International Cooperation to Crack International Cartels
~ Japanese Successes and Failures ~

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The ACCC's law enforcement conference
'Cracking Cartels; International and Australian developments'

November 24, 2004

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ABSTRACT

In line with the globalization of the economy, the number of international cartels is on the increase. In addition to giving an overview of the Japan Fair Trade Commission's (JFTC) successes and failures to date in response to such international cartels, this paper analyze the reasons behind these successes and failures and clarify the areas in which the JFTC needs to take action, including the development of an international cooperative network and the use of leniency, in order to crack international cartels in the future.

1. Introduction

(1) Harmful nature of hardcore cartels

Hard core cartels represent the most malicious breach of competition law and harm the interests of consumers throughout the wide range of countries in which they operate, by raising prices and restricting supply, thus making the relevant goods and services totally unobtainable to certain buyers and unnecessarily expensive in the eyes of other buyers.

Effective actions to crack hard core cartels are of utmost importance, especially from an international perspective; Distortion of world trade by hard core cartels generates market power in countries where the market would otherwise be competitive, resulting in wastefulness and inefficiency.

It could be said that this understanding of such cartels has already been shared with competition authorities in countries throughout the world.

(2) Globalization of international cartels

In recent years, economic relationships between countries have grown stronger with the advancing globalization of the world economy and international trade, including direct investment. Amidst all this, companies' business activities are also undergoing the process of globalization and we have even seen cartels coming into being that span several different countries and regions.

(3) Use of leniency in countries the world over

Leniency program is an effective program of cracking cartels, which continue to become increasingly more sophisticated. Leniency program refers to the program of reducing or exempting companies from penalties imposed if companies fully and voluntarily provide the authorities with details pertaining to violations that they have committed, based on a predetermined set of conditions[1]. It differs from plea bargaining in the sense that it is a program that is applied automatically in accordance with predetermined criteria and that involves no elements of bargaining[2].

In the OECD Report of April 2002[3], the OECD recommended that the governments of member countries introduce a leniency program. A large number of countries and regions have now already done so, including the U.S., where leniency was introduced in 1978, the EC (in 1996), Canada (in 1999) and South Korea (in 1996), and have met with great success (refer to Annex 1).

Under the leniency program introduced in the U.S., member companies or individuals of a

cartel can receive reductions or exemptions in sanction on the conditions that (1) information is submitted prior to the authorities initiating an investigation, (2) the applicant cooperates with the authorities and (3) the applicant is not compelling any other companies to participate in cartel activities. The basis for this program is formed by the "US Antitrust Division Corporate Leniency Policy" (1993) and the "US Antitrust Division Leniency Policy for Individuals" (1994).

The leniency program of the European Commission is one where, as in the U.S., offending companies or individuals cooperating fully with the Commission are exempted from fines or granted significant reductions in fines. This is based on the "Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases" (2002).

As this shows, a large number of the world's leading countries have introduced the use of leniency. However, as it stands, a leniency program is yet to be introduced in Japan.

2. JFTC's successes and failures in cracking international cartels

(1) JFTC's efforts to crack international cartels

Although the JFTC has continued to strive to crack international cartels, which have been on the increase in recent years, not all of its efforts have necessarily ended in success. In the following section, we will take a look at the modifier case, as a successful example of international cartel cases by the JFTC, and the graphite electrode cartel and the vitamin cartel cases as unsuccessful examples, and analyze why each of these cases ended in success or failure.

(2) Failures: the graphite electrode cartel and the vitamin cartel cases

Two cases that can be put forward as an example of the JFTC's failure cases of international cartels are those of a graphite electrode cartel in 1999 and a vitamin cartel in 2001.

The graphite electrode case refers to a case in which a group of electrode manufacturers Japanese and overseas, were suspected to have agreed to fix (1)each manufacturer's market share of round manmade graphite electrodes designed for use in electric steel production to be supplied to the Asia and Oceania, except for Japan, the People's Republic of China and India, (2) to allocate the volume of electrodes to be supplied to individual regions the world over, and (3) to raise retail prices. It was a cartel to divide markets and to restrict output[4].

The vitamin cartel case was related to vitamin B5 and vitamin E.

Firstly, with regard to vitamin B5, this was a case in which a group of Japanese and overseas vitamin manufacturers and distributors were suspected to have fixed (1)each

company's worldwide market shares of vitamin B5 used as a basic ingredient in medical and pharmaceutical products and (2)each company's prospective annual sales in the world market and in seven regional markets, including Japan. It was a cartel to divide markets and to restrict output.

