

Compliance Efforts of Japanese Companies for Foreign Competition Laws

—Aiming at Compliance Efforts as Global Rules

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Japan Fair Trade Commission

1. Purpose of Survey (Report, Section 1)

Recently, there are many cases where Japanese companies have been charged with violations of foreign competition laws ^(Note 1). As a result, huge amounts of criminal fines and/or surcharges have been imposed on them and their executives and employees have been sentenced to imprisonment. Given these circumstances, the vulnerabilities of compliance regimes with foreign competition laws (hereinafter, “FCL compliance”) have been pointed out at Japanese companies.

The competition laws of many major countries and the Antimonopoly Act of Japan have commonality in the conducts that constitute violations especially in cartel prohibition. Therefore, Japanese companies should basically comply with the Antimonopoly Act of Japan in order not to be charged with violation of any foreign competition laws. On the other hand, there are currently differences between the competition laws of major countries and the Antimonopoly Act in terms of the requirements for constituting violations, law enforcement procedures, and other tools for immunity and/or reduction from sanctions over violations. Considering these situations, Japanese companies doing business globally would need to develop their frameworks to comply with foreign competition laws simultaneously with promoting compliance with the Antimonopoly Act (hereinafter, “AMA compliance”).

For this reason, the Japan Fair Trade Commission (hereinafter, “JFTC”) has recently conducted the questionnaire survey and interviews, with the aim of contributing to reinforcement of FCL compliance regime at Japanese companies.

(Note 1) Mean foreign laws equivalent to the Antimonopoly Act of Japan.

2. Points of This Report (Report, Section 3)

(1) Basic Viewpoints in Promoting FCL Compliance (risk management and avoidance)

When we consider how FCL compliance should be, we would basically start with discussions about “risk management and avoidance.” ^(Note 2) More specifically, it would be important to adopt an approach of accurately identifying risks based on various characteristics of foreign competition laws described below and then minimizing those risks. To this end, efforts “not to commit violations” and “not to allow employees to engage in violations” are most essential. Moreover, if companies have been involved in infringement, it is necessary to minimize damage arising out of violations against foreign competition laws through proactive use of tools for immunity and/or reduction from sanctions available under competition laws of the relevant jurisdiction.

In comparison with the Antimonopoly Act of Japan, risks involving the characteristics of foreign competition laws can be described below.

(Note 2) The Survey on Corporate Compliance Efforts with the Antimonopoly Act (published in November 2012) states “*AMA Compliance should not be a mere ‘tool for complying with laws and regulations.’ It should be utilized actively and strategically as a ‘tool for controlling and avoiding risks’.*”

A. Risks involving the legal systems under foreign competition laws and their enforcements

(a) Strict sanctions over violations

Levels of criminal fines and surcharges over anticompetitive conducts as provided by some foreign competition laws are higher than those in Japan, and larger amounts of criminal fines and surcharges are actually imposed. In some countries and/or regions, there are not a few cases in which marketing personnel and other individuals are sanctioned to imprisonment without suspended sentence.

(b) Differences in the requirements for constituting cartel

Especially in the case of price cartel, there are some countries and/or regions where only the concerted action by more than one enterprise suffices for the substantive requirements for violations and it does not matter to what extent the conduct has anticompetitive effects, unlike Japan. In other cases, the circumstantial evidences that would make the authority presume the existence of collusion play more important roles than in Japan to prove/demonstrate evidences of the cartel.

(c) Penalty on refusal to cooperate with or obstruction of the authority in carrying out investigations

There are some cases in which the authority decides to increase the amount of fine or surcharge over any entities that are not willing to cooperate on its investigations. In some countries and/or regions, separate strict sanctions are available and are actually enforced against those entities that have interfered with investigations by antitrust authorities by destroying the relevant materials and documents or otherwise.

B. Risks that may be subject to competition law enforcement in several countries and/or regions

Especially enterprises globally doing business have often committed anticompetitive conducts across the markets in several countries and/or regions, and there are an increasing number of cases in which such enterprises are subject to investigations by antitrust authorities of those several countries and/or regions, as well as to sanctions based on their competition laws. Thus, enterprises not only will be subject to competition law enforcement in countries and/or regions where they operate through their branch offices or overseas subsidiaries, but also may be

subject to competition law enforcement even in any countries or regions where they are doing business with no such offices.

