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Overview

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The Japan Enforcement Agency

The substantive provisions of Japan's competition rules are contained in the Antimonopoly Act of Japan (AMA). The Japan Fair Trade Commission (JFTC) is the principal enforcement agency, which was established as an independent administrative office with broad enforcement powers and is composed of a chairman and four commissioners. The AMA comprises four major categories of regulations:

- the prohibition of unreasonable restraint of trade (eg, cartels and bid rigging);
- the prohibition of private monopolisation;
- the prohibition of unfair trade practices; and
- regulations on business combination (eg, via mergers and acquisitions).

The JFTC is the sole enforcement agency, except in the case of criminal investigations where the public prosecutor's office is in charge of criminal prosecutions upon the JFTC's submission of a criminal accusation to the prosecutor general.

Recent developments

Cartels

The JFTC issued formal administrative orders (cease-and-desist and surcharge orders) for 13 cartel cases in 2014. In March 2014, a total of ¥22.7 billion in surcharges were levied against four shipping operators for price-fixing cartels on international ocean-shipping services for automobiles, the second-highest amount levied in a single case in the JFTC's history. The amount of surcharges levied in cartel cases is calculated as the base rate (which is basically 10 per cent, but differs according to conditions, increased to 15 per cent if any cartel activity is repeated within 10 years of an earlier finding of a breach in respect of the same matter) of the sales amount of the relevant products or services by the party fined for the period of infringement, extending up to three years from the date such conduct ceased. Surcharges imposed for cartel conduct, as well as abuse of superior bargaining position, totalled ¥30.2 billion in the 2013 fiscal year.

Regarding criminal investigations, the JFTC found a criminal violation of the AMA in the *Bearings* cartel

case and filed criminal accusations with the prosecutor general in June 2012 against three companies, as well as seven individuals of the three companies accused, who were engaged in sales of bearings. No criminal accusations were filed against the immunity applicant company and its employees. By February 2013, two companies and five individuals were convicted. A trial went on in relation to one company and two individuals that pleaded not guilty, but all of them were also convicted in February 2015. The company reportedly appealed the judgment immediately. The JFTC also opened its investigation into the *Hokuriku Shinkansen* bid-rigging case in September 2013. In March 2014, criminal accusations were filed against eight equipment companies and eight individuals, and by 15 November 2014 all the defendant companies and individuals were convicted. In this case, the JFTC also found that the procurer had divulged information to certain bid participants about the upper price that should have been kept confidential before bidding. Concerned about such involvement of a procurer in the bidding process, the JFTC demanded that the procurer take appropriate measures to prevent recurrence.

The JFTC has reiterated its policy of continuing tough, high-impact enforcements, as well as strengthening cooperation with foreign authorities for the purpose of deterring infringements. The JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union and Canada. Under these agreements, various levels of information exchanges and discussions can be made between the participating authorities. The JFTC is entitled to exchange information with other authorities as well, based on conditions set out in the AMA.

Leniency

In the 2013 fiscal year, 50 leniency filings were made. According to a JFTC press release, leniency applicants received immunity or a reduction in surcharges in 12 out of 17 cartel cases in which the JFTC issued a formal administrative order in the 2013 fiscal year.

Under the leniency programme in Japan, a maximum of five companies (or groups of companies)

will be granted immunity from, or a reduction in, surcharges by identifying the alleged facts in detail and submitting relevant evidence. The first applicant to come forward before the start of a JFTC investigation is granted full immunity, the second is granted a 50 per cent reduction, and the third, fourth and fifth are granted a 30 per cent reduction. Any applicants after the start of a JFTC investigation are granted the same 30 per cent reduction. The JFTC has no discretion in determining the order of leniency applicants or the percentage of reduction granted for cooperation.

Unfair trade practices

In June 2014, the JFTC issued a cease-and-desist order and a surcharge order imposing a ¥1.27 billion surcharge against DIREX, a supermarket operator in Kyushu, for abuse of its superior bargaining position. This was the fifth case since the enforcement of amendments to the AMA commenced in January 2010 that subjected abusers of a superior bargaining position to a surcharge. DIREX, however, was dissatisfied with the orders and requested a hearing. Following the request, the JFTC commenced hearing proceedings, and a decision on the original orders will be issued by the JFTC once proceedings are complete. Hearing proceedings have commenced for all the cases in which surcharge orders were issued for abuse of superior bargaining position under the amended AMA, which took effect in January 2010.

The base rate for calculating the amount of surcharges for the abuse of a superior market position is 1 per cent of the sales amount of the relevant products for the period of infringement, extending up to three years from the date such conduct ceased.

The JFTC is not required to demonstrate a restriction of competition in order to prove the occurrence of an abuse of a superior bargaining position in violation

of the AMA. In contrast, private monopolisation – similar to an abuse of a dominant position under EU competition law – requires a restriction of competition by a party having a market share in the relevant market exceeding around 50 per cent.

Mergers

The total number of merger notifications for the 2013 fiscal year was 264. The JFTC cleared 257 cases without Phase II review and, among those, the 30-day waiting period, where the notified transaction shall not be closed, was shortened in 80 cases. Only four cases transitioned to Phase II review. Under Phase II review, one case was cleared subject to conditions and the other three cases were cleared without any conditions. There were no formal prohibition decisions in the 2013 fiscal year.

Mergers, business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) are subject to prior notification under the AMA if they exceed certain thresholds. Amendments to the AMA, which became effective in January 2010, have introduced mandatory notification of foreign-to-foreign mergers between undertakings that have no Japanese subsidiary or branch office in Japan but that have substantial domestic turnover in Japan (eg, *BHP Billiton/Rio Tinto*).

Enforcement of the 2013 AMA Amendment

In December 2013, the Diet approved a bill for the amendment of the AMA that aimed to abolish the current administrative hearing proceedings in favour of a more detailed judicial appeal process. This amendment became effective on 1 April 2015, and parties dissatisfied with the JFTC's administrative orders will be able to appeal the orders to the Tokyo district court instead of requesting JFTC hearings.



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Setsuko Yufu is a senior partner at Atsumi & Sakai, with more than 30 years' experience in cross-border transactions and corporate practice, including antitrust and competition law. She is especially experienced in international cartel investigations and is ranked as a leading individual in relation to antitrust and competition law in the *Legal 500 Asia-Pacific 2015* and *Chambers Asia-Pacific 2015* publications. She is also ranked as 'Highly recommended' in *GCR 100 2015*. After qualifying at the Japan Federation of Bar Associations, she studied at the Europa Instituut in the University of Amsterdam and worked in a leading global law firm in Brussels from 1986 to 1987. She serves as a board member of the EU Studies Association – Japan and is noted for her comprehensive knowledge of EU competition law.



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Atsumi & Sakai was established in 1994 as a boutique firm focusing mainly on finance law. Since then, the firm has developed and broadened its legal experiences in finance as well as a wide range of corporate and dispute resolution disciplines, including antitrust and competition law, such as cartel investigations and merger controls. It also advises on antitrust and competition law aspects of various transactions, including licensing, franchise and distributorship arrangements. Recently, Atsumi & Sakai has become increasingly active in the field of international cartel investigations and merger controls. Many of the firm's junior lawyers have extensive international experience in Asian, EU and American jurisdictions.



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