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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Japan --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Procedures for administrative investigations

1.1 Initiation of a case investigation

1. With regard to the initiation of a case investigation, Section 7 of the Rules of Administrative Investigation by the Japan Fair Trade Commission (the Investigation Rules) stipulates as follows.

- When the Director General of the Investigation Bureau has found a fact that will be the basis of a case, he/she shall report it to the Commission by attaching his/her opinions on the necessity of an investigation and by clarifying (i) a preface, (ii) a summary of the facts, and (iii) relevant law as much as possible.
- In cases where the Commission has found that a case needs to be subject to an administrative measure, such as a submission order, etc., it shall designate investigators to be in charge of that case.

1.2 Collection of evidence by investigators

2. The principal means of collecting evidence employed by the investigators of the Japan Fair Trade Commission (JFTC) include (i) the issuing of orders to submit physical evidence or to keep such evidence through onsite investigations, (ii) recording of statements through interviews, and (iii) issuing of orders to report, etc.

3. The authority to make compulsory measures concerning these means of investigations is stipulated in Article 47 of the Antimonopoly Act (AMA). However, this authority concerns an indirect compulsory execution, with which the party's obligation to tolerate the investigations is secured by the existence of a penal provision, instead of direct compulsory execution that is conducted irrespective of the intentions of the party concerned. Therefore, a court warrant is not required for such investigations.

4. In addition, with respect to the means of investigations (i) to (iii) above, voluntary cooperation is also made by the parties concerned, mainly for (ii) recording statements through interviews, instead of invocations of the authority to perform compulsory execution.

1.2.1 Order to submit physical evidence or detention through on-the-spot investigations

5. Article 47, paragraph (1), item (iv) of the AMA defines the area of on-the-spot investigations by the JFTC as "any business office of the persons concerned with a case or other necessary sites," and investigators are allowed to undertake, and actually do undertake, on-the-spot investigations not only to the persons concerned with a case but also to their trading partners, etc.

6. When an on-the-spot investigation is undertaken, a document showing the name of the case, the gist of the alleged facts, and relevant articles is issued for the persons concerned with the case and due explanations are given to them.

7. Where documents or other materials are deemed necessary for a case investigation as a result of an on-the-spot investigation, investigators order the representative of the party concerned to submit the said documents or materials and keep them, pursuant to the provisions of Article 47, paragraph (1), item (iii) of the AMA.

8. Where an investigator gives an order for the submission of a material, he/she shall send a written order of submission to the party concerned. (Section 9, paragraph (1), item (iv) of the Investigation Rules)

9. Even where a “trade secret” is included in the physical evidence to be kept for a case investigation, the investigator keeps the said evidence as long as it is deemed necessary for the said case investigation.

10. A “trade secret” herein is construed as information that meets all of the following requirements: (i) the information is not within the public domain, (ii) the entrepreneur concerned with the case desires to keep the information confidential, and (iii) there is deemed to be a rational reason for keeping the information confidential from an objective point of view (Judgment of Tokyo District Court rendered on July 28, 1978).

11. Concretely, “production cost, purchasing cost, names of business partners, know-how on sales activities, etc.” are deemed to fall under “trade secrets” [“Criteria concerning measures made in accordance with the Act on Access to Information Held by Administrative Organs” (April 2001, JFTC)].

12. A person who received an order to submit documents or materials may inspect or copy the said documents or materials unless doing so gives particular obstructions to the case investigation (Section 18 of the Investigation Rules).

- Investigators may, and actually do, order persons concerned with cases or witnesses to submit materials, other than through onsite investigations. Examples of such materials include physical evidence brought to interviews described in the section B below.
- Investigators may receive documents or other materials submitted voluntarily by persons concerned with cases or witnesses.

1.2.2 Recording of statements through interviews

Appearance order and compulsory interrogation

13. Article 47, paragraph (1), item (i) of the AMA authorizes investigators of the JFTC to order persons concerned with a case or witnesses to appear for interrogation.

