



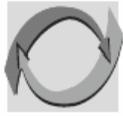
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PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

Confidential information exchange in competition cases: perception versus reality in the EU and US

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
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Confidential information exchange in competition cases: perception versus reality in the EU and US

*Valerie Demedts**

Abstract:

Procedural fairness is not only a highly debated issue in national competition cases, it is even more so on the international scene, where trust among peers is often lacking. One of the biggest obstacles repeatedly identified by competition authorities regarding international law enforcement is the difficulty of exchanging (confidential) information. Delicate issues of procedural fairness are one of the main causes of reluctance towards information exchange. Two specific bilateral ‘second generation agreements’ that allow such exchanges currently exist: the 1999 US-Australia agreement and the 2013 EU-Switzerland agreement (not yet ratified). This contribution studies both agreements and investigates their distinctive approach. Early-on analysis of existing agreements can produce valuable insights relevant for future cooperation between a growing number of jurisdictions and might overcome some of the reluctance that information exchange between competition agencies is facing.

I. Introduction

The US already adopted its International Antitrust Enforcement Assistance Act (IAEAA), allowing the exchange of confidential information among competition agencies in 1994.¹ The first and only agreement concluded under this act, between the US and Australia, was signed in 1999, but is hardly ever used.² That same year, in a speech on international antitrust law and policy, Diane Wood stated that in her experience, the main reason “why more and better cooperation does not yet occur between national authorities can be summed up in a word:

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¹ <http://www.law.cornell.edu/uscode/text/15/chapter-88>.

² Agreement between the government of the United States of America and the government of Australia on mutual enforcement assistance, Washington, 27 April 1999.

confidentiality.”³ No less than fourteen years later, the European Union finally concluded a far-reaching competition cooperation agreement with Switzerland that can be categorized as the EU’s first ‘second generation’ agreement.

According to Papadopoulos, second generation agreements are characterised by more binding obligations than first generation agreements, and the fact that they allow for the exchange of confidential information while also providing for a compulsory process on behalf of the requesting party.⁴ One of the main problems obstructing the full potential of first generation agreements, intended to embed case related cooperation as well as policy dialogue into a structured and facilitating framework, is indeed that the exchange of protected or confidential information is excluded,⁵ as such agreements generally foresee that no changes to existing laws should be made following the agreement.⁶ In this situation, exchange of confidential information is only possible via a waiver of the parties concerned, as many nations have strict confidentiality laws, inhibiting the exchange of information.⁷ Confidentiality rights are quite frequently waived in merger cases, where it is in the benefit of the parties to get a quick decision based on all relevant information, but it is problematic in cartel cases. Second generation agreements intend to

³ D. Wood, Luncheon speech, “Is cooperation possible?”, (2000) *New England Law Review*, Vol. 34:1, 109.

⁴ A.S. Papadopoulos, *The international dimension of EU competition law and policy*, The Cambridge Antitrust and Competition Law Series, Cambridge, Cambridge University Press, 2010, 83. Such agreements can be described as antitrust-specific Mutual Legal Assistance Treaties. These are treaties that allow the sharing of confidential information in the context of criminal investigations. M. Chowdhury, “From paper promises to concrete commitments: dismantling the obstacles to transatlantic cooperation in cartel enforcement”, AAI working paper no. 11-09, November 28, 2011, 9. It should be mentioned that some legal commentators refer to first generation agreements as the formal bilateral co-operation agreements that introduced the negative comity principle, while second generation agreements are those that incorporate a positive comity principle. Third generation agreements then refer to “antitrust mutual assistance treaties which as a result of domestic law amendments provide for more extensive co-operation.” OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Global Forum on Competition, ‘Improving international co-operation in cartel investigations’, background note, Session II, 13 February 2012, DAF/COMP/GF(2012)6, 6, fn. 13. As the EU has never been involved in bilateral agreements including only negative comity, the two-generation division will be used here.

⁵ Explanatory Memorandum accompanying the European Commission’s proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, para. 1.

⁶ For a more detailed overview of the provisions of first generation agreements, see V. Demedts, “International Competition law enforcement: different means, one goal?”, (2012) *Competition Law Review*, Vol. 8 Iss. 3, 223-253.

⁷ In absence of a second generation agreement, the EU is severely restrained in exchanging confidential information. The basic Treaty provision dealing with professional secrecy is Article 339 TFEU. The fact that the need was felt to insert this obligation in the Treaty itself, and even to put particular emphasis on *business* information, reflects the grave concerns of the business community about the protection of their confidential information. This obligation of professional secrecy and the protection of confidential information is further elaborated in secondary legislation.

overcome this obstacle by regulating the discussion and exchange of protected and confidential information.⁸

The exchange of confidential information in competition cases and the so-called second-generation agreements allowing it, are since long approached with reluctance. Today, it is said that “the spirit of cooperation has never been brighter”,⁹ and that the taboo on confidential information exchange in competition cases is less present than in the past.¹⁰ The existence of only two second generation agreements, however, seems to indicate a subsistent averseness towards concluding such agreements, even though the lack of exchange of protected or confidential information is widely regarded as one of the main obstacles for international cooperation.¹¹ While international cooperation in the field of competition law has certainly blossomed over the past years, it was more a widening rather than a true deepening that took place, with an exponentially increasing amount of competition laws and agencies and consequently more bilateral agreements. Second generation agreements have the potential to take international cooperation in competition matters to another level. It is therefore important to gain a clear understanding of this type of agreements.

This paper will first analyse the context and content of the EU-Switzerland agreement, and then engage in a similar analysis of the US-Australia agreement. As each agreement is the first ‘second generation agreement’ of the US and the EU respectively, they can be regarded as models of the approach towards information exchange in competition matters by these globally leading competition agencies. With regard to the EU-Switzerland agreement, reference will be made to the 1991 agreement between the EU and US,¹² which can be regarded as a model for the EU’s first generation agreements and therefore establishes a relevant benchmark to assess potential progress.

⁸ D. Mamane & S. Wittmer, “Competition law cooperation agreement EU/Switzerland”, Kluwer Competition Law Blog, July 31, 2012, available at <http://kluwercompetitionlawblog.com/2012/07/31/competition-law-cooperation-agreement-euswitzerland/> (accessed February 2012).

⁹ J.F. Wayland, “International Cooperation at the Antitrust Division”, International Bar Association’s 16th Annual Competition Conference, 14 September 2012, Florence, 6.

¹⁰ B. Zanettin, *Cooperation between antitrust agencies at the International Level*, Hart Publishing, 2002, 144.

¹¹ See, for instance OECD Global Forum on Competition, background note, *op.cit.*, 3; and International Competition Network Cartels Working Group, Subgroup 1 - general framework, “Cooperation between Competition Agencies in Cartel Investigations”, Report to the ICN Annual conference, Moscow, May 2007, 5.

¹² Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, Washington, 23 September 1991, *OJ L* 95 of 27 April 1995, 47.

II. EU-Switzerland advanced competition cooperation agreement: the European model

Background

The relationship between the EU and Switzerland is a complex, *albeit* intense one, with more than a hundred bilateral agreements concluded between both parties.¹³ While Switzerland is one of the EU's largest economic partners and the second largest FDI recipient,¹⁴ it is nonetheless a surprise that Switzerland is the first country to conclude a second generation competition agreement with the EU, as it did not belong to the four countries with which the EU concluded a first generation cooperation agreements.¹⁵

The very first (informal) mention of cooperation between the competition authorities of Switzerland and the EU dates back to 2006 and was initialled by the president of COMCO and the competition Commissioner. A fact finding report was released in 2008, followed by the issuing of a mandate by the Federal Council to the Swiss negotiating team in 2010. Negotiations took place mainly via video conference between March 2011 and April 2012. The 'innovative'

¹³ European Union External Action, Switzerland, http://eeas.europa.eu/switzerland/index_en.htm (accessed June 2012).

¹⁴ Opinion of the Committee on International Trade for the Committee on Economic and Monetary Affairs on the 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 (12418/2012 – C7-0146/2013-2012/0127(NLE)).

