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I. INTRODUCTION

The Japan Fair Trade Commission ("JFTC") vigorously enforces the Japanese competition law, Antimonopoly Act ("AMA") to improve the competitive environment with the goal of promoting fair and free competition in order to invigorate the economy and promote consumer benefits. In this article, a brief description will be given of recent developments regarding the enforcement of the AMA against hard-core cartels, and regulations on unilateral conduct with a specific focus on private monopolization.

II. RECENT EFFORTS TO FIGHT AGAINST CARTELS AND BID-RIGGING

A. The State of Law Enforcement against Cartels and Bid-rigging

Rigorous enforcement of the AMA with a view to swiftly eliminating cartels and bid-rigging is essential for the achievement of sound competition and providing increased benefits to consumers. The JFTC addresses this challenge as one of its high-priority issues.

A number of amendments made to the AMA in recent years, including the 2009 amendment, were primarily intended to strengthen the AMA's power of enforcement and deterrence with a view to eradicating cartels and bid-rigging. Making full use of the leniency program newly introduced under the 2005 amendment, the JFTC is making efforts to rigorously enforce the AMA against cartels and bid-rigging.

1. Administrative Order

Under the AMA, the JFTC issues to a violator an order to pay surcharge as an administrative order against a cartel or bid-rigging. The amount of surcharge is calculated by multiplying by a certain fixed figure the amount of target products or services sold by the violator(s) as a result of the cartel or bid-rigging during the duration of the violation.

In 2009, the JFTC carried out 24 administrative orders in relation to violations of the AMA. Of these, 18, or three-quarters, were related to cartel or bid-rigging cases.

On average it took approximately 10 months to complete proceedings for these cases, beginning with the start of an investigation and ending with the issuance of a cease and desist order and a surcharge payment order.

In 2009, the JFTC ordered 89 business entities in total to pay 54,321.81 million yen, a record annual amount. In particular, it is noteworthy that the JFTC ordered a company to pay surcharge of 7,965.32 million yen, the highest-ever surcharge levied on a business entity, in a price-cartel case involving the manufacturer of polyvinyl-chloride pipes and joints. These figures serve as clear proof of the JFTC's successful exposure of major cases.

In October 2009 (or February and March of 2010 with respect to some business entities), the JFTC issued cease-and-desist orders to two business entities and ordered six business entities

to pay surcharge equivalent to 4,254.92 million yen in a price-cartel case involving television cathode-ray tube manufacturers. This case was the first in which a foreign business entity based outside Japan was ordered to pay surcharge. The order characterized the case as follows: a Japanese television set manufacturer ("Parent Company") used its manufacturing subsidiary based in Southeast Asia ("Subsidiary Company") as its virtual manufacturing site for the production of its CRT-based televisions sets. Thus it was deemed to be virtually integrated with the Subsidiary Company, which was the formal user of the relevant CRTs and which received instructions from the Parent Company with respect to the price at which it purchased the relevant CRTs. The Parent Company, based in Japan, was deemed to be the virtual user of the relevant product. The sequence of these activities was deemed to be in conflict with Japanese AMA.

2. Criminal Complaint

In Japan, in cases involving a malicious and serious violation of the AMA such as cartels and bid-riggings that may have a wide-ranging impact on the lives of Japanese citizens, the JFTC may file a criminal accusation with the Prosecutor General seeking punishment of the violator, in addition to surcharge payment order.

At the end of 2008, in a galvanized-steel sheets price-cartel case, the JFTC filed a criminal complaint against three companies and six individuals. This was the fourth case that involved a criminal accusation since 2006, when the criminal investigation power was introduced in order to enhance its ability to file criminal complaints. Galvanized-steel sheets commanded a large market of approximately 100 billion yen in fiscal 2006 and were used widely as a building material. The alleged actions of the cartel, therefore, were deemed to have a wide-ranging adverse effect on the lives of Japanese citizens.

In addition, one of the three accused companies had become subject to an administrative order with respect to a stainless-steel sheets price cartel in 2004, a fact known to the two other companies who participated in the subject price cartel, clearly demonstrating a lack of law-abiding spirit on the part of the three companies. In September 2009, a court imposed a surcharge of 160 to 180 million yen on the three companies and sentenced the individuals to a prison term of 10 months to one year, with the suspension of execution of the sentence for three years. This decision has become final and conclusive.

B. Institutional Efforts to Strengthen the Power of Enforcement and Deterrence

In the successful detection of these major cases, the leniency program has played a leading role. Although some objected to the introduction of the program, alleging that it is alien to circumstances in Japan, more than 300 applications have been filed under the program since its inauguration in January 2006.

Concurrently with the introduction of the leniency program, sanctions on violations of the AMA were strengthened by increasing the rate used to calculate the surcharge levied on large corporate violators. The rate was raised from 6 percent to 10 percent of the amount of sales of the target products or services sold by the violator under the relevant violating activity, and by requiring the application of a rate to be increased by a further half in cases where the relevant business entity violates the AMA repeatedly. The 2009 amendment further increased deterrent effects on potentially violating conduct by either increasing the surcharge that could be levied on a company that has played a leading role in violating conduct or by permitting the JFTC to order

a successor company of the business entity in question that fulfills certain conditions to pay surcharge.

