

Maintaining a competition law relationship with the EU whilst not a member state

Speakers: Professor Vincent Martenet ("VM"), Chairman, Swiss Competition Commission
Sir Christopher Bellamy QC ("CB"), Chairman, Linklaters Global Competition Practice

Date: 19 July 2017 at 12.45 pm

Venue: Addleshaw Goddard LLP

Professor Vincent Martenet's presentation

1. VM began his talk by introducing the Cooperation Agreement between Switzerland and the EU. He stated that the Cooperation Agreement is a very important achievement for Switzerland. He explained that the Cooperation Agreement is the first second-generation agreement entered into by the EU that allows information exchange without consent, if certain conditions are met.

History of the Cooperation Agreement

2. VM acknowledged that the UK is under a tight two year deadline, but he said that the Cooperation Agreement had taken approximately eight years to conclude. He elaborated that the first exploratory talks took place in 2006, negotiations started in 2012, which took one year, the agreement was signed in May 2013 and it took a further year for the Cooperation Agreement to receive parliamentary approval from both Switzerland and the EU. The Agreement entered into force on 1 December 2014.

Exchange of Information (Art 7)

3. VM introduced Art 7 as the most important part of the Cooperation Agreement. He explained that Article 7 allows for the exchange of information obtained through investigative processes.
4. VM said that Switzerland previously operated on a waiver system for information exchange, which worked well for mergers, but was problematic for investigations on cartels and abuse of dominance.
5. VM explained that there are four important conditions where information is exchanged, requiring that:
 - a. There is a request of the other competition authority. VM explained that information could not be sent unless it was requested, which he believed was quite reasonable.
 - b. Both competition authorities are investigating the same or related conduct or transaction. VM explained that all areas of competition law are included with the exception of state aid, which is not contained in Swiss law.
 - c. The request shall be made in writing.
 - d. The requested competition authority shall determine what information is relevant and may be transmitted. VM explained that the Swiss Competition Commission is not obliged to provide the information and can decide whether or not to share.

Exceptions

6. VM said that there are two exceptions to the right to exchange information:



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- a. There is a requirement for a waiver if the information was obtained through the leniency or settlement procedure. VM explained that the idea is to protect immunity and maintain the incentive to provide information. He said that this was very important and was a point that Switzerland and the EU agreed quickly.
- b. Information cannot be exchanged if it is subject to procedural rights and privilege. VM explained that Switzerland recognises legal professional privilege and such documents cannot be transmitted.

Restrictions on use

7. VM said that there are four restrictions on the use of the information that it can be used:
 - a. Only for the purpose of enforcing its competition laws. VM informed that the Cooperation Agreement cannot, for instance, be used to exchange information relating to tax issues.
 - b. With regard to the same or related conduct or transaction. VM explained that Swiss competition law is quite close to EU competition law, so this provision was not very problematic to agree. He said that the closeness of the two systems was an important factor in getting the Cooperation Agreement agreed and any changes in UK competition law may make agreements with the EU more difficult.
 - c. Only for the purpose defined in the request.
 - d. Not to impose sanctions on natural persons. VM explained that in the EU and Switzerland there are no possible sanctions on natural persons. He elaborated that the existence of sanctions against natural persons in the UK could make negotiating with the EU more difficult.

Confidentiality

8. VM said that the confidentiality provisions in the Cooperation Agreement were not too difficult to agree because the confidentiality protections in Switzerland are similar to those in the EU.

Limitations

9. VM said that there are several limitations to the Cooperation Agreement:
 - a. The Cooperation Agreement only covers cooperation at the EU level. VM informed that Switzerland is currently having preliminary talks with Germany, France and Austria to have similar agreements in place, but at the moment there is no provision to allow cooperation between national competition authorities. VM further explained that the discussions with Germany are quite advanced, but the damages directive has meant that modifications may be needed, which will take time.
 - b. There is no legal base for mutual legal assistance. VM explained that the Swiss Competition Commission cannot carry out dawn raids for the EU. He said that such a right would have been damaging to the Swiss parliament.
 - c. The Cooperation Agreement does not harmonise laws. VM said that this was a very important provision for the Swiss Parliament, which felt that it was important to maintain Swiss law. VM informed that this provision was made possible because Swiss and EU competition law is already very similar.

- d. There are no common institutions of Switzerland and the EU. VM explained that this was very important to the Swiss Parliament.

Experiences so far

10. VM said that there is weekly contact between the Swiss Competition Commission and DG COMP. He said that the Swiss authority had dealt with a number of cases in the finance sector, such as the LIBOR case and the FOREX case, and case handlers regularly hold discussions with colleagues in Brussels.
11. VM said that to date there had been no information exchanged without consent. He argued that this shows that the Cooperation Agreement is working because it means that lawyers give the same information to both Switzerland and the EU. VM said that in his view the purpose of competition law is to be preventative, so the Cooperation Agreement is achieving its purpose.

