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THE EUROPEAN UNION**

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**LEGISLATIVE ACTS AND OTHER INSTRUMENTS**

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Subject: Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws

**COMMON GUIDELINES**

**Consultation deadline for Croatia: 27.3.2013**

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AGREEMENT  
BETWEEN THE EUROPEAN UNION  
AND THE SWISS CONFEDERATION  
CONCERNING COOPERATION ON THE APPLICATION  
OF THEIR COMPETITION LAWS



THE EUROPEAN UNION, hereinafter referred to as "the Union",

of the one part, and

THE SWISS CONFEDERATION, hereinafter referred to as "Switzerland",

of the other part,

hereinafter referred to as "Party" or "Parties",

CONSIDERING the close relations between the Union and Switzerland and recognising that cooperation on addressing anticompetitive activities will contribute to improving and strengthening their relationship,

NOTING that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets, as well as to economic welfare of consumers of both Parties and trade between them,

BEARING IN MIND that the competition enforcement systems of the Union and of Switzerland are based on the same principles and provide for similar rules,

NOTING the revised Recommendation of the Council of the Organization for Economic Cooperation and Development concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade, adopted on 27 and 28 July 1995,

RECOGNISING that cooperation and coordination, including the exchange of information and in particular the transmission of information that has been obtained by the Parties in the course of their investigative processes, will contribute to the more effective enforcement of the competition laws of both Parties,

HAVE AGREED AS FOLLOWS:

## ARTICLE 1

### Purpose

The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through cooperation and coordination, including the exchange of information, between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters concerning the application of the competition laws of each Party.

## ARTICLE 2

### Definitions

For the purpose of this Agreement, the following terms shall have the following definitions:

- (1) "competition authority" and "competition authorities" of the Parties mean:
  - (a) for the Union: the European Commission, as to its responsibilities pursuant to the competition laws of the Union; and
  - (b) for Switzerland: the Competition Commission, including its Secretariat;

- (2) "competent authority of a Member State" means the authority of each Member State of the Union competent for the application of competition laws. Upon signature of this Agreement a list of such authorities will be notified by the Union to Switzerland. The European Commission will notify to the competition authority of Switzerland an updated list each time a change occurs;
- (3) "competition laws" means:
- (a) for the Union, Articles 101, 102, and 105 of the Treaty on the Functioning of the European Union, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter referred to as "Regulation (EC) No 139/2004"), Articles 53 and 54 of the Agreement on the European Economic Area (hereinafter referred to as the "EEA Agreement") when used in conjunction with Articles 101 and 102 of the Treaty on the Functioning of the European Union, and their implementing regulations as well as any amendments thereto; and
  - (b) for Switzerland, the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (hereinafter referred to as "Acart") and its implementing regulations as well as any amendments thereto;
- (4) "anticompetitive activities" means any activities that may be subject to a prohibition, sanctions or other relief measures by competition authorities under the competition laws of one of the Parties or of both Parties;

- (5) "enforcement activities" means any application of competition laws by way of investigation or proceedings conducted by the competition authority of a Party;
- (6) "information obtained by investigative process" means any information obtained by a Party using its formal investigative rights or submitted to a Party pursuant to a legal obligation.
- (a) For the Union, this means information obtained through requests for information according to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup> (hereinafter referred to as "Regulation (EC) No 1/2003"), oral statements according to Article 19 of Regulation (EC) No 1/2003 and inspections conducted by the European Commission or on behalf of the European Commission according to Articles 20, 21 or 22 of Regulation (EC) No 1/2003 or information acquired as a result of the application of Regulation (EC) No 139/2004.
- (b) For Switzerland, this means information obtained through requests for information according to Article 40 Acart, oral statements according to paragraph 1 of Article 42 Acart and inspections conducted by the competition authority according to paragraph 2 of Article 42 Acart, or information acquired as a result of the application of the Ordinance on the Control of Concentrations of Undertakings of 17 June 1996;

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<sup>1</sup> In accordance with Article 5 of the Treaty of Lisbon, Articles 81 and 82 of the Treaty establishing the European Community were renumbered as Articles 101 and 102 of the Treaty on the Functioning of the European Union.



