

Remarks as Prepared for the 2015 Asia Forum of  
American Bar Association on  
“Hard Core Crackdown: Anti-Cartel Enforcement  
in High Gear in Asia”

Takashi YAMAMOTO

Commissioner of the Japan Fair Trade Commission

Beijing, China

November 17, 2015

- Role of Leniency Program

We launched the leniency program in January 2006. Our primary purpose of the introduction of leniency program was to give enterprises an incentive to report their violations, aiming at uncovering the cartels and bid riggings.

The background is that it is quite hard to detect cartels and bid riggings because they are done behind closed doors, leaving very little evidence.

Before the introduction of the leniency program, it was claimed not to be rooted in Japan because it seemed to rely on betraying other cartel members, which would go against the Japanese culture of putting conformity before competition. Once it was introduced, however, the leniency program was first applied to a leading big company in Japan.

Since its introduction, enterprises have been making good use of the leniency program, and the number of applications has reached 836 in total between 2006 and the end of the fiscal year 2014. Moreover, the leniency program was used in 102 cases during that period, showing how effective the leniency program is to detect cartels.

For your information, up to 3 applications were accepted under the very first leniency program in Japan. (The first applicant before the JFTC started investigation was exempted from surcharge. The second applicant was reduced 50% of surcharge. And the third applicant was reduced 30% of surcharge. Even after the JFTC started the investigation, if an enterprise was the third or less including those who applied before the JFTC's investigation, the surcharge was still reduced 30%.)

Since January 2010, the number of leniency applicants who will receive a surcharge reduction has been raised from 3 to 5. In addition, since January 2010, if an enterprise makes an application together with its subsidiaries and affiliated companies, they are taken as a single application by one company group and the same leniency treatment is applied.

- Gathering of Evidence

The JFTC has 2 ways to investigate, that is, the administrative investigation and the criminal one. However, we usually use the administrative one.

Under the administrative investigation, we usually go through a process including dawn raids, interrogation and orders to report to gather evidence.

We carry out dawn raids on headquarters and branches of the business concerned and order them to submit materials we think are necessary to investigate the case. If the case is an international cartel, we may get in touch with competition authorities of other countries before the dawn raids and coordinate its schedule.

Dawn raids are usually done without notice in order to prevent the investigated enterprises from destroying or hiding relevant documents or files.

When we get to an inspection spot, we begin a dawn raid by handing to a person in charge a “Notice of Alleged Fact and Others,” that is, a paper that describes on what articles of the Anti-Monopoly Act (AMA) the raid is based, the name of the case, and a summary of the alleged conduct.

We order them to hand in not only relevant documents but also data saved on PCs and servers. When it comes to a PC used by a key figure, we copy the data outright with digital forensic software. The digital forensic team of the Investigation Bureau of the JFTC saves and looks into the data we gathered and recovers any deleted data.

After dawn raids, we interview key figures and take record of their oral statement. We seek to gather information on a turnover of the goods or service in question through a procedure of “Report to Order.”

When the leniency application is received on the case, we form a big picture of the case with the information we received through the leniency application. We also encourage the leniency applicant to cooperate with the investigation by accepting

additional interviews and handing in more evidence so that the case can be solved as quickly as possible.

By the way, the AMA has no article allowing lawyers to be present during dawn raids or interviews, and only allows them during and after procedures for hearing.

Even though there is no legal requirement to wait for lawyers to get to the inspection spot for the conduct of dawn raids, we allow them to be there if the inspected enterprise makes the request as long as it does not affect the smooth implementation of such on-the-spot inspection.

By contrast, lawyers are not allowed to be present during interviews as we believe that it may discourage interviewees from speaking the truth, which will make it difficult for us to find the facts.

However, if the investigated enterprise asks us to exchange views on the case and to let a lawyer be there, we don't see it as a problem.

Under the criminal investigation, we search a spot and confiscate materials with force based on a warrant issued by a judge. We also get evidence through interviews, etc. on their voluntary basis.

- Procedure for Taking Measures

When we conclude, from the evidence we obtained through dawn raids, interviews and orders to report, etc., that the investigated enterprise violates the AMA, we issue a cease and desist order and a surcharge payment order in the case of administrative investigation.

The JFTC's order is eventually subject to judicial review, so we have to establish the fact with high level of probability as the same extent as a plaintiff in civil lawsuit.

Prior to issuing orders, the JFTC is required to notify in advance information regarding what the JFTC is about to order, what facts the JFTC found, to hold the hearing procedures and the date of hearing.

When a notice on procedures for hearing is received, the recipient enterprise has the right to let others represent it at all phases of the procedure.

Moreover, the recipient is provided opportunity to inspect and copy the evidence to prove the facts found by the JFTC.

An officer designated by the JFTC will hold procedures for hearing. However, we are not allowed to select any person engaged in the investigation of the case.

On the very first day of hearing, the investigator of the JFTC in charge will describe what the expected order is.

The party being investigated may appear on the day, ask the investigator questions with approval from the designated officer, state its opinions and submit evidence.

When the hearing procedure is over, the designated officer will make a record of process of hearing and submit a report that puts together issues of the case to the JFTC.

After the notice is given to the investigated party that the record and the report are finalized, the JFTC will let the investigated party review them, at their request.

The JFTC then makes a judgment on orders, paying due consideration to what these documents describe.

Lastly, as for the role of the judiciary, if the JFTC's order is found to be unacceptable, the party under investigation may file the case to the Tokyo District court.

When it comes to the criminal investigation, the JFTC may make a criminal accusation on the case to the Attorney General, if the JFTC is convinced the criminal violation.

- Possible Measures for Cartels and Bid Riggings

The JFTC may issue a cease and desist order, which is necessary to eliminate the infringement. As a result of the administrative investigation, if the violation of a cartel or bid rigging is found, the investigated party will also receive a surcharge payment order.

The purpose of the surcharge payment order is to prevent

cartels from forming in the first place. The AMA stipulates how to calculate the amount of surcharge, that is, a turnover of the goods or services related to the cartel during a period of infringement (of up to 3 years) is multiplied by the designated surcharge rate, which differs according to the scale and nature of the business.

Together with the introduction of the leniency program, the surcharge rate was raised from 6% to 10% in January 2006. As a result, the total amount of surcharges has been soaring.

When the JFTC makes a criminal accusation, enterprises and individuals may receive a fine or jail sentences.

In the case of bid rigging in public procurement, on top of the measures from the JFTC, procurement agencies for public works such as the central and local governments or incorporated administrative agencies usually suspend those who violate the AMA from participating in bids for a given period of time.

- International Cooperation among Competition Authorities

Promoting international cooperation among competition authorities is becoming more and more crucial in order to deal with cross boarder violating activities.

As you may know, the OECD Council's Recommendation in 2014 calls for a framework that enables competition authorities of member countries to exchange confidential information based on an information gateway provision.

The AMA has already had such a provision. Given this context, the JFTC and the Australian Competition and Consumer Commission (ACCC) signed the so-called 2nd generation arrangement last April, which enables us to share confidential information without getting a waiver. That is the first agreement of this type for the JFTC.

Moreover, when it comes to the exchange of information between Japan and China, we'd like to promote cooperation, following the Memorandum of Understanding, MOU, signed last month between the NDRC and the JFTC.

As for the issue of extraditing criminals, we should refrain

from making a comment because the Minister of Justice is in charge of such a decision, following the conditions set by the Extradition Treaty and the Act of Extradition.