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Cross-Border Anticompetitive Practices

by

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Agenda 3: Cross-Border Anti-Competitive Practices: The Challenges for Developing Countries and Economies in Transition

1. Introduction

These days, the number of international cartel and merger cases in which several competition authorities need to review simultaneously is increasing because of the internationalization of corporate activities. In these circumstances, the Japan Fair Trade Commission (hereinafter referred to as “JFTC”) is enforcing the competition policy in close cooperation with foreign authorities. The JFTC is also assisting foreign authorities and contributing to establish the international cooperation framework in order to improve the competition policy of the world.

In this paper, firstly, as for both the cartel and merger review, the chapter 2 explains the international cooperation framework that the JFTC uses when it cooperates with foreign competition authorities. Secondly, the chapter 3 introduces ICN work products and programs which will be useful for younger competition authorities to improve their capacities efficiently. Lastly, as for the cartel investigation, the chapter 4 mentions the mock dawn raids which is implemented as a part of technical assistance.

2. The international framework that the JFTC uses when it cooperates with foreign competition authorities

(1) Outline

The JFTC often coordinates and cooperates with foreign competition authorities as the international cooperation on cartel investigations and merger reviews. Such cooperation is usually implemented based on international cooperation mechanisms such as Anti-monopoly Cooperation Agreement and so on. In 2009, the article for the information exchange with foreign authorities was introduced to the AMA and clarified requirements for the information exchange through the law revision.

In what follows, the cooperation mechanism based on Anti-monopoly Cooperation Agreement, Economic Partnership Agreement, the OECD Council Recommendation and Article 43.2 of the Antimonopoly Act will be introduced.

(2) The cooperation mechanism based on Anti-Monopoly Cooperation Agreement, Economic Partnership Agreement and the OECD Council Recommendation

The JFTC often coordinates and cooperates with foreign competition authorities based on Anti-monopoly Cooperation Agreement, Economic Partnership Agreement and the OECD Council Recommendation. The Japanese government concluded Anti-monopoly Cooperation Agreement with the USA in 1999, EC in 2003 and Canada in 2005.

The Japanese government also put the competition chapter in Economic Partnership Agreement concluded with 11 countries. Among them, the agreement with Singapore (effectuation in 2002), Mexico (2005), Thailand (2007), Indonesia (2008), Switzerland (2009) and Peru (2012, March) has specific stipulations on the cooperation in the competition chapter which is similar to one in the Anti-monopoly Cooperation Agreement.

In those chapters, notification, enforcement cooperation and how to deal with information offered are stipulated and the JFTC cooperates with foreign authorities based on them.

As for Anti-monopoly Cooperation Agreement with the USA, the notification scheme and how to deal with the information are defined by article 2 and 9 as below.

Article II

1. The competition authority of each Party shall notify the competition authority of the other Party with respect to the enforcement activities of the notifying Party that the notifying competition authority considers may affect the important interests of the other Party.
2. Enforcement activities that may affect the important interests of the other Party include those that:
 - (a) are relevant to enforcement activities of the other Party;
 - (b) are against a national or nationals of the other country, or against a company or companies incorporated or organized under the applicable laws and regulations within the territory of the other country;
 - (c) involve anticompetitive activities, other than mergers or acquisitions, carried out in any substantial part in the territory of the other country;
 - (d) involve mergers or acquisitions in which
 - one or more of the parties to the transaction, or
 - a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the applicable laws and regulations within the territory of the other country;
 - (e) involve conduct considered by the notifying competition authority to have been required, encouraged or approved by the other Party;

or

- (f) involve relief that requires or prohibits conduct in the territory of the other country.

Article IX

1. (a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall only be used by the receiving Party for the purpose specified in Article 1¹, paragraph 1 of this Agreement, unless the Party providing the information has approved otherwise.
- (b) Information, other than publicly available information, provided by a competition authority or a relevant law enforcement authority pursuant to this Agreement shall not be communicated to a third party or other authorities, unless the competition authority or the relevant law enforcement authority providing the information has approved otherwise.

Furthermore, the JFTC has cooperated with OECD member authorities with regard to notification, information exchange, remedy coordination and others based on the OECD Council Recommendation² in 1995 even though they don't concluded Anti-monopoly Cooperation Agreement and Economic Partnership Agreement with the Japanese Government.

¹ Article I

1. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. The competition authorities of the Parties shall, in accordance with the provisions of this Agreement, cooperate with and provide assistance to each other in their enforcement activities, to the extent compatible with their respective Party's important interests.

² The formal nomenclature is "Revised Recommendation of The Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade (No: C(95) 130/FINAL)".

(3) The cooperation mechanism based on the Antimonopoly Act

The JFTC can cooperate with foreign authorities even though they didn't conclude any agreement with Japan and they are not OECD member.

