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## Global Forum on Competition

### IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

#### Contribution from Switzerland

-- Session II --

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## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Switzerland --

### Introduction

1. International co-operation in all its forms in the area of competition is today a necessity as much among industrialised countries as between those countries and the emerging economies. In fact, the globalisation of anticompetitive practices in general and of cartels in particular has made the strengthening of such co-operation unavoidable as a means of identifying and combating international cartels more effectively. The issue of improving international co-operation against cartels is an important one for the enforcement of competition policy in Switzerland, given the international openness of its economy and the volume of its trade within Europe.

#### 1. Types and instruments of Swiss co-operation in combating international cartels

##### 1.1 *Informal co-operation with other competition authorities*

2. The Competition Commission (Comco) maintains informal contacts with other competition authorities, regardless of any formal co-operation agreement. It is also very active in the International Competition Network (ICN) and participates in meetings of the OECD Competition Committee. As well, it takes part in the regular sessions of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy. The IGE in fact represents an increasingly important forum for sharing experience in the enforcement of competition law between OECD members and developing countries. Generally speaking, these forums offer the chance to forge and develop bilateral contacts with other competition authorities.

3. The informal contacts established during these various international encounters can give rise to subsequent exchanges concerning general issues as well as questions relating to concrete cases. However, no confidential information can be exchanged in this framework. The Comco maintains such exchanges with the DG COMP (EU), the *Bundeskartellamt* (Germany), and the *Autorité de la Concurrence* (France). Contact is made either by telephone or by e-mail. This informal co-operation has also made it possible to coordinate searches and inspections at the international level, when a company files a request with several authorities, including Comco, to participate in a leniency programme.

4. Technical assistance and capacity building activities are another source of informal contact between the Swiss authority and those newly established foreign competition authorities which it is helping to establish competition regimes in accordance with international standards (for example in South America and Vietnam). These activities also permit Comco to keep informed about regimes and practices for enforcing competition law abroad, while offering assistance to foreign authorities. This is the case, for example, with the COMPAL programme in South America.<sup>1</sup>

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<sup>1</sup> Under this programme, Comco accepts two or three trainees every year from the competition authorities of Nicaragua, Costa Rica, El Salvador, Peru, Bolivia, Colombia, Ecuador, Paraguay, Uruguay, and the Dominican Republic.

## **1.2 Formal co-operation with other competition authorities**

### *1.2.1 Co-operation based on memorandums of understanding*

5. In 2011 Switzerland signed a memorandum of understanding with Ukraine. This instrument provides for co-operation between the two countries' competition authorities through the exchange of non-confidential information on procedures and similar topics. Through this co-operation, the Swiss authority will also help Ukraine to institute its leniency programme.

### *1.2.2 Co-operation based on free-trade agreements (FTA)*

6. The free-trade agreements negotiated by Switzerland bilaterally or in the EFTA context always contain competition provisions. This reflects the fact that the benefits of trade liberalisation can be impeded by anticompetitive practices, and consequently any free-trade agreement must contain co-operation mechanisms to avoid or do away with such practices. The contents and formulation of these provisions will vary, ranging from simple co-operation described in general terms to detailed regulation of co-operation and the transmission of information. These provisions generally draw upon the 1995 OECD recommendation. Thus, some free-trade agreements, for example the EFTA-Chile and EFTA-Canada ones, provide for notification of certain competition law enforcement activities as well as consultations. Other arrangements, such as the EFTA-Colombia agreement, regulate requests asking the competition authority of the other party to take certain measures (positive comity) and require the competition authority of one party to take account of the other party's interests in its competition law enforcement measures (negative comity). Lastly, several agreements provide for and regulate the exchange of non-confidential information. The most complete regime in this regard is the bilateral free trade and economic partnership agreement between Switzerland and Japan, which has a detailed chapter on competition included in the FTA implementation agreement. That agreement does not however provide for the exchange of confidential information.

## **2. Limitations and outlook for Swiss co-operation in competition matters**

### *2.1 Limitations on current Swiss co-operation in combating international cartels*

7. Swiss law guarantees the protection of professional secrecy, business secrets, personal data and other confidential information. When it comes to co-operation in the area of competition, this legitimate protection for natural or legal persons may pose obstacles to the competition authorities' efforts to keep themselves informed or to exchange information concerning a cartel investigation. In fact, without a specific legal basis or the consent of the parties concerned, the exchange of confidential information is precluded. The possibilities offered by the international instruments in force for Switzerland at the present time are limited to exchanging non-confidential information or data that do not involve business secrets. In terms of informal co-operation, this is limited when there is no obligation for the authorities concerned to co-operate, but it can also be hampered by the general nature of the information to which the exchange gives access. Moreover, the LCart (Cartel Act) contains no provisions for transmitting confidential information to foreign authorities. Thus, when confidential information is exchanged this is done on the basis of a waiver of confidentiality, whereby the parties to the proceeding authorise the competition authority to transmit the information concerning them. The parties will grant such waivers essentially in cases of merger control, an area where it is in the interest of the companies to accept this exchange of information.