- (7) "information obtained under the leniency procedure" means:
- (a) for the Union, information obtained pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases; and
  - (b) for Switzerland, information obtained pursuant to paragraph 2 of Article 49a Acart and Articles 8 to 14 of the Ordinance on Sanctions Imposed for Unlawful Restraints of Competition of 12 March 2004;
- (8) "information obtained under the settlement procedure" means:
- (a) for the Union, information obtained pursuant to Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty<sup>1</sup> (hereinafter referred to as "Regulation (EC) No 773/2004"); and
  - (b) for Switzerland, information obtained pursuant to Article 29 Acart.

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<sup>1</sup> In accordance with Article 5 of the Treaty of Lisbon, Articles 81 and 82 of the Treaty establishing the European Community were renumbered as Articles 101 and 102 of the Treaty on the Functioning of the European Union.

## ARTICLE 3

### Notifications

1. The competition authority of a Party shall notify in writing the competition authority of the other Party with respect to enforcement activities that the notifying competition authority considers may affect important interests of the other Party. Notifications pursuant to this Article may be made by electronic means.
  
2. Enforcement activities that may affect important interests of the other Party include in particular:
  - (a) enforcement activities concerning anticompetitive activities other than concentrations against an undertaking incorporated or organised under the laws and regulations applicable in the territory of the other Party;
  - (b) enforcement activities which involve conduct believed to have been encouraged, required or approved by the other Party;
  - (c) enforcement activities which involve a concentration in which one or more parties to the transaction is an undertaking incorporated or organised under the laws and regulations applicable in the territory of the other Party;

- (d) enforcement activities which involve a concentration in which an undertaking controlling one or more of the parties to the transaction is incorporated or organised under the laws and regulations applicable in the territory of the other Party;
- (e) enforcement activities against anticompetitive activities other than concentrations which also take place or took place to a significant extent in the territory of the other Party; and
- (f) enforcement activities which involve remedies that expressly require or prohibit conduct in the territory of the other Party or contain binding obligations for the undertakings in that territory.

3. Notifications pursuant to paragraph 1 with respect to concentrations shall be given:

- (a) in the case of the Union, when initiating proceedings pursuant to point c of Article 6(1) of Regulation (EC) No 139/2004; and
- (b) in the case of Switzerland, when initiating proceedings pursuant to Article 33 Acart.

4. Notifications pursuant to paragraph 1 with respect to matters other than concentrations shall be given:

- (a) in the case of the Union, when initiating proceedings referred to in Article 2 of Regulation (EC) No 773/2004; and
- (b) in the case of Switzerland, when initiating proceedings pursuant to Article 27 Acart.

5. Notifications shall include in particular the names of the parties to the investigation, the activities under examination and the markets they relate to, the relevant legal provisions and the date of the enforcement activities.

## ARTICLE 4

### Coordination of enforcement activities

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they may coordinate their enforcement activities. They may in particular coordinate the timing of their inspections.

2. In considering whether particular enforcement activities may be coordinated, the competition authorities of the Parties shall take into account in particular the following factors:

- (a) the effect of such coordination on the ability of the competition authorities of the Parties to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the possibility of avoiding conflicting obligations and unnecessary burdens for the undertakings subject to the enforcement activities; and
- (d) the opportunity to make more efficient use of their resources.

3. Subject to appropriate notice to the competition authority of the other Party, the competition authority of either Party may, at any time, limit the coordination of enforcement activities and proceed independently on a specific enforcement activity.

## ARTICLE 5

### Conflict avoidance (Negative comity)

1. The competition authority of a Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of sanctions or other relief measures sought in each case.
  
2. If a specific enforcement activity envisaged by the competition authority of a Party may affect important interests of the other Party, the former, without prejudice to its full discretion, shall use its best endeavours:
  - (a) to provide to the competition authority of the other Party timely notice of significant developments relating to the interests of that Party;
  - (b) to give the competition authority of the other Party an opportunity to provide comments; and
  - (c) to take into consideration the comments of the competition authority of the other Party, while fully respecting the independence of the competition authority of either Party to make its own decision.

The application of this paragraph is without prejudice to the obligations of the competition authorities of the Parties under paragraphs 3 and 4 of Article 3.

