Introduction to the Antimonopoly Law

Chizuru IKEDA
Kobe University
What practices are subject to control by the Antimonopoly Act?

- Cartels
- Monopolization
- Mergers
- Unfair Trade Practices
Purpose of the Antimonopoly Act

- Assure the interest of consumers
- Democratic and wholesome development of the national economy

Promote free and fair competition

- Stimulate creative initiative of firms
- Enliven business activities of firms
- Heighten the level of employment and people's real income

Prohibition of cartels

Prohibition of private monopolization

- Restriction of mergers and acquisitions

Prohibition of unfair trade practices

- Regulation in accordance with the Subcontract Act
- Regulation in accordance with the Premiums and Representations Act

Structure of Antimonopoly
How is the Antimonopoly Act implemented?

- Enforcement by the JFTC
  - Elimination Measures (Elimination Order)
  - Surcharge Order (an administrative fines)
    - price cartels, bid-riggings etc.
- Criminal Penalties by the courts
- Civil Penalties by the courts
  - Civil Damage Suits
  - Civil Injunction Suits against unfair trade practice (since 2001)
Prohibition of Cartels

- Prohibition of Unreasonable restraint of trade (Section 3)
  - price cartels, volume cartels, market allocation cartels, bid riggings and boycott
- Regulation of Activities of Trade Associations (Section 8)
- Prohibition of Participation in International Cartels (Section 6)
Regulation against Monopolies and Oligopolies

- Prohibition of Private Monopolization (Section 3)
  - Formation of market power or the exercise of existing market power by a firm or by combination or conspiracy with other firms.
- Measures against a Monopolistic Situation
  - Divestiture order (we have no case)
Control of mergers (Chapter 4)

- Definition of Merger
  - merger (amalgamation)
  - acquisition of business
  - stock holdings
  - interlocking directorates

- Merger are prohibited
  - if they may cause a substantial restraint of competition in any field of trade: may create, maintain or increase a market power in any relevant markets.
Regulation of the Overall Concentration through mergers

- Restriction of the Excessive Concentration of Economic Power
- Restriction on Stockholding by a Financial Company
Regulation of Unfair Trade Practice (Section 19)

- Refusal to Deal
- Discriminatory Pricing; Discriminatory Treatment
- Predatory Pricing, Unjust Low Price Sales, and Unjust High Price Purchasing
- Deceptive Customer Enticement and Customer Enticement by Unjust Benefit
Continued….

- Tie-in Sales
- Dealing on Exclusive Terms
- Resale Price Maintenance
- Dealing on Restrictive Terms
- Abuse of Dominant Position
- Interference with a Competitor’s Transaction, Interference with Internal Operation of a Competing Company
What laws supplement the Antimonopoly Act?

- Premium and Representation Act of 1962
  - Prohibition of Excessive Premiums
  - Prohibition of Misleading Representation
- Subcontract Act of 1956
Structure of the JFTC

Organizational Structure

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Continued….

The Commission's Three powers
How is the Antimonopoly Act implemented?

- Amendment of AMA in 2005 made a fundamental change in the hearing procedures.
- System until January 2006 (?)
- System after January 2006 (?)
System until January 2006 (?)
System until January 2006 (?)

- Investigation
  - Recommendation (is not formal order)
  - Decision to initiate hearing (before the formal order)
  - Hearing Decision (a formal cease and desist order)
    - Surcharge Order procedures starts after Hearing Decision
- Surcharge Order
  - the order shall lose effect when the hearing initiate
- Decision to initiate hearing
- Surcharge Decision
- Judicial Review
System after January 2006 (?)