¹⁵ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, Washington, 23 September 1991, OJ L 95 of 27 April 1995, 47 (further referred to as the 1991 EU-US agreement); Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, 4 June 1998, OJ L 173 of 18 June 1998, 28; Agreement between the European Communities and the Government of Canada regarding the application of their competition laws - Statement by the Commission - Exchange of Letters, Bonn, 17 June 1999, OJ L 175 of 10 July 1999, 50; Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities - Agreed minute, Brussels, 10 July 2003, OJ L 183 of 22 July 2003, 12; Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, Seoul, 23 May 2009, OJ L 202 of 4 August 2009, 36. See explanatory Memorandum accompanying the European Commission's proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Brussels, June 2012, COM (2012) 244 final, para. 3. Some substantive competition provisions can be found, however, in the 1972 Agreement between the European Economic Community and the Swiss Confederation and the 2002 Agreement between the European Community and the Swiss Confederation on Air Transport. The European Commission and Swiss competition authority have also worked together outside of a formal framework.

agreement (according to the rapporteur of the Committee on international trade)¹⁶ was eventually signed on 17 May 2013 and now awaits ratification.¹⁷

The agreement is purely procedural, lacking substantive harmonisation provisions.¹⁸ More than just avoiding or diminishing the possibility of conflicts in the application of the competition laws of each party, the purpose of the agreement is to foster more effective enforcement of the competition laws of both parties.¹⁹ Whereas in the 1991 EU-US agreement the purpose of the agreement was described as the promotion of cooperation and coordination and the lessening of the possibility or impact of differences in the application of the competition laws of the parties,²⁰ a broader perspective is taken in the EU-Switzerland agreement, by seeing cooperation and coordination not as the goal, but as a means to achieve effective enforcement, and by aiming not only to lessen the possibility of conflicts, but also to avoid it.

Both the preamble and the Explanatory Memorandum elaborate on the similarities between Swiss and EU substantive and procedural rules.²¹ This is testimony of the fact that deeper cooperation will only be possible after a certain degree of convergence has taken place and that only countries with competition laws very similar to those of the EU are taken into account as possible partners for this type of cooperation.²² As will become clear, one of the

¹⁶ Opinion of the Committee on International Trade for the Committee on Economic and Monetary Affairs on the 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 (12418/2012 – C7-0146/2013-2012/0127(NLE)).

¹⁷ P. Ducrey, “The agreement between Switzerland and the EU concerning cooperation in the application of their competition laws”, *Journal of European Competition law & practice*, vol. 4 Iss. 5, 2013, 438-439.

¹⁸ *Ibid.*, 439.

¹⁹ Article I EU-Switzerland agreement.

²⁰ Article I 1991 EU-US agreement.

²¹ Explanatory Memorandum accompanying the European Commission’s proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, para. 4. Para. 5 of the Explanatory Memorandum states that “[t]he implementation of this agreement will be facilitated by the already existing convergence between the two competition enforcement systems. EU and Swiss substantive rules are very similar, [...] They also have similar investigative powers. As a result, the type and scope of information that they may collect and share is equivalent. Both enforcement systems foresee comparable sanctions [...] Furthermore, both systems recognise similar procedural rights of the parties and the rights of legal privilege and non self-incrimination.” Para. 10 provides that “[...] the Commission is satisfied that the Swiss rules on confidentiality are comparable to the EU ones and therefore that business secrets and other confidential information that it may transmit to the Swiss Competition Commission will enjoy an adequate level of protection. [...] the Commission has taken a decision concluding that Switzerland generally provides an adequate level of protection for personal data transferred from the EU.”

²² Also see Opinion of the Committee on International Trade for the Committee on Economic and Monetary Affairs on the 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 (12418/2012 – C7-0146/2013-2012/0127(NLE)); European Parliament resolution on EU cooperation agreements on competition policy enforcement – the way forward (2013/2921 5RSP), para. 10.

characteristics of the US-Australia agreement is that it is strongly founded on reciprocity.²³ While reciprocity is no explicit condition in the EU-Switzerland agreement, the language of the explanatory memorandum might be an indication that there is a *de facto* or implicit requirement to enter into a second generation agreement. It is remarkable, however, that the Explanatory Memorandum mentions that via the agreement the Commission can benefit from the results of information gathered by the Swiss Competition Commission, but does not explicitly state the reverse benefit for the Swiss authorities.²⁴

Traditional cooperation provisions

The notification obligation is modernised and simplified compared to the 1991 EU-US agreement, by allowing that, while it should still happen in writing, this may be done via electronic means, permitting notifications to happen fast and informally, for example through e-mail. A confirmation in writing through diplomatic channels – which can be slow and burdensome – is no longer required.²⁵ Also the prescribed timing of the notification has changed compared to the 1991 EU-US agreement. Focus is put on notification in the very beginning of the enforcement process, creating more possibilities for coordination and cooperation from the start. The content of the notifications is specified, in contrast to the EU-US agreement.²⁶

The coordination of enforcement activities is regulated in Article IV. There is no explicit obligation to coordinate,²⁷ but certain factors do need to be taken into consideration when deciding whether or not to coordinate.²⁸ The consequences of not taking all factors into account is unclear. This provision could be read as an obligation to motivate any refusal of coordination. Specific mention is made of the coordination of the *timing* of inspections. Coordination may be limited, subject to ‘appropriate notice’. Whether this implies both duly motivated as well as timely notice unfortunately remains unclear, as this limitation may occur ‘at any time’. It seems

²³ This reciprocity implies that some similarities must exist between the parties substantive and procedural laws.

²⁴ Explanatory Memorandum accompanying the European Commission’s proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, para. 4.

²⁵ Article XII of the EU-Switzerland agreement furthermore requires that unless otherwise agreed communications should be made in English. This language preference does not appear in any of the EU’s first generation agreements. In order to further facilitate communications, it is required that each competition authority installs a contact point.

²⁶ Article II (8) 1991 EU-US agreement. Article III (5) EU-Switzerland agreement. The provision largely codifies existing practice between the respective authorities. It does not, however, regulate the notification or service of EU sovereign documents on companies based in Switzerland, which had led to disputes in the past due to competence issues. This situation was nonetheless partially addressed in an exchange of notes. P. Ducrey, *op.cit.*, 440.

²⁷ The parties ‘may’ do so.

²⁸ The use of the word ‘shall’ indicates an obligation.

that a complete termination of the coordination is no longer allowed, as this possibility is no longer explicitly mentioned, contrary to the 1991 EU-US agreement.²⁹

The concept of negative comity is also integrated in the agreement.³⁰ The competition authorities are to give ‘careful consideration’ to the important interests of the other Party.³¹ A positive evolution is also that the EU-Switzerland agreement refers to ‘respective interests’ rather than the pejorative term ‘competing interests’ when enumerating some relevant factors to be taken into account when seeking appropriate accommodation. Both negative comity provisions differ from each other in other aspects as well.³² Factors to be taken into account in seeking appropriate accommodation are mentioned in both agreements, but differ in substance. One should, however, keep in mind that the list of factors is a non-exhaustive one and serves only as an example.³³ The effect of the omission of certain factors therefore remains limited in practice.

Despite the modest results that the positive comity principle has produced, it is reiterated in Article VI of the agreement.³⁴ The principle is formulated quite differently than in the 1991 EU-US agreement. More emphasis is put on the *potential* effects of certain behaviour. It is explicitly mentioned that the requesting party should take into account the importance of avoiding jurisdictional conflicts and that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to the anticompetitive activities at stake. Finally, the notification of the decision on cooperation should happen ‘as soon as practically possible’.

²⁹ Article IV (4) 1991 EU-US agreement.

³⁰ Article V EU-Switzerland agreement. Traditional comity can generally be described as a passive courtesy procedure, allowing the parties to consider the other party’s important interests while they apply their own implementation measures. Treaties Office Database, Summary of Treaty, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=288> (accessed November 2011).

³¹ This can be seen as a stronger obligation than the one in Article VI of the 1991 EU-US agreement where the softer expressions ‘taking into account’ and ‘considering’ were used.

³² For instance regarding the principles that should be taken into account in considering the important interests of the other party (see Article VI (1) and (2) 1991 EU-US agreement).

³³ Article V(3) EU-Switzerland agreement: “... 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.”

