

CPI's Asia Column Presents:

# A Snapshot of Japanese Competition Law Developments and What to Look for

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## Overview

The Japan Fair Trade Commission (JFTC), led by Chairman Kazuyuki Sugimoto, seems to have become very active in various areas of competition law and enforcement in the past year or so. In his 4<sup>th</sup> year as Chairman, Mr. Sugimoto is taking an even more active lead. Although there has been a downturn in the number of cartel cases brought by the JFTC in recent years, it is too early to conclude that the enforcement activities by the JFTC have weakened. Rather, there is so much activity in other areas that it is easily arguable that the JFTC has become more active than ever.

## Cartels

As mentioned above, if only looking at the statistics of cartel cases, cartel enforcement by the JFTC appears to have weakened. Indeed, in each of fiscal years (“FY”) 2014 and 2015, the JFTC only issued formal orders for seven cases, respectively; whereas, during the three years prior to 2014, it had been issuing formal orders for 15 to 20 cases annually. We have seen a similar trend with respect to leniency applications. The number of applications annually declined to 50 and 61, respectively, for FY 2013 and FY 2014, whereas there were more than 100 applications made annually between FY 2010 to FY 2012. However, there might be a shift in this trend, since in FY 2015 the number of leniency applications jumped to 102. And indeed, the JFTC reiterates that cartel enforcement remains one of the agency’s main enforcement priorities.

In terms of the substance of the cartel cases handled by the JFTC, the recent cases seem to focus more on the domestic market, such as bid-rigging in construction projects and the agriculture sector. However, the JFTC also issued formal orders for the *Capacitor Cartel (aluminum electrolytic capacitors and tantalum electrolytic capacitors)* in March 2016, which reminds us that the JFTC is also handling cartels that could have international implications. Further, in early 2016, the Tokyo High Court issued three decisions in relation to the *CRT Cartel*, all affirming the JFTC’s decisions, which included the first case in which the JFTC had imposed a surcharge payment order against a foreign company in an international cartel case.

In relation to international cooperation the JFTC has been continuing its efforts in establishing cooperative relationships with other competition agencies. Of note is the cooperation arrangement with the Australian Competition and Consumer Commission concluded in April 2015, which provides for the possibility of sharing of information obtained during the course of an investigation. The JFTC is also in negotiations with the European Commission on a similar cooperation arrangement that also aims to facilitate the exchange of information obtained during the course of an investigation.

With these developments, it is apparent that the JFTC maintains a good position to go after international cartels.

In terms of the procedure concerning cartels, there has been one minor change to the leniency program in 2016. The JFTC had announced that after June 1, 2016, the names of all leniency applicants would be made public at the time of the issuing of the surcharge payment order, whereas under the previous practice only those names of applicants that have made a request for publication are made public. The JFTC claims that this new practice will increase

transparency and should not affect its enforcement given that in roughly 80% of the cases such requests had been made. However, we need to observe and determine whether or not there are any unexpected ramifications.

Finally, looking forward, one important item that is now under consideration is the possibility of restructuring the surcharge payment system under the AMA. This concerns not only cartel enforcement; however, since the surcharge payment order is the main method of deterrence of cartels in Japan and since the majority of the surcharge payment orders issued by the JFTC concerns cartels, this issue seems to have drawn more attention in relation to cartels. In addition, during discussions in 2014 (mainly focusing on investigation for cartel cases) about the possibility of introducing enhanced due process measures, such as attorney-client privilege and more enhanced right to counsel, the JFTC argued that it needs to be equipped with mechanisms that encourage parties to cooperate more substantively before introducing such due process measures. One proposed mechanism was a discretionary surcharge payment system. The JFTC has been advocating that the current surcharge payment system is rigid and lacks flexibility. Its argument is that since it has no discretion to adjust the amount of the fine either upwards or downwards, it is consequently less effective in gaining sufficient cooperation from the parties during investigations as there is less incentive for the party to cooperate. Against this backdrop, there have been some movements in 2016.

In February 2016, the JFTC set up the “Study Group on the Anti-Monopoly Act” to study this topic. And, in July 2016, the JFTC published the Study Group’s interim report titled “Summary of Issues Concerning the Modality of the Administrative Surcharge System”<sup>1</sup> and reached out for public comments. This report merely sets out various issues that the Study Group intends to further consider, and we have yet to see to what extent there actually would be changes (if any) to the current system. However, it seems likely that there will be some sort of proposal made in 2017, so that certainly would be a development to keep an eye on.

