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Interim Measures in Antitrust Investigations – Note by Japan

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More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations.htm>

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1. Introduction

1. Typical of the IT and digital sectors, complex and rapidly evolving markets have created many new challenges for competition authorities. One of the most important and difficult tasks for competition authorities is to resolve competition problems quickly, before problematic market structures take hold and it becomes difficult to restore competitive environment.
2. The Japan Fair Trade Commission (Hereinafter referred to as “JFTC”) has been tackling these issues flexibly and proactively in accordance with the characteristics of each case, and one of the tools of the JFTC to do so is the "urgent injunction", which is an interim measure based on the Antimonopoly Act (Hereinafter referred to as “AMA”).
3. An urgent injunction is issued by the court, upon petition by the JFTC, to suspend an act that may violate the AMA when the court finds an urgent necessity to do so. Recently, the JFTC filed a petition to the court seeking an urgent injunction against suspected violation of the AMA by Rakuten Group, Inc. (Hereinafter referred to as “Rakuten”), a large digital platform operator in Japan.
4. In this contribution paper, we would like to introduce the outline of the urgent injunction system and related cases. We would also like to touch upon the relation with other tools of the JFTC to ensure the prompt elimination of suspected violations.

2. Outline of the Urgent Injunction (Article 70-4 of the AMA)

5. When an alleged violation of the AMA continues to be committed after the start of the investigation and the JFTC eventually finds the infringement of the AMA, the JFTC issues a cease and desist order to stop the relevant acts. However, as the investigation takes a certain period of time, there is a concern that the competitive environment may become unrecoverable before the cease and desist order is issued.
6. Article 70-4, paragraph (1) of the AMA (see below) provides that the court may, in response to a petition by the JFTC, order a person who is suspected of violating the AMA to suspend the conduct if the court acknowledges an urgent need.
7. *“Upon petition by the Fair Trade Commission, if the court finds there to be an urgent necessity of doing so, the court may order the person engaging in an act suspected of violating the provisions of Article 3; Article 6; Article 8; Article 9, paragraph (1) or (2); Article 10, paragraph (1); Article 11, paragraph (1); , Article 13; Article 14; Article 15, paragraph (1); Article 15-2, paragraph (1); Article 15-3, paragraph (1); Article 16, paragraph (1); Article 17; or Article 19 to temporarily stop engaging in the act, stop exercising voting rights, or stop executing business as an officer of a company, or may rescind or modify such order.”*
8. If the JFTC files a petition to the court in accordance with this provision, the court decides whether to issue an urgent injunction. In order to have an urgent injunction, it is not required that a violation of the AMA has been proven, but only required that a prima facie showing of “suspected violation” has been made and that the urgent need to stop the conduct in question has been acknowledged. The Tokyo district court has the jurisdiction for this decision.

9. There have been 8 cases where the JFTC filed a petition for an urgent injunction in the past, and the petition for an urgent injunction against Rakuten was the JFTC's first petition in more than 10 years. The JFTC's petitions have been granted by the court, fully or partially, in all past cases, except for the cases where the JFTC withdrew the petitions because enterprises terminated alleged violations after the JFTC's petitions.

3. Recent Case (Petition for an Urgent Injunction against Rakuten¹)

3.1. Outline of the case

10. Rakuten is a large-scale digital platform operator running an online mall called "Rakuten Ichiba". Rakuten has introduced the policy called "common free shipping threshold" (Hereinafter referred to as the "Threshold".) to the stores on Rakuten Ichiba. The Threshold requires that the stores cannot receive shipping fees from users in addition to the product price if the orders they received from users meet certain conditions (basically, in the cases where the amount of payment of single order is 3,980 yen or more).

11. The stores were able to receive shipping fees from users freely and voluntarily, separately from the product price, until Rakuten introduced the Threshold. However, Rakuten notified the merchants which had opened stores on Rakuten Ichiba that it would uniformly introduce the Threshold to all the stores from March 18, 2020.

12. In response to this, on February 28, 2020, the JFTC filed a petition for an urgent injunction to the Tokyo District Court in accordance with the provision of Article 70-4, paragraph (1) of the AMA. This urgent injunction was intended to temporarily stop Rakuten from introducing the Threshold uniformly against all the merchants on Rakuten Ichiba. The reasons for the petition are as follows.

1. Introducing uniformly the Threshold, which was suspected of unjustly changing the terms and conditions of transactions in a manner disadvantageous to the merchants on Rakuten Ichiba in light of normal business practices by taking advantage of Rakuten's superior bargaining position over the merchants, might fall under Article 2, paragraph (9), item (v) (c) (Abuse of Superior Bargaining Position) of the AMA, and violate the provision of Article 19 of the AMA, which prohibits unfair trade practices².
2. If Rakuten uniformly introduces the Threshold from March 18, 2020, the fair and free competitive environment would be seriously infringed, which would impede the free and voluntary transactions of a considerable number of the stores and would also cause a serious adverse impact on competition between the stores and their competitors. Furthermore, if Rakuten continues the implementation of the Threshold until the JFTC's cease and desist order, it would become difficult to restore the fair and free competitive environment. Therefore, there is an urgent necessity (stipulated in Article 70-4, paragraph (1) of the AMA) to suspend the uniform introduction of the Threshold.