³⁴ Positive comity can be described as an active courtesy process, in which the parties may request the application of the other party’s competition rules, following anti-competitive behaviour on that party’s territory, because it affects the important interests of the requesting party. Treaties Office Database, Summary of Treaty, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=288> (accessed November 2011).

Exchange of confidential information

Types of information that can be exchanged

Allowing and regulating confidential information exchange constitutes the core of second generation agreements.³⁵ As mentioned, a major obstacle for the functioning and impact of first generation agreements was their relationship with existing laws. In the 1991 EU-US agreement nothing in the agreement can be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws of either parties.³⁶ In the EU-Switzerland agreement it is specified that only competition laws should be left unchanged by the agreement. This implies that other laws, for example touching on the area of confidentiality, can be altered.³⁷ In the agreement a distinction is made between the *discussion* and the *transmission* of information. The exchange of information itself is regulated, as well as its use, and protection.

The range of information exchange is determined by a procedural definition of confidential information, namely ‘information obtained by investigative process’.³⁸ In short, the agreement covers all powers of investigation of the Commission except for sector inquiries. For Switzerland the agreement refers to Articles 40 and 42 (1)(2) Acart (Swiss Cartel Act), and information acquired through the application of the Ordinance on the Control of Concentrations of Undertakings. Some claim that the reference to the cartel act and ‘investigative procedure’ implies that due to Swiss procedural law the exchange of information is authorized even during a preliminary investigation, before a formal investigation has been opened.³⁹ At this stage of the procedure, the parties do not have access to the file and cannot assess the type of information that could be transmitted, which could result in the exchange of information collected without appropriate procedural protection in Switzerland.⁴⁰ However, as the cooperation agreement explicitly refers to Articles 40 and 42 Acart when defining the concept of information obtained

³⁵ Article VII EU-Switzerland agreement.

³⁶ Article IX 1991 EU-US agreement.

³⁷ Article XIII EU-Switzerland agreement.

³⁸ Article VII EU-Switzerland agreement. With regard to EU law reference is made to Articles 18 to 22 of Council Regulation 1/2003, as well as information acquired through the application of Council Regulation 139/2004. This concerns information gathered via Commission requests for information, through statements taken by the Commission, and by means of inspections of business or other premises by or on behalf of the Commission.

³⁹ Article 26-27 Cartel Act.

⁴⁰ Mamane & Wittmer, “Competition law cooperation agreement EU/Switzerland”, 2012; D. Mamane & S. Jost, “Let’s work together – An EU/Swiss co-operation agreement has far-reaching implications”, *Competition law insight*, 13 November 2012, 9.

by investigative process, and therefore omits Article 26 which refers to the preliminary procedure, this conclusion might not be entirely justified.

Only information that was collected within the framework and for purposes of domestic proceedings can be shared with a foreign authority.⁴¹ The reason why the European and Swiss authorities decided to introduce this limitation is unclear. As will become apparent further in this paper, they decidedly did not follow the example of the US-Australia agreement, where this limitation does not exist, and competition authorities can actively gather information solely on behalf of the foreign authority. The Swiss competition authority will therefore not be able to conduct dawn raids on behalf of the European Commission or vice versa for example.⁴² Perhaps a rapid and relatively informal procedure was preferred over a broader scope with greater procedural constraints. Pressure from the business community cannot be excluded either.

Discussion and exchange of information

The agreement identifies two distinct types of inter-agency contact: on the one hand the sharing of views/discussion and on the other hand, the exchange/transmission of information. Both types of contact are treated differently, in contrast to the US-Australia agreement (*infra*). Any information, including that obtained by investigative process, necessary to carry out the cooperation and coordination provided under the agreement, may be discussed by the parties. The transmission of information in writing, however, is subject to several conditions. The information must first be in the possession of the competition authority. Second, it may only be transmitted when the undertaking that has provided the information gives its express consent in writing.

When the relevant information involves personal data, an additional requirement is that the transmission of such data is only allowed in case the parties' competition authorities are investigating the same or related conduct or transaction, otherwise the parties shall ensure the protection of this data in accordance with their respective legislations. This condition applies even if express consent in writing has been given. The concept of personal data is not defined and leaves scope for interpretation. For instance, what is not clear from the agreement is how the Swiss authorities will deal with the fact that the scope of Swiss data protection law (the Swiss Data Protection Act) is more elaborate than the data protection laws in most EU Member States,

⁴¹ *Ibid.*

⁴² C. Rapin, M. Ammann, D. Lebel, "Cooperation agreement between the Swiss and European competition authorities", Meyerlustenberger Lachenal, www.mll-legal.com/uploads/tx_4epublication/EUR6974_ANTI-_Meyerlustenberger.pdf, accessed 6 June 2014), 2.

as that law applies both to companies (legal entities) and natural persons. This might indicate that the data that is transmitted to the European competition authorities may not be granted a level of protection of equal quality and scope as Swiss data protection law, absent other safeguards, and therefore may not be transferred.⁴³ As pointed out by Mamane and Jost, another hiatus in the agreement concerns the exchange of information subject to Swiss blocking statutes (in particular Swiss banking secrecy).⁴⁴ It would seem that they can be overridden by the agreement and transfer of such information would be possible, but it is unclear whether the limitations related to the exchange of personal data would apply.⁴⁵

The major novelty is that if consent is lacking, information can nevertheless be transmitted for the use as evidence under certain conditions.⁴⁶ Again, the information must already be in the possession of the transmitting competition authority and may only be transmitted in case both competition authorities are investigating the same or related conduct or transaction. The content of a written request for information is moreover specified in the agreement. The decision whether information is relevant and may be transmitted should occur in consultation with the requesting competition authority. The decision whether or not to exchange information, however, is left entirely to the discretion of the parties.⁴⁷ While some discretion is desirable in order to take the particularities of the situation into account, this complete freedom for the parties risks to thoroughly undermine the strength of this provision, and the entire agreement, in particular considering the strict conditions the agreement imposes with regard to both the exchange and the use of the information.

An exception is provided for information obtained under the parties' leniency or settlement procedures.⁴⁸ This information cannot be discussed nor transmitted, unless express consent in writing is given by the undertaking providing the information. This provision lacks detail. According to Ducrey, who took part in the negotiation of the agreement, only the leniency

⁴³ Mamane & Wittmer, *op.cit.*

⁴⁴ D. Mamane & S. Jost, *op.cit.*, 9.

⁴⁵ C. Rapin, M. Ammann, D. Lebel, *op.cit.*, 2.

⁴⁶ Art. VII(4) EU-Switzerland agreement.

⁴⁷ Art. VII(5) EU-Switzerland agreement: "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." Such an important interest could for instance consist of investigation tactics, not wanting to jeopardise the success of planned investigative measures. P. Ducrey, *op.cit.*, 442. According to Mamane and Jost, "[g]iven the significant difference in staffing, it would seem that a transfer of information from the European Commission to the Swiss ComCo could only rarely be considered burdensome.", D. Mamane & S. Jost, *op.cit.*, 9.

⁴⁸ Art. VII(6) EU-Switzerland agreement.

report itself is given special protection, while “[e]vidence submitted at the same time, such as correspondence, or evidence that can also be obtained in the course of a search, may be transmitted under Article 7 paragraphs 3 and 4 of the Agreement.”⁴⁹ This conclusion, however, cannot be drawn solely from the text of the provision itself, and no further guidance is available. With regard to settlements, which can occur at several stages of the procedure, it is not clear what happens with information that was discussed or transmitted prior to the settlement. Furthermore, one cannot deduct from the provision whether it is the initiation of settlement talks that restricts the possible discussions and transmissions, or only the signature of the settlement agreement.⁵⁰

Another limitation is that information obtained through investigative process cannot be discussed, requested or transmitted, if the use of this information would be prohibited under the procedural rights and privileges guaranteed under the respective laws of the parties (for instance the right against self-incrimination and the legal professional privilege). According to Mamane and Jost, this provision should be understood as guaranteeing the highest level of protection in case of differing procedural rules.⁵¹ This is not entirely clear though from the text of the provision. Confusion could be avoided as examples of explicit provisions were available at OECD-level and in Article 11 of the Hague Evidence Convention.

