An Overview of the Antimonopoly Act in Japan

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Source

- The figures and data in the following materials are cited from the Annual Reports, etc. published by the Japan Fair Trade Commission (JFTC).
Acts prohibited under the Antimonopoly Act in Japan

- Prohibition of private monopolization
- Prohibition of unreasonable restraint of trade
- Regulation of mergers
- Prohibition of unfair trade practices
Execution of the Antimonopoly Act

- The Antimonopoly Act is administered and executed by the Japan Fair Trade Commission (JFTC).
- The JFTC belongs to the Cabinet Office, and does not belong to a specific regulatory agency. It is an independent regulatory commission.
- The JFTC takes administrative dispositions (Cease and desist orders and Surcharge payment orders). Any entrepreneur who is the addressee of an order may file a revocation suit in the Tokyo District Court if having a complaint.
- Although there existed a hearing procedure as an internal procedure of the JFTC, which enabled a complaint against the decision made by the JFTC to be filed in the Tokyo High Court until the Antimonopoly Act was amended in 2013, the hearing system was abolished (the amended law came into force in April 2015).
Execution of the Antimonopoly Act

• Criminal punishment: It is judged by a court after accusation by the JFTC and indictment by the Prosecutor-General

• Civil claim: Although there are some provisions on this in the Antimonopoly Act, it is usually judged by a court after a claim for damages is made by an injured party based on the Civil Code, etc.
Prohibition of private monopolization

- Contents of the act: private monopolization
- Clause: The term “private monopolization” as used in this Act means such business activities by which any entrepreneur, individually or in combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. (Article 2 (5))
Example of private monopolization

• NTT East case (Supreme Court Decision in 2011)
  NTT East’s act was judged to be private monopolization: NTT East provided an optical fiber connection service by setting the user charge at a price (monthly, 5,800 yen to 4,500 yen per month) lower than the connection charge (monthly, 6,328 yen) that other telecommunication companies had to pay to provide the same service by connecting to NTT East’s optical fiber equipment.

• Although there was no surcharge system against private monopolization at that time, a surcharge will be imposed if a similar case occurs now.

• A “substantial restraint of competition” means “the formation, maintenance, or strengthening of the market power.”
Prohibition of the unreasonable restraint of trade

- Contents of the acts: price-fixing agreements (price-fixing cartels), quantity-limiting agreements, bid rigging, market share cartels, purchase cartels, customer-limiting cartels, activities of trade associations
- Clause: The term “unreasonable restraint of trade” as used in this Act means such business activities by which an entrepreneur, through a contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. (Article 2 (6))
Example of the unreasonable restraint of trade

- Refuse incinerator bid rigging case (cease and desist order and surcharge payment order)
- A cease and desist order was issued to five refuse incinerator manufacturers that in concert determined the prospective successful bidder so that the bidder could contract the construction of continuous and semi-continuous furnaces ordered by local governments. Subsequently, a surcharge payment order was issued under the former law. The total amount of the surcharge imposed on the five companies was about 27 billion yen.
- The local governments then claimed for damages, resulting in many court decisions. The competent courts awarded damages of about 1.6 billion yen in a case in Kobe City, 530 million yen in a case in Amagasaki City, and about 1.8 billion yen in a case in Kyoto City.
Example of the unreasonable restraint of trade (international case)

- Cathode-ray tube cartel case (cease and desist order and surcharge payment order in 2009, decision made by the JFTC on May 22, 2015)
- Eleven Asian cathode-ray tube manufacturers agreed on the selling prices of cathode-ray tubes for televisions. Of the eleven manufacturers, the JFTC issued cease and desist orders to two companies and issued surcharge payment orders to five other companies (3.3 billion yen in total).
- The amount of the surcharge was calculated based on the sales of cathode-ray tubes purchased by the local subsidiaries of Japanese cathode-ray tube television manufacturers located in other Asian countries.
- JFTC served written surcharge payment orders to attorneys living in Japan. With regard to the manufacturers that the JFTC could not serve orders, the JFTC issued a cease and desist order to a manufacturer and surcharge payment orders to two companies by service and by publication.
- The decision concluded that surcharge payment order, etc. was legitimate. It concluded that the Japanese companies manufacturing and selling cathode-ray tube televisions had decided important business conditions, such as negotiations, suppliers, purchase prices, and purchase quantities, and instructed the local subsidiaries to purchase; the Japanese companies manufacturing and selling cathode-ray tube televisions were deemed to be the consumers of the cathode-ray tubes in question, and the competition in the sales field of said cathode-ray tubes was considered to exist mainly over consumers located in Japan.
Regulation of mergers

- Contents of the acts; mergers, share holding, business transfers, corporate separation, etc.
- Clause (merger): No company shall effect a merger if any of the following items applies: (i) When the effect of the merger may be to substantially restrain competition in a particular field of trade (Article 15)
Example of merger regulation

