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**COMPETITION COMMITTEE**

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## Working Party No. 3 on Co-operation and Enforcement

**UNILATERAL DISCLOSURE OF INFORMATION WITH ANTICOMPETITIVE EFFECTS (E.G. THROUGH PRESS ANNOUNCEMENTS)**

**-- Japan --**

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*The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2012.*

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## 1. Introduction

1. "Disclosure of information" by an enterprise, can be an important issue in applying the Antimonopoly Act (hereinafter referred to as the "AMA"), in connection with "unreasonable restraint of trade" such as cartels and bid-rigging.

2. We will present four cases below which can be broken up into two large categories.

3. One category relates to cases that question if it is possible to acknowledge that a basic agreement, on the violating conduct, had been reached by enterprises if there were prior information exchanges or unilateral disclosure of information, while the existence of no "explicit" agreement is identified. As defined by Article 2, paragraph 6 of the AMA[1] and prohibited by Article 3, "unreasonable restraint of trade" is defined as: "business activities by which any enterprise, either by contract, agreement or any other means irrespective of its name, 'in concert with' other enterprises, mutually restrict their business activities to substantially restrict trade." In order to deem a behavior of an enterprise as one "in concert" with other enterprises, the existence of a "communication of intent[2]" among the enterprises in question needs to be proved. Hence, in the case like the above mentioned, whether it is possible to say that there was a communication of intent between the enterprises would be the issue.

4. The other category relates to bid-rigging cases where unilateral information plays an important role in implementing the coordination of who will successfully receive orders ("order coordination") after a basic agreement has been reached. In the current practice, the existence of a basic agreement among enterprises is regarded as the ultimate fact in proving a "communication of intent" while the order coordination itself is nothing more than an evidentiary fact which infers the existence of the ultimate fact (Tokyo High Court, Sep. 26, 2008, Stoker Furnace Bid-Rigging Case). We would like to briefly introduce the cases where unilateral disclosure of information could work as the mechanism to facilitate the order coordination, which is a point worth noting.

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1 The Antimonopoly Act, Article 2, paragraph 6: "The term 'unreasonable restraint of trade' as used in the Act means such business activities, by which any enterprise, either 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."

2 Please refer to Section 2 of this paper.

## 2. Unilateral Disclosure of Information Undertaken in the Course of Forming a Basic Agreement

### *2.1. Rescission of the Hearing Decision Case by Toshiba Chemical Corporation*[3]

#### *2.1.1. Overview of Violations*

5. Toshiba Chemical Corporation (hereinafter referred to as "Toshiba Chemical") and seven other companies in the same industry (hereinafter referred to as "the 8 companies") held a special meeting on June 10, 1987 (hereinafter referred to as "special meeting in question"), at a time when a rising trend of export prices was becoming evident. In the special meeting in question, they exchanged opinions on raising the price of copper clad laminates used in printed circuit boards sold to domestic customers based on the trend of export prices, etc. Out of the 8 companies, the three largest initially declared that they would raise prices while the remaining five were requested to follow the big three by raising their own prices. The five companies, including Toshiba Chemical, did not express an opinion opposing the request.

6. Following that special meeting in question, the management of the 8 companies respectively instructed relevant departments to raise the price of the paper phenol copper clad laminates in their company. Then, they notified their domestic customers of the price increase and requested their consent.

#### *2.1.2. Overview of the Second Decision by the Tokyo High Court*

7. Toshiba Chemical insisted that, "So long as each company merely and mutually recognized that the other companies were going to raise prices, this fact only suggests that their recognitions coexisted but were unrelated to each other", and therefore, in this case, it cannot be affirmed that there was a "communication of intent" among the companies.

8. In response, the Tokyo High Court defined a "communication of intent" as "an intention of collaborating with several enterprises on a price increase by mutually recognizing or predicting the implementation of the same or similar type of price increase." In addition, in order to prove the existence of a 'communication of intent,' it is not enough for one enterprise to raise prices and for the others to merely recognize or acknowledge the fact, while at the same time, it is not necessary for there to be an explicit agreement among enterprises to mutually restrict each other. It is appropriate to consider that it is sufficient for the enterprises to recognize each other's price increase and tacitly acknowledge the fact.

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3 The Japan Fair Trade Commission (hereinafter referred to as "the JFTC") had investigated Toshiba Chemical and the seven other companies in accordance with the provisions of the Antimonopoly Act and issued a recommendation on June 6, 1989, as the 8 companies were in violation of the provisions of Article 3 of the Antimonopoly Act (Unreasonable Restraint of Trade). Because Toshiba Chemical did not accept the recommendation while the seven other companies complied with that recommendation, the JFTC decided to commence hearing procedures against Toshiba Chemical on August 8, 1989. The JFTC subsequently instructed the hearing examiners to go through the hearing procedures and issued a hearing decision on September 16, 1992.