(2) Basics of Actions to Promote FCL Compliance (3 Pillars of Actions)

For Japanese companies to promote FCL compliance, it would be necessary to plan and take individual and concrete measures based on the following three basics of actions reflecting the fundamental viewpoints of risk control and avoidance described in (1) above, based on the assumption that they need to promote the AMA compliance.

A. Integrated actions by parent companies and overseas subsidiaries (integration)

In terms of FCL compliance by Japanese companies, they would need to build up a compliance framework that also involves their foreign subsidiaries, based on “Risks That May Be Subject to Competition Law Enforcement in Several Countries and/or Regions” in (1)B above. In that case, parent company and foreign subsidiaries should take integrated actions.

However, according to the questionnaire survey, there are not a few cases in which parent companies located in Japan are unaware of how their foreign subsidiaries address FCL compliance in detail. Thus, the survey result implies that their frameworks are still far from integrated actions as a matter of fact.

B. Extensive actions with awareness of competition laws of all countries and/or regions where companies operate (extensiveness)

From the viewpoint of preventing the amount of surcharges or other fines from getting huge as a result that the enterprise becomes the subject of enforcement of several competition laws simultaneously, as well as of appropriately controlling and avoiding risks, it is necessary to take actions with a sufficient awareness of application of competition laws of countries and/or regions where the enterprise operates its business.

According to the questionnaire survey, however, only less than 20% of enterprises doing business in the United States, European Union, China and South Korea answer that they have formulated compliance manuals on the competition laws of each country and region or have provided training opportunities. In fact, it is seen that there is still large room for improvement.

C. Flexible actions based on characteristics of legal systems for foreign competition laws different from Japanese system (flexibility)

For enterprises in order to secure proper risk management against foreign competition laws that have such risks as described in (1) above, it is important “not to commit” violations of foreign competition laws and “not to allow employees to engage in violations.” Should an enterprise be

subject to any foreign competition law enforcement, it is extremely essential to take appropriate actions based on the differences in the legal systems.

According to the questionnaire survey, with regards to contingencies under foreign competition laws in which they especially pay more attention than those under the Antimonopoly Act, a majority of enterprises that have previously committed violation of foreign competition laws ^(Note 3) answered that they have taken flexible actions taking into account the differences in how sanctions should be under foreign competition laws (e.g., the degree of sanction differs depending on the level of cooperation on investigations). However, only a few enterprises take such actions, looking into the results from all of the surveyed companies.

(Note 3) Mean those enterprises that have been subject to administrative enforcement and/or criminal prosecution by foreign antitrust authorities for a violation of any foreign competition law in the past twenty years.

3. JFTC's Future Actions (Report, Section 4)

The JFTC has ever made efforts to promote the AMA compliance at enterprises by considering strict and active enforcement of the Antimonopoly Act and activities for supporting and advocating corporate efforts for the AMA compliance as “a pair of wheels” in competition policy.

In this survey, we focused on foreign competition laws and revealed the current situations of the FCL compliance frameworks at Japanese companies. We also recommended measures and important notes that would be effective to promote FCL compliance, together with concrete examples.

While concrete measures to promote FCL compliance programs are basically not different from measures to promote AMA compliance programs, it is necessary to take actions considering risks in relation to characteristics of foreign competition laws.

For this reason, enterprises should promote their AMA compliance efforts, and also should promote their FCL compliance efforts, based on the results of this survey.

The JFTC will continue its efforts to provide information on antitrust legal systems ^(Note 4) and recent movements of antitrust authorities around the world ^(Note 5), and strongly engage in activities to support and advocate corporate efforts on the AMA compliance and FCL compliance through dissemination of results of this survey or otherwise.

(Note 4) For competition laws around the world, visit <http://www.jftc.go.jp/kokusai/worldcom/index.html>.

(Note 5) For movements of foreign authorities, visit <http://www.jftc.go.jp/kokusai/kaigaiugoki/index.html>.