

Perspective on Antitrust Law Enforcement in the Asia-Pacific
– Recent Developments in Enforcement by the JFTC in Japan –
(Excluding merger review)

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Introduction

It is a great pleasure to have the privilege to be a speaker. Now, I would like to make a speech on the recent developments in enforcement by the JFTC in Japan. The Japanese competition law is known as the Antimonopoly Act (AMA), which was enacted in 1947. The Japan Fair Trade Commission (JFTC) enforces the AMA to maintain fair and free competition in a market. The JFTC is an independent administrative commission without being directed or supervised by other government organs. The merger review will be discussed on a session scheduled for Saturday and so I will not touch on that.

Enforcement actions by the JFTC are as follows: (i) administrative cease and desist orders, (ii) administrative surcharge payment orders, and (iii) filing criminal accusations with the Prosecutor General. Other than those legal actions, the JFTC takes non-legal action: warnings (which is issued if no sufficient evidence of violation is found) or advices (which is issued if there is a likelihood of violation).

I would like to share with the audience my experience and major cases handled by the JFTC for the last fiscal year 2008 ending March 31, 2009 in the following three areas: (i) bid riggings & price fixing and other cartels, (ii) private monopolization, and (iii) unfair trade practices.

In addition, as the development in Japan, I would like to touch on the AMA amendment bill. The 2005 amendment to the AMA was required to be reviewed within 2 years. As a result of the review, on March 11, 2008, the amendment bill was submitted to the Diet but was withdrawn due to the political situation. On February 27, 2009, the amendment bill with some changes was resubmitted to the Diet. The deliberations are now underway in the Diet. The bill contains important amendments as I explained later.

Bid Riggings & Price fixing and other Cartels

I will discuss in the following order bid riggings and price fixing and other cartels prohibited under the second part of Article 3 of the AMA. First of all, I will introduce you how the JFTC made out on the strict enforcement. Secondly, criminal penalties against cartels are placed heightened importance by the United States Department of Justice to deter cartels. Individuals are being sentenced to jail for longer periods of time and corporations are paying higher criminal fines. Some of countries such as the United Kingdom and Brazil follow this. I will introduce how the JFTC reacted to these global trends. Thirdly, the leniency program has produced significant results in Japan, contrary to the initial negative forecast such as betray of comrade being not accepted to Japanese mentality. I will introduce unique features of the Japanese leniency program. Lastly, the hearing procedures are very unique to Japan and a controversial issue for the future amendment.

(1) Strict enforcement

Surcharge payment orders totaled JPY 27.03 billion (which is equivalent to around USD 270 million) in fiscal year 2008 ending March 31, 2009, which is the highest amount of total surcharges in a single year. In 1977, a surcharge payment order was introduced. In Japan, the amount of surcharge is automatically calculated by multiplying the relevant sales for the relevant period (up to 3 years) by a fixed rate. No discretion of the JFTC is allowed. The cease and desist order and the surcharge payment order are normal enforcement actions by the JFTC.

(2) Criminal penalty

The original AMA had a criminal penalty. Before the indictment by the public prosecutor, the accusation by the JFTC is necessary. A bid rigging on a public work is also a crime under the Penal Code, as to which no accusation by the JFTC is necessary. The criminal penalty under the AMA was rarely imposed.

In 2000, the JFTC announced its policy officially. The JFTC actively accuses on the following cases:

- a. vicious and serious cases which are considered to have wide spread influence on people's livings; or
- b. cases for which the administrative measures of the JFTC are not considered to fulfill the purpose of the AMA.

In January 2006, compulsory measures for criminal investigations in case the JFTC pursues an accusation were introduced.

With respect to bid rigging, there have been 3 cases where the JFTC accusations were filed since 2006 (Human Waste Disposal Facilities Construction Case (May and June 2006), Nagoya City

Subway Construction Case (February and March 2007), and Japan Green Resources Agency Forest Road Project Case (May and June 2007)).

With respect to price fixing and other cartels, in November and December 2008, the JFTC filed accusations against 3 companies and 6 individuals for the first time since 1991 (Galvanized Steel Sheet Case). The JFTC claims that this is a landmark case showing how seriously the JFTC is combating price fixing cartels.

