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I. INTRODUCTION

The leniency program has played an important role in cartel investigations carried out by the Japan Fair Trade Commission (“JFTC”),² the sole competition authority in Japan, since the inception of the program in 2006. The program has frequently been used by applicants to obtain an exemption from, or reduction of, potential sanctions. It also informs the JFTC of cartel conduct and helps it obtain necessary information concerning such matters. This is similar to the goals and effects of leniency programs in other jurisdictions.

However, the Japanese leniency program has several unique characteristics when compared to leniency procedures in other jurisdictions such as the United States and European Union. Some of these unique characteristics pose potential problems to leniency applicants. This article gives an overview of: (i) cartel regulations in Japan, (ii) the Japanese leniency program, (iii) cooperation between the JFTC and foreign competition authorities, (iv) issues concerning Japanese cartel regulations and the Japanese leniency program, and (v) points to be considered when a foreign company plans to file for the leniency program with the JFTC.

II. OVERVIEW OF CARTEL REGULATIONS IN JAPAN

The main law governing cartels in Japan is the Antimonopoly Act of Japan (the “AMA”).³ Similar to many other jurisdictions, violation of cartel regulations under the AMA is subject to severe sanctions. Moreover, companies that conspire in a cartel are subject to sanctions under the AMA even if the companies are located outside of Japan, so long as customers in Japan are affected by the cartel’s conduct.

The JFTC may render cease and desist orders and/or surcharge payment orders against companies that violate the prohibition of cartels under the AMA. The amount of a surcharge payment order is determined based on the target company’s sales of goods and services that were affected by the conduct of the cartel, and is calculated by using multipliers that vary depending on the target’s type of business and size. The administrative surcharge amount is determined only by employing this simple calculation and the JFTC has no discretion in determining the amount.

In addition to the administrative orders described above, companies and individuals who violate the AMA’s cartel prohibitions can be criminally penalized if the violation is regarded as being vicious and serious, or if the cartel violation occurs repetitively at a specific company or in

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² See JFTC’s website in English (<http://www.jftc.go.jp/en/>) for further information.

³ Available at http://www.jftc.go.jp/en/legislation_gls/amended_ama09/.

a specific industry.⁴ In addition, it should be noted that anyone who suffered from any loss incurred by a cartel's conduct can file a civil suit against the participants of the cartel seeking damages against them. However, filing such a civil suit in cartel cases is currently uncommon in Japan except for cases filed by public agencies regarding bid-rigging in public procurements.

III. OVERVIEW OF THE JAPANESE LENIENCY PROGRAM

In filing with the JFTC under the Japanese leniency program, an applicant is required to make an initial filing by fax. The Japanese leniency program has a marker system in which each applicant obtains a marker upon submitting its initial filing to the JFTC. The first leniency applicant who files before the JFTC initiates a formal investigative procedure, such as a dawn raid, will be fully exempt from paying any administrative surcharge.⁵ Also, the JFTC has announced a policy whereby the first leniency applicant who files before the initiation of a formal investigative procedure, as well as its directors, officers and employees, will be exempt from criminal prosecution.⁶ Furthermore, the administrative surcharge amount of the second leniency applicant who files before the JFTC initiates a formal investigative procedure will be reduced by 50 percent,⁷ and that for the third to fifth applicants will be reduced by 30 percent.⁸

For leniency applicants who file after the JFTC initiates formal investigative procedures, the surcharge amount for leniency applicants (up to three applicants after the formal investigative procedures begin, and up to five applicants in total including those who filed beforehand) will be reduced by 30 percent.⁹ As the JFTC has no discretion in determining the amount of the administrative surcharge, the degree to which a leniency applicant cooperates with the JFTC's investigation does not affect the administrative surcharge amount imposed on the applicant; although, in practice, the scope of the affected sales and the target period could be adjusted by the JFTC.

