

CPI's Asia Column Presents:

CPI talks...

*Interview with the Japanese Fair
Trade Commission*

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1. What are some of the major activities of the JFTC over the first half of 2017 and what is expected for the rest of the year?

First, the JFTC has rigorously enforced against violations of the Antimonopoly Act (“AMA”) in the first half of 2017. The JFTC issued seven cease and desist orders and surcharge payment orders against 15 enterprises. The total amount of the surcharge is about 7.5 billion yen. The JFTC also issued two warnings. Moreover, the JFTC closed an investigation on suspected violation of the AMA taking into consideration that the parties concerned would promptly take voluntary measures to eliminate competitive concerns.

Specifically, the JFTC issued the cease and desist order and surcharge payment orders (about 6.3 billion yen) to the manufacturing distributors of equipment for fire rescue digital radio (Bid-rigging, Feb. 2). The JFTC also issued a warning to a company dealing European Government Bond (Bid-rigging in private demand, Mar. 15) and closed the investigation against Amazon Japan G. K. regarding to the price parity clauses and the selection parity clauses (June 1).

Second, in order to reconsider the surcharge system, the JFTC released the report for the amendment of the AMA which the Study Group on the Antimonopoly Act compiled on April 25.¹ The report suggests that:

it is appropriate to revise the current rigid surcharge system in which surcharges are calculated and imposed uniformly and impartially pursuant to the stipulated and objective methods for calculation/imposition, and make the surcharge system flexible to some degrees, in order to handle the growing globalized, diversified and complicated business activities and corporate structures of enterprises, and the constant change of economic and social environments, and to give incentives for enterprises to cooperate in investigation.

In the rest of this year, the JFTC will consider specific proposals of system revisions including ones on the surcharge system mainly based on the Study Group’s report.

Third, the Competition Policy Research Center of the JFTC released the report for “big data” on June 6 (See, item 3).²

Fourth, the JFTC amended the “Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act”³ to make them more explicit, versatile and useful for enterprises and trade associations. These guidelines are, therefore, wholly restructured especially by resorting the description of conduct by each standard. In addition, the standards are more clarified mainly as follows; (i) these guidelines clarify the analytical process; (ii) stipulate the policy for vertical restraints related to on-line transactions; and (iii) add some case examples based on JFTC’s decisions, court judgements and consultation cases.

Finally, the JFTC published a Survey Report on LNG Trades.⁴ The report clarifies the problems of

¹ <http://www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425.html>.

² <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.html>.

³ <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170616.html>.

⁴ <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170628.html>.

LNG trades in perspective of competition policy and the AMA. In particular, this report points out that the competition-restraining clauses and business practices may lead to restriction of competition, such as destination restrictions, profit share clauses, and take or pay clauses. This report also points out that LNG sellers should not provide competition-restraining clauses nor take business practices which lead to the restrictions of resale and when LNG sellers conclude a new contract or revise a contract after the expiration. Furthermore, it points out that LNG sellers, at least, should review competition-restraining business practices which lead to restrictions of resale as for the existing contracts before the expiration.

2. A recent JFTC report suggested legal privilege would remain absent from Japanese investigations. Bar associations have urged Japan's Fair Trade Commission to recognize attorney-client privilege. Are there any new developments?

The report which the Study Group established in order to review the surcharge system says that:

[c]oncrete facts were not found that enterprises have actually suffered from disadvantages for lack of so-called attorney-client privilege” and “from the perspective of enabling the new leniency program to function better, it is appropriate for the JFTC to take care in the operation of the only communications between attorneys and their clients (enterprises) related to the use of the new leniency program to the extent that the fact-finding ability of the JFTC should not be impeded, on the premise of establishing measures to prevent adverse effects such as concealing evidence, etc.

The JFTC is working on the issue of the privilege in line with the suggestion in the report.

3. What are some of the major takeaways from the recent report by a study group at Japan's Fair Trade Commission on the collection and use of big data?

In recent years, it is expected that knowledge derived from “big data” analysis will inspire further innovation across the existing industrial boundaries in the context of the spread of the Internet of Things (“IoT”) and the advancement of artificial intelligence-related technology.