In addition, as mentioned earlier, the criminal investigation power was introduced and the JFTC, if circumstances require, can make an inspection and search of the premises of the relevant business entity(s) and effect a seizure based on a court warrant. This authorization was given with a view to strengthening the JFTC's power to collect evidence so that the JFTC may file a criminal complaint in a case involving a malicious or serious violation of the AMA in a more proactive manner. In the meantime, the JFTC has clearly stated its policy of withholding the filing of criminal complaints against a business entity or employee of such who firsts applies for exemption from surcharge under the leniency program prior to the start of an JFTC investigation ("The JFTC's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations").

With this package of institutional arrangements designed to enhance the incentive for a business entity to break away from a cartel, it is believed that the leniency program has steadily become a permanent fixture in the Japanese business world and that the business community's awareness of compliance with the AMA has increased considerably. Furthermore, the 2009 amendment made the leniency program more accessible to users by extending the scope of applicable business entities and employees. The scope can now include up to the first five to apply for reduction or exemption from surcharge under the leniency program and by allowing more than one company in an industrial group to jointly apply for exemption from surcharge. The JFTC will make efforts to sustain these developments and ensure theses measures continue to produce the desired effect in the future.

Next, a brief description will be given of the guidelines for regulating exclusionary private monopolization, which is similar to exclusionary conduct regulated under Article 2 of the Sherman Antitrust Act in the United States and under Article 102 of the Treaty on the Functioning of the European Union in the EU.

III. THE GUIDELINES FOR EXCLUSIONARY PRIVATE MONOPOLIZATION UNDER THE ANTIMONOPOLY ACT

A. Background of Preparation of the Guidelines

"Exclusionary Private Monopolization" refers to conduct by any business entity that causes difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities (hereinafter "Exclusionary Conduct"), thereby causing, contrary to public interest, a substantial restraint of competition in any particular field of trade. Private monopolization is prohibited under the provision of Article 3 of the AMA.

Although Exclusionary Conduct that adversely affects market competition carried out by a business entity holding a dominant position in the market is a typical example of conduct that violates the AMA and is subject to regulations around the world, it is considered to be very difficult to determine whether or not an activity carried out by a business entity holding a dominant position in the market adversely affects market competition. In recent years, this issue has been drawing attention in the sphere of competition law as evidenced by new global developments including the preparation of relevant guidelines in major jurisdictions.

The Act to Amend the AMA that became effective in January 2010 required the JFTC afresh to order a business entity found to engage in exclusionary private monopolization to pay

surcharge in an amount equivalent to 6 percent (or 2 percent for a retailer and 1 percent for a wholesaler) of the amount of sales of affected products or services sold by the business entity.

Given the various types of the alleged conduct that can fall under exclusionary private monopolization, and the difficulty in distinguishing exclusionary conduct from normal business activities leading to exclude the business activities of other business entities, it has been pointed out that the introduction of a surcharge against exclusionary private monopolization might cause a so-called chilling effect for business entities and interfere with their fair and free business activities.

In light of these circumstances, the JFTC formulated the "Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act" (hereinafter referred to as the "Guidelines"). The purpose of the Guidelines is to ensure further transparency of law enforcement and to improve predictability for business entities by clarifying, to the extent possible, the requirements for Exclusionary Private Monopolization.

B. Outline and Characteristics of the Guidelines

The Guidelines summarize the JFTC's views with respect to the following matters: (i) General matters that the JFTC is to consider when determining whether to prioritize an investigation of a particular case as Exclusionary Private Monopolization; (ii) Describing types of chief conduct that tend to be deemed problematic as Exclusionary Conduct and the framework for deliberations and factors applied for assessing whether or not the conduct falls under Exclusionary Conduct for each type; and (iii) Factors to be considered for defining a particular field of trade and determining the presence or absence of a substantial restraint of competition in a particular field of trade.

1. The JFTC's Enforcement Policy

In order to enhance predictability for business regarding the JFTC's enforcement, the JFTC has clearly articulated in the Guidelines that, when deciding whether to investigate a case as Exclusionary Private Monopolization, the JFTC will prioritize the case where the share of the product that the said business entity supplies exceeds approximately 50 percent and where the conduct is deemed to have a serious impact on the lives of the citizenry.

Although the AMA do not confine the actor who engages in Exclusionary Private Monopolization to a business entity holding a dominant position in the market, qualifications for Exclusionary Private Monopolization include substantial restraint of competition in any particular field of trade. In determining whether or not competition has been substantially restrained in a particular field of trade, the JFTC will consider whether or not the business entity(s) has created, maintained, or reinforced market domination in particular field of trade (an effect-driven approach). This will typically regulate Exclusionary Conduct by business entities who dominate the market, which, in turn, will essentially result in the same scope of Exclusionary Private Monopolization becoming subject to regulation as that of its U.S. and European counterparts.