The Japanese leniency program has been used frequently by companies since the procedures became effective in 2006. During the five years from April 2010 to March 2015, the JFTC received a total of 487 leniency filings, and issued administrative orders for 71 cartel cases in total.¹⁰

IV. COOPERATION WITH THE JFTC AND FOREIGN COMPETITION AUTHORITIES

The JFTC cooperates with foreign competition authorities as a signatory to cooperation agreements with authorities in the United States,¹¹ the European Union,¹² and Canada,¹³ and also

⁴ The Fair Trade Commission's policy on Criminal Accusations and Compulsory Investigations of Criminal Cases Regarding Antimonopoly Violations. An English translation based on the policy before the latest amendment is available at

http://www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.files/policy_on_criminalaccusation.pdf.

⁵ Article 7-2(10) of the AMA.

⁶ See *supra* note 4.

⁷ Article 7-2(11) of the AMA.

⁸ *Id.*

⁹ Article 7-2(12) of the AMA.

¹⁰ Available at http://www.jftc.go.jp/houdou/pressrelease/h27/may/150527_1.files/honnibun_3.pdf (Japanese).

¹¹ Available at http://www.jftc.go.jp/en/int_relations/agreements.files/usagreee.pdf.

¹² Available at http://www.jftc.go.jp/en/int_relations/agreements.files/J-ECagreement.pdf.

via other means such as cooperation arrangements, economic partnership agreements, and memorandums on cooperation with foreign competition authorities.¹⁴

The most recent agreement between the JFTC and a foreign competition authority, which came into effect in August 2015, is the cooperation arrangement between the JFTC and the Australian Competition and Consumer Commission.¹⁵ This competition arrangement provides that both competition agencies will give due consideration to sharing information obtained during the course of an investigation.¹⁶ Such activities may lead to a broader and deeper cooperation between the JFTC and a foreign competition authority than would take place under any of the other agreements or arrangements that were previously concluded.

In addition, treaties and domestic laws regarding international assistance in investigations enable the JFTC and foreign competition authorities to cooperate in investigations.

V. ISSUES REGARDING JAPANESE CARTEL REGULATIONS AND THE JAPANESE LENIENCY PROGRAM

Cartel regulations and the leniency program in Japan have some unique characteristics when compared to those in other jurisdictions.

First, in Japan, privileges such as the attorney-client privilege are generally not recognized. Therefore, the JFTC can retain evidence that would have otherwise been protected due to privileges in the United States, European Union, and other jurisdictions.

Second, during voluntary interview sessions conducted by the JFTC with individuals who are allegedly involved in cartels, representatives—such as legal counsel or the relevant company’s legal department personnel—are not allowed to attend the sessions. Further, the interviewee is not allowed to record the audio of conversations that take place during the sessions.

Third, the JFTC places emphasis on information obtained from the interviews of individuals involved in the cartel, rather than the proffers made by the target company through its legal counsel. Because of this emphasis, investigators at the JFTC often request to hold sessions with a large number of the target company’s employees. Each interview is held for several hours, from the morning to the evening, and each interviewee is interviewed several times. This process creates physical and mental stress on the interviewees.

VI. POINTS TO CONSIDER WHEN PLANNING TO UTILIZE THE JAPANESE LENIENCY PROGRAM

The points to be considered by a foreign company considering whether to file for the leniency program with the JFTC are stated below.

First and foremost, when a foreign company becomes aware of a cartel involving its company, the company should consider whether the conduct is regulated by the AMA. Even

¹³ Available at http://www.jftc.go.jp/en/int_relations/agreements.files/J-CANADAagreement.pdf.

¹⁴ Available at For more information, see http://www.jftc.go.jp/en/int_relations/agreements.html.

¹⁵ Available at <http://www.jftc.go.jp/houdou/pressrelease/h27/apr/150430.files/150430MOU2.pdf>.