Legal protection with regard to the actual transmission of confidential information or evidence is unavailable to the parties. The agreement is silent with regard to a right to appeal a decision of an authority to exchange information. According to Ducrey, member of the Swiss delegation during the negotiations of the agreement, this is “[d]ue to the comprehensive protection provided when obtaining information in both legal systems and the corresponding prohibitions of transmissions in paragraph 7 [of Article 7] as well as the adequate legal protection provided in relation to using transmitted information.”⁵² Mamane and Jost, however, argue in favour of introducing in the respective procedural rules of the parties the possibility of appealing a decision to transfer information, considering the far-reaching consequences of this omission in the agreement, even if the information exchange could be appealed together with the final decision. According to the authors, this would require that the parties are informed about a possible exchange of information, and that access to the file is provided to make possible an

⁴⁹ P. Ducrey, *op.cit.*, 442.

⁵⁰ Mamane & Wittmer, *op.cit.*

⁵¹ D. Mamane & S. Jost, *op.cit.*, 10.

⁵² P. Ducrey, *op.cit.*, 442.

assessment of the content of the information.⁵³ Ducrey claims that despite the fact that the transmission of information is not covered by Article 5 of the Federal Act on Administrative Procedure (APA), parties concerned are nevertheless notified of the transmission of documents.⁵⁴ This would imply that Article IX (1) of the EU-Switzerland agreement stating that the fact that the request has been made or received shall be treated as confidential, is interpreted as applying solely with regard to third parties in order to ensure judicial protection for the concerned enterprises and allowing them the possibility to challenge such decisions.⁵⁵ This is confirmed by Ducrey, stating that “only the parties to the proceedings are informed of this, in accordance with their legal rights” and “[i]f there is any doubt as to whether information will be protected, COMCO may decide not to transmit it until it has been given the necessary assurances”, although again, it cannot be deducted from the text of the provision.⁵⁶ This seems to be rather far-going. The solution suggested by Mamane and Jost may cause a lot of trouble if there is no uniformity in both procedure and substance. Moreover, ex ante notification of the parties could result in abuse and delaying-tactics. Also within the ECN-system no prior notification of the parties takes place. According to Rapin, Ammann and Lebel an appeal against an exchange of information cannot be excluded on the basis of the Swiss Administrative Procedure Act, and it is difficult to anticipate how this would be implemented.⁵⁷ While the European Parliament welcomes a coherent approach to appeals against final decisions in both jurisdictions, it cautions, however, that allowing parties to appeal against intermediate decisions, such as the exchange of information, would obstruct investigations and could compromise the effectiveness of the cooperation.⁵⁸

Use of exchanged information

Not only the exchange of information is governed by the agreement, also the *use* of such information once it is transmitted is restricted.⁵⁹ First of all the transmitted or discussed information may only be used for the purpose of enforcing the requesting party’s competition laws by its competition authority. Private litigation is thus excluded. The consequences of this exclusion are rather modest, as in both the EU and Switzerland, private enforcement is quite

⁵³ D. Mamane & S. Jost, *op.cit.*, 10.

⁵⁴ P. Ducrey, *op.cit.*, 442.

⁵⁵ D. Mamane & S. Jost, *op.cit.*, 10.

⁵⁶ P. Ducrey, *op.cit.*, 443-444.

⁵⁷ C. Rapin, M. Ammann, D. Lebel, *op.cit.*, 2-3.

⁵⁸ European Parliament resolution on EU cooperation agreements on competition policy enforcement – the way forward (2013/2921 5RSP)), para. 5.

⁵⁹ Article VIII EU-Switzerland agreement.

limited.⁶⁰ Furthermore, such enforcement activities need to have regard to the same or related conduct or transactions. Information that is obtained without consent of the party, may only be used for the purpose defined in the request for the information. Under no circumstances shall it be used to impose sanctions on natural persons. By prohibiting the sanctioning of natural persons, problems with regard to Article 12(3) of Regulation 1/2003 are avoided.⁶¹ On top of this, the requested authority may subject the use of the information exchanged to certain binding terms and conditions that it specifies, and the receiving authority cannot use it contrary to these terms lacking prior consent. It is very unclear what the scope of these terms and conditions could be. This article is again potentially dangerous in that it could undermine the agreement, all the more as the receiving authority should obey. There appears to be no limitation to these conditions, even words such as ‘reasonable’ or ‘appropriate’ are missing. Again, an explanatory document with some examples would be welcome.

Protection and confidentiality of exchanged information

As mentioned, the *fact that a request has been made or received* shall be treated as confidential. The *information received* shall be treated as confidential according to the national legislation of the parties.⁶² Information can be disclosed in four cases: in order to obtain a court order in relation to the public enforcement of the party’s competition laws (again implying that private enforcement is excluded); 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”; to courts during an appeal; and to the extent that it is indispensable for the exercise of the right of access to documents under the laws of a party. The context in which this last case can be invoked is rather unclear, and seems to leave a large margin of discretion to the receiving authority. When information is disclosed in such cases, the agreement proscribes that the protection of business secrets should still remain fully guaranteed. This concept, however, is not further defined. Protection from disclosure therefore seems to constitute the main weakness of the agreement. It

⁶⁰ K. Moodaliyar, J. F. Reardon, S. Theuerkauf, “The Relationship between Public and Private Enforcement in Competition Law - A Comparative Analysis of South African, the European Union, and Swiss Law”, available at <http://www.compcom.co.za/assets/Uploads/events/10-year-review/parallel-3b/The-Relationship-between-Public-and-Private-Enforcement-of-Competition-Law-SA-EU-CH.pdf> (accessed February 2012), 14.

⁶¹ If the EU would allow information exchange with a goal of sanctioning natural persons in its second generation agreements, it would discriminate against its own Member States.

⁶² Article IX EU-Switzerland agreement.

remains to be seen whether the limitations on the use of the transferred information still applies once the information has been disclosed according to the agreement.

Important for a country signing a cooperation agreement with the EU is the interaction with the Member States. Indeed, when the US invited comments on the draft-IAEAA, “[s]everal parties [...] expressed concern that evidence provided to the European Commission under a mutual assistance agreement would automatically be disclosed to all Member States.”⁶³ The European Commission interacts intensely with the national competition authorities of the Member States, via the European Competition Network and through its information obligations under Council Regulation (EC) n° 1/2003 and Council Regulation (EC) n° 139/2004. Article X therefore regulates this relationship, as well as the relationship with the EFTA Surveillance Authority. The Commission may inform the national competition authorities (NCA’s) of the Member States of the existence of any cooperation and coordination of enforcement activities, and may inform the NCA of a Member State whose important interests are affected of the notifications sent to it by the Swiss competition authority. Transmitted information may only be disclosed to the Member States to fulfil the prior mentioned information obligations. Equally, transmitted information can only be disclosed to the EFTA Surveillance Authority in order to fulfil the obligations under Protocol 23 of the EEA Agreement concerning the cooperation between the surveillance authorities. Information that is communicated in any of the above ways can only be used to enforce the Union’s competition laws by the Commission and cannot be disclosed. This provision nevertheless may cause legal uncertainty as the EU Member States competition authorities and the EFTA Surveillance Authority are formally not legally bound to respect the confidentiality of the transmitted information.⁶⁴

⁶³ L. Laudati & T. Friedbacher, “Trading secrets – the International Antitrust Enforcement Assistance Act”, *Northwestern Journal of International Law and Business* 1995-1996, Vol. 16 Iss. 3 spring, 490.

⁶⁴ C. Rapin, M. Ammann, D. Lebel, *op.cit.*, 3.

