

EU/Switzerland Agreement: cooperation on the application of their competition laws

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PURPOSE: conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws.

PROPOSED ACT: Council Decision.

BACKGROUND: the European Union has concluded bilateral cooperation agreements in order to structure and facilitate the cooperation between the Commission and foreign competition authorities. There are four such agreements, 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 they **expressly exclude the exchange of protected or confidential information**.

Given that the EU and Switzerland are two very important economic partners, whose economies are deeply integrated, many anticompetitive practices have cross border effects on trade between the EU and Switzerland. Many cases dealt with by the Commission concern practices which involve Swiss firms and /or affect the Swiss market. Similarly, there is clear evidence showing that certain anticompetitive practices taking place in Switzerland, and especially cartels, also affect the EU markets.

The Swiss Competition Commission and the Commission have already cooperated in a certain number of cases outside the framework of a formal agreement. As in the case of "first generation" agreements, this cooperation is significantly limited by the fact that they cannot exchange confidential information.

On 26 November 2011, the Council authorised the Commission to negotiate this agreement with the Swiss Confederation. After ten rounds of negotiations, the negotiations were concluded on 7 December 2011.

IMPACT ASSESSMENT: no impact assessment has been made.

LEGAL BASIS: Article 207, paragraphs 3 and 4, first paragraphs, together with Article 218, paragraph 6, point a) v), and Article 218, paragraph 7, of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: this agreement between the EU and the Swiss Confederation concerning cooperation on the application of their competition laws will **allow, under certain specific conditions, the Commission and the Swiss Competition Commission to exchange confidential information**.

First, this agreement contains the provisions that are found in the cooperation agreements that have been concluded so far with the US, Canada, Japan and Korea. It contains provisions on the notification of enforcement activities which significantly affect the important interest of the other party; provisions organising the practical cooperation between the Commission and the Swiss Competition Commission and provisions on negative and positive comity.

Secondly, the agreement regulates the discussion and transmission of information between the Commission and the Swiss Competition Commission. It authorises the Commission and the Swiss Competition to discuss information obtained by investigative process. Furthermore, both authorities may under certain conditions transmit information already in their possession and obtained by investigative process to the other authority. They can only do so when they investigate the same or related conduct or

transaction. The agreement provides that they cannot discuss or transmit information which was received under their respective leniency or settlement procedures, without the prior express agreement of the source. Nor can they exchange information if using such information would be prohibited under the procedural rights and privileges guaranteed under their respective laws. The decision to transmit information is always in the discretion of the transmitting authority; there is no obligation to do so.

The agreement lays down rules regarding the use of the information thus discussed or transmitted : the information obtained by investigative process which is discussed or transmitted under the agreement can only be used by the receiving authority for the enforcement of its competition rules to the same or related conduct or transaction, and for the purpose of the relevant request, when applicable. In addition, no information discussed or transmitted shall be used to impose any type of sanctions, whether custodial or not, on natural persons.

The agreement also contains provisions on the protection of the information discussed or transmitted : The Commission and the Swiss Competition Commission must keep this information confidential under their own rules. Both authorities shall also ensure the protection of personal data, under their respective laws on personal data.

Finally, the agreement allows **the disclosure of information transmitted under the agreement in certain limited circumstances**, such as for the procedure of access to file, for court procedures, and to national competition authorities and the EFTA Surveillance Authority, when disclosure of important documents to these agencies is required for the adoption of a Commission decision.