EU and Switzerland to Sign Cooperation Agreement in Competition Matters

Francesco Liberatore

The European Commission (EC) and the Swiss Competition Commission (SCC) have signed an agreement to strengthen cooperation between them and enable the exchange of information on antitrust matters. The agreement will enter into force once it has been approved by the European Parliament and the Swiss national assembly. The most important feature of this agreement is that it will allow the EC and the SCC to exchange certain confidential information without having to obtain the prior written consent of the parties under investigation. This level of cooperation is already possible within the EU, but it is a first with a competition authority of a country outside the EU. The main provisions of the new Cooperation Agreement are summarised below.

- **Notifications.** The EC and SCC will notify each other of the opening of proceedings against the parties to a merger raising serious competition issues (so-called Phase II cases), as well as the opening of antitrust investigations, where it may affect both the EU and Switzerland.

- **Coordination.** The EC and SCC will coordinate their enforcement actions, in particular the timing of on-site inspections (so-called dawn raids), in relation to matters affecting both the EU and Switzerland.

- **Comity.** The EC and SCC will use their best efforts to avoid conflicting enforcement actions. In addition, one authority will be able to request the other to initiate or expand enforcement actions into any antitrust matters which the other is best placed to deal with.

**Exchange of information.** The EC and SCC will also be able, and without the prior consent of the parties, to exchange information obtained in the course of an investigation where both competition authorities are investigating the same or related conduct or transaction. The following procedures will be followed:

- the request for information is made in writing, identifies the undertakings subject to the investigation or procedure whose identity is available at the time of the request, and describes the subject matter and nature of the investigation or proceedings to which the request relates and the specific legal provisions involved; and

- the competition authority receiving the request determines, in consultation with the requesting competition authority, what information in its possession is relevant and may be transmitted.

In all other instances, the EC and SCC will be able to exchange any information obtained in the course of an investigation, provided they obtain prior waiver or written consent from the parties who provided such information. When such information contains personal data, this personal data may only be transmitted when the EC and SCC are investigating the same or related conduct or transaction.
In addition, the EC will be able to exchange any information received from the SCC with any national competition authority within the European Competition Network whose interests are affected by the information transmitted by the SCC. However, the EC and SCC will still not be permitted to discuss, request or transmit legally privileged information nor will they be permitted to discuss or exchange information which they received under their respective leniency or settlement procedures, unless they obtain the leniency applicant's prior written consent.

**Conclusion**

The Cooperation Agreement is not expected to come into force before the end of 2013. Once ratified, business should expect an increase in enforcement cooperation between the EC and SCC, given the number of cases which are likely to have a potential impact on both the EU and Switzerland, such as today’s LIBOR investigations. Companies therefore must take account of the implications of the Cooperation Agreement on their compliance programs, dawn raid manuals, merger control filings, and remedies discussions, as well as leniency and settlement applications, whenever the conduct or transaction in question may have effects in the EU and Switzerland.

The EU has concluded bilateral cooperation agreements on antitrust matters with the US (1991), Canada (1999), Japan (2003) and South Korea (2009). None of these agreements goes as far as the one with Switzerland. This probably reflects the special place that Switzerland has geographically, economically and politically for the EU. However, it may mark a trend toward a “second generation” of bilateral cooperation agreements allowing for the transmission of certain types of information between competition authorities without the prior written consent of the relevant parties.