3. Where the competition authority of a Party considers that its enforcement activities may adversely affect important interests of the other Party, it shall use its best endeavours to seek an appropriate accommodation of the respective interests. In seeking such accommodation, the competition authority of the Party concerned should consider the following factors, in addition to any other factor that may be relevant in the circumstances:

- (a) the relative significance of the actual or potential effects of the anticompetitive activities on the enforcing Party's important interests as compared to the effects on the other Party's important interests;
- (b) the relative significance to the anticompetitive activities of conduct or transactions occurring within the territory of a Party as compared to conduct or transactions occurring within the territory of the other Party;
- (c) the extent to which enforcement activities by the other Party with respect to the same undertakings would be affected; and
- (d) the extent to which undertakings will be placed under conflicting requirements by both Parties.

## ARTICLE 6

### Positive comity

1. If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other Party may adversely affect the important interests of the former Party, it may, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive activities, request that the competition authority of the other Party initiate or expand appropriate enforcement activities.
2. The request shall be as specific as possible about the nature of the anticompetitive activities and their actual or potential effect on the important interests of the Party whose competition authority has made the request, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.
3. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated or expanded, the requested competition authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.



4. Nothing in this Article limits the discretion of the requested competition authority under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the anticompetitive activities identified in the request, or precludes the requesting competition authority from withdrawing its request.

## ARTICLE 7

### Exchange of information

1. In order to achieve the purpose of this Agreement as set out in Article 1, the competition authorities of the Parties may share views and exchange information related to the application of their respective competition laws as provided for in this Article and in Articles 8, 9 and 10.

2. The competition authorities of the Parties may discuss any information, including information obtained by investigative process, as necessary to carry out the cooperation and coordination provided for under this Agreement.

3. The competition authorities of the Parties may transmit information in their possession to each other when the undertaking which provided the information has given its express consent in writing. When such information contains personal data, those personal data may only be transmitted when the competition authorities of the Parties are investigating the same or related conduct or transaction. Paragraph 3 of Article 9 otherwise applies.

4. In the absence of a consent as referred to in paragraph 3, the competition authority of a Party may, upon request, transmit for use as evidence information obtained by investigative process that is already in its possession to the competition authority of the other Party, subject to the following conditions:

- (a) information obtained by investigative process may only be transmitted where both competition authorities are investigating the same or related conduct or transaction;
- (b) the request for such information shall be made in writing and shall include a general description of the subject matter and the nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request; and
- (c) the requested competition authority shall determine, in consultation with the requesting competition authority what information in its possession is relevant and may be transmitted.

5. Neither competition authority is required to discuss or transmit information obtained by investigative process to the other competition authority, in particular if it would be incompatible with its important interests or unduly burdensome.

6. The competition authorities of the Parties shall not discuss or transmit to each other information obtained under the Parties' leniency or settlement procedures, unless the undertaking which provided the information has given its express consent in writing.

7. The competition authorities of the Parties shall not discuss, request or transmit information obtained by investigative process if using such information would be prohibited under the procedural rights and privileges guaranteed under the respective laws of the Parties and applicable to their enforcement activities, including the right against self-incrimination and the legal professional privilege.

8. If the competition authority of a Party becomes aware that any document transmitted under this Article contains incorrect information, it shall immediately inform the competition authority of the other Party which shall correct it or remove it.

## ARTICLE 8

### Use of information

1. Information that the competition authority of a Party discusses with or transmits to the competition authority of the other Party under this Agreement shall be used only for the purpose of enforcing that Party's competition laws by its competition authority.

2. Information obtained by investigative process and discussed with or transmitted to the competition authority of the other Party under this Agreement shall only be used by the receiving competition authority for the enforcement of its competition laws with regard to the same or related conduct or transaction.
3. Information transmitted under paragraph 4 of Article 7 shall only be used by the receiving competition authority for the purpose defined in the request.
4. No information discussed or transmitted under this Agreement shall be used to impose sanctions on natural persons.
5. The competition authority of a Party may require that information transmitted pursuant to this Agreement shall be used subject to the terms and conditions it specifies. The receiving competition authority shall not use such information in a manner contrary to such terms and conditions without the prior consent of the transmitting competition authority.

## ARTICLE 9

### Protection and confidentiality of information

1. The competition authorities of the Parties shall treat the fact that a request has been made or received as confidential. Information obtained pursuant to this Agreement shall be kept confidential by the receiving competition authority according to its respective legislation. Both competition authorities shall in particular oppose any application of a third party or another authority for disclosure of information received. This does not prevent disclosure of such information for the purpose of:

- (a) obtaining a court order in relation to the public enforcement of the competition laws of a Party;
- (b) disclosure to undertakings which are subject to an investigation or a procedure under the competition laws of the Parties and against whom the information may be used, if such disclosure is required by the law of the Party receiving the information;
- (c) disclosure to courts in appeal procedures;

- (d) disclosure if and in so far as it is indispensable for the exercise of the right of access to documents under the laws of a Party.

