

## **AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE GOVERNMENT OF JAPAN CONCERNING COOPERATION ON ANTI-COMPETITIVE ACTIVITIES<sup>122</sup>**

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THE EUROPEAN COMMUNITY, of the one part, and THE GOVERNMENT OF JAPAN, of the other part (hereinafter referred to as “the Parties”):

RECOGNISING that the world’s economies, including those of the European Community and Japan, are becoming increasingly interrelated;

NOTING that the sound and effective enforcement of competition laws of the European Community and Japan respectively is a matter of importance to the efficient functioning of their respective markets and to trade between them;

NOTING that the sound and effective enforcement of competition laws of the European Community and Japan respectively would be enhanced by cooperation and, where appropriate, coordination between the Parties in the application of those laws;

NOTING that from time to time differences may arise between the Parties concerning the application of the competition laws of the European Community and Japan respectively;

NOTING their commitment to give careful consideration to the important interests of each Party in the application of the competition laws of the European Community and Japan respectively (hereinafter referred to as the “competition laws of each Party”); and

HAVING REGARD to the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade, as revised July 27 and 28, 1995, and to the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Effective Action Against Hard Core Cartels adopted on March 25, 1998;

HAVE AGREED AS FOLLOWS:

### **Article 1**

1. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through promoting cooperation and coordination between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters pertaining to the application of the competition laws of each Party.

2. For the purposes of this Agreement:

- (a) the term “anti-competitive activities” means any conduct or transaction that may be subject to sanctions or other relief under the competition laws of the European Community or Japan;

- (b) the term “competent authority of a Member State” means one authority for each Member State mentioned in Article 299(1) of the Treaty establishing the European Community competent for the application of competition laws. Upon signature of this Agreement a list of such authorities will be notified by the Commission of the European Communities to the Government of Japan. The Commission will notify to the Government of Japan an updated list each time this becomes necessary. No information pursuant to paragraph 6 of Article 9 of this Agreement shall be sent to a competent authority of a Member State before this authority is included in the list notified by the Commission to the Government of Japan;
- (c) the terms “competition authority” and “competition authorities” mean:
  - (i) for the European Community, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Community; and
  - (ii) for Japan, the Fair Trade Commission;
- (d) the term “competition laws” means:
  - (i) for the European Community, Articles 81, 82, and 85 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and their implementing Regulations pursuant to the said Treaty, as well as any amendments thereto; and
  - (ii) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No 54, 1947) (hereinafter referred to as “the Antimonopoly Law”) and its implementing regulations as well as any amendments thereto;
- (e) the term “enforcement activities” means any application of competition laws by way of investigation or proceeding conducted by the competition authority of a Party. However, research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries are not included. Such research, studies or surveys shall not be construed so as to include any investigation with regard to suspected violation of competition laws;
- (f) the term “the territory of a Party”, “the territory of the Party” and “the territory of the other Party” means the territory to which the Treaty establishing the European Community applies or the territory of Japan, as the context requires;
- (g) the term “the laws and regulations of a Party”, “the laws and regulations of the Party” and “the laws and regulations of the other Party” means the laws and regulations of the European Community or the laws and regulations of Japan, as the context requires.

## **Article 2**

1. The competition authority of each Party shall notify the competition authority of the other Party with respect to the enforcement activities that the notifying competition authority considers may affect the important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party include those that:

- (a) are relevant to enforcement activities of the other Party;
- (b) are against a national or nationals of the other Party (in the case of the European Community a national or nationals of the Member States of the European Community), or against a company or companies incorporated or organised under the applicable laws and regulations within the territory of the other Party;
- (c) involve anti-competitive activities, other than mergers or acquisitions, carried out in any substantial part within the territory of the other Party;
- (d) involve a merger or acquisition in which:
  - (i) one or more of the parties to the transaction; or
  - (ii) a company controlling one or more of the parties to the transaction, is a company incorporated or organised under the applicable laws and regulations within the territory of the other Party;
- (e) involve conduct considered by the notifying competition authority to have been required, encouraged or approved by the other Party; or
- (f) involve the imposition of, or application for, sanctions or other relief by a competition authority that would require or prohibit conduct within the territory of the other Party.