Toshiba Chemical then filed suit to rescind the hearing decision and the Tokyo High Court found that the fairness of the decision was impaired by the fact that a commission member who was disqualified to be involved in the hearing had taken part in a conference on the hearing decision. The decision was rescinded and the case was remanded to the JFTC ("The first Tokyo High Court decision"). On May 26, 1994, the JFTC, organizing the panel of four to exclude the commissioner in question, issued a cease and desist order just as they did in 1992. Toshiba Chemical filed suit to rescind the decision with the Tokyo High Court, but, on September 25, 1995, the Tokyo High Court dismissed the suit ("The second Tokyo High Court decision").

9. Furthermore, regarding the proof of a "communication of intent," the Court held that "If a specific enterprise exchanged information with other enterprises regarding a price increase and as a consequence they acted in the same or similar manner, the Court cannot but infer that they would expect each other to act cooperatively, thus a "communication of intent" existed as mentioned above, unless there was a special fact which showed that they undertook a price increase based on an independent judgment to be able to survive the competition in the market". In this case, the existence of a "communication of intent" was inferred and a concerted action was regarded to exist because of the following facts: 1) The 8 companies met beforehand to exchange information and opinions; 2) The content of exchanged information and opinions was related to the price increase of the subject goods in this case; 3) Consequently, there was a concerted action to raise the sales price of the goods in question to domestic customers.

### *2.2. Bid-rigging Case for Automatic Postal Code Reading and Sorting Machines Ordered by the Former Ministry of Posts and Telecommunications*[4]

#### *2.2.1. Overview of the Violations*

10. Both the Toshiba Corporation and the NEC Corporation were registered as qualified bidders in the open competitive bidding for automatic postal code reading and sorting machines (hereinafter referred to as "postal sorting machines") which was placed by the [former] Ministry of Posts and Telecommunications (hereinafter referred to as the "Ministry"). From fiscal years 1995 to 1997, they participated in the competitive bidding for postal sorting machines. As a matter of fact, during the above mentioned period, the two companies received 70 orders among the total of 71 orders for postal sorting machines. (The two companies each received roughly half of the total value of orders placed by the Ministry.) In reality, prior to the opening of competitive bidding, the two companies mentioned above received information on the bidding (such as the type of postal sorting machine, number of units, the location of post offices where the machines would be deployed, the timetable for deployment, etc.) for which they respectively were supposed to bid from the Ministry officials in charge. Only the company which received the above information would participate in the particular bidding while the other company would not participate. For that reason, bids for that particular bidding would be submitted only by the company that had received the information while the remaining company, which had not received the information, would decline to submit the bid. With the result, the one company that submitted a bid would receive the order.

[4] The JFTC issued a recommendation against Toshiba Corporation and NEC Corporation on October 12, 1998, as they were in violation of the provisions of Article 3 of the Antimonopoly Act. However, because they did not accept the recommendation, the JFTC decided to commence hearing procedures against the two companies on December 4, 1998. On June 27, 2003, a cease and desist order was issued by the hearing decision, but the two companies filed suit in the Tokyo High Court to rescind the decision. On April 23, 2004, the Tokyo High Court found that the JFTC's decision was in violation of the provision of Article 54, paragraph 2 of the Antimonopoly Act prior to the 2005 Amendment, which stipulated that the JFTC could issue a cease and desist order "when it is particularly necessary" and therefore, rescinded the hearing decision. Against this judgment, on May 7, 2004, the JFTC petitioned the Supreme Court for the acceptance of a final appeal and, on April 19, 2007, the Supreme Court held that, with regard to the High Court decision, "It should be recognized that the JFTC had the specialized discretion" and reversed the High Court judgment, remanding the case to the High Court. On December 19, 2008, the Tokyo High Court affirmed the JFTC's hearing decision and dismissed the suit brought by the plaintiffs. (Thereinafter, on December 3, 2010, the Supreme Court dismissed the final appeal from the plaintiffs and the decision was upheld.)

*2.2.2. Overview of the Decision by the Tokyo High Court*

11. In this case, the point of issue was whether or not there was a "communication of intent" because unilaterally disclosed unofficial notifications of the officials of the Ministry to the plaintiffs served as a means of order coordination between the plaintiffs and because matters such as the time, place or method of forming an agreement between the plaintiffs were not identified. Regarding this point, the Tokyo High Court stated that it was no problem to apply the criteria shown in the Toshiba Chemical case as a general standard to this case. In addition, the Court pointed out the following facts: (i)The plaintiffs had made unnaturally concerted action, that is, only the plaintiff who received an unofficial notification from the Ministry participated in the bidding while another plaintiff who did not receive the information did not participate; (ii) They had actually been competing in the technological development because they recognized that the comparison of the postal sorting machines' performance of reading zip codes would result in the difference in the number of the machines ordered. Based on these facts, the Court held that it was difficult to explain the fact that the plaintiff who did not receive an unofficial notification from the Ministry did not participate in the bidding by only the fact that the plaintiff did not receive the notification. Therefore, the Court stated that in addition to the unofficial notification by the Ministry, implicit communication of intent between the two plaintiffs, which stipulated that the plaintiffs would decide whether or not to participate in a particular bidding depending on whether they receive the unofficial notification from the Ministry or not, should be regarded as the reason to explain the fact. Consequently, the Court ruled that it was difficult to believe that the plaintiffs had accidentally exhibited the concerted action without their communication of intent.

