

Enhanced Sharing of Antitrust Evidence: New EU/Japan Cooperation Agreement

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The review is understood to focus primarily on the facilitation of exchanges of information and evidence between the Japan Fair Trade Commission and the EU Commission. If the negotiations prove successful, it would be the second time that each of the agencies has entered into a “second generation” co-operation agreement. The JFTC entered into a second generation co-operation agreement with the Australian Competition and Consumer Commission in April 2015 and a second generation agreement between the European Union and the Swiss Confederation was signed in May 2013.

Background

One of the key features of a second generation co-operation agreement is that it allows the respective competition authorities to exchange confidential information acquired during investigations, e.g., through requests for information or on-site inspections, without having to obtain prior consent or waivers from the company that provided the information. Such exchanges of information were endorsed by the Organisation for Economic Cooperation and Development in its 2014 Recommendation Concerning International Co-operation on Competition

Investigations and Proceedings.

Although the provision of consent would normally be encouraged by the regulators, companies investigated by competition authorities frequently refuse to agree to such exchanges of information or provide only a limited waiver. This is primarily because businesses want to avoid incurring the costs that are associated with extra document productions and translations, and they do not want to undermine the value (or jeopardise the success) of any leniency applications in the other country. The existence of differences in leniency regimes between jurisdictions could cause an exchange of information to bring about significant snowball effects, for example by virtue of the existence of a “leniency +” regime.

New Co-operation Agreement

In negotiating and drafting the revised EU/Japan co-operation agreement, the JFTC and the Commission will undoubtedly draw on their respective experiences from the existing second generation co-operation agreements. It is likely, therefore, that the new co-operation agreement will incorporate the following features:

- A general rule that the competition authorities are not obliged to discuss or transmit information obtained through investigations, but instead enjoy full discretion to determine whether or not to share information in their possession (point 4.3 of the Australian agreement and Article 7(5) of the Swiss agreement).
- A prohibition on the discussion and exchange of information obtained under the leniency or settlement procedures, unless the company that provided the information has given its express consent (Article 7(6) of the Swiss agreement).
- A requirement for requests for information to be substantiated by the requesting competition authority. This would involve providing a description of the subject matter and nature of the on-going investigation, the relevant legal provisions and the names of the companies involved (Article 7(4)(b) of the Swiss agreement).
- The protection of any personal data communicated as part of an exchange (Articles 7(3) and 9(3) of the Swiss agreement).

The revised JFTC/EU co-operation agreement will have to deal with the fact that the concept of attorney-client privilege does not exist in Japan. Documents that would otherwise be legally privileged in most EU Member States may therefore be obtained by the JFTC and transmitted to the Commission. A provision preventing privileged documents from being exchanged by the competition authorities may stop the flow of such evidence from the European Union to Japan, but not vice versa.

Implications

With enhanced evidence-sharing capabilities under a future co-operation agreement, the JFTC and the Commission may become more successful, and therefore more active, in pursuing cases involving European and Japanese companies.

On one hand, effective information exchanges can make public enforcement more

efficient by decreasing the length of the evidence-gathering stage of antitrust investigations. On the other hand, companies may need to rush to apply for leniency in both jurisdictions to ensure the highest reductions of fines that are determined by reference to factors such as the importance of evidence handed over by the company relative to the information that is already in the possession of the regulator.

It would also be advisable for Japanese companies to ensure that documents containing legal advice are properly labelled, e.g., “subject to legal professional privilege”, and to warn the JFTC that such documents should not be transmitted to the Commission.

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