3. Where notification is required pursuant to paragraph 1 of this Article with respect to mergers or acquisitions, such notification shall be given not later than:

- (a) in the case of the European Community,
  - (i) the Decision to initiate proceedings with respect to the concentration, pursuant to Article 6(1)(c) of Council Regulation (EEC) No 4064/89; and
  - (ii) the issuance of a Statement of Objections;
- (b) in the case of Japan,
  - (i) the issuance of request to submit documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law; and
  - (ii) the issuance of a Recommendation or the Decision to initiate a hearing.

4. Where notification is required pursuant to paragraph 1 of this Article with respect to matters other than mergers or acquisitions, notification shall be given as far in advance of the following actions as is practically possible:

- (a) in the case of the European Community,
  - (i) the issuance of a Statement of Objections; and
  - (ii) the adoption of a Decision or settlement;
- (b) in the case of Japan,

- (i) the filing of a criminal accusation;
- (ii) the filing of a complaint seeking an urgent injunction;
- (iii) the issuance of a Recommendation or the Decision to initiate a hearing; and
- (iv) the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued.

5. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effects of the enforcement activities on its own important interests.

### **Article 3**

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the Party rendering the assistance and the important interests of that Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of the Party, and the important interests of that Party:

- (a) inform the competition authority of the other Party with respect to its enforcement activities involving anti-competitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other Party;
- (b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anti-competitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and
- (c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

### **Article 4**

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;

- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective relief against the anti-competitive activities involved;
- (d) the opportunity to make more efficient use of resources;
- (e) the possible reduction of cost to the persons subject to the enforcement activities; and
- (f) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activities, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

### **Article 5**

1. If the competition authority of a Party believes that anti-competitive activities carried out in the territory of the other Party adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the competition authority of the other Party initiate appropriate enforcement activities.

2. The request shall be as specific as possible about the nature of the anti-competitive activities and their effect on the important interests of the Party of the requesting competition authority, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

3. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anti-competitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition

authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request, or precludes the requesting Party's competition authority from withdrawing its request.

### **Article 6**

1. The competition authority of each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of sanctions or other relief sought in each case.

2. When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall endeavour to provide timely notice of significant developments of such enforcement activities.

3. Where either Party considers that enforcement activities by a Party may adversely affect the important interests of the other Party, the Parties should consider the following factors, in addition to any other factor that may be relevant in the circumstances in seeking an appropriate accommodation of the competing interests:

- (a) the relative significance to the anti-competitive activities of conduct or transactions occurring within the territory of a Party as compared to conduct or transactions occurring within the territory of the other Party;
- (b) the relative impact of the anti-competitive activities on the important interests of the respective Parties;
- (c) the presence or absence of evidence of an intention on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the territory of the Party conducting the enforcement activities;
- (d) the extent to which the anti-competitive activities substantially lessen competition in the market of the European Community and Japan respectively;
- (e) the degree of conflict or consistency between the enforcement activities by a Party and the laws and regulations of the other Party, or the policies or important interests of that other Party;
- (f) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;
- (g) the location of relevant assets and parties to the transaction;
- (h) the degree to which effective sanctions or other relief can be secured by the enforcement activities of the Party against the anti-competitive activities; and
- (i) the extent to which enforcement activities by the other Party with respect to the same persons, either natural or legal, would be affected.

### **Article 7**

1. The Parties may hold, as necessary, consultations through the diplomatic channel on any matter which may arise in connection with this Agreement.
2. A request for consultations under this Article shall be communicated through the diplomatic channel.

### **Article 8**

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in the implementation of this Agreement.
2. The competition authorities of the Parties shall meet at least once a year to:
  - (a) exchange information on their current enforcement efforts and priorities in relation to the competition laws of each Party;
  - (b) exchange information on economic sectors of common interest;
  - (c) discuss policy changes that they are considering; and
  - (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

### **Article 9**

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws and regulations of the Party possessing the information or such communication would be incompatible with its important interests.
2. (a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall only be used by the receiving Party for the purpose specified in paragraph 1 of Article 1 of this Agreement.  
(b) When a Party communicates information in confidence under this Agreement, the receiving Party shall, consistent with the laws and regulations, maintain its confidentiality.
3. A Party may require that information communicated pursuant to this Agreement be used subject to the terms and conditions it may specify. The receiving Party shall not use such information in a manner contrary to such terms and conditions without the prior consent of the other Party.
4. Each Party may limit the information it communicates to the other Party when the latter Party is unable to give the assurance requested by it with respect to confidentiality, with respect to the terms and conditions it specifies, or with respect to the limitations of purposes for which the information will be used.

