

Japanese Antitrust and Compliance: The Fair Trade Commission, no longer a toothless tiger?

In the pursuit of its basic policy to swiftly and efficiently enforce antitrust laws, the Japan Fair Trade Commission ("JFTC") has given priority to exposing and sanctioning strictly, relentlessly and actively (i) cartels and bid-rigging which may have a material detrimental effect on the lives of people, (ii) certain unfair trade practices (abuse of a dominant position, sales below cost price and discriminatory pricing) which may adversely affect business activities of small and medium-size enterprises, and (iii) illegal obstacles to new market entrants in the IT and public infrastructure sectors and in the use and dissemination of intellectual property rights.

During fiscal year 2011, the JFTC issued statutory sanctions (i.e. cease and desist orders and surcharge (see below) payment orders) in 22 cases. Predictably, a large majority of cases relate to bid-rigging (12 cases) and price cartels (5 cases). Although the number of cases in the last 5 fiscal years has remained stable, the number of companies subject to legal action reached a record high in FY 2011, indicative of a surging number of participants in illegal practices and also of the fact that the JFTC is more efficiently cracking down on unfair practices. The total amount of the surcharge, an administrative fine imposed by the JFTC for certain types of violations, was JPY 44.25 billion in FY 2011. Although the amount of surcharge imposed by the JFTC is at a significantly lower level than that of fines imposed in the EU or the US, this was the highest amount the JFTC has ever imposed in a single fiscal year. This is mainly attributable to 2 large cases in which the surcharge exceeded JPY 10 billion (a bid-rigging case in the automotive wire harness sector involving Yazaki Corporation and other manufacturers and a price-fixing cartel relating to industrial gases involving Taiyo Nippon Sanso and others).

The above facts and figures clearly illustrate the JFTC's strong motivation to enforce antitrust laws in order to stop the proliferation of illegal practices. Yet the US Department of Justice is still critical of the Japanese approach based on comparatively modest financial sanctions; jail sentences as a key feature of the US approach being viewed as a far more efficient deterrent.

The JFTC's investigative powers are greatly assisted by a leniency programme. It is a most important investigative tool for detecting cartel activity. Companies and individuals who report their cartel activity and cooperate in the JFTC's investigation of the cartel reported can avoid or mitigate surcharges, and escape criminal conviction, fines, and prison sentences, if they meet the requirements of the programme. The programme, which began in January 2006 and initially met with much skepticism, has been reasonably successful. In January 2010, the leniency programme was revised and the total number of applicants who can now benefit from leniency is 5 as opposed to 3 previously. Group companies are now able to jointly apply for leniency in a common application allowing them to be eligible and share the same ranking order.

In respect of unfair trade practices giving an unfair advantage to small and medium-size enterprises, a recent revision of antitrust laws allows the JFTC to impose surcharges for abuses of a dominant position (abuses of superior bargaining position). "Abuse of a dominant position" bears some resemblance to, but still differs from, the concept of "abuse of dominance" in the EU. A party to a contract is said to be in a "dominant position" when this contractual party exerts power over the other contractual party, where the latter heavily relies on its business dealings with the former and can be forced to bow to the former's unreasonable demands. In FY 2011, the JFTC ordered payment of a surcharge for "abuse of a dominant position" for the first time. In one of 3 cases, the JFTC condemned Yamada Denki, a large electrical appliance retailer, for forcing its suppliers to second their employees to provide assistance at the retailer's shops without charge. The JFTC ordered payment of a JPY 4 billion surcharge. The retailer has requested a JFTC panel review and thus the order is yet to be finalised. In addition, the JFTC established an "Abuse of a Dominant Position Task Force" in November 2009 and issued 52 instructions in FY 2011. The JFTC is also active in the area of sales below cost. As a consequence of a recent revision of the law, in case of frequent sales of products at prices significantly below cost, which may harm other businesses, the JFTC now has the authority to order the payment of a surcharge if the company has already been sanctioned by the JFTC for sales below cost within the last 10 years. In FY 2011 alone, the JFTC issued 1,772 instructions mainly in the retail sector. In August 2012, the JFTC issued a warning to 3 liquor wholesalers suspected of (although sufficient evidence to enforce statutory sanctions was lacking) selling beer to Aeon, a large supermarket chain, at a price below cost consequently damaging the business of liquor shops located near the supermarkets. The case drew widespread publicity, principally due to the absence of a warning from the JFTC to the supermarket chain despite widespread suspicion that such sales could only have resulted from the supermarket's pressure aiming to push prices down. Aeon has strongly denied any wrongdoing.