The Antimonopoly Act

Article 43-2

(1) The Fair Trade Commission may provide any foreign authority responsible for enforcement of that executes any laws and regulations of a foreign country corresponding that are equivalent to this Act (hereinafter referred to in this article as a "foreign competition authority") with information that is deemed helpful necessary for the execution performance of its duties (limited to duties corresponding that are equivalent to the duties of the Fair Trade Commission as provided in this Act; the same shall apply in the following paragraph); provided, however, that this does not apply to cases where the provision of such the said information is deemed likely to interfere with proper executions of this Act or to infringe on the interests of Japan in any other way.

(2) When providing the information pursuant to the provisions of the preceding paragraph to a foreign competition authority, the Fair Trade Commission shall confirm matters listed in the following items:

(i) That the relevant foreign competition authority is capable of providing information corresponding to that is equivalent of the information provided pursuant to the provisions of the preceding paragraph

(ii) That the secrecy of the information provided as a secret pursuant to the provisions of the preceding paragraph and as a secret will be protected under the laws and regulations of the relevant foreign country to a degree that is equivalent of a degree to which the secrecy of such information is protected in Japan

(iii) That the information provided pursuant to the provisions of the preceding paragraph will not be used by the relevant foreign competition authority for a purposes other than that those contributing that will contribute to execution performance of its duties

(3) Appropriate measures shall be taken so that the information provided pursuant to the provisions of paragraph (1) will not be used for criminal proceedings to be taken by courts or judges of foreign countries.

(Reference) main cases on the international cooperation between the JFTC and foreign authorities

(1) Cases on cartel investigation

	Date of Measure	Outline	Counterparts	Foundation of Cooperation
1	December, 2003 (Hearing Decision, June, 2012)	Price cartel on modifiers used for polyvinyl chloride product (PVC)	EU	Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange
2	February, 2008	Bid-rigging by Marine Hose Manufacturers	1 The USA 2 EU 3 The UK 4 Italy 5 France 6 South Korea	1. Japan-the USA Anti-monopoly Cooperation Agreement/ notification, information exchange 2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange 3. OECD Recommendation/ notification 4. OECD Recommendation/ notification 5. OECD Recommendation/ notification 6. OECD Recommendation/ notification

3	October, 2009 (on a hearing procedure)	Price cartel by Manufacturers of Cathode Ray Tubes for Televisions	1 EU 2 South Korea 3 Thailand 4 Indonesia	1. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange 2. OECD Recommendation/ notification 3. Japan-Thailand Economic Partnership Agreement/ notification 4. Japan-Indonesia Economic Partnership Agreement/ notification
4	January, 2012 (on a hearing procedure for surcharge)	Bid-rigging for automotive wire harness and related products	1 The USA 2 EU 3 Canada 4 The UK 5 Australia	1. Japan-the USA Anti-monopoly Cooperation Agreement/ notification, information exchange 2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange 3. Japan-Canada Anti-monopoly Cooperation Agreement/ notification, information exchange 4. OECD Recommendation/ Information exchange 5. OECD Recommendation/ information exchange

(2) Cases on merger review

	Review Completion Date	Outline	Counterparts	Foundation of Cooperation
1	September, 2009	The acquisition of Sanyo's shares by Panasonic	1 The USA 2 EU	1. Japan-the USA Anti-monopoly Cooperation Agreement/ notification, information exchange 2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange
2	June, 2010	The acquisition of Varian's shares by Agilent Technology	1 The USA 2 EU	1. Japan-the USA Anti-monopoly Cooperation Agreement/ notification, information exchange 2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange
3	October, 2010	The joint venture for iron ore production between BHP Billiton and Rio Tinto	1 Australia 2 EU 3 Germany 4 South Korea	1. OECD Recommendation/ notification, information exchange 2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange 3. OECD Recommendation/ notification, information exchange 4. OECD Recommendation/ notification, information exchange

				exchange
4	December, 2011	M&A s in the Hard Disc Drive (HDD) Sector	1 The USA	1. Japan-the USA Anti-monopoly Cooperation Agreement/ notification, information exchange
			2 EU	2. Japan-EC Anti-monopoly Cooperation Agreement/ notification, information exchange
			3 South Korea	3. OECD Recommendation/ notification, information exchange

3. The ICN products and programs which are useful for younger competition authorities to improve their capacities

(1) Outline of the ICN

The ICN (International Competition Network) is a network organization that consists of competition authorities in each country and economy. Non-Governmental Advisor such as international organization, lawyer and economist also join the discussion in the ICN. The objective of the organization is to promote the international convergence of the procedures and the substantive contents of competition laws. The ICN consists of five working groups, Cartel, Merger, Unilateral Conduct, Agency Effectiveness and Advocacy under Steering Group, decision-making body. Each working group makes work products relating to each theme and periodically holds telephone and web seminar. In addition they also hold workshop about technical skill on competition policy. The JFTC has become the member since the ICN was established and now is in a position of the Vice-Chair of the Steering Group. Also, experienced member agencies in the ICN provide the advice based on the work products as technical assistance to younger agencies.