14. When issuing an order for an appearance, the investigator shall send a written appearance order to the person concerned with a case or the witness. (Section 9, paragraph (1), item (i) of the Investigation Rules)

15. The investigator shall create a record of the interrogation after interrogating the person concerned with a case or a witness. The investigator shall read the record clearly to the person being interrogated or have the person being interrogated inspect the record, and request the person to sign and seal the record if he/she acknowledges that it contains no error. (Section 11 of the Investigation Rules)

Voluntary interview

16. Investigators may also request persons concerned with a case or witnesses to appear voluntarily to conduct voluntary interviews, and create records of the interview. The investigator shall read out the record to the person or witness being interviewed or have him/her inspect the record, and request the person or witness to sign and seal the record if he/she acknowledges that it contains no error. (Section 13 of the Investigation Rules)

17. In actual investigations, voluntary interview is conducted more frequently than an appearance order or compulsory interrogation mentioned in (A) above.

Presentation of physical evidence to persons being interrogated or interviewed

18. During an interrogation or interview mentioned in (A) and (B) above, respectively, the investigator may present physical evidence to the person being interrogated or interviewed for the purpose of aiding his or her memory, for example. In such cases, where required for the investigation, the physical evidence may be from sources other than the person's own company. However, where evidence from another company is presented and the evidence contains "trade secrets," investigators are careful to mask the relevant portions or take any other necessary measures so as not to reveal such secrets.

19. Such physical evidence is usually not assumed to include secrets regarding the private life of an individual, but if it should, such secrets are naturally maintained.

1.2.3 Issuance of order to report, etc.

Order to report

20. Article 47, paragraph (1), item (i) of the AMA authorizes investigators of the JFTC to order persons concerned with a case or witnesses to submit their opinions or reports.

21. To issue orders for the submission of opinions or reports, the investigator shall send a written order to report to the person concerned with a case or the witness. (Section 9, paragraph (1), item (ii) of the Investigation Rules)

Request to report

22. Investigators may also request persons concerned with a case or witnesses to submit their opinions or report voluntarily.

23. However, when investigators intend to collect opinions or reports from persons concerned with a case, they usually issue an order to the persons. Requests for voluntary submissions are made mostly to witnesses.

Objection to measures taken by investigators

24. Any persons who were subject to either of the measures mentioned in A, B-(A), and C-(A) above by investigators pursuant to Article 47 of the AMA may lodge an objection with the JFTC in writing, describing the reasons for the objection, within one week of the measure being taken.

25. Where the JFTC acknowledges that the objection has sufficient grounds, it shall order the investigators to revoke, rescind, or modify the measure against which the objection was filed and notify the petitioner to that effect. (Section 22 of the Investigation Rules)

1.3 Reporting the results of investigations

26. When an investigation of a case has been completed, the Director General of the Investigation Bureau reports the result to the Commission.

27. The report shall include (i) a preface, (ii) a history of the investigation, (iii) a summary of the facts, (iv) relevant articles, and (v) the opinions of the investigators. (Section 23 of the Investigation Rules) The summary of the facts shall also include supporting evidence, namely contents of records of interviews with persons concerned with the case and/or witnesses and physical evidence collected as part of the investigation.

28. There is no system under which teams that are independent of the investigators in charge of the case review the result of the investigation or external specialists give opinions directly to the JFTC. However, investigators may request external specialists to give opinions about specific points of a case on a voluntary basis, when this is deemed necessary.

1.4 *Prior explanations of the content of cease and desist orders, etc., and statement of opinions and submission of evidence, etc., by the person subject to the order*

1.4.1 *Prior notice*

29. If the JFTC finds it appropriate to issue a cease and desist order given the result of investigation described in (3) above, it shall notify the person subject to the order of the content of the cease and desist order in advance, by sending a document describing (i) the content of the cease and desist order to be issued, (ii) the facts found by the JFTC, and the application of laws and regulations thereto, and (iii) the opportunity to express opinions and to submit evidence with regard to the matters listed in (i) and (ii) to the JFTC and the deadline for same. (Article 49, paragraph (5) of the AMA, Section 24 of the Investigation Rules)

30. When the issuing of a surcharge payment order is deemed appropriate, the JFTC shall notify the person subject to the order, in place of (i) and (ii) above, (i) the amount of the surcharge intended to be ordered to be paid and (ii) the basis of calculation of the surcharge and the violation pertaining to such surcharge. (Article 50, paragraph (6) of the AMA, Section 29 of the Investigation Rules)

