



Issues of Dominance: Japanese Competition Law

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Overview

- n Introduction
- n The Japanese Antimonopoly Act (AMA)
- n Cartel enforcement
- n Prohibition of private monopolization
- n Intel case
- n Prohibition of unfair trade practices
- n Abuse of a dominant bargaining position
- n Intellectual Property and Competition Law
- n Microsoft Case
- n Possible Future Trends



Structure of the Japanese AMA

- n Prohibition of Unreasonable Restraints of Trade
- n Prohibition of Private Monopolization
- n Prohibition of Unfair Trade Practices→
 - n E.g., abuse of a dominant bargaining position etc
- n Trade Association
- n Monopolistic Situation- Transfer of a Part of Business etc.
- n Limitations on the Formation of Enterprises Group
 - n Pure Holding company, Corporation engaged in Banking or Insurance
 - n Holding of Stocks, Interlocking Directorate, Merger



Structure of the Japanese AMA

- n Exemptions- IP rights; Cooperative Society; Resale Price Maintenance
- n Enforcement
 - n JFTC; Organization, Procedures-Cease and Desist Order, Decision, Lawsuits(the Tokyo High Court)
 - n Surcharge; Leniency Program
 - n Criminal Enforcement; Penalty(Imprisonment, Fine)
 - n Suspension or Prevention of Infringement; Civil Damage



Cartel Enforcement -Surcharge

- n Since 1977, a **Surcharge** may be imposed for price cartels, supply or purchase restraints cartels, market share cartels
- n Amount calculated by multiplying the surcharge percentage times the sales amount of the relevant goods or services calculated pursuant to the method provided by a Cabinet order
- n Amendment of 2005
 - n Revisions of the surcharge system
 - n Cf. Increasing the surcharge rate
 - n Manufacturers, etc.: Large-sized enterprises: 6% → 10%
 - n Small and Medium-sized enterprises (SMEs): 3%→4%
 - n Wholesalers: Large-sized enterprises: 1% → 2%
 - n SMEs: 1% (no change)
 - n Retailers: Large-sized enterprises: 2% → 3%
 - n SMEs: 1% → 1.2%



Cartel Enforcement - Leniency

- n Leniency Program

- n Immunity from or reduction in surcharge payment for enterprises that meet statutory conditions (e.g. those that **voluntarily disclose the existence of violations and provide related information to the JFTC and cease the violation after initiation of an investigation.**)

- n 1st applicant before initiation of investigation = total immunity

- n 2nd applicant before initiation of investigation = 50% deducted

- n 3rd applicant before initiation of investigation = 30% deducted

- n An applicant after initiation of investigation = 30% deducted

- n the total number of enterprises applied to the leniency program is no more than 3.



Cartel Enforcement - Criminal enforcement

- n Imprisonment and fines may be imposed
- n Generally speaking, criminal sanctions are imposed only in cases of serious violations
 - n A person=five million yen
 - n Judicial person=five hundred million yen
- n JFTC's policy on Criminal Accusation
 - n Serious cases are those with widespread influence on people's lives such as price- fixing cartels, supply restraints cartels, market allocations, bid-rigging, group boycotts and other violations.
 - n Cases involving repeat offenders and those cases for which the administrative measures of the FTC are not considered to fulfill the purpose of the act
- n Relation with surcharge

The amount of surcharge can be reduced by an amount equivalent to one-half of the amount of the fine imposed



2008 Violations of the AMA

- n 9 legal actions were taken by JFTC
- n Bid rigging(3) Cartel(2) Dominant bargaining power(3) Resale price maintenance(1)
- n 7 cases are processed
- n Surcharges were assessed against 56 undertakings for a total of 45 hundred million yen (4.5 Billion yen)
- n 14 Lawsuits at Tokyo High Court are pending
- n One criminal case