In such cases, the receiving competition authority shall ensure that the protection of business secrets remains fully guaranteed.

2. If the competition authority of a Party becomes aware that, despite its best efforts, information has accidentally been used or disclosed in a manner contrary to the provisions of this Article, it shall notify the competition authority of the other Party forthwith. The Parties shall promptly consult on steps to minimise any harm resulting from such use or disclosure and to ensure that such situation does not recur.

3. The Parties shall ensure the protection of personal data in accordance with their respective legislations.

## ARTICLE 10

### Information of the competition authorities of the Member States and the EFTA Surveillance Authority

1. The European Commission, acting in accordance with the Union's competition laws or other international provisions relating to competition:
  - (a) may inform the competent authorities of a Member State whose important interests are affected of the notifications sent to it by the competition authority of Switzerland pursuant to Article 3;
  - (b) may inform the competent authorities of a Member State of the existence of any cooperation and coordination of enforcement activities;
  - (c) may only disclose information transmitted by the competition authority of Switzerland pursuant to Article 7 of this Agreement to the competent authorities of the Member States in order to fulfil its obligation of information under Articles 11 and 14 of Regulation (EC) No 1/2003 and Article 19 of Regulation (EC) No 139/2004; and

(d) may only disclose information transmitted by the competition authority of Switzerland pursuant to Article 7 of this Agreement to the EFTA Surveillance Authority in order to fulfil its obligations of information under Articles 6 and 7 of Protocol 23 of the EEA Agreement concerning the cooperation between the surveillance authorities.

2. Information, other than publicly available information, communicated to the competent authorities of a Member State and to the EFTA Surveillance Authority pursuant to paragraph 1 shall not be used for any purpose other than enforcement of the Union's competition laws by the European Commission, and shall not be disclosed.

## ARTICLE 11

### Consultations

1. The Parties shall consult with each other, upon request of either Party, on any matter which may arise in the implementation of this Agreement. Upon request of either Party, the Parties shall consider reviewing the operation of this Agreement and examine the possibility of further developing their cooperation.



2. The Parties shall as soon as possible inform each other of any amendment to their competition laws, as well as of any amendment to other laws and regulations and of any change in the enforcement practice of their competition authorities that may affect the operation of this Agreement. Upon request of either Party, the Parties shall hold consultations in order to assess the specific implications of such amendment or change for this Agreement, and in particular to determine whether this Agreement should be amended pursuant to paragraph 2 of Article 14.

3. The competition authorities of the Parties shall meet at the appropriate level, at the request of either competition authority. At these meetings, they may:

- (a) inform each other on their current enforcement efforts and priorities in relation to the competition laws of each Party;
- (b) exchange views on economic sectors of common interest;
- (c) discuss policy issues of mutual interest; and
- (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

## ARTICLE 12

### Communications

1. Unless otherwise agreed between the Parties or their competition authorities, communications under this Agreement shall be made in the English language.
2. The competition authority of each Party shall designate a contact point to facilitate communications between the Parties on any matter relating to the implementation of this Agreement.

## ARTICLE 13

### Existing law

Nothing in this Agreement shall be construed to prejudice the formulation or enforcement of the competition laws of either Party.

## ARTICLE 14

### Entry into force, amendment and termination

1. This Agreement shall be approved by the Parties in accordance with their own internal procedures. The Parties shall notify each other of the completion of the respective procedures. This Agreement shall enter into force on the first day of the second month following the date of the last notification of approval.
2. The Parties may agree on any amendment to this Agreement. Unless otherwise agreed upon, such amendment shall enter into force through the same procedures as laid down in paragraph 1.
3. Either Party may terminate this Agreement at any time by notifying the other in writing through diplomatic channels. In that event, this Agreement shall cease to have effect six (6) months from the date of receiving such a notification.

In WITNESS WHEREOF, the undersigned, being duly authorised thereto by the respective Party, have signed this Agreement.

Done in duplicate, at ... on ... in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages.

For the European Union

For the Swiss Confederation