***2.3. Summary***

12. In the case of Toshiba Chemical, where there was no explicit agreement on the day of the special meeting in question and only a request to raise prices from some enterprises to others, the Tokyo High Court identified the evidential facts such as prior information exchanges among the enterprises and concerted action for raising prices to prove the existence of a "communication of intent".

13. In the case of postal sorting machines, where there was only the unilateral disclosure of information regarding the bidding by the procuring ministry to the enterprises and no information exchanges between the enterprises, the Tokyo High Court acknowledged, just like the case of Toshiba Chemical, the existence of a "communication of intent (implicit agreement)" through the findings of evidential facts such as enterprises' actions.

## 3. Unilateral Disclosure of Information Upon a Basic Agreement

14. Unilateral disclosure of information in the cases of "unreasonable restraint of trade" is seen in the process of not only forming a basic agreement among enterprises but also implementing the basic agreement and thus moving into a violating conduct.

15. For example, "Violation of the Antimonopoly Act in the Bid-Rigging concerning Orders for Water Meters Placed by the Tokyo Municipal Government" (2004) [5] and "Bid-Rigging concerning Orders Placed by the Japan Green Resources Agency[6]" differ from each other in that the former was a case where

[5] In July 2003, the JFTC investigated bid-rigging in orders for water meters placed by the Tokyo Municipal Government and filed accusation with the Prosecutor-General against four enterprises and five individuals engaging in the sales of water meters ordered by the Tokyo Municipal Government under Article 73, paragraph 1 of the Antimonopoly Act.

[6] In May and June, 2007, the JFTC filed accusations with the Prosecutor-General against the corporations and other entities which, in compliance with the intent of the Japan Green Resources Agency, had predetermined a bid winner, and also agreed to help a prearranged winner to win a bid over businesses

private sector bidders planned to coordinate the orders while the latter was a case where an independent administrative agency[7], as the procurer, decided in advance which companies would be successful bidders. However these cases are similar in the following points:

a) There was a prior agreement among the bidders on “implementing the order coordination to the bidding in question".

b) A liaison unilaterally disclosed information only to the specific enterprises that would receive orders in the bidding based on the arrangement among the bidders before the implementation of the bidding. In the water meter case, the "managing companies" which were designated in advance, played the role of liaison, while, in the case of the Japan Green Resources Agency, the liaison was the Japan Green Resources Agency, that is, the procuring agency itself.

c) Enterprises that were not informed by the liaisons in B above, of being the predetermined winner of the bids in question, helped those who received information to actually win the bid by means such as bidding at higher prices than that of the predetermined bid winner.

16. The reason for choosing a unilateral disclosure of information as a method for implementing a basic agreement is that, compared to contacting one another at meetings where attended by all the enterprises, it is thought to be more difficult for the illegal action to come to light. In this sense, unilateral disclosure of information in these cases noted above functioned as a mechanism that allowed successful implementation of a basic agreement. In the water meter bid-rigging criminal case, the Tokyo High Court decision (March 26, 2004) commented on the unilateral disclosure of information as follows: "in this case, the process of reaching an agreement on the order coordination was undertaken in an ingenious way, in which the "managing company" played a role as the keystone of the scheme, without meetings where the persons in charge at the enterprises concerned came together publicly."

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concerning geological research and location survey planning on main forest road projects procured by the agency in the fiscal years 2005 and 2006 by way of designated competitive bids, etc. In addition, 21 bidders were found to have acted illegally and, of these, with the exception of two persons who terminated the business in question, 19 were found to be in violation of the provisions of Article 3 of the Antimonopoly Act (prohibition against the unreasonable restraint of trade) and were issued cease and desist orders under Article 7, paragraph 2 of the Antimonopoly Act and 13 were issued surcharge payment orders under the provisions of Article 7-2, paragraph 1 of the same Act on December 25, 2007. Furthermore, with regard to these violations, the JFTC found the involvement of the directors and employees of the Japan Green Resources Agency in the bid-rigging, and notified the agency of this fact on December 27, 2007.
http://www.jftc.go.jp/pressrelease/07.december/07122702.html [Japanese only]

[7] In Japan, in order to prevent involvement in bid-rigging by employees of contracting agencies, the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. was enacted in 2002, and put into effect in 2003. Under this law, if an employee of a procuring agency is found to be involved in bid-rigging, the JFTC can demand the head of the procuring agency to implement improvement measures. To date, the JFTC has found 11 involvements in bid-rigging under this Act, of which nine have resulted in the demand for the head of the agencies to implement improvement measures.