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Competition Compliance Programmes – Note by Japan

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More documents related to this discussion can be found at
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Japan

1. Introduction

1. The Japan Fair Trade Commission (hereinafter referred to as the "JFTC") has strengthened its enforcement power against violations of the Antimonopoly Act (hereinafter referred to as the "AMA") in the amendments of the AMA to date, by increasing the surcharge calculation rate and by other means, aiming to enhance its deterrent power against violations of the AMA.

2. Enterprises and trade associations (hereinafter referred to as "Enterprises") that commit a violation of the AMA can also be subject to sanctions based on laws and regulations other than the AMA. Therefore, there is an increasing need for Enterprises to establish an effective competition compliance system to prevent and withdraw from violations of the AMA.

3. This contribution paper, focusing on the AMA compliance, (1) outlines the sanctions against violations of the AMA that have led to the improvement of the AMA compliance awareness of Enterprises, (2) introduces the efforts of Enterprises regarding the AMA compliance, and (3) refers to the meaning and the significance of the AMA compliance in the commitment procedure and the revised leniency program introduced in the recent amendments of the AMA.

2. Institutional Background of the AMA Compliance

2.1. Outline of Cease and Desist Order and Surcharge Payment Order by the JFTC

4. Following the series of amendments of the AMA since the 2000's which strengthened sanctions against violations of the AMA, the more strict enforcement of the AMA by the JFTC raised awareness of Enterprises concerning the AMA compliance. The outline of the administrative measures taken by the JFTC is as follows:

2.1.1. Cease and Desist Order¹

5. The JFTC may issue a cease and desist order to the Enterprises found to have committed violations of the AMA such as Private Monopolization, Unreasonable Restraint of Trade (cartels and bid rigging), or Unfair Trade Practices, to make them cease such violations or take measures to prevent recurrences.

6. From the viewpoint of the AMA compliance, the JFTC may order cease and desist measures such as the establishment or revision of guidelines for the AMA compliance, periodic training and audits of sales staff, the development of internal rules concerning the disciplinary actions against executives and employees involved in violations of the AMA, and the establishment of an effective internal reporting system that may give an appropriate consideration for whistleblowers. There have been many actual cases, where the JFTC ordered some of the above mentioned measures, for example, the case against JFE Engineering Corporation and 39 other enterprises in 2005; the case against the participants

¹ Article 7, Paragraphs (1) and (2), Article 8-2, Paragraphs (1) through (3), Article 17-2, Paragraphs (1) and (2), and Article 20, Paragraphs (1) and (2) of the AMA.

in bidding ordered by Central Japan Railway Company for the construction of the Shinagawa and Nagoya new terminal stations for the Chuo Shinkansen using the superconducting maglev system² in 2020 and the case against drug manufacturers and distributors of CALVAN Tablets³ in 2020. Enterprises that fail to comply with a cease and desist order after it has become final and binding are punished by imprisonment with work for not more than two years or by a fine of not more than three million yen (Article 90, Item (iii) of the AMA).

2.1.2. Surcharge Payment Order⁴

7. If an enterprise has committed a violation of the AMA that is subject to surcharge such as Private Monopolization, Unreasonable Restraint of Trade (cartels and bid rigging), the JFTC must order the enterprise to pay a surcharge to the national treasury.

8. Particularly, since the amendment of the AMA in 2005, further efforts have been made to enhance the deterrence of violations of the AMA through the reviews on the surcharge system, such as raising the surcharge calculation rates and the introduction of the leniency program.

9. In the amendment in 2005, the JFTC introduced the leniency program, in which the amount of surcharge would be reduced at a predetermined rate or exempted according to the order of application when the enterprise who had committed a violation of the AMA reported the details of the violation to the JFTC.

10. In the recent amendment of the AMA in 2019, the calculation basis, calculation rate of the surcharge, and other factors were revised so that appropriate amount of surcharge could be imposed even in recent complex and diversified cases. Specifically, the calculation period, that is, the basis of calculation, was revised as "traceable back to 10 years from the date on which the JFTC started investigation" (the period was 3 years before the revision). In addition, with regard to the surcharge calculation rate, namely the scheme concerning the increased surcharge calculation rate for the enterprises which played leading roles in infringements, the following cases were newly added to its subject: (i) an act of enterprises requiring other enterprises to obstruct the JFTC's investigations, and (ii) an infringement of an enterprise, of which wholly-owned subsidiaries have received the surcharge payment order within the past 10 years, and which has succeeded the business of enterprises which violated the AMA within the past 10 years.

