Enhanced EU/Japan co-operation: the Commission proposes to conclude an agreement

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Introduction

On May 8, 2002, the Commission adopted a Proposal for a Council and Commission Decision concluding the Agreement between the European Communities and the Government of Japan concerning cooperation on anticompetitive activities (1). Annexed to this proposal is a draft of the envisaged EU/Japan bilateral agreement. The draft agreement is the result of intensive negotiations between the Commission and the Government of Japan — in Tokyo and Brussels — from June 2000 till May 2002. It must be noted here that the Commission conducted the negotiation of the proposed draft text on the basis of directives approved by the Council on 8.6.2000. The envisaged agreement will usefully reinforce the expanding network of bilateral competition cooperation agreements, next to agreements such as the 1991 (2) and 1998 (3) EU/US agreements, the 1999 (4) EU/Canada agreement and the 1999 (5) US/Japan agreement.

Procedural aspects

Since the Commission’s proposal to the Council, the institutional framework governing the conclusion of such bilateral competition cooperation agreements in the past has been slightly modified due to the expiration of the ECSC Treaty on July 23, 2002. Before that date, and to the extent that such international agreements applied to ECSC products, the legal basis for the Commission to conclude them was offered by Art. 65 and 66 of the ECSC Treaty. The subject matter covered by the ECSC Treaty has, upon its expiry, been covered by the EC Treaty. Consequently, and as far as international agreements already concluded by the ECSC are concerned, the Commission proposed to the Council to adopt a decision transferring the rights and obligations flowing from these international agreements to the EC (6).

In the future, the conclusion of bilateral cooperation agreements on competition matters will be decided and carried out solely by the Council on the basis of Art. 83 and 308 of the EC Treaty in conjunction with the first subparagraph of Art. 300 paragraph 3 of the same Treaty. As needed for such agreements, before taking a decision on the text proposed by the Commission, the Council consulted the European Parliament which approved the text on July 3, 2002. The procedure for the adoption and the signature of the Agreement will now be continued in the Council.

Basic provisions

To a large extent the draft agreement is similar to the 1999 EU/Canada and US/Japan ones. All the usual clauses and tools of bilateral antitrust cooperation are present. Below is presented the content of the proposed agreement with emphasis on the most important provisions:

Objectives and definitions

The envisaged agreement aims at establishing a system of cooperation and coordination between the competition authorities of the two sides, essentially in order to promote the effectiveness of antitrust enforcement on each side and to reduce the likelihood of conflicting or overlapping

(4) Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ L 175, 10.7.1999.
(5) Available online at http://www.usdoj.gov/atr/public/international/docs/3740.htm
decisions. The two competition authorities involved are the European Commission, on the EU side, and the Japanese Fair Trade Commission (the ‘JFTC’) on the Japanese side.

In addition to the usual terms, such as ‘anticompetitive activities’ or ‘competition laws’, the draft text defines the meaning - for the purposes of the agreement – of the term ‘competent authority of a Member State’. Pursuant to Art. I.2.(b) this term means one authority for each Member State mentioned in Art. 299(1) of the EC Treaty competent for the application of competition laws. After the conclusion of the agreement, the Commission will be expected to notify a list of such authorities to the Government of Japan, and to maintain this list up-to-date when necessary (mainly after an enlargement of the EU or the establishment of a new competition authority). This provision reflects on one hand the increasing cooperation regarding enforcement activities that takes place within the network of European Competition Authorities — and the need for relevant information to circulate between members of the network —, while, on the other, providing Japan with a guarantee that the information it will supply under the agreement will not end up with recipients that can not be precisely identified in advance. As far as the other definitions are concerned, it is also interesting to note that market research, studies and surveys are outside the scope of the term ‘enforcement activities’, if — and for so long as — they are not linked to a suspected infringement of competition rules. Finally, the term ‘territory of a Party’ means for the EU ‘the territory to which the Treaty establishing the European Community [...] apply.’

