
- According to paragraph 1 of this provision, data may only be disclosed to a foreign competition authority **based on**
 - **an act,**
 - **an international agreement** (like the Cooperation Agreement between the EU and Switzerland) **or**
 - **with the consent of the undertaking** (a so-called “waiver letter”).



Article 42b of the Swiss Cartel Act / 2

Article 42b Cartel Act establishes conditions for disclosure of information in the absence of a consent of the undertaking:

- According to paragraph 2 of this provision, **without the consent** of the undertaking, the competition authorities may disclose confidential data **on the basis of an international agreement only if:**
 - the behavior under investigation is **also unlawful** under **Swiss law**
 - both competition authorities are investigating the **same/related behavior**
 - the data is only used in the **investigation matter** for which it was **requested**
 - the data is **not** used **in criminal or civil proceedings**
 - the foreign procedural law safeguards **party rights** and **official secrecy**
 - the data is **not** disclosed in the context of an **amicable settlement** or **leniency application**



Article 42b of the Swiss Cartel Act / 3

Article 42b Cartel Act ensures that the competition authorities notify the undertaking before transmitting data:

- According to paragraph 3 of this provision, the competition authorities have to **notify the undertaking** concerned and invite it to state its views **before transmitting the data** to the foreign competition authority.
- However, the undertaking has **no right of appeal** against the transmission of the data.



Many thanks for your attention!