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Proposal for a

**COUNCIL DECISION**

**concluding the Agreement between the Government of the Republic of Korea and the  
European Community concerning cooperation on anti-competitive activities**

(presented by the Commission)

Proposal for a

**COUNCIL DECISION**

**concluding the Agreement between the Government of the Republic of Korea and the European Community concerning cooperation on anti-competitive activities**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 (ex Article 87) and 308 (ex Article 235),

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) Given the increasingly pronounced international dimension to competition problems, international cooperation in this field should be strengthened.
- (2) The sound and effective enforcement of competition laws is a matter of importance to the efficient operation of the markets and to international trade.
- (3) Elaboration of the principles of positive comity in international law and implementation of those principles in the enforcement of the competition laws of the European Community and South Korea are likely to increase the effectiveness in their application.
- (4) To this end, the Commission has negotiated an Agreement with the Government of the Republic of Korea regarding the application of the competition rules of the European Community and South Korea.
- (5) Article 308 of the Treaty must be invoked owing to the inclusion in the text of the Agreement of mergers and acquisitions which are covered by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, which in turn is essentially based on Article 308.
- (6) The Agreement should be approved,

HAS DECIDED AS FOLLOWS:

*Article 1*

The Agreement between the Government of the Republic of Korea and the European Community concerning cooperation on anti-competitive activities is hereby approved on behalf of the European Community.

The text of the Agreement is attached to this Decision.

*Article 2*

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the European Community.

Done at Brussels,

*For the Council  
The President*

## **Agreement between the Government of the Republic of Korea and the European Community concerning cooperation on anti-competitive activities**

The European Community of the one part, and the Government of the Republic of Korea of the other part (hereinafter referred to as "the Parties");

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the European Community and the Republic of Korea;

Noting that the European Community and the Republic of Korea share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets, as well as to economic welfare of consumers of both Parties and trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Further recognizing that cooperation between the Parties' competition authorities will contribute to improving and strengthening their relationship; and

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the revised Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, adopted on July 27 and 28, 1995;

Having regard to the Memorandum of Understanding concluded between the Competition Directorate General of the European Commission and the Fair Trade Commission of the Republic of Korea on 28 October 2004,

Have agreed as follows:

## **Article I – Purpose and Definitions**

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 purpose of this Agreement, the following terms shall have the following definitions:
  - a) the term "anticompetitive activities" means any activities that may be subject to sanctions or other relief under the competition laws of one of the Parties or both Parties;
  - b) 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 the Republic of Korea, the Korea Fair Trade Commission;
  - c) the term "competent authority of a Member State" means the authority/ies of each Member State mentioned in Article 299(1) of the Treaty establishing the European Community competent for the application of competition laws.
  - (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 (EC) No 139/2004 on the control of concentrations between undertakings, and their implementing Regulations as well as any amendments thereto; and
    - (ii) for the Republic of Korea, the Monopoly Regulation and Fair Trade Act, 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 proceedings conducted by the competition authority of a Party;

## **Article II – Notifications**

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 and are relevant to enforcement activities of the other Party include *inter alia*:
  - a) Enforcement activities involving 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;
  - b) Enforcement activities against anticompetitive activities other than concentrations which also take place or took place in significant part within the other Party's territory;
  - c) Enforcement activities which involve a concentration in which one or more parties to the transaction is a company incorporated or organised under the applicable laws and regulations of the territory of the other Party;

d) Enforcement activities which involve a concentration in which a company controlling one or more of the parties to the transaction is a company incorporated or organised under the applicable laws and regulations of the territory of the other Party;

e) Enforcement activities which involve conduct believed to have been encouraged, required or approved by the other Party;

f) Enforcement activities which involve remedies that expressly require or prohibit conduct in the other Party's territory or contain binding obligations for the undertakings in that territory;

3. Notifications with respect to concentrations pursuant to paragraph 1 of this Article shall be given:

a) in the case of the European Community:

i) when initiating proceedings pursuant to Article 6(1)c of Council Regulation (EC) No. 139/2004;

ii) when issuing a Statement of Objections;

b) in the case of the Republic of Korea

i) not later than the time when the competition authority produces a written request either to extend the period of review or to ask for submission of additional materials concerning concentrations with potential anti-competitive effects; and

ii) when issuing the examination report.