1.4.2 *Prior explanation*

31. When requested by a person who received the notice mentioned in A. above or by his/her agent, the investigators shall give explanations about (i) the content of the cease and desist order to be issued, and (ii) the facts found by the JFTC, and the application of the AMA thereto. In this case, the investigators shall also explain the evidence required to provide the bases for the facts found by the JFTC concerning the person to which the explanations are given. (Section 25 of the Investigation Rules) Explanations are also given about the prior notice of the payment order. (Sections 29 and 25 of the Investigation Rules)

32. In principle, prior explanations shall be given separately to each company. Evidence other than record of interview or physical evidence from the company to which the explanations are given are also disclosed and explained as necessary, when that evidence proves the violation of the said company. In this case, however, investigators are careful not to reveal the “trade secrets” of companies other than the one subject to the order, by masking the relevant portions or taking any other necessary measures. (The same applies to information that is likely to permit identification of persons who gave statements or provided information and who may be targeted by related persons if identified, and to secrets regarding the private life of an individual.)

1.4.3 *Statement of opinions and submission of evidence by person subject to the order*

33. A person who received the notice mentioned in A. may submit written opinions or evidence to the JFTC by a specified date. When submitting evidence, the person shall clarify the matters he or she is seeking to prove. The JFTC may also allow the person to express his/her opinions orally where doing so is deemed particularly necessary. (Article 49, paragraph (3) of the AMA, Section 26 of the Investigation Rules)

34. A person who received the notice mentioned in A. may have an agent express opinions or submit evidence on his/her behalf. (Section 27 of the Investigation Rules)

1.5 *Cease and desist order, etc.*

35. The JFTC finally issues a cease and desist order or surcharge payment order after giving sufficient consideration to the opinions and evidence from the person subject to the order concerning the prior explanations in (4) above.

2. Revisions concerning judicial review to the orders issued by the JFTC, etc.

2.1 *Background*

36. Currently, any persons who are dissatisfied with administrative measures taken by the JFTC may request the JFTC to initiate a hearing regarding the said administrative measure. The hearing is conducted under the JFTC. However, it has been pointed out that this system of hearings could be lacking fairness because the JFTC, which took the administrative measure, determines the appropriateness of the measure itself.

2.2 *Submission of the amendment bill of the AMA to the Diet*

37. In response to the criticism about the fairness of the procedures described in (1) above, an amendment bill of the AMA was submitted to the Diet in March 2010. The content of the bill is as follows.

- The JFTC's hearing procedure for administrative appeal will be abolished and the provision that jurisdiction in the first instance over appeals against decisions made at the JFTC's hearing shall rest with the Tokyo High Court will also be abolished.
- To ensure expertise in the court and for other purposes, jurisdictions over appeals against cease and desist orders, etc., shall rest exclusively with the Tokyo District Court, and at the Tokyo District Court, a panel of three or five judges shall hear trials and hand down judicial decisions.
- Concerning the procedures for hearings pertaining to cease and desist orders, etc., provisions, etc., will be developed for explanations of the content, etc., of the cease and desist order to be issued and inspections and copying of evidence, in order to ensure due process.

3. Business combination reviews

3.1 *Ensuring transparency with guidelines, etc.*

38. To further ensure the transparency of the application of laws concerning business combination reviews and to improve predictability for entrepreneurs, the JFTC has published the "Guidelines on the Application of the AMA to Reviewing Business Combinations." These Guidelines show (i) the types of business combinations subject to reviews, (ii) the criteria for determining relevant markets, (iii) the interpretation of the stipulation that "the effect may be substantially to restrain competition," (iv) the frameworks and criteria for determining whether competition will be substantially restrained or not, and (v) examples of measures taken to solve problems.

39. Meanwhile, companies involved in a business combination may ask for consultations prior to sending notification of the business combination to avoid cease and desist orders and any other risks. Thus, there are many cases in which business combination reviews are undertaken at the phase of prior consultation. The JFTC has published "Policies dealing with prior consultation regarding enterprise combination plans" (hereafter, the "Prior Consultation Guidelines") to (i) ensure that procedures for prior consultations be taken with the same level of transparency and fairness as legal procedures and (ii) improve the predictability of the JFTC's judgment to be made after business combination reviews.

40. In addition, the JFTC publishes its reviews of business combinations about which the JFTC has accepted notifications or prior consultations, where the content is deemed informative for entrepreneurs planning business combinations.