III. The US-Australia agreement on mutual antitrust enforcement assistance: a different approach

The International Antitrust Enforcement Assistance Act

As is the case in the EU, the US is severely limited in exchanging confidential information with foreign agencies.⁶⁵ As the Antitrust Modernization Commission put it, “[i]n the absence of an AMAA ... , the United States ... is generally barred from sharing confidential information obtained from businesses in the course of antitrust investigations.”⁶⁶ Contrary to the EU, that relies directly on the agreement as a legal basis for its information exchange activities with other jurisdictions, the legal basis in the US is formed by national enabling legislation, namely the International Antitrust Enforcement Assistance Act (IAEAA), adopted in 1994. MLATs only cover criminal law, but in most countries antitrust law remains a civil matter. The IAEAA “was designed to remedy this situation by negotiating bilateral treaties between other nations that provide for reciprocal assistance on antitrust matters.”⁶⁷ Indeed, this act allows the US to enter into bilateral Antitrust Mutual Assistance Agreements (AMAAs), and determines under which conditions information may be exchanged with foreign competition authorities in both civil and criminal cases.⁶⁸ Considering the litigation-based nature of U.S. antitrust enforcement, it is important for U.S. competition agencies that they can obtain evidence located abroad in a form that is admissible for direct use in U.S. court proceedings. The Act ensures that this is possible.⁶⁹

At the time of enactment of the IAEAA, its necessity was strongly underlined. Anne K. Bingaman, Assistant Attorney General at the time, stated that “this legislation is vitally needed if we are to bring our antitrust enforcement tools into line with the realities of the global economy

⁶⁵ See for instance Federal Rule of Criminal Procedure 6(e)(2)(B) and 6(e)(3)(E)(i), Antitrust Civil Process Act Section 1313(c)(3)USC, Section 46f 15 USC of the Federal Trade Commission Act and Section 57b-2 (b)(3)(C), Section 7 (A) (h) of the Clayton Act. The annex to the US-Australia agreement cites and briefly describes the relevant confidentiality laws and procedures, as well as the laws and procedures that provide sanctions for breaches of these confidentiality provisions.

⁶⁶ Antitrust Modernization Commission, Report and Recommendations, April 2007, 218, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁶⁷ W.P. Connolly, “Lessons to be learned: the conflict in international antitrust law contrasted with progress in international financial law”, *Fordham Journal of Corporate & Financial law* 2000, Vol.6 Iss. 1, 209.

⁶⁸ OECD Global Forum on Competition, background note, 2012, 21-22. The term regional economic integration organization was specifically included in the definition of an AMAA to make the conclusion of an agreement with the EU possible. See Section 6211(2) 15 USC.

⁶⁹ L. Laudati & T. Friedbacher, *op.cit.*, 481.

of today and tomorrow.”⁷⁰ Four years later, however, not a single AMAA was signed, resulting in a less promising description of the IAEAA, as “one of many options for pursuing cooperation” and no longer “the next step over antiquated ‘first-generation’ MLATs and MOUs”.⁷¹ Almost twenty years after the introduction of the IAEAA, the US has concluded only one mutual antitrust enforcement agreement, and its use appears to have been quite limited.⁷² The US-Australia agreement of 1999⁷³ was announced as “a critical contribution to international antitrust enforcement.”⁷⁴ It remains the first and only agreement concluded under the IAEAA. A problem with antitrust mutual assistance agreements such as the US-Australia agreement is the issue of strict reciprocity (see below). This excludes many partner countries for the US because many countries do not have the legal framework allowing them to enter into this type of agreement.⁷⁵ Others have pointed to the ‘rigidity’ or ‘compelled formality’ of the IAEAA as a source of trouble, and suggest single-case agreements or test protocols as a cautious way forward.⁷⁶ However, the whole point of concluding cooperation agreements is to provide both the competition agencies as the companies involved with a clear and structured framework within which cooperation can evolve, so this suggestion does not seem optimal.

The reason for this lack of enthusiasm may be that there was quite some concern among potential foreign counterparts that the US was using its antitrust laws to promote trade objectives.⁷⁷ Some scholars expressed their doubt as to whether the IAEAA should be considered as “a valued tool in the grand strategy of U.S. international antitrust policy, or [...] merely a ploy to satiate the international community while the U.S. continues to refuse to agree on reforming

⁷⁰ Department of Justice, Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, before the Committee on the Judiciary U.S. Senate concerning the International Antitrust Enforcement Assistance Act of 1994, S. 2297 Presented on August 4, 1994.

⁷¹ Chief of the foreign Commerce Division of the Antitrust Department of the DOJ at the time, Charles Stark, as cited in W. Connolly, *op.cit.*, 225.

⁷² Many documents state that it has been used ‘at least once’. OECD Global forum on competition, background note, *op.cit.*, 22; P.J. White, “International judicial assistance in antitrust enforcement: the shortcomings of current practices and legislation, and the roles of international organizations”, *Administrative Law Review* 2010, 62 (1), 265. Other documents mention that the agreement has been invoked ‘on several occasions’, in particular in the infamous *Vitamins* cartel case. Zanettin, *op.cit.*, 161.

⁷³ Australia had legislation in place which was similar to the IAEAA: the 1992 Mutual Assistance in Business Regulation Act. P. Holmes *et al.*, “A taxonomy of international competition cooperation provisions”, Paper for the International Research and Policy Symposium on ‘Competition Policy for International Development, Growth, and Trade’, organized by Centre for Economic Policy Research, Brussels, December 9-10, 2005, 56.

⁷⁴ Federal Trade Commission, “First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ”, April 17, 1997, available at <http://www.ftc.gov/opa/1997/04/iaeea.shtm>. (accessed January 2013).

⁷⁵ OECD Global Forum on Competition, background note, *op.cit.*, 21-22.

⁷⁶ D. Wood, *op.cit.*, 110-111.

⁷⁷ L. Laudati & T. Friedbacher, *op.cit.*, 479 ft. 5.

[...] substantive and procedural law to reconcile with international concerns [...]”⁷⁸ and wonder if it is not merely “another piece of aggressive U.S. international trade policy.”⁷⁹ Connolly mentions the reaction of former Assistant Attorney Bingham during a news conference introducing the IAEAA, as an example of the ‘we will get what we can and move on’-attitude of the U.S. Mrs Bingham emphasized that the bill would be able to out-do subpoenas by going across borders. However, confronted with the critical question whether this implied that the DOJ could be forced to itself issue subpoenas on behalf of foreign nations against Americans on U.S. soil, she stressed “that the best part of the bill was that it allowed the U.S. to opt-out of cooperation [and that] requests under the IAEAA [...] can be denied at the DOJ or FTC’s discretion.”⁸⁰

Some statements of (former) US officials indeed confirm a somewhat two-faced attitude of the US towards international antitrust cooperation and convergence.⁸¹ Connolly explains this ‘hypocritical approach’ by the fact that there is a feeling in the US that “because U.S. substantive law antitrust law [sic] arrived on the scene first, it must have prominence internationally.”⁸² The aggressive extraterritorial approach of the US in the past, has led countries to believe that that entering into an agreement under the IAEAA would imply “allowing the US agencies to reach for foreign-based companies with little benefit offered in return, and at considerable sunk cost involved in the negotiation of the agreement.”⁸³ Suspicion may have been further strengthened by the stark contrast between the IAEAA and the US Antitrust Guidelines for International Operations, published only shortly after the adoption of the Act. The European Commission criticised the lack of recognition of the principles of comity present in the EU-U.S. Agreement.⁸⁴ Moreover, the IAEAA is barely mentioned in the Guidelines, that seem to reaffirm an aggressive extraterritorial approach.⁸⁵ A former FTC commissioner admitted that the guidelines undermined

⁷⁸ Connolly, *op.cit.*, 212.

⁷⁹ *Ibid.*, 212.

⁸⁰ *Ibid.*, 228.

⁸¹ For instance “Ironically, Klein is concerned that any WTO convergence agreement, such as an international antitrust court, would interfere with our national sovereignty through the inappropriate review of witnesses, poor use of prosecutorial discretion, and the release of confidential business information. He is thus arguing that other nations should not be allowed to engage in extraterritorial action.” *Ibid.*, 239.

⁸² *Ibid.*, 242.

⁸³ M. Martyniszyn, “Discovery and evidence in transnational antitrust cases: current framework and the way forward”, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, University College Dublin - School of Law, September 2012, 41. Available at <http://ssrn.com/abstract=/2142978>.

⁸⁴ L. Laudati & T. Friedbacher, *op.cit.*, 491.

⁸⁵ Connolly, *op.cit.*, 220.

the goals promoted by the IAEAA.⁸⁶ Many European nations wonder whether the administration of the IAEAA and thus of reciprocal cooperation will be influenced by the tone of the Guidelines.⁸⁷

According to the IAEAA, a central characteristic of an AMAA is that it is based on reciprocity. This implies that the assistance provided and confidentiality protection offered by the foreign antitrust authority should be comparable in scope to that which the US authorities provide. Not every competition authority is therefore eligible to sign an AMAA with the US authorities.