With respect to international cartel, however, in the Marine Hose case, the JFTC did not use the criminal investigation and resulted in the cease and desist order and the surcharge payment order in February 2008 (Marine Hose Case is a famous case as to which to date 3 companies and 12 individuals have been indicted or have pleaded guilty or agreed to plead guilty in the United States and 3 individuals have been indicted in the United Kingdom). This shows that the JFTC's policy on criminal accusations is unique compared to those countries. Even though it is a vicious violation, the JFTC will not file any criminal accusation unless it is considered to have wide spread influence on people's livings.

(3) Leniency program

In January 2006, the leniency program started in Japan. Under the AMA, immunity from, or reduction (50% or 30%) in, surcharge payment order is granted to at most 3 applicants. In practice, cease and desist order against the first applicant before the initiation of investigation is considered unnecessary because such applicant is required to cease its violation before the initiation of investigation. The marker position can be secured by sending by fax Form 1 to the JFTC followed by the submission of Form 2. Part of Form 2 may be substituted by the oral proffer if needed to avoid the discovery in civil damage actions in other jurisdictions, in particular the United States.

In 2005, the JFTC announced its policy officially. The JFTC will not file accusations against the first applicant before the initiation of investigation as well as its officers and employees who have cooperated with the JFTC. Also, the Ministry of Justice answered in the Diet session that the public prosecutor would sufficiently consider the fact of the first application before the initiation of investigation as mitigating circumstance in exercising its prosecutory discretion so that the leniency program can effectively work. So far, no applicant before the initiation of investigation has been indicted.

The applicant has an obligation of confidentiality. The applicant is not allowed to disclose to any third party the fact of filing application without just cause. In order to promote measures to enhance compliance system by business, however, the JFTC recommends that the applicant announce its name and address as well as the application of the leniency program at the JFTC website at the time of the cease and desist order and the surcharge payment order issued against the other companies.

(4) Hearing procedures

Before January 2006, the hearing procedures are as follows:

Recommendation → Hearing → Decision → (→ Surcharge Payment Order → Hearing → Decision →) Appeal to Tokyo High Court (and further to Supreme Court)

After January 2006, the hearing procedures were amended as follows:

Advance notification → Opportunity to present opinion and evidence → Order → Request → Hearing → Decision → Appeal to Tokyo High Court (and further to Supreme Court)

The rate of the commencement of hearing dramatically decreased from around 20% to around 2% after such amendment. Some argue that both pre-hearing and post-hearing being existed within the JFTC are redundant and unreasonable. Also, fairness and transparency of the post-hearing procedures is doubted because the prosecutor and judge are persons of the same organization. However, the JFTC takes the position that the post-hearing is still necessary by pointing out the fact that most of the decisions of the JFTC have been upheld by the Tokyo High Court if appealed.

Private Monopolization

Private monopolization is prohibited under the first part of Article 3 of the AMA.

Cease and desist order against Japan Society for Rights of Authors, Composers and Publishers (JASRAC) was issued by the JFTC in February 2009 – which is a case relating to exclusionary unilateral conduct by dominant firm or firms with substantial market power

JASRAC is engaged in copyright management business associated with the copyright of musical works. JASRAC is a dominant firm which has a around 99% market share in the field of licensing of the managed musical works associated with broadcasting for broadcasters in Japan. JASRAC collected from broadcasters royalties in which the percentage of use of musical works managed by JASRAC for broadcasting was not reflected. This method of royalty collection excluded new entry of other copyright management business operators. The JFTC found that JASRAC was in violation of the first part of Article 3 of the AMA.

Unfair Trade Practices

Unfair trade practices are prohibited under Article 19 of the AMA. Unfair trade practices consist of the general designation applicable to the entire category of business and the special designation applicable only to specific category of business. The general designation contains 16 acts likely to impede fair competition in a market.