Evaluation of leniency



program

- n Since the introduction the program in 2005, 27 cases (19 bid- rigging, 8 cartel) have involved leniency
- n Observations: the leniency program together with the increase in the surcharge rate:
 - n Contributes more than expected to promoting competition policy, considering Japanese tradition (under which group loyalty as seen through bid rigging or cartel behaviors were seen as beneficial to society and its economy)
 - n Viewed as a highly valued method to deter bid rigging
 - n Now, after measures taken by JFTC regarding bid rigging, suspension of participation in a private tender is generally expected but can be avoided by application to a leniency program.
 - n Crucial for any company

Prohibition of private monopolization



- n Art. 3 prohibits private monopolization, which is defined as “any entrepreneur, who ...excludes or controls the business activities of other entrepreneurs ... thereby causing, contrary to the public interest, a **substantial restraint of competition** in any particular field of trade.”
- n Originally aimed to prohibit not the abuse of the dominant position but **monopolization by control or exclusion** of the business activities of other entrepreneurs
- n Under Art. 3, the standard is “a substantial restraint of competition in any particular field of trade”.
- n “Exclusion” is emphasized and what constitutes “exclusion” is currently under debate.
- n An open question is whether Art. 3 is more comparable to Section 2 of the Sherman Act or Art. 82 of EC Treaty?
- n Some guidance is provided by recent cases: Intel, NTT East Japan, Usen Broadnetworks, etc.



Intel Case *(JFTC Decision of 2005.4.13)*

The Factual Findings:

- n Intel Japan required the five major Japanese manufactures of PC's to refrain from adopting competitors' CPUs for most of the PCs manufactured and sold by them by promising rebates and/or market development funds to maximize Intel's MSS (percentage of Intel CPUs of the manufacturer's total volume of CPUs). The rebates varied based on MSS at 100%; MSS at 90%, and so on.
- n The ratio of the sale volume by AMD Japan and Transmeta USA among total Domestic CPU Sales Volume decreased from approximately 24% to 11 % in one year.
- n By these means, Intel Japan substantially restrained the competition in the market of CPUs sold to the Japanese manufactures by excluding its competitors' business activities related to the sales of CPUs to these five manufactures.



Discussion

1. Definition of the Market: CPUs sold to these five Japanese five manufactures
2. The issue was about “exclusion” not Predatory Practices
 - n The specific exclusionary conduct was loyalty rebates
 - n The understanding of rebates is controversial
 - n Rebates often leads to lower prices for consumers
 - n Rebates can make it difficult for competitors to expand on the market (cause market foreclosure)
 - n Here, concrete effects on the market were not proved
 - n But market share of competitors’ CPUs declined
 - n The abusive conduct of firm with high market share =tendency to restrict competition

Prohibition of Unfair Trade Practices



- n Unfair Trade Practices
- n Under Art. 19, the standard for infringement is to "tend to impede fair competition"
- n Examples include: (Concerted) Refusals to deal, Discriminatory Treatment on Transaction Terms, Unjust Low Price Sales, Deceptive Customer Inducement, Tie -in Sales, Dealing with Exclusive Terms, Trading on Restrictive Terms, Resale Price Maintenance, Abuse of a Dominant Bargaining Position, Interference with a Competitor's Transactions



The concept of “unfair” and “impede fair competition”

- n Tendency or possibility to impede fair competition is sufficient
- n There is no requirement to demonstrate that the conduct has concrete effects on the market concerned
- n A dominant position is not required
- n The concept “unfair” as to each type of conduct is determined from three competitive viewpoints:
 - n (1) Free competition
 - n (2) Fairness of the conduct (fair competition)
 - n (3) Basic conditions for competition→competitiveness·
no competitive constraint
- n “Unfair” could be equivalent to the concept of “abuse”.



Prohibition of Abuse of a Dominant Bargaining Position

- n Two conditions of Section 14 (Designation of unfair Trade Practices),
- n Superior position over the other party
 - n Evaluate the possibility of changing trade partner (switching to competing trade partner)
- n Abuse (making use of the dominant bargaining position over the party)
 - n causing the said party in regular trade,
 - n to purchase goods or services other than the one pertaining to the said transactions
 - n to provide for oneself money, services or other economic benefits
 - n By establishing or changing trade terms in a way disadvantageous to the said party, etc



How is a dominant bargaining position examined?

