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SANCTIONS IN ANTITRUST CASES

Contribution by Japan

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SANCTIONS IN ANTITRUST CASES

-- Japan --

1. Introduction

1. Regarding the necessity of sanctions against violations of the Antimonopoly Act (hereinafter referred to as the “AMA”), social concerns have been growing year by year.
2. Very serious sanctions, e.g. criminal sanctions (fine, imprisonment) are imposed on enterprises that violate the Antimonopoly Act (hereinafter referred to as the “AMA”) and claims for damage against them are filed by local government, as well as administrative measures are taken by the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”).
3. On the other hand, there are various adjustment provisions on sanctions in order to make such sanctions appropriate for actual facts of the violation and give incentives to enterprises to voluntarily cease the violations.
4. Our contribution paper firstly explains the sanction regime to the violator of the AMA in Japan, and then introduces the cases as examples.

2. Sanctions against the violations of the AMA

5. With regards to the sanctions against the violations of the AMA, there are two types of sanctions, namely, (i) administrative measures such as cease and desist orders and surcharge payment orders issued on the basis of the JFTC’s administrative investigation procedures and (ii) criminal sanctions which are issued by the court based on the JFTC’s criminal investigation procedures.

2.1 *Administrative measures*

6. When a violation by an enterprise is found as a result of investigation under administrative procedures by the JFTC, the JFTC issues a cease and desist order and a surcharge payment order against the violator of the AMA.

2.1.1 *Cease and desist orders*

7. The JFTC may order an enterprise which violates the AMA to cease and desist the relevant act, to transfer a part of the relevant enterprise's business, or to take any other measures necessary to eliminate the act in violation of the AMA(Article7(1),etc.). Furthermore, whenever the JFTC finds it to be particularly necessary, even if an act in violation of the AMA has already ceased to exist, the JFTC may order the enterprise to take any measures necessary to ensure elimination of the AMA (Article7(2), etc.).

8. In case of price cartel cases, enterprises which have been involved in the violation of the AMA are ordered to cancel the price increasing agreement, to inform stakeholders and employees of its cancelation, to take measures to prevent its recurrence (for example, establishing guidelines for action to ensure compliance with the AMA, training for sales representative) and so on as cease and desist orders.

2.1.2 *Surcharge payment orders*

9. Surcharge payment order is to impose monetary disadvantages on the violator in order to achieve the administrative goal of preventing cartels or other offenses. The surcharge is applied to those enterprises which carry out unreasonable restraint of trade such as cartels and bid rigging, private monopolization (control type and exclusionary type) and certain types of unfair trade practices¹(concerted refusal to trade, discriminatory consideration, unjust low price sales, resale price restriction and abuse of dominant bargaining position).

10. The surcharge is calculated, under the provisions of the AMA, on the basis of the amount of the sales or purchase amounts of the goods or services in question during the period of the violations (3 years maximum) by multiplying such amounts by calculation rates, while these rates are diverse depending on the type of the conduct in question as well as the operation scales and business categories of the enterprises.

11. Under the AMA, the JFTC does not have the discretion over whether to issue surcharge payment orders against violations or how much surcharge amount is imposed. Therefore, the JFTC does not be allowed to adjust the amount of surcharge without the adjustment provisions in the AMA, and the amount of surcharge will not be affected by any penalty or fine imposed in foreign countries.

- Additions and reductions of surcharge and adjustment provisions about surcharge and fine

- Additions

If a party that has received an order for surcharge payments, etc., (limited to cases where said order has become final and binding) as a result of violations of the provisions of Article 3 of the AMA (private monopolization or unreasonable restraint of trade) commits another violation of Article 3 of the AMA within 10 years and becomes subject to surcharge payment orders, the calculation rates of surcharge shall be increased by 50%. The same increase applies to an enterprise who plays a leading role in the illegal activity prescribed under Article 3 of the AMA (limited to unreasonable restraint of trade).

- Reductions

The calculation rates of surcharge are provided depending on the business category of the enterprise. The basic calculation rate is 10% in case the conduct of the enterprise is unreasonable restraint of trade, but the reduced rate will be applied in case the business category of the violator corresponds to retail business (3%), wholesale business (2%) (Article 7-2(1)).

In case the medium and small enterprise violates the AMA, more reduced rates are applied to such enterprise than that of large enterprise (Article 7-2(5)).