- Investigation (administrative investigation)
  - Elimination Order issued by JFTC (a formal order)
  - Surcharge Order issued by JFTC
    - the respondent have an opportunity to submit its opinions, etc
    - Recommendation system shall be abolished
  - Initiate hearings when those orders are objected to
    - a post-issuance review procedure
  - Decision by JFTC
  - Judicial Review
Elimination Measures

- before January 2006
- Three Types of JFTC Decisions
  - Recommendation Decision
  - Consent Decision
  - Hearing Decision
- Judicial Review
  - Tokyo High Court
  - Supreme Court
Elimination Orders (after January 2006)

- The JFTC issues elimination orders (formal administrative order) after having provided the respondent an opportunity to submit its opinions, etc.
- The JFTC initiates hearings when the elimination orders are objected to.
- Recommendation system shall be abolished.
- Extending the statute of limitations from 1 year to 3 years for the JFTC to issue elimination order to ensure elimination of the violation after termination of the unlawful conduct.
Surcharge Order

- Surcharges are imposed in the case that price cartels and bid-riggings as well as cartels that influence prices by restricting production and/or sales quantity are carried out.
  
  ▶️ The scope of conduct subject to the surcharge system shall expand after January 2005

- The surcharge order is issued to firms and members of trade associations which engaged in such cartels.
Expanding the scope of conduct subject to the surcharge system

● Before January 2006
  ▶️ price cartels and cartels affecting the price of goods or services by substantially restraining the volume of supply
  ↓

● After January 2006
  ▶️ price cartels, cartels affecting the price of goods or services by substantially restraining the volume of supply or purchase, market share, or customers or suppliers and Private monopolization through controlling the business activities of other enterprises
The sum of surcharge is calculated by the following formula:

\[
\left( \frac{\text{Sales amount of the concerned goods during the period of the cartel}^*}{\text{Sales amount of the concerned goods during the period of the cartel}^*} \right) \times \begin{cases} 
6\% \text{ for non-wholesalers and non-retailers} \\
1\% \text{ for wholesalers} \\
2\% \text{ for retailers}
\end{cases} = \text{Sum of surcharge}
\]

* The calculation period consists of a maximum of three years from the final phase of the cartel
Increasing the surcharge rate

- The surcharge rate shall increase after January 2006
- Non-wholesalers and non-retailers (ex. Manufacturers, etc)
  - 6% → 10%
  - Small and Medium-sized Enterprises: 3% → 4%
- Wholesalers
  - 1% → 2%
  - SMEs: 1% (no change)
- Retailers
  - 2% → 3%
  - SMEs: 1% → 1.2%
Surcharge Order (after January 2006)

- Enterprise that *repeat violations within 10 years* → a 50% increase in fines
- Enterprise whose duration of violation is less than 2 years and who have *ceased the unlawful conduct* more than one month *before a JFTC investigation* → a 20% reduction in fines
- *Introducing an adjustment clause* in situations where criminal fines are also imposed (Half the amount of the criminal fine shall be deducted from the surcharge in cases where both surcharge and criminal fine are imposed on a corporation)
- The surcharge order does not lose effect in cases where hearing procedure have been initiated
- The JFTC may collect a surcharge by adding an arrears of interest rate if any person fails to pay a surcharge by the designated deadline and the surcharge payment order is sustained by a decision after hearing procedures
Introduction of a leniency program

- A leniency program are introduced by Amendment of Antimonopoly Act in 2005
- Immunity from or reduction in surcharge payment shall be applied to enterprises that meet statutory conditions (e.g. enterprises committing unreasonable restraints of trade shall voluntarily disclose the existence of violations, provide information to the JFTC and cease the violation after initiation of an investigation)
- As for 1st applicant, the JFTC has a policy of not request the charge against the company and executives and employees of the company to the Public Prosecutors Office. The PPO will respect a conclusion of the JFTC
The total number of enterprises that may be applied to the leniency program in *no more than 3*

- 1st applicant before initiation of investigation
  ⇒ total immunity
- 2nd applicant before initiation of investigation
  ⇒ 50% deducted
- 3rd applicant before initiation of investigation
  ⇒ 30% deducted
- An applicant after initiation of investigation
  ⇒ 30% deducted
Civil Suits

- Civil Damage Suits
  - Section 26 of the Antimonopoly Act
  - Section 709 of the Civil Code (Torts)
- Injunction Relief Suits against Unfair Trade Practices (Section 24)
Criminal Penalties