Cease and desist order against Yamada Denki was issued by the JFTC in June 2008 – which is a case relating to abuse of superior bargaining position (ASBP), which is one of unfair trade practices

Yamada Denki is one of large-scale retailers of electric home appliances but its market share among large-scale retailers is still around 30%. Yamada Denki coerced suppliers which are in a relatively weaker bargaining position to dispatch their employees, whether or not the goods involved from those suppliers, without prior agreement on dispatching conditions with the suppliers or bearing the cost usually required to have temporary staff dispatched.

2008 ICN Kyoto Annual Conference Report reveals that only Germany, Korea and Japan employ such provisions as part of their competition laws. A party in the superior bargaining position does not necessarily have to be a dominant firm with significant market power. However, ASBP needs to be addressed under the competition law because ASBP undermines the foundation of the free competition. Namely, the other party on whom the disadvantages are imposed by ASBP would be in the disadvantageous position in terms of condition of competition with its competitors. Also, the party imposing disadvantages on the other party by ASBP would be in the advantageous position in terms of condition of competition with its competitors.

AMA Amendment Bill

As I said earlier, the AMA amendment bill was recently resubmitted to the Diet. Important points (excluding merger review) are as follows:

- (1) Expansion of subjects of surcharge (which are currently limited to price fixing and other cartel, bid rigging and control type of private monopolization)
 - a. exclusionary type of private monopolization (such as the above-mentioned act of JASRAC)
 - b. the second offence within 10 years of:
 - i. concerted refusal to trade
 - ii. discriminatory pricing
 - iii. unjust low price sales
 - iv. RPM
 - c. continuous offence of ASBP (such as the above-mentioned act of Yamada Denki)
- (2) Increase of surcharge rates for ring leader by 50%
- (3) Increase of maximum individual imprisonment term for cartel and bid rigging
From 3 years to 5 years
- (4) Extension of statute of limitations for cease and desist order and surcharge payment order
From 3 years to 5 years
- (5) Review of leniency program
 - a. at most 5 applicants may apply for leniency
 - b. joint application of group companies is permitted
- (6) Review of addresses of cease and desist order and surcharge payment order in case a M&A is

involved

(7) Information exchange with foreign competition authorities under stipulated conditions

Thank you

Well, this is the end of my presentation. Thank you very much for your attention.

Towards Fair and Free Competition is a title of an interesting video footage to introduce the activities of the JFTC, which you can see at the JFTC's website: <http://www.jftc.go.jp/douga/index.html>. Please enjoy.

Recent Developments in Enforcement by the JFTC in Japan (excluding merger review)

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Introduction

- The Japanese competition law is known as the Antimonopoly Act (AMA), which was enacted in 1947.
- The Japan Fair Trade Commission (JFTC) enforces the AMA to maintain fair and free competition in a market.
- The merger review will be discussed on Saturday.

Enforcement Actions by the JFTC

- Administrative Cease and Desist Order
- Administrative Surcharge Payment Order
- Filing Criminal Accusation with the Prosecutor General
- Non-legal Action - Warning (no sufficient evidence of violation) or Advice (likelihood of violation)

Outline

- Bid Rigging & Price Fixing and other Cartels
- Private Monopolization
- Un-fair Trade Practices

AMA Amendment Bill

- The 2005 amendment was required to be reviewed within 2 years.
- On March 11, 2008, the amendment bill was submitted to the Diet but was withdrawn due to the political situation.
- On February 27, 2009, the amendment bill with some changes was resubmitted to the Diet.

Bid Rigging & Price fixing and other Cartels

- Strict enforcement
- Criminal penalty
- Leniency program
- Hearing procedures

Bid Rigging & Price fixing and other Cartels

-Strict Enforcement-

- Surcharge payment order totaled JPY 27.03 billion in FY2008 (4/08-3/09), which is the highest amount of total surcharges in a single year.
- The surcharge payment order was introduced in 1977.
- The amount of surcharge is automatically calculated by multiplying the relevant sales for the relevant period (up to 3 years) by a fixed rate.
- The cease and desist order and the surcharge payment order are normal enforcement actions.