- n In case of large scale retailers' relationship to its suppliers
 - n Sales amount of at least 10 billion yen in the previous fiscal year with a floor space (1500m²~3,000m²)
- n Market share; Market position
- n Importance of business for the suppliers
- n Suppliers are in inferior position or in weaker trade position
- n Comment: The scope of dominant bargaining position is inclined to be extended



Main Target

- n Business relationships between manufacturers (producers of finished products) and their suppliers (subcontractor)
 - n long term transaction
 - n manufacturers may use its superior bargaining position over the subcontractor to force the subcontractor to agree unfavorable transaction conditions.
- n Supply transactions between large scale retailers (e.g., department stores, supermarkets, mass retailers specializing in clothing, home electronics and so on) and their suppliers
 - n continuous dealing
 - n their scale has been growing
- n Example: Exploiting its business relations, a supermarket repeatedly pressured the suppliers to dispatch employees to assist the supermarket with stocktaking. etc.



Intellectual Property Rights and Competition Law

- n Art. 21 in the AMA, which sets the exemptions to AMA and it provides:
 - n “The provisions of this act shall not apply to such acts recognizable as the exercise of the rights under Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act”.
- n General Principles:
- n The protection of IP rights should not consequently lead to a monopoly in the relevant market.
- n Certain licensing restrictions may be an exercise of IP rights and exempted from the AMA
- n But every business activity that may seem to be an exercise of IP right may not be exempted under Art. 21 of the AMA.
- n Guidelines for the Use of IP under the AMA by JFTC indicates these principles regarding the application of the AMA to IP licensing



Microsoft Case (JFTC Decision of 2008.9.16)

- n In its licensing agreements with manufacturers of PC's Microsoft employed a non-assertion provision (NAP), which prohibited any lawsuit against Microsoft or any licensee arising out of any infringement of the patent rights for the relevant PC operating system.
- n JFTC found Microsoft was unjustly "dealing on restrictive terms" (which falls the category of unfair trade practices)



Major Issues of Microsoft Case

- n PC manufactures were forced to execute direct agreements containing the NAP.
- n The Windows series represented 90% of all PC Operating systems worldwide and was indispensable for PC manufactures in order to continue in the business of manufacturing PCs.
- n NAP included a grant of a royalty- free license.
- n NAP applied not only to licensed products but also to products sold in future
- n In line with the expansion of the functions of the Windows series a wide range of patent rights subject to the free-of-charge license would be covered
- n Technological information about the Windows series was not sufficiently disclosed
- n PC manufactures took view that their patent rights for core PC Audio Visual technologies may have been infringed by Windows series products



Major Issues of Microsoft Case

- n The PC manufactures and Microsoft are competitors in the PC Audio Visual technology trading market
 - n By NAP the competitor's incentives to research and develop such PC Audio Visual technology is undermined and its position is weakened as a result.
- n The argument in support of the NAP
 - n A strong public interest in ensuring the stability of the rights and obligations associated with the platform
 - n NAP provides this stability
- n Conclusion: The NAP is an unjust device
 - n Microsoft takes advantage of its strong position in the PC operating system market, to force PC manufactures, its competitors in the PC Audio Visual technology field, to accept the NAP and deny themselves the right to initiate a lawsuit relating to any infringement of patent rights



Possible Future Trends Regarding Dominant Firm Conduct

- n Private monopolization

- n Economic argument is not sufficiently employed in practice
- n The assessment of exclusive conduct is core issue
- n “Exclusion” and foreclosure effects

- n Abuse of a dominant bargaining position

- n The role of Prohibition of Abuse of a Dominant Bargaining Position is significant

- n The exercise of the IP rights by dominant firms will tend to be evaluated more strictly under the AMA in light of the policy desire to increase R & D