Certain information is excluded from being exchanged under an AMAA. These limitations are mentioned in Section 6204 15 USC. First, information received by the Attorney General or the Commission under section 7A of the Clayton Act, as added by title II of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 is excluded (i.e. information obtained under the pre-merger notification procedure).⁸⁸ While this is regrettable, the practical implications will be limited as waivers are often provided in merger cases. Secondly, antitrust evidence occurring before a grand jury cannot be exchanged, apart from the situation in which ‘a particularized need’ can be demonstrated. Business lobbying seems to have inspired this requirement, as there does not appear to be an objective justification for a positive presumption of the existence of this need when a state official makes a request, but not when a foreign government official does so.⁸⁹ Thirdly, antitrust evidence that needs to be kept secret in the interest of national defense or foreign policy, and finally antitrust evidence that is classified under section 142 of the Atomic Energy Act of 1954 are not exchangeable either. According to Connolly, such exclusions might cause other nations to not view the IAEAA as worthwhile.⁹⁰ As many IAEAA provisions are reiterated in the AMAA itself, they will be discussed in further sections.

⁸⁶ *Ibid.*, 231.

⁸⁷ L. Laudati & T. Friedbacher, *op.cit.*, 491; Connolly, *op.cit.*, 230.

⁸⁸ This provision has been inserted after concern of the business community about their international competitive position. “[This] provision is particularly regrettable. It is true that HSR information is very sensitive, but the IAEAA provides strict confidentiality requirements, and the US authorities are specifically empowered, under the ‘public interest’ provision, not to disclose very sensitive information in specific cases. ... The second main criticism is that it seriously constrains the scope of cooperation under the IAEAA and the usefulness of this act. The study of soft cooperation revealed that it is in the area of international mergers that such cooperation mainly takes place.” Zanettin, *op.cit.*, 162-163.

⁸⁹ Zanettin, *op.cit.*, 164; M. Chowdhury, *op.cit.*, 10-12.

⁹⁰ Connolly, *op.cit.*, 234.

The scope of assistance in the US-Australia agreement

The goal of the agreement is to improve the effectiveness of the enforcement of the antitrust laws of both countries, via cooperation and mutual legal assistance on a reciprocal basis.⁹¹ Parties intend to assist each other and cooperate in providing, or obtaining, antitrust evidence that may contribute to the determination of whether a person has violated, or is about to violate, the respective antitrust laws of the parties, or in facilitating the administration or enforcement of such antitrust laws.⁹² This provision is not particularly strong, as it only expresses an *intent*. The most remarkable difference with the EU-Switzerland agreement is that information can also be actively gathered on behalf of a foreign jurisdiction. This means that the information exchanged does not need to be already in the possession of the authority. Article II E clarifies what is to be understood by *assistance* in the context of the agreement. The non-exhaustive list deserves to be cited in full:

1. disclosing, providing, exchanging, or discussing antitrust evidence in the possession on an Antitrust Authority;
2. obtaining antitrust evidence at the request of an Antitrust Authority of the other party, including (a) taking the testimony or statements of persons or otherwise obtaining information from persons, (b) obtaining documents, records, or other forms of documentary evidence, (c) locating or identifying persons or things, and (d) executing searches and seizures, and disclosing, providing, exchanging, or discussing such evidence; and
3. providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.

‘Antitrust evidence’ is defined in Article I, which contains a procedural definition similar to, but more elaborate than the EU-Switzerland one:

Antitrust evidence refers to information, testimony, statements, documents or copies thereof, or other things that are obtained, in anticipation of, or during the course of, an investigation or

⁹¹ Preamble US-Australia Agreement.

⁹² Article II US-Australia agreement. The American Bar Association Section of Antitrust Law in its report on the proposal of the agreement, expressed its concern on the inclusion of the word ‘administration’ apart from ‘enforcement’. It doubted the exact meaning of the word, and the compatibility with the IAEEA, which only mentions enforcement in its Section 6202(b)(2). American Bar Association Section of Antitrust Law Report on the proposed agreement between the government of the United States of America and the government of Australia on mutual antitrust enforcement assistance.

proceeding under the Parties' respective antitrust laws, or pursuant to the Parties' Mutual Assistance Legislation.

It must be noted from the start that while in the EU-Switzerland agreement the discussion of information is treated differently than the exchange, the US-Australia agreement imposes identical conditions and limitations. The US antitrust agencies may obtain antitrust evidence at the request of the other party. In doing so, they may not only use their normal investigative powers (e.g., CIDs, subpoenas), but they may also apply to a U.S. federal courts. However, an important limitation is that the DOJ/FTC would only do this if it were offered the same category of assistance by the other party.⁹³ Moreover, despite this relatively large scope for assistance, the AMAA provides fewer tools than originally envisaged and the IAEEA hoped for.⁹⁴

Assistance may be provided regardless of the fact whether the conduct underlying a request violates the antitrust laws of the requested party.⁹⁵ This way, US agencies can provide assistance "without having to analyse evidence and case theories to determine whether US laws would be violated".⁹⁶ Trujillo, however, argues that "the obstacles to a mutual assistance agreement in antitrust enforcement may have less to do with differences in substantive antitrust laws and confidentiality requirements and more to do with the differing methods the two countries use to enforce their antitrust policy."⁹⁷ This provision might furthermore not be as facilitating as it seems. Foreign antitrust legislation is defined in the IAEEA as "laws of a foreign state, or of a regional economic integration organization, that are *substantially similar* to any of the federal antitrust laws and that *prohibit conduct similar to* conduct prohibited under the Federal antitrust laws".⁹⁸ It is therefore already embedded in the definition that the laws of the requesting state will not be substantially different. Moreover, assistance may be refused when it is contrary to the public interest of the United States (see below).⁹⁹ The absence of a 'double negative' requirement is more straightforward in the EU-Switzerland agreement.¹⁰⁰

⁹³ L. Laudati & T. Friedbacher, *op.cit.*, 480-481.

⁹⁴ Connolly, *op.cit.*, 226.

⁹⁵ Section 6202(c) 15 USC.

⁹⁶ Senate Committee on the Judiciary, Report on the IAEEA of 1994, N° 103-388, 103rd Cong. 2d Sess., 30 September 1994, 11, as cited in Zanettin, *op.cit.*, 159.

⁹⁷ G. Trujillo, "Mutual assistance under the international antitrust enforcement assistance act: obstacles to a United States-Japanese agreement", *Texas International Law Journal* 1998, Vol. 33, 614-615.

⁹⁸ Section 6211 (7) 15 USC, emphasis added.

⁹⁹ G. Trujillo, *op.cit.*, 619.

¹⁰⁰ Article II (4) of the EU-Switzerland agreement defines 'anticompetitive activities' as "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."

Exchange of information

The form and content of requests for assistance are regulated in large detail.¹⁰¹ The procedure for requesting assistance is more formalistic than under the EU-Switzerland agreement. Requests should happen in writing. Whether an e-mail will suffice, as is the case in the EU-Switzerland agreement, is unlikely, as it is not specified and the scope for assistance is more broad and thus perhaps requires and justifies a greater level of formality. The elaborate minimum content of a request is described in detail. Requests should also be accompanied by “written assurances of the relevant Antitrust Authority that there have been no significant modifications to the confidentiality laws and procedures” as described in annex A of the agreement. The US should indicate in its requests whether or not the information they seek may be used for possible criminal proceedings.¹⁰² This was included because the Australian legislation applies certain constraints when the investigation could result in criminal proceedings.¹⁰³ Moreover, Australia has the right to refuse that the information it provided is used in criminal proceedings (see below).