8. The impossibility of sharing confidential information with the authorities of neighbouring countries can pose a problem when the Swiss competition authorities are investigating international cartels. These problems appear particularly when a foreign authority is taking parallel action against an international cartel that has active members in Switzerland. In this case, Comco generally finds that the

companies targeted have beaten it to the draw by destroying evidence that would demonstrate the existence of cartel ramifications in Switzerland. As noted in this excerpt from its 2010 annual report<sup>2</sup>, Comco has encountered this problem in a number of international cartel investigations.

In the four Comco decisions described below concerning cartels, where the DG COMP had also opened an investigation, the possibility of enhanced co-operation would have made for greater efficiency in identifying and eliminating the cartels concerned.

"On 13 February 2006, Comco opened an investigation against several airline companies for collusion concerning air freight. This related to various airfreight surcharges, for example those on fuel, security, war risk and customs clearance. The Swiss investigation is not closed. The EU investigation ended with a decision of 9 November 2010 imposing a penalty of €799 million on the participating companies.

On 18 July 2007, Comco opened an investigation against several firms for collusion in the area of window and door fittings. The participating companies were active both in Switzerland and internationally. The investigation ended on 18 October 2010; the penalty imposed by Comco amounted to some fr.7.6 million. Three firms have challenged the Comco decision. The parallel procedure opened in the EU is still underway.

On 10 October 2007, Comco opened an investigation against the Swiss Spedlog Association and various transport and logistics companies active internationally. It suspects unlawful collusion in the setting of surcharges, charges and tariffs in the provision of transport services. The Swiss and European proceedings are still underway.

On 16 December 2008, Comco opened an investigation against several firms active internationally in components for sanitary installations (water management), heating and air-conditioning. The investigation was wrapped up on 10 May 2010; Comco imposed a penalty of fr.169,000. The decision has been confirmed by the courts. The parallel procedure opened in the EU is continuing.

Two of the four investigations, i.e. those involving window and door fittings and water management, have been closed in Switzerland. Formal co-operation with the European Commission would have facilitated these two investigations both in Switzerland and in the EU (...). Comco notes that both investigations revealed indications and documents suggesting the existence of price-fixing cartels in the EU. There is every reason to think that indications and documents concerning the cartels established in Switzerland are to be found in the European investigation. The exchange or transmission of indications and documents concerning the other inquiry would no doubt have facilitated and even accelerated the proceedings. Moreover, one of the two proceedings conducted in Switzerland was sparked by two instances of self-reporting, while only one self-report was filed in the European procedure. The communication of the second report or, at least, the portions thereof concerning the European procedure would have allowed both the EU and Switzerland to complete the investigation more quickly.

Two investigations, those concerning air freight and transportation services, are still suspended in Switzerland, while the airfreight investigation in the EU has been closed. One may ask why the Swiss proceeding is taking so long and why it could not be wrapped up at more or less the same time as the European Commission's investigation. The reason lies essentially in the impossibility of co-operating with that institution (...). Moreover, when a parallel proceeding is conducted by the European Commission, the Swiss competition authorities, in the absence of formal co-operation, have no way of knowing before that investigation is completed what deeds the EU is going to prosecute and punish (...). Under these conditions, the Swiss competition authorities must await the EU decision in order to determine clearly their jurisdiction and the facts in question, which inevitably makes for lengthy and unsatisfactory proceedings for the companies. Without a co-operation agreement with the EU, there can be no discussion or decision on these key questions, at the beginning or during the course of the procedure. Nor is it possible to coordinate the scheduling of the procedure."

<sup>2</sup> Comco Annual Report 2010, pages 5 to 6, at : <http://www.weko.admin.ch/org/00143/index.html?lang=fr>

9. In light of these limitations, then, alternatives need to be sought for reinforcing co-operation among competition authorities, if international cartels are to be effectively discovered and prosecuted.

## **2.2 *The outlook for Swiss co-operation in combating international cartels***

10. As a way of enhancing co-operation, the option of creating a domestic legal base for co-operation in cartel investigations was considered during the first consultation initiated by the Federal Council as part of the review of the LCart in June 2010. The proposal was to introduce in the LCart a new article 41 to provide a legal basis for Comco to co-operate closely with foreign authorities, to communicate confidential information to them, including business secrets, and to coordinate cartel investigations with those authorities. The review procedure is still underway but there is not much chance that such a provision, giving broad leeway to Comco in co-operation, will be approved.

11. The conclusion of second-generation co-operation agreements allowing the exchange of confidential information with Switzerland's principal trading partners is another preferred route. An example is the Switzerland-EU agreement on co-operation and competition matters, currently being negotiated, which could facilitate co-operation in cartel investigations and thereby contribute significantly to combating international cartels, given the number of potentially similar investigations concerning restraint of competition.