2.2. Civil Procedures

11. In addition to the administrative measures mentioned in above (1), violations of the AMA involve the risk of civil liability for compensation of damages as described below. This has also prompted the need to establish the AMA compliance program in Enterprises.

2.2.1. Liability without Fault for Damages (Article 25 of the AMA)

12. Pursuant to Article 25 of the AMA, once a cease and desist order has become final and binding, any enterprise or trade association that has committed Private Monopolisation,

² <https://www.jftc.go.jp/en/pressreleases/yearly-2020/December/201222.html>

³ <https://www.jftc.go.jp/en/pressreleases/yearly-2020/March/200305.html>

⁴ Article 7-2, Paragraph (1), Article 7-9, Paragraphs (1) and (2), Article 8-3, and Articles 20-2 through 20-6 of the AMA

Unreasonable Restraint of Trade, Unfair Trade Practices, etc. is liable for faultless (i.e. non-existence of intention or negligence) damages suffered by another party.

2.2.2. Action for Pursuing Liability, etc. by Shareholder (Article 847 of the Companies Act)

13. "Action for Pursuing Liability, etc." is an action filed by a stock company's shareholder, on behalf of the stock company, for pursuing the liability of the stock company's executives when the stock company does not pursue the liability of the executives. In the context of a violation of the AMA, a shareholder, on behalf of a company, can file an action pursuing the liability of its executives for damages that company suffers due to its executives' involvement in a violation of the AMA such as their acquiescence to the violation, or a defect in the internal control system.

14. There is an increasing risk that the executives of companies involved in a violation of the AMA are pursued for their liability in the shareholder lawsuit. For example, Sumitomo Electric Industries, Ltd. received a surcharge payment order total of about 8.8 billion yen from the JFTC in 2010 and 2012 in the cartel case of optical fiber cable products. The shareholders of Sumitomo Electric Industries, Ltd. claimed that 22 executives of the company had caused damages to the company due to (i) the involvement in or acquiescence to the cartel; (ii) the breach of the obligation to establish an internal control system for the prevention of cartels; (iii) the breach of the obligation to establish an internal control system for the leniency application and (iv) the negligence in applying for the leniency program, and demanded them the equivalent amount of damages. Subsequently, a settlement was reached in which the executives agreed to pay 520 million yen to the company.

2.2.3. Damages in Torts (Article 709 of the Civil Code)

15. A victim that has suffered a damage due to a violation of the AMA may seek a compensation for the damage based on the provisions of Article 709 of the Civil Code, which provides damages in torts. However, in this case, the victim is required to prove the intention or negligence of whom commit the violation of the AMA.

2.3. Others

2.3.1. Response by Public Procurement Bodies or Other Regulatory Bodies to Enterprises Committed Bid Rigging

16. When Enterprises commit bid rigging in a public procurement, the public procurement bodies may suspend the designation of them for bids or demand a penalty.

17. In addition, in accordance with provisions of the Construction Business Act, enterprises in construction business who obtain a license from the Minister of Land, Infrastructure, Transport and Tourism and undertake public constructions may be subject to an order of business suspension by the Minister of Land, Infrastructure, Transport and Tourism or the Prefectural Governors if they violate laws and regulations including the AMA.

2.3.2. Response by the JFTC to Public Procurement Bodies

18. In bid rigging cases in which the officials of ordering public procurement bodies involve (i.e. instructing or enticing Enterprises to commit bid rigging), the JFTC does not only takes administrative measures against the Enterprises pursuant to the AMA, but also requires the public procurement bodies to implement improvement measures based on the Act for the Prevention of Collusive Bidding at the Initiative of Government Officials as

institutional treatments to prevent public procurement bodies from inducing violations of the AMA.

3. Actual Status of the AMA Compliance in Enterprises

19. The following is the overview of the actual status of awareness and efforts of Enterprises concerning the AMA compliance in Japan in response to the strengthened enforcement against violations of the AMA mentioned in above 2, which is based on fact-finding surveys conducted by the JFTC.

3.1. Efforts by Enterprises (Fact-Finding Report Published in 2012)

3.1.1. Background of the Fact-Finding Survey

20. The JFTC conducted a fact-finding survey in order to grasp and analyze the state of efforts by enterprises regarding the AMA compliance, to clarify current problems and issues, and to present various measures for further improvement. In this survey, the JFTC sent a questionnaire to 1681 enterprises listed in the first section of the Tokyo Stock Exchange, and received responses from 879 enterprises. In addition, the JFTC conducted interviews with the enterprises that mentioned interesting cases in the response to the questionnaire. The JFTC published a report which summarized the results of the survey in 2012.