While the scope of assistance described so far is quite broad, there are limitations. Article IV enumerates four grounds on which assistance may be denied in whole or in part, the most controversial of which being the public interest of the requested party.¹⁰⁴ This is a very vague concept and holds great possibility for abuse. The House and Senate for instance, have identified “the ‘public interest’ provision as a rationale to deny a foreign request pursuant to an investigation of conduct not prohibited by U.S. antitrust law”,¹⁰⁵ thereby effectively infringing upon Section 6202(c) 15 USC. In the legislative history of the IAEAA, the provision is considered as a source of ‘wide latitude’ for U.S. antitrust authorities to deny or condition foreign requests.¹⁰⁶

¹⁰¹ Article III US-Australia agreement.

¹⁰² Article III B 2.

¹⁰³ P. Holmes et al., *op.cit.*, 59.

¹⁰⁴ Other grounds for refusal of a request include when the request is not made in accordance to the agreement, if the execution of the request would exceed the executing authority’s reasonably available resources, or if the execution of a request is not authorised by the domestic law of a party.

¹⁰⁵ L. Laudati & T. Friedbacher, *op.cit.*, 492.

¹⁰⁶ This may include “whether the foreign government has any proprietary interest in the outcome of a particular investigation; whether a target party should be notified of the foreign request and given an opportunity to contest the request; whether a target party has been granted immunity from U.S. antitrust prosecution in exchange for testimony on a matter; whether the evidence requested involves particularly sensitive competitive information such as a company’s future business or product plans; and, whether the party subject to a request is not in fact the target of an

A restraint to this type of behaviour however, is the central concept of reciprocity. If the US authorities invoke this provision too often or in bad faith, so could Australia. The US has furthermore been widely promoting the conclusion of AMAA, abuse of this provision would only undermine these efforts. Anne K. Bingaman, however, again employing a very inward-oriented focus, stated that the safeguard provided by this concept assures that the IAEEA is implemented in a way that advances important US interests.¹⁰⁷ What exactly these interests could be, was not elaborated upon. The possibility of important US interests being harmed by the sharing of information, should be small in theory, as the reciprocity requirement also implies that the confidentiality laws and procedures in the partner country should offer protection that is equivalent to that offered by the US.¹⁰⁸

The Laudati Report, ordered by the Commission in preparation of a possible information exchange agreement with the United States, refers to the Senate Report on the IAEEA, that mentions some other factors to be taken into account when assessing the public interest requirement, more precisely the nature of the evidence requested, whether unwarranted disclosure of information provided by uninvolved third parties will be avoided and, where the requested evidence is grand jury testimony from an immunized witness, whether the foreign authority will grant similar immunity.¹⁰⁹

The House Report notes that giving prior notice to the concerned parties is advisable in some cases (it is however not required), and that one should balance the competitive impact of sharing of business or product plans for the future with the foreign authority's need for the information against its competitive impact.¹¹⁰

Consultation between the two parties before denying a request is required and an explanation should be given for the denial. This provision deserves more merit than Article VII(5) in the EU-Switzerland agreement. While the former still leaves some discretion for the

investigation, but rather only happens to possess evidence about an investigative target." L. Laudati & T. Friedbacher, *op.cit.*, 493.

¹⁰⁷ Department of Justice, Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, before the Committee on the Judiciary U.S. Senate concerning the International Antitrust Enforcement Assistance Act of 1994, S. 2297 Presented on August 4, 1994.

¹⁰⁸ L. L. Laudati, *Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs*, (Luxembourg: Office for Official Publications of the European Communities, 1996), 14. (Laudati Report)

¹⁰⁹ *Ibid.*, 13-14.

¹¹⁰ *Ibid.*

parties, it at least limits them to a certain extent, while the latter allows states to refuse a request for any reason, and does not even explicitly require a motivation.

A person may not be compelled to provide antitrust evidence contrary to any legally applicable right or privilege.¹¹¹ The same issue with regard to the clarity of this provision plays as is the case in the EU-Switzerland agreement. Nevertheless, when requesting assistance, the requesting party may, ‘where applicable’ include a description of procedural or evidentiary requirements regarding the desired execution of the request. These may relate to “any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Executing Authority to respect in executing the request [...]”¹¹² Article IX (D) with regard to the taking of testimony and the production of documents complements this by stating that although a person can be compelled to “appear and testify and produce such documents, records, and other articles, in accordance with the requirements of the laws of the Requested Party [...] The Executing Authority shall [nevertheless], *to the extent permitted by the laws of the Requested Party*, comply with any instructions of the Requesting Party with respect to any claims of legal privilege, immunity, or incapacity under the laws of the Requesting Party.”¹¹³ This is, however, somewhat countered by Article IV (A) (3), that allows the Requested Party to (partially) deny assistance if “execution of a request would not be authorized by the domestic law of the Requested Party.”

There is no limitation on the use or disclosure of leniency information, contrary to the EU-Switzerland agreement. This might be related to the fact that in the US leniency is not the main tool of the authorities to uncover cartels, and private enforcement (and thus investigatory powers of private parties) are much stronger. However, the following statement of the US government does indicate that leniency information is treated with care:

The DOJ’s policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. The DOJ will not disclose a leniency applicant’s identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the leniency program, the DOJ has adopted a

¹¹¹ Article II (I) US-Australia agreement. What this standard of protection implies, is not entirely clear. Also see Section 6202 (d) 15 USC.

¹¹² Article III (B) (4)

¹¹³ Emphasis added.

policy of not disclosing to other authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure.¹¹⁴

The execution of requests is meticulously regulated in the agreement.¹¹⁵ Apart from providing an initial response, the executing party may request additional information or may determine that the request shall only be executed subject to certain specified terms and conditions, that may relate to the way a request is executed or its timing, or the use or disclosure of any antitrust evidence that is provided. This allows that Australia could deny the use of the information it provides in criminal proceedings. As mentioned, requests are executed in accordance with the laws of the requested party and according to the method of execution specified in the request, unless it is prohibited by the law of the requested party or unless the executing authority decides otherwise. In the EU-Switzerland agreement, such terms and conditions are not specified.

Another part of the agreement deals with the concrete execution of the different means to obtain evidence, such as the taking of testimony and production of documents, search and seizure, and the return of antitrust evidence.¹¹⁶ In this regard also see Section 6203 (b)(2)(B) 15 USC: “Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order.” Also who bears the costs of executing a request is regulated under the agreement,¹¹⁷ a practical aspect not regulated under the EU-Switzerland agreement.¹¹⁸

Use of exchanged information

Subject to some exceptions, the agreement shall only be used for the purpose of mutual antitrust enforcement assistance between the parties.¹¹⁹ Antitrust evidence that was obtained pursuant to the agreement can be used or disclosed only for the purpose of administering or

¹¹⁴ OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Global Forum on Competition, ‘Improving cooperation in cartel cases’, Contribution from the United States (DOJ), Session II, DAF/COMP/GF/WD(2012)46, 31 January 2012, 6. For more information on the impact of US discovery rules on the European Commission’s leniency policy, see A. Petrasincu, “Discovery revisited - the impact of the US discovery rules on the European Commission’s leniency programme”, *European Competition Law Review* 2011, 32 (7), 356-68.

¹¹⁵ Article V US-Australia agreement.

¹¹⁶ Article IX, X, XI US-Australia agreement.

¹¹⁷ Article XII US-Australia agreement.

¹¹⁸ This could be explained by the fact that information should already be in possession of the national authority, and will therefore be less costly.

¹¹⁹ Article VII US-Australia agreement.

enforcing the antitrust laws of the Requesting Party. This may happen solely in the investigation or proceeding specified in the request and for the purpose stated in it, unless the providing authority gave prior written consent to a different use or disclosure. The antitrust evidence obtained according to the agreement may also be used or disclosed to administer or enforce other laws than antitrust laws, if the use or disclosure of the information is ‘essential to a significant law enforcement objective’ and the authority that has provided the information has given its prior written consent. What this significant law enforcement objective could entail is not clear. So as not to lose the faith of the domestic constituency, agencies will not provide such consent lightly. Moreover, the parties that have originally submitted the information will receive notice and the opportunity to object.¹²⁰ The reciprocal basis of the agreement, combined with this possibility to request permission to use confidential information for non-antitrust-enforcement purposes, might scare off potential partner countries, as they fear that they would also have to allow the use of exchanged confidential information in non-antitrust matters.¹²¹ The Antitrust Modernization Commission advised Congress to amend the IAEAA to make it clear that it does not require AMAAs to include a provision for non-antitrust uses of confidential information.¹²²

Antitrust evidence obtained under the agreement *that has been made public* in accordance with Article VII can be used thereafter by the requesting party “for any purpose consistent with the Parties’ mutual assistance legislation”.¹²³

Protection and confidentiality of exchanged information

Subject to some exceptions, and to the fullest extent possible consistent with the Parties laws, the confidentiality of any request and of any information communicated under this Agreement shall be guaranteed.¹²⁴ Moreover, ‘to the fullest extent possible consistent with that Party’s laws’, parties are to oppose any application by a third party for disclosure of such confidential information.¹²⁵ Information is therefore not entirely protected. With regard to the parties in an action or proceeding brought by an Antitrust Authority of the Requesting Party for a violation of the antitrust laws of the Requesting Party, Article VI (B) (5) states that “Nothing in this Agreement shall prevent disclosure [...] of antitrust evidence provided hereunder to a

¹²⁰ According to Section 57b-2(c)(2), (3) 15 USC. L. Laudati & T. Friedbacher, *op.cit.*, 485.