### **Mergers**

With respect to mergers, it should be fair to say that the JFTC’s practice has become stable and steady. After moving completely to a pre-notification system in 2005, and abolishing the pre-consultation practice which was criticized by the business community as the cause of prolonged review in 2011, the overall process appears to have become more streamlined and efficient. In addition, the increased use of economic analysis could lead to further improving the process.

In terms of statistics, the number of filings accepted by the JFTC during FY 2015 was 295, which was a slight increase compared to 289 from the previous year. As this number is within the range of 250-300 cases that we have seen in the past few years, it should be fair to say that the filings are within a steady range. Of the 295 cases, 281 cases were cleared during the first phase review (95.3%), while 6 cases went to second phase review and 8 cases were withdrawn.

With respect to second phase review, during FY 2015, 4 cases were cleared after the second

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<sup>1</sup> English translation is available here:  
[http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713\\_2.files/160713\\_2.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713_2.files/160713_2.pdf)

phase review, 1 case was cleared with conditions, and no case was blocked<sup>2</sup>. These numbers are in line with those of the last few years: In FY 2013, 3 cases were cleared after second phase, 1 case was cleared with conditions, and no case was blocked; and, in FY 2014, 2 cases were cleared after second phase, 2 cases were cleared with conditions, and no case was blocked.

In FY 2016, according to the JFTC's press releases, there have been 3 cases that went to second phase review to date (as of 30<sup>th</sup> November):

One interesting development in 2016 was the JFTC issuing a caution<sup>3</sup> regarding the proposed acquisition of shares of Toshiba Medical Systems Corporation (TMSC) by Canon Inc. The JFTC claimed there could be concerns of so called "gun-jumping" in a case where the acquirer first acquired share options etc.(presumably some other rights) whose underlying shares were common shares of the target, and as consideration for such share options etc., the acquirer, in effect, made payment to the parent of the target in an amount equal to the value of the underlying common shares of the target; and, furthermore, a third party SPC came to own voting shares of the target until the acquirer exercised the share options. The concern was that such series of actions was likely to give rise to the formation of a potentially anti-competitive three-way relationship between the acquirer and the target through the SPC premised on Canon ultimately acquiring the voting shares of TMSC subject to approval being obtained in the business combination review under the Antimonopoly Act. It is rare for the JFTC to issue such caution with respect to a merger, and this also seems to demonstrate the JFTC's proactive posture.

One recent trend we see in mergers is that we are seeing a significantly increasing number of merger filings for transactions involving non-Japanese companies, especially transactions between non-Japanese companies. We have seen 45 such filings in FY 2015 and 41 such filings in FY 2014, whereas the numbers were 14 and 18 respectively for FY 2013 and 2012. This shows that the increase of global mega-mergers is also affecting Japan.

Another trend that we are seeing in Japan is the gradual increase of use of economic analysis in merger filing review. Every year, the JFTC issues a summary of the notable cases; in these annual summaries, we are seeing more and more cases that include reference to the use of economic analysis which was not the case until a couple of years ago. With the addition of a prominent economist, Reiko Aoki, joining the JFTC as commissioner in November 2016, succeeding Hiroyuki Odagiri (also an economist), we expect that this trend will continue in 2017.

### **Dominance/Vertical Conduct**

In Japan, abuse of dominance and vertical conduct are governed by the private monopolization provision and the unfair trade practice provisions under the AMA. However,

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<sup>2</sup> Here the numbers are based on the number of cases the JFTC had reached a decision whereas in the previous paragraph the numbers are based on the number of cases filed with the JFTC, and thus the total number of cases does not match with the numbers in the preceding paragraph.

<sup>3</sup> A "caution" is a measure taken by the JFTC when it did not find sufficient evidence of a violation of the AMA, but considers that the conduct in question may lead to a possible violation.

the JFTC has not been so active in the area of abuse of dominance. In fact, after the AMA was amended in 2009 to make it possible to impose surcharge payment orders, there has not been a single case where the JFTC has imposed a fine based on private monopolization. Some suggest that under the amended act, as the JFTC has no choice but to impose a surcharge payment order, the JFTC perhaps has become even more hesitant. On the other hand, if the JFTC has been avoiding taking premature action and giving due consideration to the fact that these types of cases often relate to conduct that has pro-competitive aspects as well and thus calls for close scrutiny of the specific facts and effects, then the JFTC's cautious approach seems sensible.