3.1.2. Significance of Promoting Awareness of the AMA Compliance

21. In the questionnaire survey, the JFTC asked what the costs that could be avoided and the benefits that could be obtained by promoting the AMA compliance. In addition, the JFTC also asked what costs were caused by insufficient AMA compliance system. The following are some of the responses to the questionnaire.

- The benefit is maintaining / improving the brand image of the enterprise, maintaining / improving the trust from its business partners and shareholders, and avoiding potential sanction risks.
- When our enterprise was subject to legal action for violating the AMA, we recognized that there was no economic merit from committing bid rigging because of surcharge payment, decline in stock price, debarment from bidding for public contracts and claims for damages from customers.

3.1.3. Establishment of Compliance Programs According to the Actual Situation

22. Since the risk of the AMA violation of each enterprise differs depending on its business activities and market environments, etc., enterprises need to take AMA compliance measures in accordance with the actual circumstances particular to them, instead of adopting the measures uniformly presented in a model compliance program. In the responses to the questionnaire survey, some enterprises mentioned the following efforts.

- Since general-purpose products could easily be a subject of a cartel, we considered that the business divisions dealing with such products had a high risk of violating the AMA, and therefore we conducted an internal investigation with priority in such divisions. As a result, we found a conduct deemed to violate the AMA and we were able to apply for the leniency program.

- We began trainings for the employees of the factory without a sales division who had not been previously provided the training on the AMA, because joint developments with other enterprises in the same industry had increased and those employees had had more opportunities to come in contact with the employees of the other enterprises.

3.1.4. Implementation of Audits on the AMA and Application for the Leniency Program

23. In the questionnaire survey, 57.2% of the enterprises responded that they regularly implemented internal audits on the AMA, and 14.2% of them answered that they found cases that might lead to violations of the AMA.

24. In addition, when asked whether they would like to apply for the leniency program in a case where an employee was likely to be involved in a cartel / bid rigging, 51.1% of the enterprises responded that they would apply for the leniency program, while 42.2% responded that they were not sure whether they would apply or not. And the survey also revealed that only 3.2% established a crisis management manual for violations of the AMA.

3.1.5. Proposals from the JFTC

25. In the report, the JFTC recommended enterprises to take following measures for the crisis management: (1) prevention of violations of the AMA through trainings for employees, etc., (2) detection of violations of the AMA at an early stage through audits, etc., and (3) dealing appropriately with violations of the AMA in through advance development of a crisis management manual on violations of the AMA including policies on the application for the leniency program.

3.2. Efforts by Trade Associations (Fact-Finding Report Published in 2016)

3.2.1. Background of the Fact-Finding Survey

26. The JFTC conducted a fact-finding survey in order to grasp the approach of compliance in trade associations. In this survey, the JFTC sent a questionnaire to 1041 trade associations and received responses from 696 trade associations. In addition, the JFTC conducted interviews with the trade associations which mentioned interesting cases in the responses to the questionnaire. The JFTC published a report which summarized the results of the survey in 2016.

3.2.2. Outline of the Results of the Survey

27. From the following results of the survey, it became clear that the efforts for the AMA compliance were insufficient in the trade associations.

- 22.1% of the trade associations responded that they had a manual for the AMA compliance
- 14.1% of the trade associations responded that they provided their staff with trainings on the AMA
- 8.5% of the trade associations responded that they implemented audits on the AMA
- 90.1% of the trade associations responded that they did not support member enterprises with developing a crisis management manual on violations of the AMA.

28. There seem to be two reasons why the trade associations responded in a way mentioned above. The first is that many trade associations were little aware of efforts for the AMA compliance as they recognized that respective member enterprises should mainly make an effort to address the AMA compliance matters. The second is that compliance efforts, especially those requiring a certain scale of human resources, were difficult for trade associations to implement because the most of the trade associations covered by this survey had less than 10 office clerks.

3.2.3. *Proposals from the JFTC*

29. The JFTC encouraged trade associations to make an effort to implement the AMA compliance depending on the scale and capacity and proposed that efforts requiring human resources such as training seminars should be carried out by multiple trade associations or by outsourcing.