In the following, work products on cartel investigation and merger review and above mentioned technical assistance called AISUP (Advocacy and Implementation Network Support Program) will be introduced.

(2) ICN Work Product

As mentioned in above 3(1), five working groups of the ICN make work products relating to each theme. Among of these work products, especially, ones

of Cartel Working Group and Merger Working Group will be useful for younger competition agencies. As for the former one, various kinds of work products such as Anti-Cartel Enforcement Manual, Cooperation between Competition Agencies in Cartel Investigations, Anti-Cartel Enforcement Templates, Setting of Fines for Cartels in ICN Jurisdictions are available. With regard to the latter one, we can also access Guiding Principles for Merger Notification & Multijurisdictional Merger Review, Merger Notification and Procedures Template, Merger Guidelines Workbook, Handbook on Investigative Techniques for Merger Review and so on.

In 2007, the ICN established the Advocacy and Implementation Network (AIN) which consists of chairs of each working group in order to promote the utilization for the work products. The JFTC has had the initiative of the AIN since it was established. As for activities in the AIN, the JFTC made the ICN Work Products Catalogue that comprehensively introduces the work products with brief interpretation and put it on the ICN web-site³. The JFTC also actively hand it out in various international conferences by international organizations and competition authorities. In addition, Cartel Working Group, which the JFTC is taking the role of co-chair is also holding telephone seminar based on the work products. We strongly hope many younger competition authorities take part in this seminar.

(3) AISUP (Advocacy and Implementation Network Support Program)

The AIN has implemented the technical assistance program called AISUP in order to support younger competition agencies. The AISUP is the program in which younger agencies can take advice relating to the ICN work products from ICN member agencies effectively, efficiently and timely when they revise their competition laws, guidelines, etc., with the final goal of the convergence of competition law and policy in the world. Agencies can learn from the lecture about the work products that they want to know from ICN members with experience on competition policy in the form of telephone conference or e-mail. So far, Kazakhstan, Moldova, Mongolia, Vietnam and Zambia got advice on the variety of issues such as market definition/notification procedure about merger review, leniency program and unilateral conduct through this program. As the Chair of the AIN, the JFTC made the AISUP flyer and put it on the ICN web-site⁴. Furthermore, the JFTC has positively handed it out in the ICN workshops and international conferences by international organizations and competition authorities. Through such activities, the JFTC is promoting the utilization of the

³ <http://www.internationalcompetitionnetwork.org/uploads/library/doc770.pdf>

⁴ <http://www.internationalcompetitionnetwork.org/uploads/library/doc771.pdf>

AISUP.

(4) The ICN's international cooperation framework on merger review

As mentioned above, recently the number of international merger has been increasing. In order for younger competition agencies to properly review such international merger with other agencies, a more systematic international cooperation framework is essential. In order to meet such needs, the JFTC proposed "International Competition Network's Framework for Merger Review Cooperation" and discuss with other ICN members. This framework was approved in the ICN annual conference in Rio de Janeiro in April 2012.

As for the framework, the JFTC is going to make a contact list and revise it as appropriate. All ICN members in charge of merger review can participate in the framework. If they want to cooperate with other agencies based on this framework, they can exchange information on the merger to an extent consistent with their laws and regulations and within their reasonably available information. Through this framework, each agency will get benefits in which they can make a contact with other agencies and implement the merger review more promptly.

The detailed information on the framework is uploaded on the ICN web-site⁵.

4. The mock dawn raids that the JFTC implements in a program of their technical assistance.

As for the cartel investigation, we can raise concern that it will be difficult for younger competition agencies to implement the dawn raids promptly even though they understand how to do it through proper ICN work products because of the lack of experience. In order to solve this problem, the JFTC has implemented the mock dawn raids on cartel case for staff from younger competition agencies which lack enforcement through the training program of specific countries.

In the mock dawn raids, based on a hypothetical case, the JFTC staffs play a role of investigators of the JFTC as well as company employees and show the procedure and techniques on how the JFTC implements the dawn raids for younger competition agencies from beginning to end.

The JFTC also introduces expected resistance in dawn raids by companies concerned and shows how the JFTC investigators deal with these resistances through this mock dawn raids, based on the actual case which the JFTC has experienced in the past.

The JFTC expects that this mock dawn raids will contribute to create the

⁵ <http://www.internationalcompetitionnetwork.org/uploads/2011-2012/icn%20framework%20for%20merger%20review%20cooperation.pdf>

effective scheme of dawn raids by younger agencies in the future.

FYI, as the latest, the JFTC implemented this program toward staff from Vietnam Competition Authority in May, 2012.