Secondly, with regard to synthetic vitamin E, this was a case in which a group of Japanese and overseas vitamin manufacturers and distributors were suspected to have fixed (1)each company's world wide market shares of synthetic vitamin B5 used as a basic ingredient in medical and pharmaceutical products and (2)each company's prospective annual sales in the world market and in four regional markets, including Japan. As you might expect, it was also a cartel to divide fixing markets and to restrict output[5].

In the graphite electrode case, the U.S. government, from 1998 to 2001, imposed fines totaling approximately $424.8 million on seven companies in the U.S., Japan and Germany. On July 18, 2001, the EC also imposed fines coming to a total of roughly 21.9 million Euros on eight American, Japanese and German companies (refer to Annex 2).

In the vitamin case, the U.S. government imposed fines in 1999 totaling approximately $91 million on eleven companies in the U.S., Switzerland, Germany, Japan and Canada. On November 21, 2001, the EC imposed fines coming to a total of 85.6 million Euros on eight Swiss, German, Dutch, French and Japanese companies. The Korean government levied surcharges totaling 39.2 billion won against six companies in Switzerland, Germany, France, Japan and Netherlands (refer to Annex 2, Table 1).

In both cases, leniency was applied both in the U.S. and in the EC and there were companies that actually had their fines reduced. In the graphite electrode case for example, a certain Japanese company applied to the EC for leniency and had its penalty reduced by a total of 70% (refer to Annex 2, Table 2).

In contrast U.S. and EC, in Japan, a merely warnings was issued in both graphite electrode and vitamins cases. A warning is nothing but an administrative guidance advocating that the companies concerned not repeat suspicious activities. Surcharges could not to be levied.

(3) Reasons behind failures

So, why was it that the JFTC was unable to take legal action in either of these two cases?

As stated previously, through the use of leniency, the U.S. and EU authorities were able to receive information from the companies involved. Japan, on the other hand, has not so far had a leniency program and was unable to receive such information from the companies.

Hypothetically speaking, it is thought that, if there had been a leniency program in place in Japan, the JFTC might have been able to obtain information from Japanese and overseas

companies and take legal action.

Additionally, there is a problem of period of prescription. Whereas the period in which legal action can be taken in the U.S. is three years after the violation has ceased, this period is a mere one year in Japan. Therefore, in the vitamin case, even if information had been submitted to the JFTC through a leniency program and an investigation had got underway, it would not have been possible to take legal action, because the violation ceased more than one years ago . (In order to cope with this problem, the JFTC plans to submit a bill to extend the current period for legal action from one year to three years.)

Due to the aforementioned reasons, the JFTC was unable to get evidence of the cartels in question to take appropriate legal action.

(4) Successes: the modifier cartel case

One investigation case that can be put forward as a successful example of the JFTC's efforts to crack international cartels is the modifier case, regarding which the JTFC issued a provisional order in 2003.

On February 12, 2003, simultaneous raids and search were carried out in North America, Europe and Japan by the U.S. Department of Justice, the Canadian Bureau of Competition, the European Commission and the JFTC.

The modifier case in Japan refers to a price cartel in which three Japanese manufacturers of modifiers agreed to raise the price of modifiers designed to be added to polyvinyl chloride to improve its impact and weather resistibility and its workability[6].

The JFTC took legal action in the form of issuing a provisional order against two of the three companies, Kaneka Corporation and Mitsubishi Rayon Co. Ltd, on December 11, 2003. Neither company accepted the order, and the case is currently going through hearing procedure. Surcharge payments against the third remaining company, Kureha Corporation, is currently being calculated. Provisional order was not issued to Kureha, because it had transferred its modifier business to a foreign company.

(5) Reasons behind success

So, just why was the JFTC successful in taking legal action in the form of issuing a provisional order in the modifier case?

As a result of the rapid development of telecommunications in modern society, an investigation of an international cartel will be known almost immediately by companies in other countries involved in the cartel activities. If investigations of an international cartel are carried out at different days in each country, companies in other countries than the first one can

foresee the possibility that they too will undergo an investigation. It is highly likely that, by the time investigations are carried out in other countries, those companies will have already disposed of any evidence, meaning that the authorities will be unable to collect sufficient evidence.

In order to such a situation in the modifier case, the JFTC carried out simultaneous raid and search in cooperation with the three competition agencies as stated above.[7] This made it possible to prevent the companies from destroying any evidence.

What is more, the JFTC also exchanged information with the competition agencies in these countries at the appropriate time without infringing on confidentiality.

International cooperation in this manner made it possible for the JFTC to take legal action in the form of issuing a provisional order.