¹ Concerted refusal to trade, discriminatory consideration, unjust low price sales and resale price restriction are subject to the surcharge in case enterprises repeat the same violation (in case cease and desist orders or surcharge payment orders, etc. were issued against the enterprises, due to the same violation within 10 years before investigation start date by the JFTC's.) .

In case the enterprise ceases the violation by the day at least one month prior to the investigation start date, the surcharge is calculated based on the rates which are reduced by 20% from basic calculation rate (Article 7-2(6)).

Furthermore, in case the enterprise applies the leniency program, the surcharge is reduced on condition that the application meet the legal requirements.

- Adjustment provisions about surcharges and fines

In case both surcharge and fine as a criminal sanction are imposed in the same case, the amount corresponding to half the amount of fine is deducted from surcharge amount based on an adjustment provision (Article 7-2(19)).

2.2 Criminal sanctions

12. The AMA prescribes criminal sanctions against a person and an enterprise that has caused private monopolization or unreasonable restraint of trade. A person who actually engages in cartels or bid riggings shall be punished by imprisonment with work for not more than five years or by a fine of not more than five million yen (Article 89).

13. Moreover, under Dual Criminal Liability Provision (Article 95), not only a person actually engaging in cartels / bid riggings but also an enterprise and a trade association are subject to be a fine of not more than 5 hundred million yen. Besides, if a representative of an enterprise and an executive of a trade association have failed to take necessary measures to prevent the violation despite the knowledge of the plan for the violation of the AMA, such as cartels / bid riggings, a fine of not more than 5 million yen may be imposed on such a representative and an executive (Article 95-2, Article 95-3).

14. On the other hand, criminal sanctions shall be imposed only when a criminal accusation is filed by the JFTC (Article 96), and the JFTC has a policy to accuse the cases where administrative measures are not enough to attain their objectives, such as vicious and serious violations or repeated violations.

15. The choice of sanctions and the extent of them within the range as provided for in the penal provisions will be decided by the court's own decision.

2.3 Claims for damages

16. In case the cease and desist orders etc. which are issued by the JFTC have become final and binding, an enterprise or a trade association that has committed an act in the violations of the AMA shall be liable for damages suffered by another party without fault (i.e. non-existence of intention) (Article 25). Also, even if the cease and desist orders etc. have not become final and binding, compensation for damages may be claimed against a party who has been alleged to commit an act in violation of the AMA based on Article 709 of the Civil Code.

17. Actually, some of the procurement agencies of the state / local governments that suffered damage due to bid rigging have claimed for damages against enterprises under the provisions in Article 25 of the AMA or Article 709 of the Civil Code. In addition, some of residents in the place over which local governments have a jurisdiction have entered lawsuits against local governments, forcing them to claim for damages against an enterprise pursuant to the provisions in Article 242-2 of the Local Autonomy Act.

18. Moreover, some of the procurement agencies have incorporated provisions for penalties and possible damage compensation into the contract in case of bid rigging, and they have actually claimed penalties etc. against the offending enterprises under such provisions. In addition, in some cases, nomination suspension measures for such enterprises has been taken for a certain period.

2.4 *Relationship between leniency programs and sanctions*

2.4.1 *Outline of leniency programs*

19. The Japan's leniency program is a system whereby surcharges are immunized or reduced on condition that the enterprises, which have been involved in cartels or bid riggings, voluntarily report them to the JFTC. The leniency program is a system under which the earlier an enterprise applies for leniency, the higher reduction rate of surcharges is granted. The first leniency applicant before the investigation start date may be granted full immunity from surcharges and the second applicant may be granted a 50% reduction in surcharges. The third to fifth applicants that apply before the investigation start date or any applicants that apply on and after the investigation start date may be granted a 30% reduction (up to 5 applicants before, during and after the investigation start date may be granted surcharge immunity or reductions, although up to 3 applicants on and after the investigation start date may be granted surcharge reductions)².

2.4.2 *Relationship between criminal sanctions and the leniency program*

20. The JFTC has the exclusive authority to file an accusation (Article 96: A public prosecutor may not prosecute a violation of the AMA without an accusation filed by the JFTC)³. According to its policy on criminal accusations, the relationship between this policy and the leniency program is outlined as follows.