Notwithstanding the foregoing, it certainly is not the case that the JFTC is not willing to take on such cases. Rather, Chairman Sugimoto has been voicing that one of his key area of focus is wrestling with competition law issues that arise from the changes that are brought by the proliferation of the digital economy, emphasizing the importance of competition policy as a driver of innovation. In this context, he has indicated that the JFTC will act proactively in cases where firms with market power engage in unilateral conduct, such as preventing new entry, and thus interrupting innovation.

We have not yet seen a case where the JFTC actually issued a formal order after an investigation. However, in summer 2016, some media sources reported that the JFTC had raided Amazon; some media sources also commented that the JFTC might be looking into MFN clauses. Therefore, at the very least, we should assume that the JFTC is indeed keeping a close eye in this area.

As mentioned above, we have not seen notable cases in relation to dominance and vertical conduct. However, in Japan, there is another type of unfair trade practice called "Abuse of Superior Bargaining Position" (ASBP) that is comparable to exploitative abuse in the EU, the difference being that the ASBP does not require a dominant position in the market. The 2009 amendment to the AMA mentioned above also made it possible to impose surcharge payment orders for ASBP, and since then the JFTC has been active in the enforcement of ASBP. One interesting development of note here is that while the JFTC has issued surcharge payment orders for 5 cases concerning ASBP to date, all of those cases were challenged by the parties, and that seems to have made the JFTC somewhat hesitant in pursuing these types of cases by way of imposing a surcharge payment order. However, in FY 2015, the first decision regarding such challenges came out in relation to the *Toys"R"Us* case, confirming in part the original JFTC order. So, now we have to see how this decision might affect the JFTC enforcement. It should also be noted that the JFTC still considers enforcement of ASBP as one of its important goals, especially since ASBP together with the Subcontract Act (discussed below) are the JFTC's key tools for protecting small and medium entities; therefore, the enforcement of ASBP by the JFTC as a whole is not weakening at all. The JFTC set up a special task force focusing on enforcing ASBP in 2009, and the task force has been issuing warnings and cautions in addition to the formal orders described above. Indeed, in FY 2015 the task force issued 51 cautions, which is in line with recent years (49 in FY 2014 and 58 in FY 2013). The so-called "Subcontract Act" (the Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors) mentioned above also covers conduct overlapping with ASBP. With respect to the Subcontract Act, in FY 2015, the JFTC issued 4 recommendations and 5,980 instructions pursuant to the act. We have been seeing a steady increase in these figures over

the past five years, and this also demonstrates the JFTC's enforcement focus in this area.

The JFTC has also been active in amending its guidelines in the area of dominance and vertical conduct. In January 2016, for example, the JFTC amended its IP Guidelines ("Guidelines for the Use of Intellectual Property under the Antimonopoly Act") to address issues relating to FRAND encumbered standard essential patents.

Further, the JFTC has recently set up a study group to examine the possibility of amending the Guidelines Concerning Distribution Systems and Business Practices (DSBP Guidelines), which are the most comprehensive guidelines covering vertical conduct since they were published in 1992. The DSBP guidelines had been unchanged for a long period until the JFTC made some minor amendments in March 2015 and May 2016 to address issues such as selective distribution systems and to essentially raise the threshold for certain safe-harbor provisions from 10% to 20%. However, the study group above intends to go beyond those issues to discuss the possibility of a more comprehensive change. The study group has issued its report with rather high level proposal in December 2016, and the JFTC has indicated that that it will proceed to amend the DSBP guidelines taking the report into consideration. Therefore, we are expecting to see a more specific proposal on this topic coming out from the JFTC in 2017 as well.

Besides the ongoing discussion on the possibility of amending the DSBP Guidelines, there are two other related proposals under consideration:

First is the possibility of changing the surcharge payment system under the AMA which I mentioned above in relation to cartels. The study group is not necessarily limiting the scope of discussions to cartels, so it is possible that a discretionary surcharge payment system could be structured to be also applicable to surcharge payment orders for dominance and vertical conduct cases. Some suggest that the inflexibility of the surcharge payment system under the AMA has also to some extent been an obstacle for the JFTC to pursue these types of cases in a timely manner, given that once the JFTC finds a violation it has no choice but to impose the full statutory amount, which, in turn, is likely to lead the investigated party to challenge the decision at full force. However, there are also concerns that depending on how the new system is structured, it could have a chilling effect on conduct that also has pro-competitive effects, which is a key concern in the dominance and vertical conduct area. Therefore, the outcome of the study group will be of interest from the perspective of dominance and vertical conduct as well.