3. Weapons to fight international cartel with

(1) Steps needed to crack international cartels

Based on the aforementioned examples, advancing international cooperation between competition and antitrust authorities in the world is vital to crack international cartels, as is evident from the modifier case. To enable this process to run more smoothly, it is essential that leniency is introduced when there is none, as the graphite electrode and vitamin cartel cases demonstrate.

Accordingly, in addition to enhancing international cooperation beyond anything currently in place, it is essential for any country lacking in a formal leniency program such as Japan to adapt a leniency program..

(2) Enhancing international cooperation

What we need to do is to make full use of cooperation agreements and actively work together to enforce them. Initiatives covered under such agreements include exchange of information that does not infringe on trade confidentiality[8], simultaneous investigations in order to prevent evidence being destroyed[9] and the sharing of confidential information[10] (refer to Annex 3).

The JFTC is currently working on the conclusion of agreements with Canada and Australia after having signed agreements with the U.S. government (in 1999) and the EC (in 2000). As for a Japan-Canada agreement, substantive work has been already completed and we intend to move ahead with similar work on a Japan-Australia agreement in the near future.

The Economic Partnership Agreement (EPA) signed between Japan and Mexico in

September 2004 includes a chapter dedicated to "Competition" (Chapter 12), Article 132 of which stipulates cooperation in competition policy, stating that "The Parties shall, in accordance with their respective laws and regulations, cooperate in the field of controlling anticompetitive activities." The JFTC is also negotiating with South Korea regarding antimonopoly cooperation as part of FTA negotiations. Further more, cooperation in the field of competition is also being discussed as part of the EPA negotiations with Malaysia, the Philippines and Thailand.

(3) Adoption of a leniency program

Conclusion of cooperation agreements is important. At the same time, what is essential to make the cooperation agreements work best is that each of the countries involved in agreements has adopted a leniency program, if the agreements are to work fully. Generally speaking, it is paramount that, when companies or individuals involved in an international cartel attempt to make application leniency programs, they apply to the competition authorities in all related countries and regions for eligibility under the same program and receive reductions in or exemptions from fines. If applications are to be submitted in all countries and regions, this will make it easier to conduct cooperative investigations. In other words, a leniency program could become one of the major factors in expanding international cooperation between competition authorities. However, if just one of the countries where an international cartel is in operation has not adopted leniency, there is a possibility of companies or individuals being reluctant to apply for leniency in all countries out of fear of facing sanctions in that one country. Alternatively, there is also a possibility of companies admitting the violation and applying for leniency in countries where a leniency program is in place and putting up serious 'resistance' in countries where there is no such program.

Taking possibilities into consideration, it can be said that adoption of a leniency program in each and every country and region would expose international cartels to light and facilitate cooperation between competition authorities. Absence of a leniency program in a country or a region could end up becoming the weak link in cooperation efforts between all other countries and regions to crack international cartels.

Thus, adoption of a leniency program in Japan is the most important not only in terms of facilitating the detection of domestic cartels, but also from the perspective of enabling the detection of international cartels. This is why there have been discussions both in Japan and overseas supporting that Japan should immediately introduce leniency[11].

Consequently, the Japanese Government under the JFTC initiative submitted a bill to the parliament last month to amend the Antimonopoly Act to include a leniency program. If the bill

is enacted, companies that voluntarily "disclose the existence of violations and provide related information" to the JFTC prior to investigations would be entirely exempted from surcharges if they are the first applicant in the case, have surcharges reduced by half if they are the second applicant and by 30% if they are the third. Even after the initiation of investigations, the first three applicants for leniency would also receive a 30% reduction on surcharges, if there is 'vacancy' resulting from less than these applicants prior to investigations[12].

In order to bring Japan closer to international standards, raising the rate of surcharges from the current 6% to 10% is included in the amendment bill. The higher surcharges are, the stronger an incentive they give cartel participants to apply for leniency. Viewed from an international perspective, the current level of surcharges is too low and do not provide a sufficient incentive. Therefore, the rate of surcharges would be increased in order to make the proposed leniency program more effective as well as for their reasons.

Nippon Keidanren, the largest economic organization in Japan, has voiced its opposition to proposals to introduce a leniency program on the grounds that (1) it is doubtful as to whether a leniency program would fit in with national sentiment, (2) there is no reason to introduce a plea bargaining program into formal procedure when there is, as yet, no such program in place within the Japanese criminal procedure, (3) the requirements under the leniency program are unclear and could lead to the JFTC acting at its own discretion and (4) the reasons for rejecting joint applications are unclear[13].