**Notifications**

The two competition authorities will exchange notifications and inform each other each time one of them considers that its enforcement activities may affect ‘important interests’ of the other. According to Art. II.2, this would in principle be the case when investigations by one authority are related to investigations in the same case by the other authority, when they are directed against nationals of the other party to the agreement (the draft specifies that in the case of the EU this refers to nationals of the Member States of the EU) or against companies incorporated or organised under the applicable laws and regulations within the territory of the other party. Notifications will also be carried out in the case of investigations involving anticompetitive activities carried out in any substantial part within the territory of the other party, concerning a merger or acquisition in which a company incorporated within the territory of the other party is involved, concerning conduct considered by the notifying competition authority to have been required, encouraged or approved by the other party, or when they are expected to lead to sanctions that would require or prohibit conduct within the territory of the other party.

Notifications and exchanges of information can be carried out at any point during the investigation of a case. However, specific provisions in the draft agreement specify a number of ‘triggering’ events which should provoke a notification, if the other conditions and circumstances are such that a notification is required in the particular case. As regards merger cases, the events that would trigger a notification would be i) for the EC the Decision to initiate proceedings with respect to the concentration, pursuant to Art. 6(1)(c) of Council Regulation (EEC) No. 4064/89 and the issuance of a Statement of Objections, and ii) for Japan the issuance of a request to submit documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law and the issuance of a Recommendation or the Decision to initiate a hearing in a merger case (Art. II.3). As regards non-merger cases, notifications are carried out as far in advance as practically possible before i) for the EC, the issuance of a Statement of Objections and the adoption of a Decision or settlement, and ii) for Japan, the filing of a criminal accusation, the filing of a complaint seeking an urgent injunction, the issuance of a Recommendation or the Decision to initiate a hearing and the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued (Art. II.4). The general approach here is that the notification should take place at a stage in the proceedings early enough to allow the Party receiving the notification to react to it and the Party handling the case to take account of the other Party’s opinion. Notifications are expected to be sufficiently detailed to permit an initial evaluation by the Party receiving the notification of the effects of the enforcement activities carried out by the other Party on its important interests.

**Enforcement assistance and coordination**

The two authorities are expected to assist one another whenever their laws, their important interests and their reasonably available resources allow them to do so. In particular, one competition authority will inform the other of certain enforcement activities it undertakes that involve infringements affecting competition conditions in the territory policed by the other authority, will provide
information that will assist the other authority to launch enforcement activities and will, subsequently, provide it with information relevant to such enforcement activities (Art. III).

In certain cases, the two authorities will be carrying out ‘related proceedings’ (proceedings open simultaneously on both sides and investigating one and the same conduct or closely related conduct, e.g. a multi-product international cartel active in both the EC and Japan or involving firms from both the EC and Japan). In such cases a specific anti-competitive conduct on the market of one Party may be associated with identical conduct on the market of the other and evidence on a specific illegal activity may be located on the territory of both parties. Under such circumstances, the two competition authorities can profitably coordinate their activities, including their respective investigations and provide each other with assistance, always to the extent compatible with their respective laws, important interests and reasonably available resources (Art. IV).

The draft contains the usual clauses detailing the factors to be taken into account in order to decide whether coordination should be envisaged on a specific related case (Art. IV.2) and urging each competition authority to give careful consideration to the objectives pursued by the other authority in its enforcement activities (Art. IV.3). Interestingly, Art. IV.4 provides that when the two authorities cooperate on a related case, one authority — upon a specific request from the other — may seek to obtain a waiver from a person that has provided it with confidential information, in order to share this information with the authority that has emitted the specific request. Finally, either side may at any time notify the other of its intention to limit or terminate the coordination and pursue its enforcement activities independently (Art. IV.5).