Bid Rigging & Price fixing and other Cartels -Criminal Penalty-

- The original AMA had a criminal penalty. Before the indictment by the public prosecutor, the accusation by the JFTC is necessary.
- A bid rigging on a public work is also a crime under the Penal Code, as to which no accusation by the JFTC is necessary.
- The criminal penalty under the AMA was rarely imposed.
- In 2000, the JFTC announced its policy officially. The JFTC actively accuses on the following cases: (1) vicious and serious cases which are considered to have wide spread influence on people's livings, or (2) cases for which the administrative measures of the JFTC are not considered to fulfill the purpose of the AMA.
- In January 2006, compulsory measures for criminal investigations in case the JFTC pursues an accusation were introduced.

Bid Rigging & Price fixing and other Cartels -Criminal Penalty-

- Bid rigging - there have been 3 cases where the JFTC accusations were filed since 2006 (Human Waste Disposal Facilities Construction Case (May and June 2006), Nagoya City Subway Construction Case (February and March 2007), and Japan Green Resources Agency Forest Road Project Case (May and June 2007)).
- Price fixing cartel - in November and December 2008, the JFTC filed accusations against 3 companies and 6 individuals for the first time since 1991 (Galvanized Steel Sheet Case).
- International cartel - the JFTC did not use the criminal investigation and resulted in the cease and desist order and the surcharge payment order in February 2008 (Marine Hose Case as to which 2 companies and 12 individuals have been indicted or have pleaded guilty in the US and 3 individuals have been indicted in the UK).

Bid Rigging & Price fixing and other Cartels -Leniency Program-

- In January 2006, the leniency program started. Under the AMA, immunity from or reduction (50% or 30%) in surcharge payment order is granted to at most 3 applicants. In practice, cease and desist order against the first applicant is considered unnecessary.
- The marker position can be secured by sending by fax Form 1 to the JFTC followed by the submission of Form 2. Part of Form 2 may be substituted by the oral proffer.

Bid Rigging & Price fixing and other Cartels -Leniency Program-

- In 2005, the JFTC announced its policy officially. The JFTC will not file accusations against the first applicant before the initiation of investigation as well as its officers and employees who have cooperated with the JFTC. The MOJ answered in the Diet session that the public prosecutor would sufficiently consider the fact of the first application before the initiation of investigation as mitigating circumstance in exercising its prosecutory discretion so that the leniency program can effectively work.
- The applicant has an obligation of confidentiality. In order to promote measures to enhance compliance system by business, however, the JFTC recommends that the applicant announce its name and address and the application of the leniency program at the JFTC website at the time of the cease and desist order and the surcharge payment order against the other companies.

Bid Rigging & Price fixing and other Cartels

-Hearing Procedures-

- Advance notification ➡ Opportunity to present opinion and evidence ➡ Order ➡ Request ➡ Hearing ➡ Decision ➡ Appeal to Tokyo High Court (and Supreme Court)
- The rate of the commencement of hearing dramatically decreased.

Private Monopolization

- Cease and desist order against Japan Society for Rights of Authors, Composers and Publishers (JASRAC) (February 2009) - exclusionary unilateral conduct by dominant firm or firms with substantial market power

Un-fair Trade Practices

- Cease and desist order against Yamada Denki (June 2008) - abuse of superior bargaining position (ASBP)
- 2008 ICN Kyoto Annual Conference Report reveals that only Germany, Korea and Japan employ such provisions as part of their competition law. A party in the superior bargaining position does not necessarily have to be a dominant firm or firms with significant market power.

AMA Amendment Bill (excluding merger review)

- Expansion of subjects of surcharge - (1) exclusionary type of private monopolization, (2) concerted refusal to trade, (3) discriminatory pricing, (4) unjust low price sales, (5)RPM, and (6) ASBP
- Increase of surcharge rates for ring leader by 50%
- Increase of maximum individual imprisonment term for cartel and bid rigging - from 3 years to 5 years
- Extension of statute of limitations for cease and desist order and surcharge payment order - from 3 years to 5 years
- Review of leniency program - up to 5 applicants & joint application of group companies
- Review of addresses of cease and desist order and surcharge payment order in case a M&A is involved
- Information exchange with foreign competition authorities under stipulated conditions

Thank you

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