¹⁶ Available at Clause 4.3 of the arrangement.

though the JFTC has not clarified how it construes the range of the AMA's extraterritorial application, past cases indicate the JFTC assumes jurisdiction in cases where consumers in Japan could be affected by the cartel's conduct.¹⁷

Second, if the AMA applies to the cartel's conduct, the company should take a few key factors into consideration when determining whether to file for the leniency program with the JFTC. When considering this course of action, the company should consider: (i) whether the JFTC could obtain information on the matter at hand from other sources (i.e., leniency applications of other cartel participants or through communicating with foreign competition authorities which have obtained information on the matter); (ii) the applicant's possible exposure to JFTC sanctions (for this purpose, the impact of the sanctions on the company's Japanese business must be considered); and (iii) the positive and negative effects of applying for the leniency program with the JFTC.

With regard to point (iii), it is important to note that the JFTC now tends to request more cooperation from leniency applicants than before. In many cases, the JFTC will repeatedly ask questions and request the submission of relevant documents concerning business details and the conduct of the applicants' cartel. The applicants, in order to secure an exemption or a reduction of sanctions, are required to continue to cooperate with the JFTC's requests for an extended period of time. This is not unique to the Japanese leniency program (for example, the same requirements may apply throughout the leniency programs in South Korea and China).

In addition, the JFTC sets tight timelines for leniency applicants to submit documentation. Even in investigations concerning a large-scale cartel or an international cartel, the JFTC allows only three weeks for a leniency applicant to file a document called a Form 2 document after submitting the Form 1 document. Also, even after a leniency applicant submits the Form 2 document, the JFTC requests that the applicant continuously report additional information and submit additional evidence to the JFTC. To deal with these JFTC requests, foreign companies should retain local counsel who have a great deal of experience dealing with leniency applications with the JFTC, in order to make the filing process as smooth as possible.

Third, it is important for foreign companies to keep in mind that, in an international cartel case in which competition authorities in many jurisdictions are involved, the JFTC tends to issue orders earlier than foreign competition authorities investigating the same case. Moreover, in cease-and-desist orders issued against a company that participated in a cartel, the JFTC often orders the company to confirm the company has ceased being involved in the cartel and to notify the employees and business partners of the company that it has ceased being involved in the cartel.

¹⁷ Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers, http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual_000147.html. In the Cease and Desist Order/Surcharge Payment Orders against Cathode Ray Tube ("CRT") case, the targeted products were manufactured by factories in Southeast Asia, thus whether the consumers in Japan could be affected by the conduct was disputed at the JFTC tribunal. In May 2015, the JFTC rendered a decision that the conduct would mainly affect consumers located in Japan.

Even though the cartel's conduct must already have been stopped, the JFTC may issue such a cease-and-desist order for confirmation purposes. Sometimes this creates a tension between the company's stance it took before foreign competition authorities and its stance in any civil suits (in particular in the United States).

Last, part of the evidence collected by the JFTC, including records of written statements prepared through the JFTC interview sessions, can be disclosed during the litigation process thereafter. Evidence collected by the JFTC can be disclosed to an appellate court if the JFTC orders are appealed,¹⁸ and also in criminal procedures, if applicable.

The evidence collected by the JFTC can also be used by a plaintiff in a civil litigation. In a recent civil suit¹⁹ concerning a company that participated in a cartel, the company's shareholders sought damages against directors and statutory auditors by way of a shareholders derivative lawsuit. In that case, the court issued an order to produce some of the evidence the JFTC obtained during the investigation. Furthermore, such evidence could be subject to discovery in any related civil suits in other countries.

VII. CONCLUSION

The Japanese leniency program, which was designed based on leniency programs of other countries, has been the central method for the JFTC to open an investigation into a cartel and to collect necessary information about the matter. On the other hand, as stated above, there are some aspects in which the applicant's interests may not be sufficiently protected, given the unique aspects of cartel investigations and leniency procedures in Japan. If you need to consider filing for the JFCT's leniency program in an international cartel case, it is important to consider such points for the best interest of the applicant.

¹⁸ Since April 2015, when the amendment to the AMA took effect, JFTC orders are directly appealed to a court, instead of firstly being examined at the JFTC tribunal, as was done before the amendment to the AMA took effect.

¹⁹ Osaka District Court Order dated July 15, 2012 (Sumitomo Electric).