Under these circumstances, the JFTC established the “Study Group on Data and Competition Policy” in the Competition Policy Research Center (“CPRC”) and the Study Group has held six meetings since January 2017 to clarify the issues of competition policy and the AMA relating to accumulation and utilization of data.

CPRC has compiled a report of the Study Group based on the discussions thus far and publish it herein. This report mainly clarifies the views on Data collection [e.g. collection from client companies, data collection by digital platforms, collective data collection] and “Data hoarding” such as unilateral or collective refusal to access. This report also concludes that the current approach is applicable to most of those issues. The report points out that the following conducts related to data collection and utilization could become a problem under the Antimonopoly Act.

Regarding unjust data collection, along with a business alliance, an enterprise in a superior bargaining position as a party of the alliance unilaterally demands that the other party provide data to it. A digital platform (if its service “locks in” the customers) collects personal data by unjust conduct

under Japanese laws and regulations. Although such conduct fundamentally constitutes a problem under the Act on Protection of Personal Information, it could be subject to the AMA if it is liable to have harmful effects on competitive order.

As for unjust data hoarding by monopolistic or oligopolistic enterprises, data hoarding refers to a refusal to admit access to the data which are essential to competitors' business and for which it is technically or economically difficult to obtain data substitutable by competitors and/or customers without justifiable grounds, for example, in the cases shown as follows; (i) if the data has been disclosed to the competitors and there is no rational reasons to do so other than exclusion of competitors; (ii) if there is an obligation to allow customers, etc. access to the data and if refusal of access would exclude competitors.⁵

4. The JFTC is very active in international relations, notably a recently concluded Memorandum of Cooperation with the Competition Commission of Singapore and a Cooperation Arrangement with the Canadian Competition Bureau. What are some of the other international agreements in the pipeline, i.e. with the EU, and what role do international relations play in the JFTC's mission?

With the globalization of business, competition authorities need to handle international cases quickly and effectively. Therefore, the JFTC has made international agreements, such as memorandum of understanding, with various competition agencies. In particular, the MOU with the Canadian Competition Bureau is categorized as "Second Generation" because it allows both agencies to exchange the confidential information of investigation or merger review.

The JFTC is currently preparing for the negotiation with the EU for revision of "the Agreement between the Government of Japan and the European Community concerning Cooperation on Anticompetitive Activities." The major components of the current agreement with the EU are the following: (i) the notification, assistance, and coordination of enforcement activities; (ii) enforcement request to the other Party; and (iii) consideration for the important interests of the other Party.

The revision will enable us to exchange confidential information which we got under the investigation.

5. If there are any topics or issues that the JFTC would like to specifically discuss or address, you can do so here.

70th Anniversary of the AMA

The JFTC released remarks by Chairman Kazuyuki Sugimoto as we celebrate the 70th anniversary of the AMA in order to advocate the significance of ensuring fair and free market. The remarks summarize the retrospection of JFTC's 70-year history and the contemporary significance of competition policy.⁶

⁵ <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.files/170606-4.pdf>.

⁶ <http://www.jftc.go.jp/en/pressreleases/yearly-2017/July/170720.html>.

For example, Chairman Sugimoto explains several challenges of the JFTC: (i) enhancement of cooperation with other agencies under the globalized business activities; (ii) response to the digitalized economy; and (iii) the introduction of a system leading to more effective and efficient law enforcement, such as the reconsideration of the existing surcharge system. In addition, he refers to the role of competition policy for addressing challenging issues Japan faces: (i) a decrease in the productive-age population; (ii) low productivity; and (iii) the income gap.

Competition Issues Related to Human Resources

Based on the changes in lifelong-employment system and the appearance of online platforms that makes matching enterprises and workers easier, working style becomes diversified (e.g. freelance, side job) in Japan. On the other hand, it is pointed out that supply-demand balance becomes tight in some labor markets such as skilled labors.

JFTC has established a study group on human resources and competition policy in the CPRC to sort out the issues related to competition in human resources between employers theoretically, in particular no-poaching agreements, wage-fixing agreements, transfer restrictions against workers, although the study group will not review existing specific practices and not focus on specific industries. The study group held the first meeting in August 2017.