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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Japan

-- Session II --

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-- Japan --

1. Introduction

1. When enterprises restrained competition in Japanese markets with an activity such as a cartel, regardless of whether the enterprises are located in Japan or not, the Japan Fair Trade Commission (hereinafter referred to as "the JFTC") concludes that these activities of the enterprises constitute violations of the Antimonopoly Act (hereinafter referred to as "the AMA"). Recently, the number of cases in which the activity has violated the provisions of competition laws of more than one country is increasing. In consideration of such circumstances, the JFTC co-operates closely with foreign competition authorities in case investigations.

2. We will describe below the existing mechanisms for international co-operation in cartel investigation (part II) and the case examples where the JFTC co-operated with foreign competition authorities (part III). Furthermore, Part IV explains the problems of the international co-operation in cartel investigation.

2. The Mechanism for International Co-operation

2.1 Outline

3. The JFTC co-ordinates and co-operates on enforcement activities as parts of international co-operation with foreign competition authorities in cartel investigations. These activities are undertaken based on the formal co-operation mechanisms such as the agreements between governments or economies concerning co-operation on anticompetitive activities. Recently, the provision which authorizes the JFTC to provide information to foreign competition authorities was introduced in the amended AMA (2009) and it clarified the legal requirements for providing information to foreign authorities¹.

¹ Article 43-2 of the AMA

(1) The Fair Trade Commission may provide any foreign authority responsible for the enforcement of any laws and regulations of their country that correspond to the equivalent of this Act (hereinafter referred to as a "foreign competition authority") with information that is deemed helpful or necessary to perform their duties (limited to duties that correspond to the equivalent of the duties of the Fair Trade Commission as provided in this Act; the same shall apply in the following paragraph); provided, however, that this does not apply to cases where the provision of such the said information is deemed likely to interfere with the proper execution of this Act or to infringe upon the interests of Japan in any other way.

(2) When providing the information pursuant to the provisions of the preceding paragraph to a foreign competition authority, the Fair Trade Commission shall confirm matters listed in the following items:

(i) That the relevant foreign competition authority is capable of providing information corresponding to the equivalent of the information provided pursuant to the provisions of the preceding paragraph

2.2 *The formal mechanism for international co-operation*

2.2.1 *Agreements between Governments or Economies concerning Co-operation on Anticompetitive Activities and Economic Partnership Agreements*

4. The government of Japan and the government of the United States of America signed the “Agreement between the Government of Japan and the Government of the United States of America concerning Co-operation on Anticompetitive Activities” (hereinafter referred to as “Japan-US Agreement”) in 1999. Japan concluded a similar agreement with the European Community (hereinafter referred to as “Japan-EC Agreement”) (2003) and Canada (2005). These are administrative implementing agreements concluded independent of the Japanese Diet, which stipulate the procedures regarding: the notification of enforcement activities, the co-operation (assistance), the co-ordination of the enforcement activities, the request of the enforcement activities, the consideration to the important interests of other governments, regular meetings between the competition authorities, the handling of information provided, etc. The JFTC does co-operation such as the notification, assistance and the co-ordination of the enforcement activities with competition authorities of the U.S., EU, and Canada based on these agreements.

5. In addition, the government of Japan concluded 11 Economic Partnership Agreements (hereinafter referred to as “EPA”) after being passed by the Diet, which include Chapters concerning Competition. Moreover, there are concrete provisions on co-operation in the competition area in EPAs between Japan and Singapore (put into effect in 2002), Mexico (put into effect in 2005), Thailand (put into effect in 2007), Indonesia (put into effect in 2008), Switzerland (put into effect in 2009) and Peru (signed in May, 2011, but they have not yet been put into effect), which are similar to provisions of agreements concerning co-operation on anticompetitive activities as described above. The JFTC does co-operation such as the notification, assistance and the co-ordination of the enforcement activities with their competition authorities based on the EPAs.

2.2.2 *Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (1995)*

6. Based on the 1995 Recommendation, the JFTC does co-operation such as notification, information exchange and coordination on enforcement with competition authorities of OECD member countries which have not concluded agreements concerning co-operation on anticompetitive activities or EPA with the Japanese government.

