



Companies should heed a new EU-Swiss agreement concerning cooperation over competition laws



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EU-SWISS COOPERATION AGREEMENT

Information exchange

On 1 December 2014 the EU-Swiss Cooperation Agreement entered into force, ushering in a new era for the exchange of information between the European Commission and the Swiss Competition Commission (Comco). The agreement enables the Commission and Comco to exchange confidential case-related information obtained in parallel investigations.

In recent years, the European Union has entered into a number of cooperation agreements on competition matters with certain third-party countries (namely, the US, Canada, Japan and Korea). These so-called 'first generation' agreements established a framework for cooperation between the competition authorities but have not allowed the contracting parties to exchange confidential case-related information unless they obtained express waivers from the parties involved.

The EU-Swiss 'second generation' agreement goes one step further: it enables the Commission and Comco to exchange confidential case-related information when investigating the same or related facts. The agreement further allows the two authorities to discuss current developments and to coordinate their activities with regard to specific cases, for example when they initiate formal proceedings or a phase II merger investigation.

What information will be transmitted?

Unless the parties consent to the exchange, confidential case-related information obtained by investigative process may only be transmitted for use as evidence upon receipt of a formal request by a contracting party.

The following limitations apply:

- (i) Only information already in possession of the requested authority may be transmitted. The Agreement does not enable the authorities to give any investigative tasks or orders to another.
- (ii) If the information contains personal data, a transmission is only possible if the authorities are investigating the same or related conduct or transaction.
- (iii) Information concerning leniency applications and settlement agreements must not be transmitted.
- (iv) Information protected by procedural rights and privileges, including the right against self-incrimination and the legal professional privilege, must not be transmitted.

According to the Secretariat of Comco, the agreement will not be applied retroactively. Information that was obtained during a pending investigation but before the agreement entered into force on 1 December 2014 will not be transmitted.

Even if requested formally, the Commission and Comco are under no duty to transmit any information. The requested authority may also choose to only transmit confidential information subject to conditions. For example, Comco may make its transmission of information conditional upon the Commission undertaking not to disclose any transmitted information to members of the European Competition Network.

The use of the exchanged information is strictly limited to usage for the purposes of the same case and the initial request. Information transmitted under the terms of the agreement must not be used to impose sanctions on natural persons.

Uncertain practice

Given that the agreement is a recent initiative, the practice of the authorities remains uncertain.

Potentially the greatest ambiguity concerns the exemption of information obtained by Comco under a leniency or settlement procedure. It is unclear which documents are covered by this exemption (for example, annexes to a leniency application, information that has been submitted voluntarily before a settlement is reached, etc.) which may reduce the parties' willingness to voluntarily give this kind of information to Comco.

The agreement provides neither a right to appeal a decision to exchange information nor for specific rules regarding the admissibility of information transmitted in violation of the agreement. However, a new provision was introduced into the Cartel Act obliging Comco to inform the parties concerned in advance about a transmission and to invite the parties to comment on the transmission.

Effects of the agreement

Given the new agreement and the large number of cases affecting both the European and the Swiss markets, a significant increase in enforcement cooperation between the Commission and Comco should be expected.

In particular, the authorities' new power to transmit confidential case-related information against the will of the parties will lead parties to apply a concerted EU-Swiss approach to competition compliance matters in the future.

Companies may want to take the new agreement into account when devising compliance programmes, dawn raid manuals and other competition-related programmes. Also, any strategies regarding multi-jurisdictional leniency applications or voluntary submissions in view of possible settlements, should take into consideration any information submitted to Comco.

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