**Positive and Negative Comity**

Art. V.1 of the draft is the usual ‘positive comity’ clause, which allows a Party whose interests are adversely affected by activities within the other Party’s jurisdiction to bring the matter to the other Party’s attention. The latter Party might have been unaware of the problem or might not have considered it a priority. Once it is aware of the situation and of the fact that it affects the important interests of the other Party, the requested Party may, at its own full discretion, take any appropriate measure to enforce its competition rules. Art. V.2 stipulates the contents of the ‘positive comity’ request. Art. V.3 states that the obligations of the Party receiving a ‘positive comity’ request is to consider it carefully and to inform the requesting Party of its decision as soon as practically possible. However, if the requested Party decides to initiate enforcement activities, the requested Party’s competition authority shall inform the requesting Party of significant developments and the outcome of the activities. Finally, the requested Party’s competition authority has full discretion in its decision whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request and that nothing in this article can preclude the requesting Party from withdrawing its request.

Art. VI.1 is otherwise known as the ‘negative’ or ‘traditional comity’ clause. It provides that each Party shall give careful consideration to the other Party’s important interests throughout all phases of competition enforcement activities. According to Art. VI.2, once a case has been earmarked for traditional comity, each Party shall endeavor to provide timely notice of significant developments in its enforcement activities. Art. VI.3 sets out several factors that the Parties will consider whenever their enforcement activities may adversely affect the important interests of the other Party. The concept of ‘important interests’ must be understood in terms of the purpose of the Agreement, which is the establishment of effective cooperation in the competition sphere. The interests referred to must therefore be important by reference to that objective.

**Exchange, use and protection of confidential information**

One of the key provisions in the proposed agreement (Art. IX) contains the rules governing the treatment of confidential information. Art. IX.1 provides that neither Party is required to communicate information to the other where communication is prohibited by its laws or incompatible with its interests. Art. IX.2a states that information exchanged may be used only for the purposes of the Agreement. Art. IX.2b states that information communicated in confidence between the Parties or their competition authorities must be maintained confidential. Art. IX.3 provides that information exchanged under the agreement must be used in accordance with the terms and conditions specified by the Party providing the information. Art. IX.4 provides that when uncertain on the capacity of the other side to provide all necessary guarantees and protections requested, a Party may limit the information it communicates.
Art. IX.5 provides for certain exceptions from the above rules of absolute protection of information exchanged under the agreement. This is the case when (a) the Party using the information has obtained the prior consent of the Party providing the information and (b) under certain conditions, when the receiving Party has a legal obligation to grant access to the information. In such cases the receiving Party i) shall not take any action which may result in a legal obligation to make information provided under this Agreement available to a third party, without the prior consent of the providing Party, ii) shall, when possible, give advance notice to the providing Party, upon request consult with it, and give due consideration to its important interests, and iii) shall use all available measures under its 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.

Finally, Art. IX.6 ensures that any EC Member State concerned by the enforcement activities of the Japanese competition authority is kept informed of all notifications received under the agreement. The competent authorities of the EC Member States concerned will also be informed of any cooperation and coordination of enforcement activities. In this regard, a request from the Japanese competition authority not to disclose confidential information should be respected.

Conclusion

The proposal of the Commission to the Council stresses the interest for the EU to reinforce its bilateral cooperation with Japan — one of our main trading partners — in the area of competition enforcement. Indeed, an important number of firms based in Japan are active in the European markets and European firms are increasingly interested in developing their activities in the Japanese markets and could benefit from the proposed cooperation agreement between the two sides regarding the application of their respective competition rules. The envisaged agreement, if concluded by the Council, will increase the ability of the Commission and the Fair Trade Commission of Japan to work together on competition cases of mutual interest and assist each other. This, in turn, will increase the effectiveness of enforcement and the likelihood that anti-competitive activities can be brought to an end as soon as possible. The envisaged agreement will also lead to a much closer relationship between the Commission and the JFTC and to a greater understanding of each other’s competition policies. Co-ordination will also benefit companies by ensuring that they are not unnecessarily subjected to conflicting demands by the competition authorities. For these reasons, the Commission has proposed that the Council proceeds with the conclusion of such an agreement on the basis of the negotiated draft.