- Panasonic-Sanyo merger case (2009)
- Panasonic, which manufactures and sells electrical equipment, considered making Sanyo Electric its subsidiary by acquiring a majority of the voting rights of the shares of Sanyo.
- A remedy (problem-solving measure) was taken – that is, the Tottori plant for producing cylindrical manganese dioxide lithium batteries (for residential fire-alarm device) was transferred to a rival. It was judged that there was no problem concerning lithium-ion secondary batteries (for consumer use) and nickel hydride batteries (for automobiles).
- This case was filed for examination in many countries throughout the world (such as the US, EU, and China). As a result of an examination in China, a business transfer as an additional remedy was demanded concerning nickel hydride batteries (for automobiles).
Prohibition of unfair trade practices

- Contents of the acts: concerted refusal to trade, individual refusal to trade, discriminatory pricing, unjust low price sales, unjust customer inducements, tie-in sales, dealing with restrictive conditions, dealing with exclusive conditions, resale price maintenance, abuse of a superior bargaining position, interference with a competitor's transactions
- Clause: The term “unfair trade practices” as used in this Act means any act falling under any of the following items … (the rest is omitted) (Article 2 (9))
Examples of unfair trade practices

- Although there are various acts, the following are examples of the abuse of a superior bargaining position, which is frequently detected recently:
- In 2009, the surcharge system was introduced for the abuse of a superior bargaining position.
- EDION case (cease and desist order and surcharge payment order in 2012): An order to pay a surcharge of 4,047.96 million yen was issued to EDION, a mass retailer of electrical home appliances, which had suppliers dispatch employees without concluding any agreement on the conditions for the dispatch of these employees to take out, bring in, or set up appliances in the shop and without paying the expenses that are usually necessary for such dispatch.
- Regarding acts that the headquarters of the supermarkets conducted toward the suppliers, an order to pay a surcharge of 222.16 million yen was issued to Sanyo Marunaka in 2011, and an order to pay a surcharge of about 1.2 billion yen was issued to RALSE in 2013.
- A decision was made for the first time since the introduction of the surcharge system in 2009 (Toys “R” Us case, March 26, 2015). The decision concluded that abuse of a superior bargaining position did not apply to part of the conduct and annulled a part of the surcharge payment order (the amount beyond 222.18 million yen (146.9 million yen) out of the total amount of 369.08 million yen).
Characteristics of the Antimonopoly Act in Japan (1)

- See the attached materials (table).
- This was enacted in 1947. It was the third competition law in the world after those in the US and Canada. Although it was modeled on the US law, it has many original provisions.
- It regulates not the abuse of a dominant market position, but private monopolization (influence of the US law).
- Regarding hardcore cartels (price cartels, bid rigging, etc.), the requirements also include a particular field of trade (relevant market) and substantial restraint of competition (however, depending on the legal interpretation, they are quasi per se illegal in reality).
- Due to the influence of precedents, etc., vertical restraints are substantially regulated not as an unreasonable restraint of trade but as an unfair trade practice.
Characteristics of the Antimonopoly Act in Japan (2)

- Unfair trade practices have been regulated frequently. The regulation of these is stricter than for private monopolization.
- Regulation of unfair trade practices has been influenced by the US law. However, the regulation of unfair trade practices in Japan is stricter than in the US (“substantial restraint of competition” as an effect requirement for private monopolization – that is, the formation, maintenance, or strengthening of market power – is unnecessary; it is sufficient to prove that an act “tends to impede fair competition”).
- The provision for the abuse of a superior bargaining position is not included in the competition laws of many foreign countries. The execution of this provision has been strengthened by the introduction of the surcharge system in 2009.
- Japan has a Subcontracts Act as a special law for restriction of the abuse of a superior bargaining position, which has been frequently used to restrict such abuse. Although the measures imposed are recommendations or public announcements, a refund may be required.
Execution of the Antimonopoly Act

• Administrative disposition (JFTC)
  Cease and desist order: Suspension and prevention of an act
  Surcharge payment order: In the case of a cartel, for example, an order to pay 10% of the sales to the national government as a surcharge is issued.

• Criminal punishment (imposed by a court after accusation by the JFTC and indictment by the Prosecutor-General)
  In the case of a cartel or bid rigging, for example, a penalty of up to 500 million yen is imposed on the companies concerned, and a penalty of up to 5 million yen or imprisonment of up to 5 years is imposed on the natural persons concerned.