¹²¹ Antitrust Modernization Commission, *op.cit.*, 218.

¹²² *Ibid.*, 209.

¹²³ Article VII (D) US-Australia agreement.

¹²⁴ Article VI (A) US-Australia agreement.

¹²⁵ Article VI (A) (2) US-Australia agreement.

defendant or respondent in that action or proceeding, if such disclosure *is required by the law of the Requesting Party.*¹²⁶ This is limited to the situation in which a complaint has already been filed. Laudati & Friedbacher elaborate on the instances in which this exception might play.¹²⁷ The legislation at stake mainly involves the Brady doctrine, Federal Rule of Criminal Procedure 16(a)(1)(C), and Federal Rule of Civil Procedure 26(b). The latter rule “allows parties to obtain discovery regarding any matter, *not privileged*, relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence.”¹²⁸ Laudati & Friedbacher do point to existing limits on such broad discovery rights in this context. For instance “the limited access granted to respondents with regard to information submitted to the DOJ/FTC by third parties”,¹²⁹ via so-called protective orders. Even in the case of disclosure, certain limitations on the use of exchanged information exist as well (see below).

While the IAEEA does override national barriers to exchange confidential information, it does not “amend existing disclosure provisions to specifically exempt from disclosure to other law enforcement agencies information received from foreign partners.”¹³⁰ Requests from other law enforcement agencies for information provided by a foreign partner can therefore not be automatically and categorically denied, but a case-by-case assessment should take place to avoid accusations of arbitrariness or capriciousness. Categorical denial would furthermore constitute a form of positive discrimination of foreign partners compared to domestic parties submitting information. While the FTC enjoys a relatively large margin of discretion to decide whether or not to positively respond to information requests from state attorneys general, Congress (see Section 46(f) 15 USC) has expressed its preference for Federal-State cooperation, which could colour the review of possible denials.¹³¹ Although Laudati and Friedbacher are relatively negative concerning the IAEEA and consequently the AMAA’s confidentiality provisions, Trujillo holds a more positive view. While recognising that the exposure of confidential information may cause harm to a company’s reputation and may affect the market, “an examination of the IAEEA’s

¹²⁶ Emphasis added. This is confirmed in Section 6207 (b) 15 USC.

¹²⁷ L. Laudati & T. Friedbacher, *op.cit.*, 482-484.

¹²⁸ Emphasis added. G. Trujillo, *op.cit.*, 628-629.

¹²⁹ L. Laudati & T. Friedbacher, *op.cit.*, 484.

¹³⁰ *Ibid.*, 486-488. For instance Section 57b-2(f) 15 USC, which contains an exhaustive list of situations that are automatically and categorically ‘immune’ from disclosure by the FTC to other law enforcement agencies.

¹³¹ L. Laudati & T. Friedbacher, *op.cit.*, 486-488.

provisions governing confidentiality reveals that an agreement adhering to those provisions will adequately protect sensitive information elicited through its mechanisms.”¹³²

IV. Conclusion

The second generation agreement concluded by the US is of an entirely different nature than the one concluded by the EU. The former is based on mutual legal assistance treaties and is more formalistic, while the latter is more limited in nature, less formal, and remains closer to first generation agreements. The EU-Switzerland agreement rather *allows* cooperation than *requires* it. While this might take away some reservations states may have with this type of cooperation, the large discretion given to the parties in combination with several restrictions regarding both the exchange of information and its use, is a severe weakness. Moreover, while the EU-type agreement might have a lower participation threshold, its scope remains very limited. The broad array of assistance that can be offered under the US-type of agreement should be applauded, but on the other hand its strict reciprocity requirement is quite exclusionary.

This should be held against the background that these agreements were concluded with partner countries that have very similar competition systems and confidentiality laws and are either implicitly or explicitly based on reciprocity. In order to enthruse other countries about advanced cooperation, it is advised to publish more data on how such agreements work in practice, and whether there is a balance between both partners involved. As Papadopoulos rightly pointed out, not a single guideline on the implementation of second generation agreements has been issued by the competition agencies that are implementing them.¹³³ Second generation agreements therefore remain unidentified objects to many states. This is exemplified by the provisions in both agreements with regard to procedural justice. Often time the text of the agreement leaves much room for interpretation, and further detailing and instructions are required.

The agreements differ from each other with regard to procedural fairness in several regards. A first issue is that in the EU-Switzerland agreement discussion and transmission of information are treated differently, while in the US-Australia agreement they are treated the same and are subject to the same conditions. Moreover, as the EU-style agreement rather allows

¹³² G. Trujillo, *op.cit.*, 627.

¹³³ Papadopoulos, *op.cit.*, 87.

information exchange than requires it, there are no specifications with regard to a refusal to cooperate. This seems to be possible at any point and without motivation (the provision merely states that there is no obligation to discuss or transmit information, ‘in particular if it would be incompatible with important interests or unduly burdensome’, two very vague concepts), in contrast to the US-Australia agreement where four situations are explicitly mentioned as grounds of refusal and where an explanation is required. The EU-Switzerland agreement does provide explicit protection for information coming from leniency or settlement procedures, although the provision lacks detail, which results in uncertainty. Nevertheless, it is still better than a mere policy statement, which is all the parties have to rely on in the US.

Both the EU-Switzerland and US-Australia agreements limit the use of exchanged information. While the former agreement excludes sanctions on natural persons, the latter agreement allows them, but the US does mention whether the information it requests could be used in criminal proceedings, to which Australia can object. The EU-Switzerland agreement moreover allows the imposition of certain binding terms and conditions by the requested authority, again an admirable yet vague provision. It is regrettable that the US-Australia agreement employs the imprecise condition of being ‘essential to a significant law enforcement objective’ to allow use of exchanged information in cases that are not-competition law related, even if the parties that originally submitted the information are given the opportunity to object.

Two issues stand out in both agreements as being particularly under-developed or under-addressed: the treatment of information that is protected by certain rights and privileges, and the lack of an appeal to a decision to transmit information. Both the EU and US style provisions with regard to information protected by certain rights and privileges should be more explicit with regard to the level of protection offered. It is to be commended that in the US-Australia agreement the practice and procedure of the requesting party may be used when for instance taking testimony or during a search and seizure. This is, however, somewhat countered by the fact that the Requested Party may deny assistance if the requested execution would not be authorized by its domestic law.

The protection and confidentiality of exchanged information can be identified as the weakest point in each agreement. Disclosure is not specifically protected and it is unclear which safeguards still apply once information has been disclosed according to the agreement. Criticism on the lack of an appeal procedure, however, does not seem entirely justified. While limitation of

disclosure cannot be fully guaranteed in both agreements, the constraints on the use of the information and the conditions of exchange already minimise the risk companies face when their information is exchanged. Allowing an intermediate appeal would create more opportunity for abuse and delays, than it would create benefits. It would also require notification ‘ex ante’ of the parties of a transmission, which could endanger the benefits of cooperation.

In short, while the basic safeguards offered by both agreements are adapted to the scope of assistance that is available and seem to guarantee a sufficient level of protection, perception may be different due to the lack of detail in the text of the provisions. Guidelines or further clarification would help remedy this situation.

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