

International Antitrust Enforcement in Japan – Litigation Procedure and Practices –

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Does your company have business in Japan?

If the answer is YES ...

Then you must know more about
the Antimonopoly Act of Japan
独占禁止法 (独禁法)

(私的独占の禁止及び公正取引の確保に関する法律)

Why does the Antimonopoly Act of Japan matter to you?

Several reasons why:

1. Larger administrative surcharge (課徴金) charged against cartelists
2. Stronger enforcement by Japan's Fair Trade Commission (JFTC) (公正取引委員会)
3. Recent introduction of the Leniency Program (課徴金減免制度)
4. Criminal prosecution more frequent
5. Increase of international enforcement
6. Increasing pressure for customers to sue

1. Larger administrative surcharge (課徴金) charged against infringers

Antimonopoly Act has a fixed calculation formula for surcharges.

For large manufacturers:

<10% of total sales of subject product>

→ prior to 2006 amendments to the Antimonopoly Act, percentage was 6%.

However, beware of increased percentage rate as additional penalty:

- 15% of total sales of subject product, if either a repeat offender or a ringleader.
- 20% of total sales of subject product, if both a repeat offender and a ringleader.

1. Larger administrative surcharge (課徴金)
charged against infringers

Largest surcharge ever ordered against one company:

Sekisui Chemical Co., Ltd. (積水化学工業株式会社)

JPY 7,965,320,000

2009 – PVC (polyvinyl chloride) pipe & fittings case

2. Stronger enforcement by Japan's Fair Trade Commission (JFTC) (公正取引委員会)

Strong leadership by JFTC Chairman Takeshima since 2002

公正取引委員会 委員長 竹島一彦

- 2006 amendments to the Antimonopoly Act
- 2010 amendments to the Antimonopoly Act
- In Fiscal Year 2009 (April 2009 – March 2010), JFTC issued surcharge payment orders to 106 companies for a total amount of JPY 36,074,710,000

3. Recent introduction of the Leniency Program (課徴金減免制度)

But who will really become a whistleblower and disturb industry harmony?

Harmony and friendly competition is vital for Japanese (and Asian) companies? True?

Yes, maybe, but Japanese companies are not hesitating to file leniency applications with the JFTC. Fear of shareholder derivative lawsuits against directors.

In Fiscal Year 2009, there were 85 leniency applications (average of about 7 per month).

From January 2006 to March 2010, there were 349 leniency applications (average of about 7 per month)

3. Recent introduction of the Leniency Program (課徴金減免制度)

Features of the Leniency Program in Japan:

- Informal prior consultation (事前相談) possible, always recommended
- First filing required to be conducted by facsimile transmission
- Order of application determined by the time when filing was faxed to JFTC
- After first filing, a second filing must be made within 4–5 weeks, including names of individuals, facts of illegal activities, and supporting documents.
- Leniency applicant has the duty to keep leniency a secret, and may not disclose to third parties unless there is just cause for disclosure.
- Average JFTC investigation time between start of investigation (dawn raids) and issue of surcharge payment order (or cease and desist order): about 12 months

4. Criminal prosecution more frequent

Public prosecutors in Japan always had the power to prosecute cartelists, but they neither had enough resources or priority to tackle cartels.

JFTC was always eager to send its most serious cases to the public prosecutors. However, there were problems with prosecutors using documents and testimonies obtained by JFTC through administrative investigation. The violators were not provided their rights as a defendant in a criminal prosecution.

After the 2006 amendments to the Antimonopoly Act, JFTC now has its own criminal investigation department. Documents and testimonies obtained by this department can be turned over to the prosecutors offices if the prosecutors choose to take on this case as a criminal case.

4. Criminal prosecution more frequent

5 bid rigging/cartel cases were criminally prosecuted since 2006.

Individuals involved are also prosecuted, though they would receive a suspended jail sentence because it would be their first offense.

However, 2010 amendments to the Antimonopoly Act increased the maximum prison sentence for cartelists from 3 years to 5 years. Under Japan law, it is not possible to receive a suspended sentence if the prison sentence is above 3 years. This means that in the future, individuals involved in cartels or bid rigging may have to serve jailtime in prison, even if that is the first offense for the individual.

Separate legal counsel may be required for individuals in a criminal investigation.

5. Increase of international enforcement

There have been international cartel cases for a long time. Japanese companies were involved with many of them. (For example, the vitamins case in 1990's)

Yet in the past, JFTC had been very reluctant to enforce the Antimonopoly Act outside its territory.

Now, JFTC is more eager to enforce illegal activities that takes place overseas, and those that is conducted by non-Japanese companies.

5. Increase of international enforcement

February 2008 – Marine hose case

JFTC issues first cease and desist orders (排除措置命令) against non-Japanese companies (Dunlop, Trelleborg, Parker ITR, Manuli).

October 2009 – Cathode ray tubes case

JFTC issues first surcharge payment orders (課徴金納付命令) against non-Japanese companies, even though the companies did not have any direct sales of the subject product in Japan (subsidiaries of MT Picture Display in Malaysia, Indonesia and Thailand; Malaysia subsidiary of Samsung SDI; LG Philips Displays Korea).

→ Non-Japanese companies are no longer immune to JFTC cartel investigation.

5. Increase of international enforcement

But what if my company does not have an office in Japan?

JFTC can still serve surcharge payment orders or cease and desist orders through the following means:

- by serving to the non-Japanese company's attorney in Japan
- by serving through diplomatic channels
- service by public notification (公示送達), by posting the order on a JFTC bulletin board

For Taiwan companies without a subsidiary or branch in Japan, and without a Japanese lawyer, JFTC orders cannot be served in Japan, and diplomatic channels are not available.

Service by public notification will be the only method of service against Taiwan companies.

6. Increasing pressure for customers to sue

In the past, Japanese customers purchasing the products subject to price fixing did not seek legal action for damages.

Now, especially when customers are listed companies, shareholder pressure is intense, and customers are compelled to make civil damage claims against cartelists, in part in fear of shareholder derivative lawsuits against directors.

At the moment, most cases are settled out of court.

In short, what should your company know about Japan's cartel enforcement?

- Japan law against cartels are strict, and has become even more severe recently.
- Serious enforcement by JFTC, possible criminal investigation in addition to administrative surcharges.
- Strong efforts by JFTC on international enforcement of Antimonopoly Act. Non-Japanese companies will be targeted, and Taiwan companies are no exception.
- Top management, as well as business managers and staff, need to be aware of the basics of Japan's Antimonopoly Act and its consequences.

Thank you very much for listening !
ご静聴ありがとうございました。

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