• Civil claim (court; raised by injured parties)
  Claim for damages: torts under the Civil Code or Article 25 of the Antimonopoly Act
  Injunction: Allowed to be issued only against unfair trade practices; Article 24 of the Antimonopoly Act
Characteristics of the execution of the Antimonopoly Act in Japan

- Cease and desist order
  Applicable to any act

- Surcharge payment order
  Cartels and some types of hardcore cartels, such as bid rigging; recently, the range of targets has widened to most types of private monopolization and some unfair trade practices

- Criminal punishment
  Any acts other than unfair trade practices; actually only involving cartels and bid rigging (about a dozen cases in the past; 1 or 2 cases every few years)
  Criminal punishment can be imposed for bid rigging under the Penal Code or the Act for the Prevention of Collusive Bidding at the Initiative of Government Officials

- Civil remedies (raised by injured parties)
  Damages (applicable only to the actual amount of the damage; no punitive damage system)
  Injunctions (applicable only to unfair trade practices)
Characteristics of enforcement of the Antimonopoly Act in Japan

• The surcharge system was introduced in 1977, and the leniency program was introduced in 2007. These have become effective means to regulate cartels and bid rigging.
• The number of cases where a criminal indictment is filed for the violation of the Antimonopoly Act is about one every few years.
• Although the number of cases where civil lawsuits were filed was small, the number of cases where victims of bid rigging (such as local governments) claim damages and award damages of several hundreds of millions of yen has recently been increasing (such as the refuse incinerator bid rigging cases).
Procedures for violation of the Antimonopoly Act

Fact finding on own authority 45 (4)

Report from the general public 45 (1)

Use of the leniency program 7-2 (10) to (13)

Claim by the Small and Medium Enterprise Agency

Act for the Establishment of the Small and Medium Enterprise Agency 4 (7)

Investigation of criminal cases 101 to 116

Prior notification

Rules on investigation 26 (1)

Application for urgent suspension order 70-4 (1)

Examination

Cancellation of order

Dismissing the claim or the suit

Appeal

Final decision

Law suit

Application for a suspension of execution of the urgent suspension order 70-5 (1)

Decision

Charged

Dismissed

Examination

Claims

Applicants for urgent suspension order 70-4 (1)
Figure 1: Number of Cases with Legal Measures Taken

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<th></th>
<th>FY2009</th>
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<th>FY2013</th>
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<td>5</td>
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<td>8</td>
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<tr>
<td>Bid-rigging (in public demand)</td>
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<td>4</td>
<td>2</td>
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<tr>
<td>Bid-rigging (in private demand)</td>
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<td>1</td>
<td>5</td>
<td>15</td>
<td>7</td>
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<tr>
<td>Unfair trade Practices</td>
<td>4</td>
<td>2</td>
<td>5</td>
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<td>1</td>
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<tr>
<td>Others</td>
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<td>0</td>
<td>0</td>
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Figure 2: Amount of Surcharges

(Notes) Includes decisions on surcharge payment orders under the former law prior to the implementation of the 2005 amended AMA (meaning the Act for the Partial Amendment of the Antimonopoly Act [Law No.35, 2005]; hereinafter the same will apply), and excludes surcharge payment orders nullified by the initiation of hearing procedures under the former law.
Figure 3: Number of Hearing Cases by Category

(Note) The number of hearing cases represents the total of the case numbers which are given to requests for hearing against administrative orders.

(Note) Hearing cases regarding cease and desist order include hearing cases under the former law prior to the implementation of the 2005 amended AMA (excluding cases regarding surcharge payment orders).
Trends in the number of JFTC staff and the budget amount (JFTC materials)
History of the Antimonopoly Act in Japan

• Enacted under the occupation policy of the General Headquarters (GHQ) after World War II (in 1947)
• The contents of the US antitrust law were transplanted after being modified into radical and idealistic ones.
• After the amendments in 1949 and 1952, the Act became almost the same as the current one.
• In the 1950s and the 1960s, however, industrial policy had priority over competition policy.
• Since the amendment in 1977, the Antimonopoly Act has been consistently amended to strengthen its enforcement.
Intuitive drawing that shows the strength of legislation and its application in history

<table>
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<tr>
<th>Year</th>
<th>1947</th>
<th>52</th>
<th>77</th>
<th>90</th>
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<td>Weak</td>
<td></td>
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The graph indicates a rise in strength over time, particularly from 1947 to 2010.
Amendments and other changes in the 2000s

• Amendment to the Antimonopoly Act in 2000: introduction of the right of a private person to make a claim for an injunction (which covers unfair trade practices only)
• In 2002, the overseas serving procedure was powered up and the upper limit of the penalty on a juridical person was raised from 100 million to 500 million yen.
• Amendment to the Antimonopoly Act in 2005: (1) raising the amount of the surcharge; (2) introducing the leniency program; (3) introducing the authority to investigate crimes, etc.
• Revision of the Merger Guidelines and the Intellectual Property Guidelines
• Amendment to the Antimonopoly Act in 2009: (1) expanding the surcharge system (to private monopolization and some unfair trade practices); and (2) expanding the leniency program
• Amendment to the Antimonopoly Act in 2013: (1) abolishment of the hearing system; and (2) establishment of the procedure for an opinion hearing on a cease and desist order, etc.