- Enterprises

21. The JFTC will not file an accusation against the first party to submit a leniency application (the first applicant for leniency) before the investigation start date. Similarly, an accusation shall not be filed against enterprises that belong to the same corporate group as the first applicant for leniency and make a joint application.

- Executives and employees of enterprises

22. The JFTC will not file an accusation against executives, employees, etc. of the first applicant to submit an application for leniency or the first applicant to submit a joint application for leniency (the first applicant for leniency) before the investigation start date, on the condition that such executives, employees, etc. cooperate with the JFTC's investigations in the same manner as the enterprise (s).

23. On the other hand, regarding filing an accusation against applicants other than the first (subsequent applicants that were the second to last to file a leniency application before the investigation start date or applicants that submitted leniency applications on and after the investigation start date), it is at the JFTC's discretion whether or not to file an accusation against subsequent applicants including its executives and employees, taking into account the applicant's degree of cooperation with the JFTC's investigation.

² Reductions in surcharges by leniency program applies surcharges calculated after additions and reductions described in 2.1.2.

³ As a result of criminal accusation by the JFTC on the basis of such competence, criminal sanctions had been imposed on total 74 enterprises and 68 individuals for the period from April, 2001 to March, 2015.

- Promotion of leniency applications

24. As described above 2.1, 2.2 and 2.3, very serious sanctions such as criminal sanctions and administrative measures are imposed on enterprises that violate the AMA. However, even if enterprises may be subject to a criminal sanction, the first party to submit an application for leniency before the investigation start date may receive immunity from criminal accusation.

25. In addition, as described above 2.4.1, the leniency program is a system under which the earlier an enterprise applies for leniency, the higher reduction rate of surcharges is granted.

26. Therefore, the leniency program is structured to provide strong incentives for enterprises to apply for leniency early.

3. Cases

3.1 *Bid-rigging case of Snow-Melting Equipment Engineering Works for Hokuriku Shinkansen ordered by the Japan Railway Construction, Transport and Technology Agency*

3.1.1 *Outline of the case*

27. The JFTC filed a criminal accusation with the Prosecutor-General against 8 enterprises which had agreed to designate successful bidders and to bid at prices allowing the designated successful bidders to win with respect to snow-melting equipment engineering works for Hokuriku Shinkansen ordered by the Japan Railway Construction, Transport and Technology Agency (hereinafter referred to as the “JRCTTA”) and, in accordance with the agreement, designated the successful bidders for each of the works. The JFTC also filed criminal accusation against the 8 individuals who were engaged in equipment engineering business of the 8 accused enterprises on March 4, 2014.

28. Thereafter, the JFTC issued the cease and desist orders to the 11 enterprises that had participated in bidding for snow-melting equipment works and the surcharge payment orders to the 7 enterprises that had participated in bidding for snow-melting equipment works on October 9, 2015.

3.1.2 *Sanctions*

- Criminal sanctions

In the case mentioned above, the criminal violation of the 8 enterprises which committing an act in violation of the AMA and 8 individuals, who were engaged in equipment engineering business of the 8 accused enterprises, were convicted through the court procedure (fines (from 120 million to 160 million Japanese yen (hereinafter referred to as “JPY”)) were imposed on enterprises and the individuals were sentenced to imprisonment from a year and 2 months to a year and 6 months (with suspended execution of the sentence).

- Administrative measures

The JFTC issued cease and desist orders, which obliges the enterprises to confirm that they had ceased their violations of the AMA and to make or revise provisions of internal regulations relating to measures against executives and employees which were involved in the violations, to 11 enterprises that had participated in bidding for snow-melting equipment works. In addition, the JFTC issued surcharge payment orders to the 7 enterprises (Total amount of surcharge: 1,034 million JPY).

- Others

The JRCTTA claimed for penalty based on penalty clauses (the amount equivalent to 10% of contract prices based on construction contract agreement) and took nomination suspension measures (from 1.5 months to 14 months) to the enterprises whose conviction were decided. Moreover, based on Japan's Building Standards Act, Ministry of Land, Infrastructure, Transport and Tourism (hereinafter referred as "MLIT") ordered those enterprises to suspend their business (from 60 days to 120 days).