- For instance, those who engaged in unreasonable restraints of trade or private monopolization may be sentenced to a penal servitude of up to three years or fined up to 5 million yen (Section 89). Those who did not comply with the final decision are sentenced to a penal servitude of up to two years or fined up to 3 million yen. In addition, maximum fines up to 500 million yen may be imposed on persons or juridical persons in the case of the double punishment (Section 95) of Section 89 offenders.
- Concerning unfair trade practices, there are no penalties expect for violations of the final decision.
Criminal Penalties

- the JFTC only can pursue criminal accusation
- Introduction of compulsory measures for criminal investigations (2005)
  - with a court-issued warrant
- Penalties against interference with inspection, etc shall be strengthened (2005)
  - a fine of not more than 200 thousand yen → penal servitude for not more than one year or a fine of not more than 3 million yen
  - double punishment for corporations (in addition to their responsible employees) shall be introduced
History of the Japanese Antimonopoly Act

- Enactment of original Antimonopoly Act (1947)
  - End of the World War II (1945)
  - GHQ’s Occupation of Japan
  - GHQ’s order to enact Antimonopoly Act
    - Judge Kime’s Draft: influence of “New Dealer”
- Amendment of Antimonopoly Act (1949, 1953)
  - Deletion of the influence of “New Dealer”
History....

- Amendment of Antimonopoly Act (1977)
  - Introduction of new regulations; surcharge, measures against a monopolistic situation, and monitoring Parallel Price Increase
  - Reinforcement of the regulation of the overall concentration, especially against corporate groups
History....

- Amendment of Anti-monopoly Act in the 1990s
  - Hike in the calculated rate of surcharges (1991)
  - Reinforcement of criminal penalties (1992)
  - Reinforcement of organization in JFTC (1996)
  - Lifting of ban on holding company, etc
History….

- Amendment of Antimonopoly Act in the 1990s…continued…
  - Promulgation of the omnibus law for abolishing exempted cartels and other exemptions under various laws (1997, 1999 etc)
  - Introduction of the injunction system (2000)
  - Amendment of the provisions concerning the regulation of the overall concentration through mergers (2002?)
Amendment of Antimonopoly Act in 2005

- The new AMA was enacted on April 20, 2005, was promulgated on April 27, 2005 and will become effective from January 2006
- Revision of surcharge system
  - increasing the surcharge rate; expanding the scope of conduct subject to the surcharge system; introducing an adjustment clause in situations where criminal fines are also imposed, etc
- Introduction of a leniency program
- Revision of hearing procedures, etc
- Introduction of compulsory measures for criminal investigations, etc
- The provision that requires a report on parallel price increases shall be abolished (already be in force)
Three piers (?) of the world competition laws

- U.S. antitrust law
  - prohibition of collusion (Section 1 of the Sherman Act, etc)
    - horizontal collusion: cartels, bid rigging etc.
    - vertical collusion (including vertical restraints)
  - prohibition of monopolization, attempt to monopolize (Section 2 of the Sherman Act)
  - Merger Control (Section 7 of the Clayton Act)
Three piers....

- **EC Competition Law**
  - Prohibition of collusion (Section 81 of the EC Treaty)
    - horizontal collusion: cartels, bid rigging etc.
    - vertical collusion (including vertical restraints)
  - Prohibition of Abuse of Dominant Position (Section 82 of the EC Treaty)
    - Creation of the dominant position in Not prohibited
  - Merger Control (Merger Regulation)
    - Since 1990
Japanese Antimonopoly Act

- Prohibition of collusion (Section 3)
  - horizontal collusion: cartels, bid rigging etc
  - vertical restraint is Not prohibited as collusion
- Prohibition of monopolization (Section 3)
  - Creation of the dominant position is prohibited
- Merger Control (Chapter 4)
- Regulation of Unfair Trade Practice (Section 19)
  - vertical restraint is prohibited by Section 19
Main Features of the Bill to Amend the Antimonopoly Act

14 October 2004
Fair Trade Commission

Submission of the amendment to the Antimonopoly Act to the Diet will be proposed at the Cabinet Meeting on October 15.

