



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

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| from: | General Secretariat |
| to: | Delegations |
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| Subject: | Proposal for a COUNCIL DECISION on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws - Presidency compromise text |

Following to the meeting of the Working Party on Competition on 2 July 2012, delegations will find in Annex, a Presidency compromise text reflecting the revised legal basis of the draft Council Decision on the conclusion of the Agreement.

Changes compared to the previous text (10786/12) are marked.

2012/0127 (NLE)

Proposal for a

COUNCIL DECISION

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 und 352, in conjunction with Article 218(6)(a)(v) and Article 218(7) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹,

Whereas:

- (1) In accordance with Council Decision 2011/XXX of [...]², the Agreement between the European Union and the Swiss Confederation on the application of their competition laws was signed on [...], subject to its conclusion.
- (2) The Agreement should be concluded.

HAS ADOPTED THIS DECISION:

¹ OJ C [...], [...], p. [...].

² OJ L [...], [...], p. [...].

Article 1

The Agreement between the European Union and the Swiss Confederation on the application of their competition laws is hereby concluded.

The text of the Agreement is attached to this Decision.

Article 2

This Decision shall enter into force on the date of its adoption.

Article 3

This Decision shall be published in the Official Journal of the European Union.

Done at Brussels,

*For the Council
The President*

ANNEX

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

The Swiss Confederation (hereinafter referred to as "Switzerland") of the one part, and the European Union (hereinafter referred to as "the Union") of the other part, hereinafter referred to as "Party" or "Parties";

Considering the close relations between Switzerland and the Union 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 Swiss and the Union competition enforcement systems 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 July 27 and 28, 1995;

Recognizing 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 a more effective enforcement of the competition laws of both Parties.

Have agreed as follows:

Article I – 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 II- Definitions

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

- (1) "petition 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 and 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 Commission an updated list each time a change occurs.

- (3) "petition 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 on the control of concentrations between undertakings, Articles 53 and 54 of the Agreement on the European Economic Area 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) "icompetitive 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 both Parties.
- (5) "orcement activities" means any application of competition laws by way of investigation or proceedings conducted by the competition authority of a Party;
- (6) "ormation 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, oral statements according to article 19 of Council Regulation (EC) No. 1/2003 and inspections conducted by the Commission or on behalf of the Commission according to Articles 20, 21 or 22 of Council Regulation (EC) No. 1/2003 or information acquired as a result of the application of Council Regulation No 139/2004 the control of concentrations between undertakings.

- (b) for Switzerland, this means information obtained through requests for information according to Article 40 Acart, oral statements according to Article 42 para. 1 Acart and inspections conducted by the Competition authorities according to Article 42 para. 2 Acart or information acquired as a result of the application of the Ordinance on the Control of Concentrations of Undertakings.
- (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.
 - (b) for Switzerland, information obtained pursuant to Article 49a para. 2 Acart and Articles 8 to 14 of Ordinance on Sanctions imposed for Unlawful Restraints of Competition.
- (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.
 - (b) for Switzerland, information obtained pursuant to Article 29 Acart.

Article III – 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 in significant part 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 Article 6(1)c of Council Regulation (EC) No. 139/2004;
 - (b) in the case of Switzerland, when initiating a proceeding pursuant to Article 33 Acart.
- (4) Notification pursuant to paragraph 1 with respect to matters other than concentrations shall be given:
- (a) in the case of the Union, when initiating a proceeding referred to in Article 2 of Commission Regulation (EC) No. 773/2004;
 - (b) in the case of Switzerland, when initiating a proceeding 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 IV - 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 both 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;
 - (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 V - Conflict avoidance (Negative Comity)

- (1) The competition authorities of both Parties shall give careful consideration to the important interests of the other Party throughout all phases of their enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of sanctions or other relief sought in each case.

- (2) If a specific enforcement activity envisaged by a competition authority of one 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 the latter 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 III.

- (3) Where the competition authority of either 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 one 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;
- (d) the extent to which undertakings will be placed under conflicting requirements by both Parties.

Article VI - 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, such competition authority, 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, may 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 of the requesting competition authority, 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 Party's 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 Party's competition authority from withdrawing its request.

Article VII - Exchange of information

- (1) In order to achieve the purpose of this Agreement as set out in Article I, 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 VIII, IX and X.
- (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, this 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 IX otherwise applies.
- (4) In the absence of a consent as referred to in paragraph 3, a competition authority may, upon request, transmit for the use as evidence, information obtained by investigative process that is already in its possession to the other competition authority, 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 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 competition authority receiving the request 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 nor 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 for their enforcement activities, including the right against self-incrimination and the legal professional privilege.
 - (8) If a competition authority of one of the Parties becomes aware that any document transmitted under this article contains incorrect information, it shall immediately inform the other competition authority which shall correct it or remove it.

Article VIII – Use of discussed or transmitted information

- (1) Information that a Party's competition authority discusses with or transmits to the other Party's competition authority 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 other Party's competition authority 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 Article 7(4) 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) A competition authority may require that information transmitted pursuant to this Agreement shall be used subject to the terms and conditions it specifies. The competition authority receiving the information shall not use it in a manner contrary to such terms and conditions without the prior consent of the other competition authority.

Article IX - 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 Party's competition law(s);

- (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; and
- (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 competition authority receiving the information shall ensure that the protection of business secrets remains fully guaranteed.

- (2) The Parties agree that 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 X - Information of the competition authorities of the Member States and the EFTA Surveillance Authority

- (1) The European Commission, based on 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 Swiss competition authority 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 VII of the Agreement, to the competent authorities of the Member States in order to fulfil its obligation of information under Articles 11 and 14 of Council Regulation (EC) No 1/2003 and on Article 19 of Council Regulation (EC) No 139/2004,
 - (d) may only disclose information transmitted by the competition authority of Switzerland pursuant to Article VII of the Agreement to the EFTA Surveillance Authority in order to fulfil its obligations of information under Articles 6 and 7 of the 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 the Member State and to the EFTA Surveillance Authority pursuant to subparagraphs (a), (b) (c) and (d) above 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 XI - Consultation

- (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 of their competition laws, as well as of any amendment of 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 XIV.
- (3) The competition authorities of the Parties shall meet on request from one of them, at appropriate level. 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 XII - Communications

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

Article XIII – Existing law

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

Article XIV- 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 set forth 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 WHERE OF, the undersigned, being duly authorized thereto by the respective Parties, have signed this Agreement.

Done in duplicate, at Brussels 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 SWISS CONFEDERATION

FOR THE EUROPEAN UNION