3.2 *Prior consultations*

3.2.1 Initiation of a prior consultation

41. When a prior consultation concerning a planned business combination has been requested and no additional material concerning the plan was deemed necessary, the JFTC shall notify the company to that effect within 20 days of the submission of materials showing the specific plans for the said business combination, in principle. Where additional materials are deemed necessary, the JFTC shall present a list of the required additional materials in writing by the said deadline. To ensure that prior consultation is commenced smoothly, it is stipulated that the companies involved may inquire with the JFTC, before the commencement of prior consultation, about the outline of the AMA, the content of materials showing specific details of the business combination plan, and other matters. (Section 3-(1) of the Prior Consultation Guidelines)

42. A company involved may submit any materials or written opinions, etc., it believes it should submit at any time during the review as well as at the time it requests a prior consultation. (Section 3-(2)-C of the Prior Consultation Guidelines)

3.2.2 Primary review

43. Where the JFTC has notified a company involved that no additional material is necessary in the case of A. above, it shall commence the business combination review as of the date of the said notification, and where the JFTC has presented a list of additional materials to the company involved, it shall commence the said review as of the date when the said additional materials were submitted (this review is called the “primary review”). The JFTC shall notify the company involved that the proposed combination is not problematic in light of the AMA or that a more detailed review (this review is called the “secondary review”) is necessary, within 30 days of the commencement of the primary review, in principle. (Section 3-(3) of the Prior Consultation Guidelines)

44. It is stipulated that where the JFTC notifies a company involved that a secondary review is required, it shall explain specific points of contention in light of the AMA after identifying the commodity or service and geographical area in question, and shall request the submission of specific materials deemed necessary for the secondary review. (Section 4-(1) of the Prior Consultation Guidelines)

3.2.3 Secondary review

45. It is stipulated that after the JFTC has notified the company involved that a secondary review is necessary, the JFTC shall undertake a review on whether the planned business combination is problematic in light of the provisions of the AMA, give a written response concerning the result of the review including reasons, and make public the result within 90 days, in principle, of the submission of specific materials deemed necessary for the secondary review, which was requested in the process described in B above. (Section 4-(2)-E of the Prior Consultation Guidelines)

46. Where a business combination subject to a review is not to be made public by the JFTC, it may not undertake hearings, etc., with business partners, etc., of the companies involved in the business combination, to protect confidentiality.

47. However, secondary reviews require hearings, etc., with business partners, etc., by the JFTC. Therefore, where the business combination subject to the secondary review is not to be made public by the JFTC, the company involved is required to make public the said business combination itself. (Section 4-(2)-B of the Prior Consultation Guidelines)

48. The JFTC shall announce that it will conduct a secondary review of a business combination plan after it has notified the companies involved to that effect and after the companies involved have made an announcement to that effect, and this applies where the matter is not to be made public by the JFTC. Any persons who have opinions they wish to state about the said business combination plan may submit written opinions to the JFTC within 30 days after it has announced that it would undertake detailed reviews of the said plan. (Section 4-(2)-C of the Prior Consultation Guidelines)

49. It is stipulated that where the JFTC intends to point out, in the process of a secondary review, that the business combination plan under review is problematic in light of the provisions of Chapter IV of the AMA, it shall present the grounds for having judged it to be problematic (such as findings concerning facts advocated by the companies involved and the results of surveys, analyses, or questionnaires conducted by the JFTC) excluding portions showing trade secrets of other entrepreneurs. (Section 4-(2)-E of the Prior Consultation Guidelines)

3.3 *Legal procedures*

50. It is stipulated that when the JFTC has accepted a notification of business combination such as the acquisition of shares or a merger, it shall request additional reports, etc., required for the review or judge whether the proposed business combination is problematic in light of the AMA or not within 30 days of the date of acceptance of the said notification, or judge whether the proposed business combination is problematic in light of the AMA or not within 90 days of the date of acceptance of additional report, etc., required for the review or within 120 days of the date of acceptance of the first notification, whichever is later. (Article 10, paragraph (9), Article 15, paragraph (3), etc., of the AMA) Also, where a business combination is deemed problematic in light of the AMA, the JFTC shall issue a cease and desist order to demand the suspension, etc., of the said business combination after giving the companies concerned prior notice and an opportunity to state opinions and submit evidence. (Article 17-2 of the AMA) The provisions covering prior notification, statement of opinions, and submission of evidence are identical to those covering the procedures for the investigations of cases other than business combination reviews. (See 1-(4) above.)