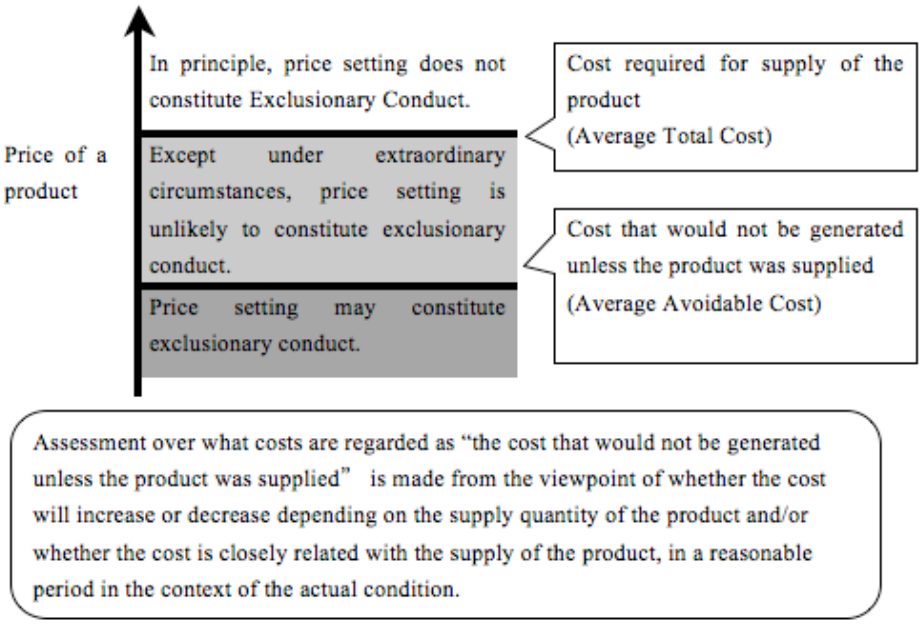
2. Exclusionary Conduct

With respect to conduct liable to come into question as Exclusionary Conduct, the JFTC has identified the following four types, using examples from past records of conduct that actually

came into question in Japan and guidelines in place in foreign countries that deal with similar types of conduct:[1]

- Below-cost pricing: When a business entity sets a price below the cost that would not be generated unless the product was supplied ("average avoidable cost"), (see the chart below);
- Exclusive dealing: Where a business entity deals with the trade partners on the condition of prohibition or restraint of transaction with competitors;
- Tying: Supplying (or purchasing) only on the condition that the trade partners also purchase (or supply) another product; and
- Refusal to supply and discriminatory treatment: Carrying out refusal to supply and discriminatory treatment, beyond a reasonable degree, concerning a product necessary for the trading customers to carry out business activities in the downstream market.

Any conduct falling under any of these types that is deemed to cause difficulty for other business entities to continue their business activities from a comprehensive standpoint of conditions of the entire market, the position of the actor and its competitors in the market, period of the conduct and conditions of the conduct, and other relevant factors will be considered to constitute Exclusionary Conduct.



[1] It should be noted that exclusionary conduct that constitutes exclusionary private monopolization is not limited to these four patterns; for example, in one case a business entity's conduct in setting prices in selected sales territories or for customers in regard to which it faced competition from other business entities and in impeding other business entity's businesses was deemed to be exclusionary conduct.

3. Substantially Restrained Competition in Any Particular Field of Trade

Whether Exclusionary Conduct eventually constitutes Exclusionary Private Monopolization or not depends upon the impact of the conduct on market competition.

Whether substantial restraint of competition in any particular field of trade exists or not is determined on a case-by-case basis from a comprehensive standpoint of the position of the actor and the conditions of its competitors in the market (market share, ranking, the condition of competition in the market, etc.), potential competitive pressures (entry barriers), user's countervailing bargaining power, efficiency, and extraordinary circumstances to assure consumer interests.

Taking a "below-cost pricing" case as an example, even if the actor increases the price of the target product after its rivals were excluded, it is realistically possible that a business entity with a valid countervailing power will enter the market within a short period of time if conditions determining its access to the market, including regulations based on legislations, location, technical issues and conditions of purchasing raw materials, create only a low entry barrier. In this case, it is not likely that the conduct in question would be deemed to substantial restraint of competition.

"Efficiency" would be taken into account when (i) it is deemed that efficiency improves as effect specific to the conduct, and it cannot be achieved by other means that less restrictive on competition; and (ii) it is deemed that outcomes such as a decline in the prices of conduct, an improvement of product's quality, and a supply of new products are returned to users due to the said improvement of efficiency, and the welfare of users is improved.

IV. CONCLUSION

The JFTC will continue to deal with cartels and bid-rigging, including those operating at an international level, in a rigorous and effective manner, making full use of its tools such as leniency program and the criminal investigation power. The agency will also appropriately deal with exclusionary private monopolization cases in accordance with by the Guidelines.