4. Where notification is required pursuant to paragraph 1 of this Article with respect to matters *other* than concentrations, notification shall be given:

(a) in the case of the European Community:

(i) when issuing a Statement of Objections;

(ii) when adopting a decision or a settlement;

(b) in the case of the Republic of Korea:

(i) when issuing the examination report;

(ii) when filing a criminal accusation;

(iii) when adopting a decision.

5. Notifications shall include in particular the names of the parties to the investigation, the activities under examination and the markets they relate to, the relevant legal provisions and the date of the enforcement activities.

### **Article III- Enforcement Cooperation**

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 IV - Coordination of enforcement activities**

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 to the extent compatible with their respective laws.

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 the ability of the competition authorities of both Parties to achieve the objectives of their enforcement activities;

(b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

(c) the possibility of avoiding conflicting obligations and unnecessary burdens for the persons subject to the enforcement activities;

(d) the opportunity to make more efficient use of their resources through coordination.

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 companies/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 ("waiver of confidentiality").

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit the coordination of enforcement activities and proceed independently on a specific enforcement activity.

#### **Article V - Conflict avoidance (Negative Comity)**

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. If a specific enforcement activity envisaged by a competition authority of one Party may affect the important interests of the other Party, the former, without prejudice to its full discretion, shall use its best endeavours:

- i) to provide to the competition authority of the other Party timely notice of significant developments relating to the interests of the latter,
- ii) to give the competition authority of the other Party an opportunity to provide comments, and
- iii) to take into consideration the comments of the competition authority of the other Party, while fully respecting the independence of each Party to make its own decision.

The application of paragraph 2 of Article V is without prejudice to the obligations of the Parties under Article II paragraphs 3 and 4.

3. Where either Party considers that enforcement activities by its competition authority 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 of the effects of the anticompetitive activities on the enforcing Party's important interests as compared to the effects on the other Party's important interests;
- (b) the relative significance of the anti-competitive activities of conduct or transactions occurring within the territory of one Party as compared to conduct or transactions occurring within the territory of the other Party;
- (c) the extent to which enforcement activities by the competition authority of the other Party with respect to the same persons, either natural or legal, would be affected;
- (d) the extent to which private persons, either natural or legal, will be placed under conflicting requirements by both Parties.

#### **Article VI - Positive comity**

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 VII– Confidentiality

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 if such communication would be incompatible with its important interests.

1. a) The European Community is not required to communicate to the Republic of Korea under the Agreement confidential information covered by Article 28 of Council Regulation (EC) No. 1/2003, and Article 17 of Council Regulation (EC) No. 139/2004, except for the information communicated in accordance with the provisions of Article IV (4) of the Agreement.

b) The Government of the Republic of Korea is not required to communicate to the European Community under the Agreement confidential information covered by Article 62 of the Monopoly Regulation and Fair Trade Act and Article 9 of the Disclosure of Information by Public Agencies Act, except for the information communicated in accordance with the provisions of Article IV (4) of the Agreement.

2. (a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall be used by the receiving Party solely for the purpose of investigating anti-competitive activities under its competition laws in connection with the matter specified in the request.

(b) When a Party communicates information in confidence under this Agreement, the receiving Party shall, consistent with the laws and regulations, maintain its confidentiality and only use it for the effective enforcement of the respective competition laws.

3. A Party may require that confidential 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 confidential 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) 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 Korean competition authority;
- b) 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 Article 1(1) of this Agreement, as well as that such information shall not be disclosed.

#### **Article VIII - Meetings**

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 issues of mutual interest;
  - (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

#### **Article IX - Communications under the Agreement**

Communications under this Agreement may be carried out by direct communication between the competition authorities of the Parties. Requests under Article VI.1 shall, however, be confirmed promptly in writing through customary diplomatic channels and shall contain the information initially exchanged between the competition authorities.

#### **Article X – Existing law**

Nothing in this Agreement shall require a Party to take any action that is inconsistent with its existing laws or future laws, or require any change in the laws of the Parties.

#### **Article XI - Entry into force, termination and review**

1. This Agreement shall enter into force on the 30th 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 consider reviewing the operation of this Agreement not more than five years from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.