3.3. Advocacy Efforts by the JFTC to Raise Awareness of the AMA Among Enterprises

30. As can be seen especially from the result of the fact-finding survey in above (1), it can be evaluated to a certain extent that the awareness of the establishment of the AMA compliance system has been improved against the backdrop of the sanction cost for violations of the AMA. However, as mentioned especially in above (2), there remain problems that need to be improved, and it is desirable for the JFTC to further enhance awareness of the AMA in Enterprises.

31. The JFTC mainly implements following advocacy activities to further improve awareness of the AMA which is a prerequisite for the AMA compliance in Enterprises: (1) dispatching JFTC staff as resource persons to workshops and seminars on the AMA organized by trade associations, consumer associations, local governments, etc., (2) holding discussions, etc. on the enforcement of the AMA between experts and JFTC commissioners, and (3) dispatching JFTC staff as resource persons to workshops on the Act for the Prevention of Collusive Bidding at the Initiative of Government Officials organized by public procurement organizations. The number of advocacy events for the last three years is shown in the table below.

Table 1.

Events	2018	2019	2020
Dispatch of Resource Persons based on Requests from Trade Associations, Consumer Groups, Local Governments, etc.	165	176	110
Discussions, etc. with Experts	95	91	60
Dispatch of Resource Persons based on Requests from Public Procurement Agencies	283	314	153

32. In addition to the above mentioned activities, the JFTC provides consultation for Enterprises on whether or not a specific act to be carried out by Enterprises may conflict with the provisions of the AMA. The JFTC compiles the outline of the leading consultation cases which seem to be helpful for Enterprises, besides consultants, and publishes it every year. These activities are expected to lead to further understanding of the AMA and introduction of measures to prevent violations of the AMA by Enterprises.

4. Recent Institutional Developments Concerning the AMA Compliance

33. In addition to the sanctions against violations of the AMA mentioned in above 2, the JFTC has developed systems to further deter violations of the AMA by introducing procedures to promote enterprises' cooperation to the JFTC's investigation and to impose appropriate surcharges, through a series of amendments of the AMA. Recent developments include (i) introduction of the commitment procedures (2018) and (ii) introduction of the reduction system for cooperation in investigation through the review of surcharge system (2020). The AMA compliance is taken into account in both systems, and the advantages and significance of the AMA compliance in these systems are described as follows.

4.1. Introduction of the Commitment Procedure (2018)

34. The JFTC introduced the commitment procedure in 2018 in order to resolve competition concerns earlier and to enable the JFTC to resolve cases through cooperation with enterprises. The outline of the procedures is described below.

4.1.1. Flow of the Commitment Procedures

35. The commitment procedures are carried out in order of (i) a notification by the JFTC informing the availability of the commitment procedure to the enterprise suspected as a violator (hereinafter referred to as the "notified enterprise"), (ii) an application for an approval of commitment by the notified enterprise in which the notified enterprise submits a commitment plan describing its measures to eliminate, or to ensure elimination of, the suspected violation of the AMA and the deadline for their implementation, and (iii) an approval of the commitment plan by the JFTC. In the process (iii), when the JFTC recognizes that the commitment plan satisfies the requirements of "sufficiency of the content of the measures" and "reliability of measures implemented", the JFTC will approve the commitment plan and shall not take any legal measure against the suspected violation and the conducts related to commitment measures. The JFTC must render a decision to rescind the approval of the commitment plan when it finds that the approved commitment measures have not been implemented or that the notified enterprise obtain the approval based on false or wrongful facts.

4.1.2. The AMA Compliance and the Commitment Procedures

36. In the "Policies Concerning Commitment Procedures⁵" established by the JFTC, "development of a compliance program", such as regular auditing and in-house training of employees, is listed as one of typical examples of commitment measures. This is because it may be necessary to develop a compliance program in some cases, in order to ensure the requirement of "reliability of measures implemented" mentioned in above (A), ensuring the cease of the suspected violation or the confirming that it has already ceased to exist.

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https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/policies_concerning_commitment_procedures.pdf

4.1.3. Commitment Procedures in Actual Cases

37. The recent cases regarding suspected violations of the Article 19 of the AMA⁶, in which the enterprises submitted a commitment plan and the JFTC approved, are as follows:

- Amazon Japan, who was investigated by the JFTC because its activities (i.e. price reduction, request for economic benefits, unreasonable return of goods, etc. to suppliers in a weaker position in the transaction) were suspected to violate the AMA, made an application for commitment approval. The JFTC, after considering the application, recognized that the commitment plan of Amazon Japan would conform to the requirements and approved it.
- BMW Japan, who was investigated by the JFTC because its activities (i.e. setting a sales target for new BMW vehicles which was difficult to achieve, having dealers agree to the sales target without sufficient discussion and requesting dealers to own new BMW vehicles more than necessary for their business purposes in order to achieve the sales target) were suspected to violate the AMA, made an application for commitment approval. The JFTC, after considering the application, recognized that the commitment plan of BMW Japan would conform to the requirements and approved it.