In the IT sector, the JFTC issued a cease and desist order in 2011 to DeNA, a leading social game provider, for "interfering with a competitor's transactions" as it effectively prohibited game developers from supplying games to GREE, its biggest competitor. After this order was issued, GREE commenced a civil action claiming JPY 1 billion in damages.

What is currently being evidenced is stronger political will to enforce antitrust laws by the JFTC, now endowed with increased enforcement powers and benefiting from clearer acceptance amongst business people of the JFTC's supervisory and policing role. There is, however, an element of concern.

Keidanren, the Japan Business Federation, an economic organisation with a membership of 1,300 representative companies in Japan, has robustly requested more than once the revision of the current appeal process to review the JFTC's cease and desist and surcharge payment orders. As the Keidanren correctly points out, the current system is akin to "self-review" because the JFTC panel itself hears appeals made by parties against the JFTC's orders. A party dissatisfied with the panel's conclusion may further appeal to the High Court; however the High Court is bound by the facts determined by the JFTC with substantial evidence. This request was heard by the government and it has submitted a bill to the Diet aiming to abolish this JFTC panel and establish a review system by the courts. However, since 2010, there has been no substantial discussion on the bill.

Other points of concern relate to a company's defence rights during the JFTC investigation. Since there is no "client-attorney privilege", communications between clients and lawyers are not excluded from the JFTC's investigation, with the exception of protection by a lawyer's professional duty of confidentiality. Lawyers are not permitted to attend interviews by the JFTC and the interviewees must endure rigorous and intensive questioning by the JFTC without legal assistance. The JFTC may raid offices of companies and remove all relevant original documents, but the right of a company to request to take photocopies of these documents is not legally established. For the time being, these issues are not likely to be addressed. Lack of predictability and transparency as to what activities are deemed unlawful by the JFTC is becoming a more acute issue as the JFTC's authority to order surcharge payments is being broadened. The JFTC has issued guidelines, such as on the abuse of a dominant position and on sales below cost, along with the revision of the law in order to mitigate such concern. Businesses are expected to carefully read and understand the guidelines in order to defend themselves.

In the global economy, corporate activity is often cross-border and as a result, violations of competition law can also go beyond borders. International cooperation among competition authorities is gradually increasing. In addition to the competition authorities of the US, the EU and Canada, and countries or regions with which Japan has entered into bilateral antitrust cooperation treaties, the JFTC regularly communicates with competition authorities of various countries through various forums such as the International Competition Network (ICN), the OECD and APEC.

In real-life cartel investigations, the JFTC does not exchange confidential information on the parties with competition authorities in other countries. Notwithstanding, there is active cooperation with other authorities, principally before commencement of an investigation in areas such as the provision of information about a potential cartel or discussions on general strategy to conduct investigations, including the timing of dawn raids. Needless to say, foreign companies are not exempted from the JFTC's enforcement of Japanese antitrust laws. In 2008, the JFTC issued a cease and desist order to foreign cartel participants for the first time (in a marine hose cartel involving Bridgestone Corporation). In 2009, the JFTC issued a surcharge order to foreign cartel participants for the first time (a cathode-ray tube cartel involving Samsung and LG Philips).

The JFTC is still being criticised for being too soft on unlawful practices but it is making the most of its comparatively limited legal tools and means of action. Those who still believe the JFTC is a toothless tiger should definitely beware...

Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.

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