

# European Commission and Japan Fair Trade Commission agree to update their cooperation agreement, facilitating information exchange during investigations

On 15 March 2016, the EU Commissioner for Competition, Margrethe Vestager, and Japan Fair Trade Commission Chairman, Kazuyuki Sugimoto, agreed to start preparations for negotiating an update to the existing EU/Japan Cooperation Agreement on Anticompetitive Activities. If the revisions follow the model set by other recent cooperation agreements, the authorities will be able to exchange confidential information without the consent of the provider.

## Tell one, tell all

**The aim of the negotiations, according to a statement from the European Commission ("EC"), will be to allow for the exchange of evidence obtained during investigations of related conduct.**

Commissioner Vestager said: "*For more than a decade now, the European Commission and the Japan Fair Trade Commission have benefitted from a strong relationship based on our existing Cooperation Agreement. Today, Chairman Kazuyuki Sugimoto and I have committed to take the cooperation to the next level by preparing the necessary steps to enable the two authorities to exchange evidence during common investigations.*"

The update to the Cooperation Agreement could have a potentially significant impact, having regard to the innovative information exchange provisions in recently concluded

bilateral cooperation agreements, such as between the EU and Switzerland and between Japan and Australia.

## The current EU/Japan Cooperation Agreement

The existing Cooperation Agreement, enacted in July 2003, provides for mutual notification of enforcement activities affecting each other's important interests, for one party to ask the other to investigate anti-competitive conduct in its jurisdiction that may harm interests in the territory of the requesting party, to ask one another to take into account at all stages of enforcement the important interests of the other party, as well as to render assistance and to consider coordination of enforcement activities (where the authorities are pursuing investigations into related matters).

Bilateral cooperation agreements relating to antitrust issues typically involve an agreement to share information between antitrust

## Key issues

- How does the current cooperation arrangement work?
- Will the revised cooperation arrangement allow for the exchange of confidential information of a party without its consent? If so, what safeguards might be included?
- What are the implications for parties subject to EU and Japanese investigations?
- How will the position change if Japan introduces the possibility of fine reductions for cooperation?

authorities, pursuant to certain aspects of their cooperation. Such bilateral cooperation agreements usually entail safeguards with respect

to sharing confidential information, such as requiring a waiver from the undertaking that has provided the information, as is the case with the current Cooperation Agreement between Japan and the EU.

The US/EU antitrust cooperation agreement, concluded in 1991, similarly prevents the EC and US antitrust agencies from exchanging confidential information in the absence of express waivers from the source of any information. The EU's cooperation agreements with Canada and Korea also include these limitations on the exchange of confidential information, as does the US/Japan antitrust cooperation agreement.

### "Second-Generation" cooperation agreements

Certain more recently concluded bilateral cooperation agreements facilitate inter-agency information exchange by permitting competition agencies to exchange confidential information they have obtained in their respective investigations, without a waiver. These are referred to as "second-generation" cooperation agreements.

For example, the EU and Switzerland concluded a bilateral cooperation agreement in May 2013, permitting confidential information to be shared between the agencies without an undertaking's consent. The EC press release stated in respect of the information exchange provisions of the agreement with Switzerland: "[s]uch an advanced form of cooperation between competition authorities is an innovation in a bilateral cooperation agreement."

Japan and Australia entered into a similar second-generation

cooperation agreement in April 2015, in which they agreed that the Japan Fair Trade Commission ("JFTC") and Australian competition authority ("ACCC") would share information, including confidential information. In the statement announcing the agreement, the ACCC chairman, Rod Sims, noted, "[t]his is the first time the JFTC has concluded an agreement that will enable the JFTC to share confidential information without getting a waiver."

It is to be expected that the trend towards second-generation cooperation agreements will continue, in particular in light of the OECD's September 2014 Recommendation concerning cooperation in competition investigations, recommending the adoption of legal provisions that allow the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information.

Against this background, the announcement that the JFTC and the EC will seek to update the information exchange provisions of the existing Cooperation Agreement can certainly be seen as a signal that the parties intend to move towards a second-generation cooperation agreement.

### Comments on the move towards a second-generation agreement by the EU and Japan

Facilitating the exchange of confidential information between the EU and Japan may be partly in response to the need to ensure closer cooperation with respect to cartel investigations. Undertakings under investigation for cartel conduct may be less likely to provide voluntary

confidentiality waivers permitting agencies to share information with other agencies, than in other types of investigations (e.g., mergers). Indeed, the EC noted in its 2000 Report on Competition Policy that the inability to share confidential information without a waiver was the reason for less frequent EU/US inter-agency contact relating to cartel investigations, compared to other types of investigations. Thus, a second-generation cooperation agreement between the EC and the JFTC could give the agencies stronger capabilities to pursue enforcement action against cartel conduct. Moreover, after the EC and the JFTC enter into the second-generation cooperation agreement, the agencies will more easily be able to find out whether undertakings submitted certain evidence only to one authority, which will make it more important for undertakings to be consistent regarding the submission of evidence to the competition authorities.

The decision to update the existing Cooperation Agreement should also be considered in light of the fact that the JFTC is exploring the adoption of a discretionary fine model. Under a discretionary fine model, companies may receive lower fines if they cooperate fully with the competition authority – with one possible measure of cooperation being the extent and nature of evidence supplied by the company under investigation. Once the update to the existing Cooperation Agreement is negotiated and implemented, and if the JFTC were to introduce a discretionary fine model, the JFTC may receive more evidence from companies under investigation. As a result, the EC could also benefit through the updated information exchange provisions.

Although second-generation agreements generally do not require waivers to be obtained from the source of information, second-generation agreements do contain other confidentiality safeguards and limit the type of information that can be exchanged without a waiver. In addition, there may be restrictions under national laws regarding the information that can be shared with other competition authorities. It can be expected that the updated EU/Japan agreement will also reflect such limitations and safeguards. For example, under Japanese law, the JFTC cannot provide information if doing so is likely to interfere with the proper execution of the Anti-Monopoly Act of Japan or to infringe on the interests of Japan. In this regard, under the cooperation agreement between the JFTC and the ACCC, the JFTC does not intend to provide depositions and information provided by leniency applicants, in order to ensure full cooperation from deposition witnesses and leniency applicants. Similar treatment could be expected under the updated

agreement between the EC and the JFTC.

The EU/Switzerland cooperation agreement (in addition to placing restrictions on the exchange of evidence obtained through leniency procedures) prohibits the exchange of information that would infringe the procedural rights and privileges guaranteed under the laws of the parties, including the right against self-incrimination and the legal professional privilege. There is no concept equivalent to legal professional privilege under Japanese law - there are some protections for confidential information held by lawyers, but materials in the possession of the client are unprotected - and the Japanese Government's advisory panel concluded in 2014 that "*it is not appropriate to introduce attorney-client privilege at the present stage.*"

Consequently, it would in theory be possible for the JFTC to share information with the EC that would qualify as privileged in the EU. However, it would seem likely that the

updated EU/Japan agreement would seek to account for this and formulate limitations with similar effects as the EU/Switzerland cooperation agreement.

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