Second is the possibility of introducing a commitment-like procedure (as exists in the EU) where the parties and the JFTC work towards an agreed resolution. Pursuant to the Trans-Pacific Strategic Economic Partnership Agreement (TPP), a new act has been enacted (though not yet in effect) that provides for a procedure that allows the JFTC and the party to reach an agreed resolution for an alleged violation of the AMA. The new act would only come into effect once the TPP comes into effect for Japan; however, the JFTC has already prepared a set of draft procedural rules, which it submitted for public comments in December 2016. Under the proposed procedure, in cases where the JFTC suspects there is a certain type of violation of the AMA (including dominance and vertical conduct addressed by the private monopolization and unfair trade practice provisions, but excluding cartels), the JFTC will notify the party that

it may apply for approval by the JFTC of measures that would likely to be sufficient to remove the conduct that formed the basis of the JFTC's suspicion. This new procedure is yet to come into effect, so we have to see how things develop including whether the underlying TPP will come into effect. However, the facts that such proposal has been made and the JFTC has actually come up with procedural rules could be viewed as a track record, and this might work in favor of an introduction of such system regardless of whether the TPP comes into effect. In either event, whether this new commitment-like system would work or not is yet to be seen, but once it comes into effect, and if appropriately managed, this new procedure could provide a cost-effective option for both the agency and the parties to balance pro-competitive benefits and anti-competitive harms. So, this is also an area that is worth keeping an eye on.

### **Competition Policy**

Besides the JFTC's efforts to introduce reform and amend its guidelines, the JFTC has also been active in terms of competition policy. One interesting development that we are seeing is the JFTC's increased efforts to collaborate with other government agencies. Recently, the JFTC worked together with the Ministry of Internal Affairs and Communication to address issues relating to the telecommunications industry, and together they amended the Guidelines for Promotion of Competition in the Telecommunications Business Field in May 2016.

In early 2016, the JFTC also worked together with the Ministry of Economy, Trade and Industry (METI) to conduct a joint inquiry into online related businesses, and the outcome of such inquiry contributed to the report issued by METI's study group (Cross-sectional System Study Group for the Fourth Industrial Revolution) addressing competition policy, data use/protection and intellectual property in relation to proliferation of platform businesses and expanding use of big data.

These efforts too seem to reflect Chairman Sugimoto's emphasis on competition policy as a key driver of economic growth, and we are likely to see similar efforts in the near future.

### **Challenges**

There remain some challenges for the JFTC. One major outstanding issue is we have yet to see whether the JFTC will give consideration to enhancing due process for its investigation procedure, which has long been subpar compared to other jurisdictions. Especially given that the JFTC argued against the introduction of enhanced due process measures, such as attorney-client privilege and a more substantive right to counsel back in 2014 based on its view of the "flaws" of the current surcharge payment system, once those "flaws" are resolved, then the next issue to tackle should be how it would address the due process issues that had been set aside.

Another challenge might be whether the JFTC could maintain and further improve its posture towards giving due consideration to pro-competitive effects in its analysis, which can be seen in the amended DSBP Guidelines of 2015. This issue will become increasingly more important considering with Chairman Sugimoto's strong interest in addressing the impact of the digital economy on competition policy. With the rapidly changing nature of technology and the economy, the agency could be tempted to deliver quick decisions so as not to be left behind;

however, such behavior bears the risk of premature intervention that could disrupt competition, which is contrary to the agency's goals. The JFTC currently seems to appreciate that it needs to examine the facts of each case carefully, but we need to watch carefully that the JFTC continues to do so and gives due consideration to pro-competitive effects so that a right balance will be struck.

### **Conclusion**

The JFTC, led by Chairman Sugimoto's strong leadership, seems to have gained traction recently and has become very active in various areas. What is most notable is the broad spectrum that it covers, going beyond the subject matters that the JFTC would have previously focused on and not necessarily limiting itself to existing methodologies. Efforts such as trying to introduce reform to the surcharge payment system, a commitment-like procedure, amending various key guidelines, and enhancing collaboration with other government agencies suggests that the JFTC has a firm mid-long term goal in mind. These all seem to be in line with Chairman Sugimoto's emphasis on the importance of competition policy for the future of the Japanese economy; or, in the language that he often uses: "No competition, no economic growth." With an ever-ambitious JFTC, it seems very likely that we will see more interesting developments in 2017.