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Overview

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The Japan Enforcement Agency

The substantive provisions of Japan's competition rules are contained in the Antimonopoly Act of Japan (AMA). The Japan Fair Trade Commission (JFTC) is the principal enforcement agency, which was established as an independent administrative office with broad enforcement powers and is composed of a chairman and four commissioners. The AMA comprises four major categories of regulations:

- the prohibition of unreasonable restraint of trade (eg, cartels, bid rigging);
- the prohibition of private monopolisation;
- the prohibition of unfair trade practices; and
- regulations on business combination (eg, via mergers and acquisitions).

The JFTC is the sole enforcement agency, except in the case of criminal investigations where the public prosecutor's office is in charge of criminal prosecutions upon the JFTC's submission of a criminal accusation to the prosecutor general.

Recent developments

Cartels

The JFTC issued a formal administrative order (cease and desist and surcharge order) for 14 cartel cases in 2013. In March 2013, a total of ¥13.3 billion in surcharges were levied against NTN, NSK and NACHI in the bearing cartel case, and a total of ¥4.6 billion in surcharges were levied against Koito and Ichiko in the automotive headlamps and rear combination lamps cartel cases. The amount of surcharges levied in cartel cases is calculated as follows: the base rate (which is basically 10 per cent, but differs according to conditions, increased to 15 per cent if any cartel is repeated within 10 years of an earlier finding of a breach in respect of the same matter) of the sales amount of the relevant products by the party fined for the period of infringement, extending up to three years from the date such conduct ceased. Surcharges imposed for cartel conduct, as well as abuse of superior bargaining position (see below), totalled as much as ¥23 billion in the 2012 fiscal year.

Regarding criminal investigations, the JFTC found a criminal violation of the AMA in the bearings cartel

case and filed criminal accusations with the prosecutor general in June 2012 against three companies, as well as seven individuals of the three companies accused, who were engaged in sales of bearings. No criminal accusations were filed against the immunity applicant company and its employees. By February 2013, two companies and five individuals were convicted, and a criminal trial is still ongoing in relation to one company and two individuals in March 2014. This trial is expected to end at the end of July 2014. The JFTC also opened its investigation on a criminal violation of the AMA in the Hokuriku-Shinkansen bid-rigging case in September 2013. In March 2014, criminal accusations were filed against eight equipment companies and eight individuals.

The JFTC has expressed its policy of continuing strong and high-impact enforcements, as well as strengthening cooperation with foreign authorities for the purpose of deterring an infringement. The JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union and Canada. Under these agreements, various levels of information exchanges and discussions can be made between the participating authorities. The JFTC is entitled to exchange information with other authorities as well, based on the conditions set out in the AMA.

Leniency

In the 2012 fiscal year, 102 leniency filings were made. According to a JFTC press release, 10 out of 14 cartel cases in which the JFTC issued a formal administrative order in 2012 were triggered by the first leniency applicant before the start of a JFTC investigation, and other alleged companies followed in most cases.

Under the leniency programme in Japan, a maximum of five companies (or groups of companies) will be granted immunity from, or a reduction in, surcharges by identifying the alleged facts in detail and submitting relevant evidence. The first applicant to come forward before the start of a JFTC investigation is granted full immunity, the second is granted a 50 per cent reduction and the third, fourth and fifth are granted a 30 per cent reduction. Any applicants after

the start of a JFTC investigation are granted the same 30 per cent reduction. The JFTC has no discretion in determining the order of leniency applicants or the percentage of reduction granted for cooperation.

Unfair trade practices

The JFTC imposed a ¥1.2 billion surcharge against RAISE operating supermarket stores in North Japan areas in July 2012 for abuse of its superior bargaining position, the fourth case since the enforcement of amendments to the AMA commenced in January 2010 that subjected abusers of a superior bargaining position to a surcharge. The base rate for calculating the amount of surcharges for the abuse of a superior market position is 1 per cent of the sales amount of the relevant products for the period of infringement, extending up to three years from the date such conduct ceased.

In Japan, it is not necessary for the JFTC to demonstrate a restriction of competition in order to prove the occurrence of an abuse of a superior bargaining position in violation of the AMA. In contrast, private monopolisation – similar to an abuse of a dominant position under EU competition law – requires a restriction of competition by a party having a market share in the relevant market exceeding around 50 per cent.

Mergers

The total number of merger notifications for the 2012 fiscal year was 349. Of these notifications, three cases

were cleared subject to conditions under Phase II review while three cases were cleared without any conditions under Phase II review. In addition, the JFTC cleared 340 cases with Phase II review and, among those, the 30-day waiting period, where the notified transaction shall not be closed, was shortened in 127 cases, which represents a substantial increase from the 36 cases in the 2011 fiscal year. There were no formal prohibition decisions in 2013.

Mergers, business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) are subject to prior notification under the AMA if they exceed certain thresholds. Amendments to the AMA, which became effective in January 2010, have introduced mandatory notification of foreign-to-foreign mergers between undertakings that have no Japanese subsidiary or branch office in Japan but that have substantial domestic turnover in Japan (eg, *BHP Billiton/Rio Tinto*).

Proposed Reforms

In December 2013, the National Diet in Japan approved a bill for the amendment of the AMA with the aim of abolishing the current administrative hearing procedure in favour of a more detailed judicial appeal procedure. This amendment has not yet but will become effective on the day provided by the Cabinet Ordinance no later than one-and-a-half years after the date of such approval.



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Atsumi & Sakai was established in 1994 as a boutique firm focusing mainly on finance law. Since then, the firm has developed and broadened its legal experiences, not only in finance but also in a wide range of corporate and dispute resolution disciplines, including antitrust and competition law, such as cartel investigations and merger controls. It also advises on antitrust and competition law aspects of various transactions, including licensing, franchise and distributorship arrangements. Recently, Atsumi & Sakai has become increasingly active in the field of international cartel investigations and merger controls. Many of the firm's junior lawyers have extensive international experience in Asian, EU and American jurisdictions.

**Setsuko Yufu**

Atsumi & Sakai

Setsuko Yufu is a senior partner at Atsumi & Sakai, having developed for more than 30 years her extensive experience in cross-border transactions and corporate practice, including antitrust and competition law. She is especially experienced in international cartel investigations and is ranked as a leading individual in relation to antitrust and competition law in the *Legal 500 Asia-Pacific 2013* and *Chambers Asia-Pacific 2013* publications. After qualifying at the Japan Federation of Bar Associations, she studied at the Europa Instituut in the University of Amsterdam and worked in a leading global law firm in Brussels in 1986–1987. She serves as a board member of the EU Studies Association – Japan and is noted for her comprehensive knowledge of EU competition law.

**Tatsuo Yamashima**

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Tatsuo Yamashima is a partner at Atsumi & Sakai working primarily in the field of antitrust and competition law, government regulations, employment and human resources and other corporate legal affairs. He has assisted and represented many Japanese and foreign companies with antitrust cases and merger cases involving the JFTC, as well as authorities in many foreign jurisdictions. In particular, he has significant experience with leniency applications for the JFTC. He is a graduate of the University of Tokyo (BA, 2002; LL.M., 2004) and is admitted to the bar in Japan. He worked in Brussels at the competition law group of a leading global firm in 2011 as a visiting foreign attorney.