In addition to the sanctions to the enterprises, in this case, the JFTC found the employees of JRCTTA were involved in the above violations (bid-rigging). The JFTC demanded that the chairman of the JRCTTA implement improvement measures to ensure that said involvement in bid rigging etc. was eliminated based on the Act on Elimination and Prevention of Involvement in Bid Rigging etc⁴. Based on above improvement measures, the JRCTTA imposed disciplinary actions (the disciplinary discharges and the suspensions) to employees which were involved in the above violations.

- Disadvantages

For example, the fine of 120 million JPY was imposed on an enterprise which was one of the violators and an its employee was sentenced to imprisonment with work for a year and 2 months (with suspended execution of the sentence for 3 years) as criminal sanctions, and the JFTC issued the cease and desist orders and the surcharge payment orders (177 million JPY) to the enterprise as administrative measures. In addition, the JRCTTA took nomination suspension measures against that enterprise (maximum 11 months) and claimed for penalty (383 million JPY) and MLIT ordered to suspend their business (60 days) based on Japan's Building Standards Act.

3.2 Bid-rigging case of the construction of garbage incineration facilities ordered by local government

3.2.1 Outline of the case

29. In relation to a case involving the garbage incineration facilities ordered by a local government, 5 manufacturing contractors of garbage incineration facilities jointly designated a successful bidder for each work and managed to have the designated bidders receive the order.

30. Therefore, the JFTC issued decisions after hearing procedures, to cease and desist the violations on June 27, 2006. In addition, the JFTC issued surcharge payment orders to them on March 23, 2007.

3.2.2 Sanctions

31. The JFTC ordered the 5 enterprises to cease and desist the violations and issued surcharge payment orders (Total amount of surcharge; about 27 billion JPY, (the range of surcharge amount is from 4.7 billion JPY to 6.4 billion JPY)) to them.

⁴

The act prescribes that, in case the JFTC recognizes that the officials of procurement agencies have been involved in bid-rigging (This kind of bid-rigging is called "Kansei-dango"), the JFTC may demand that the heads of the procurement agencies implement improvement measures to eliminate the involvement in bid rigging etc. When the procurement agencies receive the demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

3.2.3 *Suits for damages*

32. Regarding this case, suits for damages were filed by procurement agencies and many residents (at least 20 suits as of the end of August 2016 (as far as the JFTC knows), and court rulings allowing a part of claims by residents were issued in some trials.

3.2.4 *Disadvantages*

33. In addition to surcharges of approximate 27 billion JPY in total, in suits for damages under Article 25 of the AMA and under Article 709 of the Civil Code, court rulings allowing claims by procurement agencies, etc. were issued, and payment of compensation of approximately 31.5 billion JPY by total 5 enterprises was decided. It means that the 5 enterprises incurred a monetary disadvantage of 58.5 billion JPY. In addition, some trials were finalized by the money paid to settle.

4. Review of the current surcharge system

34. Under the current surcharge system, the JFTC must without discretion impose the surcharge on the infringed enterprises, which is calculated in a rigidly uniform, mechanical method of multiplying amount, such as sales of goods or services subject to cartels or other infringements by a fixed rate in accordance with objective calculation requirements and methods stipulated by law.

35. As there are some cases in which the current surcharge system sometimes makes it difficult for the JFTC to properly deal with the business activities and corporate structures that are getting globalized, diversified and complicated, the study group of the AMA is reviewing the modality of a surcharge system in order to adapt surcharge system to unceasing changes in economic and social environment.

ANNEX

Order of application before the investigation start date and Immunity/reduction rate

Order of application before the investigation start date	Immunity/reduction rate
1st applicant	Total(100%) immunity
2nd applicant	50% reduction
3rd applicant	30% reduction
4th and 5th applicants	30% reduction(Note 1)

Order of application on and after the investigation start date and Immunity/reduction rate

Order of application after the investigation start date	Immunity/reduction rate
maximum 3 applicants	30% reduction(Note 1,2)

Note 1: As for applicants of fourth and fifth who apply before the investigation start date and those who apply on and after the investigation start date, they are required to submit reports and materials of the illegal activity which the JFTC has not yet obtained from any other source at the time.

Note 2: Together with the parties before the investigation start date, a maximum of 5 companies may be granted (e.g., if 3 applicants are granted leniency before the investigation start date, a maximum of 2 applicants may be granted leniency on and after the investigation start date).