NEW SWISS/EU COOPERATION AGREEMENT CREATES ENHANCED ENFORCEMENT OPPORTUNITIES FOR ANTITRUST REGULATORS, BUT LEAVES UNCERTAINTY FOR COMPANIES

To Our Clients and Friends:

On 1 December 2014, a bilateral cooperation agreement on competition matters, signed in May 2013, between the European Union (the "EU") and the Swiss Confederation came into force (the "Cooperation Agreement").[1] The Cooperation Agreement deals exclusively with antitrust matters (a so-called "dedicated agreement") and will significantly enhance the way in which the European Commission (the "EC") and the Swiss Competition Authority ("COMCO") co-ordinate and cooperate in relation to their enforcement activities (e.g., mergers, abuse of dominance cases, antitrust and cartels).

Prior to the Cooperation Agreement, the EC and COMCO were confined to informal means of cooperation on antitrust matters, for example, through diplomatic channels. Given that Switzerland is the EU's third-largest economic partner, the close integration of the two economies and the fact that many anticompetitive practices investigated by the EC are perceived to have effects within both the EU and Switzerland, the authorities have decided to move towards a more structured form of collaboration.[2]

The Cooperation Agreement marks the first of what is likely to be a series of "second generation" EC agreements with third countries.[3] While EC cooperation with competition authorities in third countries is by no means unprecedented,[4] what distinguishes this Cooperation Agreement from the so-called "first generation" of dedicated agreements is that it explicitly allows the EC and COMCO to exchange information obtained during investigations (from dawn raids, responses to information requests and oral statements), without the need always to obtain consent from the parties. Although this potentially has broad implications for firms being investigated by either authority, the Cooperation Agreement provides some limitations on each authority's ability to share information. However, as discussed below, the terms of the Cooperation Agreement in many respects raise more questions than they answer.

Key Provisions

The Cooperation Agreement contains the following key provisions:

- **Mutual notifications**: A general duty exists for the EC to inform COMCO (and vice-versa) of "enforcement activities" (investigations and proceedings in connection with, for example,
mergers, anticompetitive conduct, and the imposition of remedies) which may affect "important interests" in their respective territories.

- **Coordination of enforcement activities:** The EC and COMCO, if they so choose, may coordinate their enforcement activities (particularly, the timing of dawn raids) when dealing with related matters. The Cooperation Agreement also contains "negative comity" provisions, which aim at reducing the risk of conflicts, and also "positive comity" provisions which permit the EC to request COMCO (and vice-versa) to initiate or expand enforcement activities.

- **Exchange of information:** One of the most important provisions in the Cooperation Agreement is that the EC and COMCO can exchange information during parallel investigations. Companies will need to keep this in mind when dealing with the EC and COMCO, given that these authorities (upon request) can, without a party's consent, transmit evidence obtained during their investigations (including during dawn raids, in response to information requests and as provided in oral statements) to each other where they are investigating the "same or related conduct or transaction." These powers are, however, subject to certain limitations. For example, if the information contains "personal data" or was provided during the course of leniency or settlement proceedings in cartel cases, consent (likely in the form of a waiver) would be required. Furthermore, there are provisions addressing the protection of procedural rights, such as the rights to legal professional privilege and against self-incrimination. There are also restrictions put in place on the use of the information: for example, the receiving authority can only use the information for a pre-defined purpose in relation to an investigation or proceeding into the same or related conduct. The EC and COMCO are also prohibited from using the information to impose sanctions on natural persons and must keep the information they have received confidential (subject to, for example, the need to disclose such information as part of the rights of defense and/or in appeal proceedings) and ensure the protection of "business secrets."

**Impact on Cartel Settlements/Amnesty Programs**

The Cooperation Agreement precludes the EC and COMCO from transmitting information obtained under their leniency (amnesty) or settlement procedures unless they have express written consent from the party concerned. In practice, this means that the EC will be required to seek a waiver from a leniency applicant and/or settling party before being able to transmit information submitted during the course of leniency and/or settlement proceedings. This is consistent with the practice followed by the EC in its various "first generation" agreements.

**Open Questions**

The Cooperation Agreement leaves open a number of questions:

*First, it is unclear whether the Cooperation Agreement will apply to proceedings which were ongoing at that date on which the Cooperation Agreement came into force.*
Second, outside of the context of cartel settlements and leniency applications, the Cooperation Agreement provides neither guidance nor mechanisms for prior consultation with parties, nor for redress where, for example, there is an issue regarding whether the information to be shared includes "personal data" or contains "business secrets." To whom can companies complain if they believe their information has been transmitted contrary to the Cooperation Agreement? In the EU, it would seem logical that the EC's Hearing Officer, whose mission is to ensure the effective exercise of rights in EC competition proceedings, should be competent to hear such complaints. However, the Cooperation Agreement remains silent on this.

Third, although the Cooperation Agreement precludes the authorities from discussing, transferring or requesting information where this "would be prohibited under procedural rights and privileges under the respective laws . . . , including the right against self-incrimination and the legal professional privilege,"[6] one cannot help but question the scope and purpose of this provision. At an EU level legal professional privilege is very narrowly construed, such that in-house counsel communications are not protected and advice from non-EU qualified lawyers cannot be assumed to benefit from legal professional privilege.[7] If information is, in fact, protected by legal professional privilege in a given jurisdiction, then arguably it should not be on an authority's file in the first place. Furthermore, it is not clear what the situation would be where information is protected by legal professional privilege in one jurisdiction, but not in another: could such information still be transmitted? Similarly, it remains uncertain how the right against self-incrimination would work in practice in preventing one authority from possessing, but not sharing information pursuant to the Cooperation Agreement.

Fourth, while the receiving authority must keep the information transmitted under the Cooperation Agreement confidential, there is a degree of uncertainty as to the precise level of protection. For example, it cannot be excluded that a civil court (in an EU Member State or in a third country) could order disclosure of such information in private damages claims.

Fifth, the Cooperation Agreement is silent on whether information subject to Swiss Blocking Statutes, such as the banking secrecy rules, could be transferred under the Cooperation Agreement.

Sixth, the Cooperation Agreement fails to address the extent to which those companies cooperating with the EC, for example, in the context of cartel investigations, would (absent explicit authorization from the relevant Swiss authority) be carrying "out activities on behalf of a foreign state on Swiss territory," contrary to Article 271(1) of the Swiss Penal Code, because, for example, they submitted evidence obtained in Switzerland to a foreign regulator.[8]

Conclusion

While the Cooperation Agreement is designed to foster increased enforcement on the part of the EC and COMCO, it creates significant risks and uncertainties for companies. Any company that is subject to antitrust proceedings before the EU and Swiss authorities must be on high alert to the possibility that these authorities may seek to share information obtained from the company without its prior knowledge or consent.


[3] Ibid. The European Parliament has called for the EU to proceed with concluding other "second generation" agreements with other partners.


[5] Under the Cooperation Agreement, the purpose for which the information can be used needs to be defined in an authority's request to receive information.

[6] See Article 7(7) of the Cooperation Agreement.


[8] Article 271(1) of the Swiss Penal Code is aimed at preventing the assertion of foreign jurisdiction within the Swiss territory and is punishable by up to three years imprisonment and/or a fine.

Gibson Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors of this alert:

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