4.2. Introduction of the Reduction System for Cooperation in Investigation through the Review of Surcharge System (2020)

4.2.1. Background

38. The JFTC's previous leniency system has the limit concerning enterprises' cooperation to the JFTC's investigation, as the reduction rate of surcharges is calculated uniformly according only to the order of leniency application, regardless of degree of enterprises' cooperation. In order to address this challenge, the reduction system for cooperation in investigation (hereinafter referred to as the "reduction system") was added to the current leniency system in 2020. This has promoted efficient and effective fact finding and investigation process by enhancing the cooperative relationships between enterprises and the JFTC, and has enabled the JFTC to calculate and impose an appropriate amount of surcharges according to the complicated economic environments.

4.2.2. Outline of the the Reduction System

Reduction Rate

39. In the reduction system, the reduction rate according to the degree of cooperation is added to the reduction rate according to the order of leniency application (the table below shows applicable reduction rate). The content of the enterprise's cooperation and the total reduction rate are determined based on a consultation and agreement between the enterprise and the JFTC.

40. The enterprise that first applies for leniency before the investigation start date is not subject to the reduction system.

⁶ Unfair Trade Practices, stipulated in the Article 2, Paragraph (9), Item (v) [Abuse of Superior Bargaining Position] of the Antimonopoly Act.

Table 2.

Leniency program				Reduction system		Total reduction rate
The date of application	The order of application	Reduction rate according to the order of leniency application		Reduction rate according to the degree of cooperation		
Before the investigation start date	1st	100%	+	-	=	100%
	2nd	20%		Up to 60%		
	3rd-5th	10%		Up to 50%		
	6th and after	5%		Up to 45%		
After the investigation start date	Up to 3 ⁷	10%		Up to 30%		
	Other than the above	5%		Up to 25%		

Flow of the Reduction System

41. The procedure of the reduction system is carried out in the order of (i) an application for the leniency program by the enterprise that has recognized its violation of the AMA, (ii) consultation and agreement between the JFTC and the enterprise on the content of the enterprise's cooperation and the total reduction rate, and (iii) an actual cooperation of the enterprise.

42. If the enterprise fails to cooperate by the deadline set in the agreement, this system will not be applied.

The AMA Compliance and the Reduction System

43. It is essential for enterprises to enhance cooperation from their employees in their in-house investigations to detect violations of the AMA, especially in connection with above (b) (i), in order that they can effectively utilize the reduction system and that the reduction system fully functions. In this respect, the JFTC, in order to promote enterprises' development of the AMA compliance program, has presented the following measures.

- Introduction and development of in-house leniency program that allows enterprises to consider mitigating the disciplinary actions against employees who has been involved in a violation of the AMA but has voluntarily made a necessary report on the violation.
- Introduction and development of internal reporting system in order for enterprises to receive reports from their employees concerning the acts that violate laws and internal rules.
- Consideration regarding handling of their employees who have cooperated with the investigation of the JFTC. In order to ensure that the reduction system fully functions, the cooperating employees should not be treated disadvantageously according to their statements, etc. without reasonable grounds.

44. As described above, in order to effectively utilize the reduction system, it is desirable for enterprises to promote the AMA compliance by introducing and developing advanced systems in addition to regular audits.

⁷ They can acquire the 10% reduction rate according to the order of leniency application on condition that the total number of applicants (the applicants who applied before the investigation start date are included) is 5 or less.

5. Conclusion

45. Enterprises have enhanced their awareness of the AMA compliance and have had further incentive to establish a more effective AMA compliance system against the backdrop of the introduction of systems to effectively prevent violations of the AMA including the leniency program and other measures from the viewpoint of strengthening the enforcement power of the AMA, and the increase in the risk of sanctions based on laws and regulations other than the AMA.

46. In order to make recently introduced systems such as the reduction system function effectively, it is desirable that Enterprises will further develop the AMA compliance system, which is expected to promote the prevention of violations of the AMA.