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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Agreement between the European Union and the Government of Canada regarding the application of their competition laws

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The proposal derives from a Council mandate of 9 October 2008 in which the Commission was authorised to start negotiations to update the existing Cooperation Agreement between the EU and Canada in competition matters. The purpose is to include provisions which allow the competition authorities of both sides to exchange evidence that they have collected in the course of their respective investigations.

The existing Cooperation Agreement with Canada dates from June 1999 and at that time the exchange of evidence between the parties was not regarded as needed. In the meantime, the bilateral cooperation between the European Commission and the Canadian Competition Bureau has become more frequent and deeper as concerns substance. The absence of the possibility to exchange information with the Canadian competition authority is regarded as a major impediment to effective cooperation. The proposed changes to the existing agreement will allow the European Commission and the Canadian Competition Bureau to exchange evidence which both sides have obtained in their investigations. This will in particular be useful in all cases where the alleged anticompetitive behaviour affects transatlantic or world markets. Many worldwide or transatlantic cartels include Canada and via Canada the Commission will get a good opportunity to have access to additional information concerning these cartels.

- **Consistency with existing policy provisions in the policy area**

Cooperation with third country competition authorities is now standard practice in international competition investigations. In addition to the agreement with Canada the European Union has concluded dedicated cooperation agreements with the USA, Japan, Korea and Switzerland. The most advanced agreement is the one with Switzerland which contains already provisions on the exchange of evidence and the proposed update would bring the agreement with Canada to the same level as the one concluded with Switzerland.

- **Consistency with other Union policies**

Competition policy aims at making markets deliver more benefits to consumers, businesses and the society as a whole. Therefore, competition policy contributes to the wider Commission objectives, in particular to boosting jobs, growth and investment. The Commission pursues this objective by enforcing competition rules, sanctioning breaches and promoting a competition culture internationally.

The proposed agreement will improve the administrative cooperation between the European Commission and the Canadian Competition Bureau. Ultimately, consumers both in the EU and in Canada are positively affected if violations of the competition rules are better detected and sanctioned which will also contribute to stronger deterrence. More effective competition enforcement results in more open and competitive markets where companies compete more freely on the merits enabling them to generate wealth and to create jobs. It does also give consumers a better choice of products at lower prices.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for the Union to act are Articles 103 and 352 TFEU. Article 103 is the legal basis for the implementation of Articles 101 and 102. Article 352 is the legal basis for Regulation 139/2004 (the Merger Regulation) and the proposed agreement also covers cooperation in merger investigations.

- **Subsidiarity (for non-exclusive competence)**

The initiative falls under the exclusive competence of the EU according to Article 3 (1) (b) of the TFEU as it relates to competition rules necessary for the functioning of the internal market. Therefore, the subsidiarity principle does not apply.

- **Proportionality**

EU action does not go further than what is necessary to achieve the policy objective of improved international cooperation between the European Commission and the Canadian Competition Bureau. This improved administrative cooperation can only be achieved through an international agreement concluded between the EU and Canada.

The proposed agreement regulates the administrative cooperation between the European Commission and the Canadian Competition Bureau and only concerns those cases dealt with by the European Commission. The proposed agreement does not concern competition law enforcement by Member States as it does not apply to cases dealt with by them.

- **Choice of the instrument**

The Commission needs an express legal authorisation to transfer legally protected information to the Canadian Competition Bureau. 'Soft law' instruments as an administrative Memorandum of Understanding would not be sufficient to overcome the provisions on professional secrecy in Article 28 of Regulation 1/2003 and in Article 17 of Regulation 139/2004 (the Merger Regulation). The envisaged aim can therefore only be achieved through a formal international agreement.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable.

- **Stakeholder consultations**

Member States have been regularly informed about the progress of negotiations and also the European Parliament is informed about the initiative.

- **Collection and use of expertise**

The initiative implements the Council mandate from October 2008. The mandate was based on information gathered during the practical implementation of the 1999 agreement by both competition authorities.

