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6th AIJA Antitrust Conference

## Session 2: Crossing Borders in international investigations

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1. Discovering the truth and leniency applications
2. Oral statements and other strategies to limit civil claims risks
3. Coordinating international procedures
4. Curse or blessing: Blocking statutes and data protection

# Discovering the truth and leniency applications

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## > **Discovering the truth**

- > How to handle increasing data volume?
- > How to deal with different languages?
- > How to organize an (electronic) search cross-border (eg predictive coding)?
- > How to cope with diverging legal systems (data protection, employment/telecommunication rules etc.)?

# Discovering the truth and leniency applications

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## > **Leniency applications**

- > How to deal with uncertainties regarding competence?
- > ECJ, decision of 20.01.2016, C-428/14, DHL Express (Italy):  
No legal link between a leniency application to the European Commission and an application to a National Competition Authority
- > How to deal with different cooperation obligations and potential damages claims?

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# Oral statements and other strategies to limit civil claims risks

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- > Potential Follow-on Damage Litigation Should be Part of the Analysis Every Step of the Way
- > The Party's Statements and Documents
  - > Oral Statements
    - > Careful: the “memory stick”
    - > Settlement submissions
  - > Avoid creating other discoverable documents
  - > Redacting oral statements/documents retrospectively
- > Careful with Privilege
  - > In-house/non-EU lawyers
  - > Protection of rights of defense
  - > Other jurisdictions
  - > Waiver of privilege

# Oral statements and other strategies to limit civil claims risks

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- > Commission Documents
  - > Careful with Commission communications – e.g.:
    - > Email
    - > Statement of Objections
    - > Draft settlement submission
  - > Careful review of Commission drafts
    - > Avoid statements declaring or suggesting finding of harm/effect
    - > Limit references to US
- > Limit Links to US
  - > Corporate entities
  - > US conduct?
  - > US employees?

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# Coordinating international procedures

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- > National investigations with an international character
  - > Same cartel, with same individuals, covering several jurisdictions (e.g. Flour cartel)
  - > E.g. Benelux investigations of companies that are integrated across borders
  - > Cross-border judicial assistance leading to own investigations in assisting jurisdiction
  - > ne bis in idem?

# Coordinating international procedures

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- > Cooperation duties in dawn raids / digital data access
  - > The European Commission's explanatory note: "*The Inspectors may search the IT-environment (e.g. servers, desktop computers, laptops, tablets and other mobile devices) and all storage media (e.g. CD-ROMs, DVDs, USB-keys, external hard disks, backup tapes, cloud services) of the undertaking.*"
  - > How to deal with centralized data outside of the jurisdiction? → covered by cooperation duty?
  - > Inside / Outside EU → Assistance by NCAs or cooperation agreements (e.g. Switzerland)
  - > Trans-border access to stored computer data only with consent of the state where data is stored or in case of publicly available data (Art. 32 of Convention on Cybercrime)
  - > Inspection decision does not cover third party service providers

# Coordinating international procedures

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- > **Be aware of unique Chinese characters**
- > Powerful and aggressive agencies
- > Lack of procedural transparency and detailed guidance on practical issues:
  - > No statement of objection,
  - > No public announcement of the opening of the investigation,
  - > No right to access the authorities' files
  - > Request to interview foreigners in China
  - > Suspension or termination decision might be rendered by oral notice
  - > Lack of formal procedure for leniency program
  - > No legal privilege for professionals

# Coordinating international procedures

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- > **Be aware of unique Chinese characters**
- > Request for Information could be onerous and burdensome
- > Significant discretionary power on determining the monopolistic behavior and deciding penalties
- > Right to state the opinions vs right to defence
- > Investigations follow the international cartel cases

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# Disclosing to foreign authorities

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- > Activities on behalf of a foreign state:
  - > Article 271 Swiss Criminal Code aims at preventing foreign countries from circumventing international conventions on judicial assistance:

*“Any person who, without authorization, carries out activities on behalf of a foreign state on Swiss territory, provided that such activities fall within the competence of a public authority or public official, [...] is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year”*
  - > Prior authorization can be requested
  - > Official act: e.g. gathering, compiling and establishing of means of evidence (e.g. documents, witness statements, depositions, databases) for use in foreign court proceedings
  - > How to deal with cross-border investigations while cooperating?

# Disclosing to foreign authorities

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## > Activities on behalf of a foreign state (continued): clarification provided in competition law procedures:

The European Commission regularly addresses requests for information on the implementation of competition law to companies located in Switzerland. Such requests may also be sent to a Swiss parent company via a subsidiary located in a Member State of the EU if the subsidiary is unable to provide the requested information.

Until 17 May 2013, some companies did not respond to requests for information from the European Commission until they had received authorisation from the Federal Department of Economic Affairs, Education and Research (EAER) due to Article 271 of the Swiss Criminal Code (SCC) (unlawful activities on behalf of a foreign state).

Since 17 May 2013, an exchange of notes between the Federal Council (via the Mission of Switzerland to the EU) and the European Commission addresses the issue of notification of acts of public authority in the area of competition policy<sup>1</sup>.

Therefore, if questionnaires from the European Commission are not mandatory for companies located in Switzerland, that is, if the companies are not penalised by the EU for failing to respond, they are not considered acts of public authority and responding to them does not require the authorisation of the EAER under Art. 271 SCC.

NB: This note does not exempt the Swiss companies concerned from their legal obligations (especially in terms of data protection).

# Disclosing to foreign authorities

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- > Data protection:
  - > Data Protection applies to all data pertaining to natural persons and legal persons ("personal data").
  - > Data protection legislation also imposes certain restrictions on the cross-border transfer of documents and information, that need to be taken into consideration in any given case if personal data are at issue.
  - > Disclosure to foreign authorities may be a problematic act of data processing
  - > Proportionate disclosure: no unnecessary private or sensitive data? → need for a pre-screening and redaction?



# Cooperation with foreign law firms

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- > Need for international coordination and review of data located in CH
- > Technically possible by providing access to remote session in CH on a server physically located in CH
- > Potential data protection issue under Swiss DPAAct
  - > Data includes information related to persons
  - > Providing remote access is equal to a “cross border disclosure” (article 6 DPAAct)
    - > Need for a legislation with adequate protection in the country of destination, or
    - > Conclusion of a data privacy agreement based e.g. on EU model clauses (to be notified to Federal Data Protection Commissioner), or
    - > Agreement by all persons