5. This Article shall not preclude the use or disclosure of information, other than publicly available information, by the receiving Party to the extent that:

- (a) the Party providing the information has given its prior consent to such use or disclosure, or
- (b) there is an obligation to do so under the laws and regulations of the Party receiving the information. In such case, the receiving Party:
  - (i) shall not take any action which may result in a legal obligation to make available to a third party or other authorities information provided in confidence pursuant to this Agreement without the prior consent of the Party providing the information;
  - (ii) shall, wherever possible, give advance notice of any such use or disclosure to the Party which provided the information and, upon request, consult with the other Party and give due consideration to its important interests; and
  - (iii) shall, unless otherwise agreed by the Party which provided the information, use all available measures under the applicable laws and regulations to maintain the confidentiality of information as regards applications by a third party or other authorities for disclosure of the information concerned.

6. The competition authority of the European Community,

- (a) after notice to the Japanese competition authority, will inform the competent authorities of the Member State or Member States whose important interests are affected of the notifications sent to it by the Japanese competition authority;
- (b) after consultation with the Japanese competition authority, will inform the competent authorities of such Member State or Member States of any cooperation and coordination of enforcement activities; and
- (c) shall ensure that information, other than publicly available information, communicated to the competent authorities of the Member State or Member States pursuant to subparagraphs (a) and (b) above shall not be used for any purpose other than the one specified in paragraph 1 of Article 1 of this Agreement, as well as that such information shall not be disclosed.

### **Article 10**

1. This Agreement shall be implemented by the Parties in accordance with the laws and regulations in force in the European Community and Japan respectively and within the available resources of their respective competition authorities.

2. Detailed arrangements to implement this Agreement may be made between the competition authorities of the Parties.

3. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other bilateral or multilateral agreements or arrangements between the Parties.

4. Nothing in this Agreement shall be construed to prejudice the policy or legal position of either Party regarding any issue related to jurisdiction.

5. Nothing in this Agreement shall be construed to affect the rights and obligations of either Party under other international agreements or under the laws of the European Community or Japan.

### **Article 11**

Unless otherwise provided in this Agreement, communications under this Agreement may be directly carried out between the competition authorities of the Parties. Notifications under paragraph 2(b) of Article 1, Article 2 and requests under paragraph 1 of Article 5 of this Agreement, however, shall be confirmed in writing through the diplomatic channel. The confirmation shall be made as promptly as practically possible after the communication concerned between the competition authorities of the Parties.

### **Article 12**

1. This Agreement shall enter into force on the thirtieth day after the date of signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing through the diplomatic channel that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than five years from the date of its entry into force.

IN WITNESS WHEREOF, the undersigned, being duly authorised, have signed this Agreement.

DONE at Brussels in duplicate, on this 10th day of July 2003, in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish and Japanese languages. In case of divergence the English and Japanese texts shall prevail over the other language texts.

FOR THE EUROPEAN COMMUNITY

FOR THE GOVERNMENT OF JAPAN

### **AGREED MINUTES**

The undersigned wish to record the following understanding which they have reached during the negotiation of the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (hereinafter referred to as the "Agreement") signed today:

Both Parties confirm their understanding that:

(1) the Government of Japan is not required to communicate to the European Community under the Agreement "trade secrets of entrepreneurs" covered by the provisions of Article 39 of the Law Concerning Prohibition of Private Monopoly and Mainte-

nance of Fair Trade (Law No 54, 1947), except for those communicated with the consent of the entrepreneurs concerned and in accordance with the provisions of paragraph 4 of Article 4 of the Agreement; and

- (2) the European Community is not required to communicate to the Government of Japan under the Agreement confidential information covered by Article 20 of Regulation 17/1962, except for the information communicated in accordance with the provisions of paragraph 4 of Article 4 of the Agreement.

FOR THE EUROPEAN COMMUNITY

FOR THE GOVERNMENT OF JAPAN