2.2.3 *Informal mechanism for international co-operation*

7. Based on the AMA Article 43 Paragraph 2, the JFTC can also do international co-operation with competition authorities of countries which have not concluded agreements concerning co-operation on anticompetitive activities with the Japanese government and are not OECD members.

(ii) That the secrecy of the information provided as a secret pursuant to the provisions of the preceding paragraph and as a secret will be protected under the laws and regulations of the relevant foreign country to a degree that is equivalent to the degree in which the secrecy of such information is protected in Japan

(iii) That the information provided pursuant to the provisions of the preceding paragraph will not be used by the relevant foreign competition authority for a purposes other than those that will contribute to perform its duties

(3) Appropriate measures shall be taken so that the information provided pursuant to the provisions of paragraph (1) will not be used for criminal proceedings to be taken by courts or judges of foreign countries.

3. Main Cases of International Co-operation

| Date of the enforcement | Outline of the case | Main co-operating countries/economies | Types of cooperation conducted (legal basis) |
|---|--|--|--|
| 1 December, 2003 (hearing on surcharge payment is pending now) | Price cartel of modifier for vinyl chloride resin | EU | Notification and information exchange (Japan–EC Agreement) |
| 2 February, 2008 | Bid-rigging by marine hose manufactures | US EU UK Italy France Korea | Notification and information exchange (Japan–US Agreement) Notification and information exchange (Japan–EC Agreement) Notification (1995 Recommendation) Notification (1995 Recommendation) Notification (1995 Recommendation) Notification (1995 Recommendation) |
| 3 October, 2009 (hearing is pending now) | Price cartel by manufacturers of cathode ray tubes for televisions | EU Korea Thailand Indonesia | Notification and information exchange (Japan–EC Agreement) Notification (1995 Recommendation) Notification (Japan–Thailand EPA) Notification (Japan–Indonesia EPA) |

4. Points worth noting about international co-operation in cartel investigations

8. While the JFTC co-operates formally or informally with foreign competition authorities in international cartel investigations based on the various provisions, some points are worth noting when the co-operation is done. Below, we will introduce (i) exchange of information gained by leniency applications, (ii) co-ordination of the timing of on-the-spot investigations and (iii) gathering evidence of foreign enterprises after opening investigations.

4.1 *Exchange of information gained by leniency applications*

9. In the international cartel cases, the leniency applications are often made in more than one jurisdiction simultaneously.

10. If the information gained by leniency applications would include the confidentiality of the enterprise (Article 39 of the AMA), a waiver is required from the applicants when the competition authorities exchange the information. The competition authorities should be careful not to make a leniency application by enterprises atrophied in the future in exchanging information.

4.2 *Co-ordination of the timing of on-the-spot investigations*

11. When more than one competition authority intends to do an on-the-spot investigation simultaneously, the date of the on-the-spot investigation should be decided appropriately in consideration of the case characteristics and circumstances of the competition authorities.

12. However, it is difficult to do perfectly simultaneous on-the-spot investigations in more than one country because of a time difference. Therefore, when the competition authorities investigate international cartel cases, the JFTC often co-ordinates the date of the on-the-spot investigation with foreign competition authorities in order to avoid destroying evidence by the enterprises, because if the enterprises located in the country in which the competition authorities have done the investigation provide information about the investigation with relative enterprises located in other countries, destruction of evidence could arise. In addition, such co-ordination of the date of an on-the-spot investigation can make the co-operation of enforcement among competition authorities effective.

4.3 *Gathering evidence of foreign enterprises after opening investigations*

13. After an on-the-spot investigation, the formal investigation procedure shall be developed. The JFTC has exchanged necessary information for investigations with foreign competition authorities in consideration of legal obligations of confidentiality.

14. However, it is difficult to exchange the items of evidence or the investigator's record of oral statements that are obtained by the power among the competition authorities of different jurisdictions due to legal obligations of confidentiality.

15. Under the existing legal system, the JFTC requests relevant foreign enterprises to select and appoint representative attorneys in Japan regarding the case and to co-operate in providing evidentiary materials. However, there is no way to request foreign enterprises directly to provide materials if the JFTC cannot obtain co-operation from them. Therefore, it would be desirable to be able to share the information about investigations among competition authorities of different jurisdictions.