However, (1) under the proposed leniency program, companies themselves would apply for leniency; it differs from internal whistle-blowing by company employees. The general public is less likely to be in favor of a situation in which cartels go undiscovered. What is more, there are currently Japanese companies using leniency programs in other countries (such as in the aforementioned graphite cartel and vitamin cartel cases; refer to Annex 2). (2) Leniency establishes requirements as law, eliminates elements of bargaining, is applied in a non-discretionary manner and has its basis in the official objective of preventing the law from being violated. For these reasons, leniency differs entirely from the plea bargaining program, whereby penalties are reduced by bargaining with suspects providing specific information. Furthermore, (3) the JFTC plans to push ahead in dialogue with all related parties to ensure transparency related to the leniency program. Finally, (4) if joint applications were to be accepted, the effect of leniency would be diluted in terms of preventing violations through the increased incentive for companies to cease violations due to the risk of other companies providing the authorities with information. For the details of violations to be reported properly, it is necessary that the possibility of collaboration between companies is eliminated. Under the leniency programs in the U.S. or the EC, there are no joint applications being accepted. [14]

As this discussion demonstrates, there is deep rooted opposition from within economic circles in Japan, However, such claims can not be justified. Almost all the countries where leniency has been introduced has initially faced non-acceptance of the society. In Netherlands and Germany, for instance, there was, at first, accusations that leniency "would not suit the culture of our country"; since being actually introduced, leniency programs are accepted and have achieved positive results.

Therefore, the law should be amended and to adopt a leniency programs in Japan.

(4) Conclusion

On March 23, 1998, the OECD adopted the Recommendation of the Council concerning Effective Action against Hard Core Cartels (refer to Annex 4). On the grounds that close cooperation is required in order to effectively deal with anticompetitive behavior that has an adverse effect on other countries and impedes international trade. This provisional order states that "Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels."

As this Recommendation says, international cooperation is vital in order to crack international cartels. As part of such cooperation, it is also important that, as mentioned previously, competition authorities in the world actively engage in the exchange of information.

However, there is one area that competition authorities when sharing information need to be careful about namely whether or not to share information regarding applications for leniency with other countries.

The OECD Report on Leniency Programmes to Fight Hard Core Cartels, which was published on April 27, 2001, serves as a source of reference on this matter.

Essentially, if a company applies to the authorities in one country for leniency and the authorities in that country then provide the authorities in other countries with information stating that the company has applied for leniency, then, the authorities in other countries learn details of violations before the company applies for leniency. In this case, the result would be that there are less incentives for the company to apply for leniency.

Consequently, we feel that it would be preferable not to exchange information regarding applications for leniency between the competition authorities.

As stated previously, in addition to the cooperation agreements already signed with the U.S. and the EC, the JFTC is now concluding cooperation agreements with Canada, Australia and South Korea. In doing this, the JFTC intends to build up a cooperative competition network between Japan and the many countries with which Japan has wide economic ties. The coming adoption of a leniency program will ensure that this network functions more smoothly, thus

enabling action to be taken against international cartels more promptly and more rigorously than ever before.

[1] Report of the Study Group on the Antimonopoly Act, section 10
[2] Report of the Study Group on the Antimonopoly Act, section 14
[3] Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws (2002). See at http://www.oecd.org/dataoecd/16/20/2081831.pdf
[4] JFTC press release, March 18, 1999
[5] JFTC press release, April, 5, 2001
[6] JFTC press release, December 11, 2003
[7] As above
[8] Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities (Japan-US Agreement), Article 3, Clause 2; Agreement between the Government of Japan and the European Community concerning Cooperation on Anticompetitive Activities (Japan-EC Agreement), Article 3, Clause 2
[9] Japan-US Agreement, Article 4, Clause 1; Japan-EC Agreement, Article 4, clause 1
[10] Japan-US Agreement, Article 4, Clause 4; Japan-EC Agreement, Article 4, Clause 4
[11] Public comment made by the OECD Secretariat regarding revisions to the Japanese antimonopoly Act and the Annual Reform Recommendations from the Government of the United States to the Government of Japan under the U.S.-Japan Regulatory Reform and Competition Policy Initiative(2003)
[12] In all cases, it should be noted that total number of enterprises that may be applied to the leniency program is no more than 3.
[13] "Views on the Report of the Study Group on the Antimonopoly Act", Nippon Keidanren (November, 29, 2003), etc.
[14] "Outlines of the amendment of the Antimonopoly Act", JFTC (December 24, 2003), etc.