

Unclassified**English - Or. English****13 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Japan**

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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1. Introduction

1. Anticompetitive arrangements, of which participants form an appearance of a hub-and-spoke are also seen in Japan. There have been hub-and-spoke type arrangements with a strong horizontal connection and a weak or no horizontal connection. Although there is no rule that specifically regulates hub-and-spoke type arrangements themselves as cartel conducts, Japan Fair Trade Commission (JFTC) has been applying some provisions of the Antimonopoly Act (AMA) and a related law to tackle this type of arrangements, taking into account the nature and the characteristic of each case, trying to capture the participants involved in anticompetitive conducts. In this contribution paper, we will outline the current legal framework, the AMA provisions and the other relevant law and measures which can be used to deal with hub-and-spoke type arrangements, as well as actual cases with an appearance of hub-and-spoke and how they have been handled by the JFTC.

2. Current Legal Framework

2.1. Measures against hub-and-spoke type arrangements with a strong horizontal connection

2. In Japan, cartels and bid riggings, which have a strong horizontal connection, are regulated by the second half of Article 3¹ of the AMA as unreasonable restraint of trade². This provision prohibits business activities which cause a substantial restraint of competition by the market participants, and a violation of Article 3 is subject to administrative measures by the JFTC. As court precedents regard unreasonable restraint of trade as collusions among competitors, vertically related players engaged in horizontal competition restraints including a company working as a hub in hub-and-spoke arrangements have been out of the scope of the application of Article 3 by the JFTC. On the other hand, the JFTC makes a criminal accusation against not just competitors in horizontal collusions, but also vertically related players as criminal sanctions could be applied to these players as well, if the case is brought to the criminal procedure.

3. In the case where the officials working in government ministries and agencies, local governments and state-owned enterprises (hereinafter referred to as the “Ministries and Agencies”) function as a hub in collusive biddings in the public procurement sector, the JFTC could take certain legal measures against Ministries and Agencies involved under the Act for the Prevention of Collusive Bidding at the Initiative of Government Officials. The

1 An enterprise must not effect private monopolization or unreasonable restraint of trade. (Article 3)

2 The term "unreasonable restraint of trade" as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. (Article 2 Paragraph 6)

Act was enacted in 2002 aimed at preventing involvements of the officials in bid riggings in the public procurement sector as in those days the JFTC had detected a number of bid rigging cases where the officials were to be found involved as a hub, inducing the AMA violations. Based on Article 3 of the Act, when the JFTC finds an involvement of the officials in bid riggings in the public procurement sector such as proactively organizing bid riggings and leaking confidential information on biddings to bidders, it may demand the heads of Ministries and Agencies to implement improvement measures, which may lead to the disciplinary actions and/or the damage compensation claim against the officials involved. Since the enactment of the Act, the JFTC has demanded heads of Ministries and Agencies to take improvement measures in 13 cases. Besides, any kind of acts of officials to harm the fairness of biddings in the public procurement sector are subject to criminal sanctions under Article 8 of the Act, and there are about 10 such criminal cases every year.

2.2. Measures against hub-and-spoke type arrangements with a weak or no horizontal connection

4. Regarding the anticompetitive activities which have a hub-and-spoke appearance with a weak or no horizontal connection among competitors, the JFTC could apply either the first half of Article 3 or Article 19³ of the AMA, depending on the magnitude of the adverse impact in the market caused by such activities. The first half of Article 3 prohibits private monopolization⁴, business activities by a company controlling the business activities of other companies which cause a substantial restraint of competition in the market, and the violation of it is also subject to administrative measures by the JFTC. The Article 19 prohibits unfair trade practices which tend to impede fair competition in the market such as resale price maintenances, non-price restraints and unjust low price sales, and is subject to administrative measures by the JFTC.

3. Actual Cases

3.1. Narasaki Sangyo and Hokkaido Hitachi Case

5. In the case of Narasaki Sangyo and Hokkaido Hitachi where three agricultural equipment makers colluded on biddings of the construction works for the low temperature air conditioning system used in facilities to store agricultural products ordered by the agricultural cooperatives in Hokkaido prefecture, Hokuren, an agricultural cooperative group, worked as a hub for the bid rigging arrangements. Hokuren, which contracted with the agricultural cooperatives to conduct the procurement procedures on behalf of them as their agent, facilitated the bid riggings by providing the agricultural equipment makers with information such as budget amount of the cooperatives. Consequently, the JFTC issued a cease and desist order, demanding not to repeat similar kind of anticompetitive activities in the future and take preventive measures such as compiling compliance guidelines, and a surcharge payment order a total of 16.6 million yen (approximately 140 thousand US

3 An enterprise must not employ unfair trade practices. (Article 19)

4 The term "private monopolization" as used in this Act means such business activities, by which any enterprise, individually or by combination, in conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. (Article 2 Paragraph 6)

dollars) to the makers as a violation of the second half of Article 3, the prohibition of unreasonable restraint of trade. As for Hokuren, the JFTC asked it to take appropriate measures to prevent recurrence of such inducement of the AMA violations, taking into account its degree of involvement in the bid riggings.

3.2. JA Fukui Prefectural Economic Federation of Agricultural Cooperatives Case

6. In the case of JA Fukui Prefectural Economic Federation of Agricultural Cooperatives (hereinafter referred to as the “JA Fukui Keizairen”) where there was an appearance of a hub-and-spoke arrangement but the horizontal connection was not obvious, the JFTC applied the first half of Article 3, the prohibition of private monopolization, to the JA Fukui Keizairen, which acted as a hub in the arrangement. The JA Fukui Keizairen was in charge of the procurement procedures on behalf of the agricultural cooperatives that put out construction works for the facilities for drying, husking and storage of grains to bid in Fukui prefecture. The JA Fukui Keizairen controlled the business activities of the bidders participated in the biddings, designating successful bidders and making designated successful bidders win the biddings. Eventually, the JFTC issued a cease and desist order to the JA Fukui Keizairen, demanding not to repeat similar kind of activities in the future and take preventive measures such as compiling compliance guidelines. In this case, however, the JFTC didn’t issue a surcharge payment order to the JA Fukui Keizairen as it didn’t have an annual turnover in the affected market by the AMA infringement.

3.3. Coleman Japan Case

7. Another case where there was an appearance of a hub-and-spoke arrangement but the horizontal connection was not obvious was the Coleman Japan case. In this case, a camping equipment maker Coleman Japan set a sales regulation for the retailers of its products, which demanded the retailers to sell the products at a higher price than the minimum floor price set by Coleman Japan and allowed discount sales only in limited situations. Coleman Japan, as a hub, made the retailers comply with the sales regulation by promising to make the other retailers comply with the sales regulation. Whenever Coleman Japan found that some of the retailers sold its products at a price that deviated from the sales regulation through its own investigation or complaints from the other retailers, it repeatedly requested the retailers to comply with the sales regulation, and eventually almost all the retailers were selling the products in accordance with the sales regulation. Consequently, the JFTC established the resale price maintenances by Coleman Japan as a violation of Article 19 of the AMA and issued a cease and desist order to it, demanding not to repeat similar kind of activities in the future and take preventive measures such as compiling compliance guidelines.

4. Conclusion

8. As described above, the JFTC has been vigorously and effectively enforcing the AMA, utilizing various provisions, against hub-and-spoke type arrangements which have adverse impacts on competition in the market, and the JFTC will continuously make every effort to tackle this problem.