¹ The English press release can be found at the JFTC website below.

<https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html>

² Article 2, paragraph (9), item (v) (c) of the AMA defines that engaging in act "establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty", "by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices" as one of the "Unfair Trade Practices" (Abuse of Superior Bargaining Position).

3.2. Withdrawal of the Petition for an Urgent Injunction

13. After the JFTC's petition for an urgent injunction mentioned above, on March 6, 2020, Rakuten announced that it would allow the stores to decide whether to apply the Threshold or not³ in consideration of the impact of new coronavirus infection on stores, etc., which was also stated in the procedure at the Tokyo District Court.

14. Recognizing that an injunction would be less urgent for the time being if the merchants could choose whether or not they apply for the Threshold voluntarily, the JFTC withdrew its petition for the urgent injunction on March 10, 2020.

3.3. Progress of the Subsequent Investigation

15. After the withdrawal of the petition for the urgent injunction, the JFTC continued its investigation on Rakuten's measures in order to find out if the merchants would be able to make a voluntary choice regarding the application of the Threshold. As a result of the investigation, the JFTC recognized the suspicion that Rakuten forced the merchants who had opened stores on Rakuten Ichiba by July 2019⁴ to apply for the Threshold and not to apply for the exemption, through specific Rakuten employees suggesting, for instance, to the merchants that they would be placed in a disadvantageous position if they would not apply for the Threshold. Such conduct might fall under Article 2, paragraph (9), item (v) (c) (Abuse of Superior Bargaining Position) of the AMA and violates the provision of Article 19 of the AMA.

16. During the JFTC's investigation, Rakuten proposed to take voluntary measures including full dissemination, to the specific Rakuten employees as well as the merchants, of the policy that "Rakuten would respect the will of the merchants concerning their application for the Threshold and leaving from the Threshold, and would not engage in any activity that violates the Antimonopoly Act", "Rakuten would not take any actions disadvantaging the merchants outside the Threshold, and would not suggest such actions to the merchants" and "Rakuten would not take actions constraining the exemption application from the merchants who were forced to apply for the Threshold, and would not suggest merchants to apply for the Threshold". As a result of the JFTC's review on these proposals, the JFTC recognized that these measures would eliminate the above-mentioned suspicion and decided to close the investigation on this case after the JFTC confirms the proposed measures have been actually implemented. The JFTC announced this decision on December 6, 2021.⁵

4. Significance of Urgent Injunctions

17. In markets where the pace of technological innovation and the changes in business models is rapid, such as in the IT and digital sectors, agility is required also in terms of competition policy intervention. However, since the structure of these markets is complex,

³ And Rakuten established a procedure for the merchants to apply for the exemption from the Threshold. This exemption is granted only for the merchants that had entered into a merchant contract with Rakuten by July 2019.

⁴ Rakuten has entered into store opening agreements only with the merchants that agree to apply the Threshold since August 1, 2019.

⁵ The English press release can be found at the JFTC website below.

<https://www.jftc.go.jp/en/pressreleases/yearly-2021/December/211206.html>

usual investigation procedures aiming at the JFTC's administrative measures such as cease and desist order take a considerable amount of time. As a result, prompt and sufficient restoration of competitive environment may not be achieved.

18. Looking at the JFTC's handling of anticompetitive cases in the IT and digital sectors in recent years, there are cases, in which an investigation was closed by approving commitment plans, etc.^{6,7} The JFTC's handled these cases with the overriding objective of promptly restoring competitive environment in the fast-moving digital market.

19. Even if the above mentioned tools are used, the JFTC's investigation still takes a certain period of time. Therefore, it is considered that an urgent injunction aiming at preventing the expansion of competitive harm could complement the above mentioned tools aiming at rapid restoration of the competitive environment.

20. Furthermore, there are other cases in which the alleged offender voluntarily abandoned the suspected AMA violation after the JFTC filed a petition for an urgent injunction. Therefore, a petition by the JFTC itself may have an impact in stopping anti-competitive behavior, besides the direct order by the court.

5. Conclusion

21. The JFTC has been handling cases of suspected AMA violations in the fast-moving digital market with an emphasis on restoring competitive environment in a timely manner, and the urgent injunction, which is an interim measure, can be positioned as one of the complementary tools to do so.

22. The JFTC will continue to take measures in the most appropriate manner, including the urgent injunction system, on a case-by-case basis considering market characteristics, to reliably and promptly eliminate suspected violations.

⁶ Stipulated in the Articles 48-2 to 48-9 of the AMA.

⁷ “Approval of the Commitment Plan submitted by Amazon Japan G.K.” (2020) and “Approval of the Commitment Plan submitted by Rakuten, Inc.” (2019) (another case involving Rakuten) are examples of the cases in which an investigation in the digital field is terminated through a commitment process.

<https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html>

<https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html>