- **Impact assessment**

An impact assessment was not needed. The proposed agreement follows the instructions of the Council mandate and there were no other options for implementing the mandate.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

The language of the proposed agreement has been adapted to reflect the developments in European data protection law since the entry into force of the existing agreement from 1999. Furthermore, as the evidence to be exchanged may contain personal data, detailed provisions on data protection have been included into an annex to the agreement (Annex C).

In order to guarantee that the rights of defence are always respected the draft agreement foresees that the transmitting authority has to verify that the information it sends could also be only used in its own procedures in conformity with its own procedural rights and privileges (Article VII paragraph 7).

4. BUDGETARY IMPLICATIONS

The proposed agreement has no budgetary implications.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

As the agreement only concerns administrative cooperation between the Commission and the Canadian Competition Bureau no implementation by Member States will be necessary.

- **Explanatory documents (for directives)**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

The negotiations parties left the text of the existing agreement in principle unchanged and only added the necessary provisions defining the framework for the discussion, transmission and use of legally protected information. If necessary, the text was updated to legislative developments (enactment of new competition legislation, new numbering of the TFEU) and obsolete provisions were removed. The changes also reflect the developments in European data protection law since the entry into force of the agreement.

Article I (f) defines the notion of "information obtained by investigative process" which will be subject to the newly agreed exchange mechanism.

Article VII sets the circumstances and conditions for the exchange of information:

- The Parties may discuss and share views on all information which is obtained through the investigative process (Article VII paragraph 2).
- When both authorities are investigating the same or related conduct they may transmit such evidence which is already in their possession and which was obtained by investigative process upon request to the other authority for the possible use as evidence (Article VII paragraph 4).
- The parties may never discuss nor transmit evidence which would be protected by the rights or privileges under the respective laws of the parties (e.g. the right against self-incrimination or legal professional privilege, Article VII paragraph 7) or which was obtained under their respective leniency or settlement procedures (unless there is a waiver from the party that has submitted that information) (Article VII paragraph 9).
- The decision to transmit information is always in the discretion of the transmitting authority; there is no obligation to do so (Article VII paragraph 8).

Article VIII sets out confidentiality obligations and the conditions under which the information transmitted under Article VII can be used by the receiving party:

- The information discussed or received must be kept confidential, and can only be disclosed in limited circumstances (Article VIII paragraph 2).
- Article VIII states that the information can only be used for the purposes specified in the request and for the purpose of applying the competition rules by the receiving authority (Article VIII paragraph 8).
- Under the rules 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) the Commission cannot transmit information to a competition authority of a Member State for the potential use against individuals leading to custodial sanctions. As Canada has a criminal enforcement system for cartels it was essential to ensure that the agreement did not go beyond the modalities of exchange of information among the competition authorities of the European Union. The draft agreement therefore stipulates that no information transmitted under it shall be used to impose custodial sanctions on individuals (Article VIII paragraph 9).

- As the evidence to be exchanged may contain personal data, Article VIII paragraph 5 and Annex C contain detailed provisions regarding the protection of personal data.

Article IX applies specifically to the EU and regulates the communication of documents between the Commission and the national competition authorities of the Member States and between the Commission and the EFTA Surveillance Authority.

Although the existing structure of the agreement has been left intact, the number of changes is so numerous that drafting an "article agreement" listing all the changes would not have been practical. It will therefore technically be necessary to conclude a new agreement which supersedes the existing agreement and not just introduces changes to the existing agreement. Article XIV paragraph 5 therefore foresees that the proposed agreement supersedes the existing 1999 agreement.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 352, in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 9 October 2008 the Council authorised the Commission to open negotiations with the Government of Canada concerning an agreement regarding the application of their competition laws.
- (2) The negotiations with the Government of Canada have been completed.
- (3) The Agreement should be signed, subject to its conclusion,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Agreement between the European Union and the Government of Canada regarding the application of their competition laws is hereby authorised on behalf of the Union, subject to the conclusion of the said Agreement¹.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Agreement, subject to its conclusion, for the person(s) indicated by the negotiator of the Agreement.

Article 3

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

Done at Brussels,

*For the Council
The President*

¹ The text of the Agreement will be published together with the decision on its conclusion.