1. Revision of the surcharge system
   (1) Increasing the surcharge rate

   Manufacturers, etc.: Large-sized enterprises: 6% → 10%
   Small and Medium-sized enterprises (SMEs): 3% → 4%
   Wholesalers: Large-sized enterprises: 1% → 2%
   SMEs: 1% (no change)
   Retailers: Large-sized enterprises: 2% → 3%
   SMEs: 1% → 1.2%

   (2) Imposing a surcharge rate of 150% of the normal respective surcharge rate on those enterprises that repeat violations that were responsible for the surcharge payment order within 10 years.
(3) Reducing a surcharge rate of 20% of the normal respective surcharge rate on those enterprises whose duration of violation is less than 2 years and who have ceased the unlawful conduct more than one month before the JFTC initiates an investigation (except for the case falling under above (2)).

(4) Expanding the scope of conduct subject to the surcharge system
Current provision: Unreasonable restraints of trade (cartels) restraining the price of goods or services and those affecting the price of goods or services by substantially restraining the volume of supply
→ Amendment: Unreasonable restraints of trade (cartels) restraining the price of goods or services and those which may affect the price of goods or services by substantially restraining the volume of supply or purchase, market share, or customers or suppliers and Private monopolization through controlling the business activities of other enterprises which restrains the price of their goods or services or which may affect the price of their goods or services by substantially restraining the volume of their supply, market share or customers.
(5) Introducing an adjustment clause in situations where criminal fines are also imposed (Half the amount of the criminal fine shall be deducted from the surcharge in cases where both surcharge and criminal fines are imposed on a corporation.).

2. **Introduction of a leniency program**

Immunity from or reduction in surcharge payment shall be applied to enterprises that meet statutory conditions (e.g. enterprises committing unreasonable restraints of trade shall voluntarily disclose the existence of violations and provide related information to the JFTC and cease the violation after initiation of an investigation.).

1st applicant before initiation of investigation = total immunity
2nd applicant before initiation of investigation = 50% deducted
3rd applicant before initiation of investigation = 30% deducted
An applicant after initiation of investigation = 30% deducted

Note: the total number of enterprises that may be applied to the leniency program is no more than 3.
3. *Revision of hearing procedures, etc.*

(1) A system shall be introduced by which the JFTC issues elimination orders after having provided the respondent an opportunity to submit its opinions, etc. and initiates hearings when the elimination orders are objected to (Recommendation system shall be abolished.).

(2) Extending the statute of limitations from 1 year to 3 years for the JFTC to issue elimination orders to ensure elimination of the violation after termination of the unlawful conduct.

(3) A system shall be introduced so that the surcharge payment order does not lose effect in cases where hearing procedures have been initiated. And the JFTC may collect a surcharge by adding an arrears of the interest rate provided for by the Cabinet order if any person fails to pay a surcharge by the designated deadline and the surcharge payment order is sustained by a decision after hearing procedures.

(4) Improving provisions on hearing procedures by hearing examiners.
4. Introduction of compulsory measures for criminal investigations, etc.

(1) Compulsory measures for criminal investigations shall be introduced where a criminal accusation is being pursued.

(2) Penalties against corporations that are in contravention of elimination orders shall be strengthened (a fine of not more than 300 million yen).

(3) Penalties against interference with inspection, etc. shall be strengthened (a fine of not more than 200 thousand yen → penal servitude for not more than one year or a fine of not more than 3 million yen) and double punishment for corporations (in addition to their responsible employees) shall be introduced.

(4) The provision stipulating that the Tokyo High Court has original jurisdiction over a criminal case for unreasonable restraints of trade, etc. shall be abolished. And district courts shall have jurisdiction of a criminal case for unreasonable restraints of trade, etc.
5. Others
(1) The provision that requires a report on parallel price increases shall be abolished.

(2) The provision shall be prescribed in the supplementary clause that the revised Antimonopoly Act shall be reviewed within two years after the amendment takes effect.

(3) The amendment shall be put into force on the day provided for by the Cabinet order within one year after the date of promulgation.