Cartels

12. VM said that the Swiss Parliament has made several amendments to the Swiss Cartel Act in response to the Cooperation Agreement. He said that in general the conditions are in line with the Cooperation Agreement, but there is a potential problem in that the amendments prevent exchange of information for use in civil proceedings. VM explained that civil procedures are becoming more and more important in the EU and this is something that may need amending.
13. VM informed that the Cartel Act was not amended to allow appeals against the transmission of data under the Cooperation Agreement. He explained that if such a right of appeal existed then it would effectively kill the exchange of information because it could take several years to obtain a final decision.
14. VM said that undertakings have the right to be informed and to make representations before any information is exchanged. VM argued that this is a fair deal. He reasoned that if you look at the exchange of information as having three phases, then the undertaking has a right of appeal during the first phase, being the collection of the information, and during the third stage, being the use of the information by the receiving authority.

Conclusions

15. VM concluded by making two observations: firstly, he argued that cooperation matters a lot and that the Cooperation Agreement is a big achievement for Switzerland; and secondly, he argued that timing is a big issue and for the UK's negotiations timing is important.

Sir Christopher Bellamy QC's presentation

16. SB introduced his talk by saying that his talk was based on two assumptions: firstly, that by around 2020 the UK will have agreed a free trade agreement with the EU along the lines of the EU's agreement with Canada; and secondly, such an agreement will leave the UK with room to manoeuvre on the substance of its competition law.
17. CB stated that in such circumstances the most significant issue will be the divergence in state aid rules. He reasoned that it is safe to assume that post Brexit it is unlikely for state aid rules to be close to what they are now in the UK.

Mergers

18. CB said that the UK test for merger control is not far from that used by the EU in terms of substance. He argued that the change in merger control will primarily be procedural.



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19. CB argued that the removal of the one stop shop will lead to many international mergers previously under the EU regime needing to also be dealt with by the UK authorities. He stated that the UK will end up effectively having a veto over these transactions, as most large international mergers will have a significant UK element and will be reviewable by the CMA.
20. CB said that whatever the argument is for having a one stop shop, there is an argument that goes in the other direction. He explained that one of the biggest frustrations with the EU is that the Commission drowns out opposing views on merger control and clearance.
21. CB reasoned that there are positives with having competition between competition authorities. He said that the UK has a long history of atypical competition law and it has come up with a number of innovative approaches to improve policy. CB said that this means that there will be a possibility to introduce some flex in the margins within merger control to take into consideration wider concerns when looking at mergers.
22. CB asked whether it is a good idea to have a cooperation agreement like that used by Switzerland. CB reasoned that the answer was yes and there is no reason not to have exchange of information with the EU Commission.
23. CB stated that the UK should use Brexit to think about how competition law fits in the context of the wider world. He said that the UK is in a revolutionary situation and there is no need to accept the status quo.
24. CB also explained that the UK's withdrawal will have a major shift in power within the EU away from free market principles and towards a more inwards view. He said that the EU Commission will find it difficult to resist political pressures without the support of the UK competition authority. He argued that the UK needs to make sure that it maintains its reputation for procedures and good policy. He acknowledged that the CMA needs more resources, but stated that it had a large opportunity in front of it.

Cartels

25. CB stated that the law governing cartels is essentially the same in the UK and the EU. However, he argued that Brexit is an opportunity to think about issues such as the dichotomy between object and effect infringement and EU-developed case law on parent liability, dominance and objective justifications.
26. CB argued that the UK is currently out of line with the rest of the common law world. He said that the common law world takes a much more judicial based procedure, whereas the EU has an administrative approach. He said that the underlying question is whether the UK should shift towards the US approach to cartel enforcement.
27. CB argued that cartel enforcement in the UK will become more significant. He said that the UK needs to think about how it uses its increased significance. CB gave the example that the UK can move towards criminal liability for cartel offences, which he reasoned would be more effective than the current approach of large fines, which effectively punishes shareholders which might not have been shareholders at the time of the infringement.

Conclusions

28. CB concluded by saying that it is too early to say where the UK will end up, but despite the negativity towards Brexit it can be seen as a chance to reopen doors that have been closed for a number of years and a chance for the UK to consider where it goes next.

Questions

How much pressure was put on Switzerland to accept provisions on state aid?

VM answered that Switzerland only has one provision regarding state aid, which concerns air transportation. He explained that one of the main points of the negotiations for future bilateral agreements may be state aid and when he went to the Swiss Parliament to answer questions on the mandate to negotiate the Cooperation Agreement with the EU one of the main questions he was asked was whether the Cooperation Agreement would cover state aid. He said that state aid is a sensitive issue in Switzerland. He said that, for the future, there may be two main issues in the negotiations with the EU: institutions and state aid.

What proportion of cartel cases in Switzerland have been brought as a result of pressure from the Commission?

VM answered that in the last three or four years about five to ten percent have an overlap. He said that the Swiss Competition Commission consider whether there are any specific links or effects from the infringement in Switzerland. VM gave the example that Switzerland decided to act in the LIBOR case, but not against Google because it did not see any particularities relating to Switzerland with respect to Google.

Is there any pressure within the Swiss parliament to pursue infringements to collect fines?

VM answered that if he gets any pressure from politicians his usual response is that he is happy to investigate subject to a discussion on resources.

To what extent can the UK maintain a UK wide approach in the background of devolution?

CB responded that competition law is not a devolved issue. He stated that even though there could be some minor jurisdictional divergences the approach remains mostly UK wide.

What will be the UK's approach with other countries?

VM replied that from his perspective cooperation is hugely important and going back to Switzerland's position without cooperation with the EU would be very negative for Switzerland.