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Global Forum on Competition

CARTEL CASE STUDIES

Case submitted by Japan

-- Session III --

This case is submitted by Japan in view of its discussion in GFC Sub-Session 1 on Thursday 9 February 2006 (from 9:15 am).

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PRICE CARTEL OF PAPER PHENOL COPPER CLAD LAMINATES

JAPAN

1. Description of practice or policy concerned

1. In this case, the Japan Fair Trade Commission (JFTC) found that the eight manufactures of paper phenol copper clad laminates, which supplied almost all the relevant products sold in Japan, colluded in a price cartel. Though three major companies out of eight companies expressed their intention of simultaneous price-raising at the meeting of the trade association, the JFTC found no direct evidence to show the cartel agreement made by eight companies.

2. Therefore, the central issue of this case was whether the JFTC could prove the eight companies' concerted act based on the "liaison of intention" to show the existence of cartel regarding the coordinated price-raising of the relevant products. In the lawsuit seeking to overturn the JFTC decision, the Tokyo High Court found that "tacit agreement" could be proved by showing (a) existence of previous exchange of their information and opinions, (b) information and opinions which had been exchanged was related to price-raising of the relevant products and (c) concerted act as a result. Accordingly, the Tokyo High Court concluded that there existed a cartel among eight companies in this case.

2. The factual and legal context including an explanation of why the practice poses a competition problem

2.1 *Relevant market*

3. The market of paper phenol copper clad laminates for domestic users (including paper polyester copper clad laminates, which is the equivalent of paper phenol copper clad laminates)

2.2 *Act applied in this case*

4. Section 3 of the Antimonopoly Act (Unreasonable Restraint of Trade¹)

2.3 *Main backgrounds of this case*

2.3.1 *The Japan Thermosetting Plastics Industry Association*

5. The cartel members in this case belonged to the "The Japan Thermosetting Plastics Industry Association" ("Association") consisted of manufacturers of thermosetting resin as well as the "Committee of Laminates" which was one of the Association's committees by item and organised by executive officers in charge of the item in each company. The Committee of Laminates had subordinate bodies called "Operations Committee" which consists of directors and section chiefs in each company, "Overseas Committee." The Committee of Laminates also had "Osaka Committee" and "Nagoya Committee," which consist of directors, section chiefs, and branch managers and so on.

2.3.2 *Power of influence of price-raising by three major companies regarding the relevant product*

6. The relevant product in this case was mainly used for base materials of printed-wiring boards for household electronic appliances such as televisions, tape recorders, etc. The sales amount of the related parties constituted a large share of the whole sales amount of copper clad laminates for printed-wiring

boards at the time of 1987. The total sales of the major three companies accounted for 70% of the relevant market and therefore, movements of these three companies could give a big influence to the market of the copper clad laminates for printed-wiring board.

2.3.3 Market trend and situation regarding the transaction prices of the relevant product on and after 1985 in Japan

7. In comparison with the other copper clad laminates for printed-wiring boards, paper phenol copper clad laminates were mass-produced and not largely product-differentiated. Because of those reasons, the price competition among the manufacturers and distributors was vigorous. Additionally, the manufactures which assembled electrical appliances and were ultimate customers of the relevant products had a significant buying power.

8. Furthermore, the sales price of the relevant product tended to decline for both exporting and domestic users. On the other hand, the material price of the relevant product tended to rise at the time. Considering this situation, the related parties needed not only prevention of price decline but also price-raising of the relevant product.

2.4 Relevant evidence and fact-findings (based on the Tokyo High Court ruling on September 25, 1995)

2.4.1 Existence of previous exchange of their information and opinions

9. Evidence which shows that the members exchanged their opinions regarding the price of paper phenol copper clad laminates, etc., at a committee of the Association and other opportunities since the beginning of 1987. (e.g.; in the "Usual Operations Committee" held on May 21, 1987, they exchanged their opinions regarding the raising of the sales price in Japan of the relevant product after the gradual raising of the export price of it, and then agreed to the policy.)

10. (The evidence can be found in the record of the statement of participants in the meetings and the Committee's participant list.)

11. This evidence proved that all of the eight companies were cartel members and had exchanged their information and opinions.

2.4.2 Information and opinions which had been exchanged were related to the price-raising of the relevant products

12. Evidence which shows that the situation raising the export price of paper phenol copper clad laminates was reported, then that the members exchanged their information and opinions concretely regarding the rate of the raising of the price for domestic users, the price and the time; that the three leading companies which expressed their intention to raise the price of the relevant product subsequently requested the other five companies to follow their decision and to raise the price of paper phenol copper clad laminates and that the other five companies did not object to the three companies' request at the "Temporary Committee," which began at around 1:30 p.m. on June 10, 1987. (This evidence can be found in the record of the statement of participants in the Committee meeting.)

13. This evidence proved that information and opinions which had been exchanged at the committee were related to the price-raising of paper phenol copper clad laminates.

2.4.3 *Concerted act as a result*

14. Evidence which shows that the eight companies after the said meeting gave instructions in their office to raise the price of paper phenol copper clad laminates and that the eight companies announced their price-raising to their users and requested the same price-raising.

15. This evidence showed that the eight companies concertedly carried out the price-raising of paper phenol copper clad laminate for the domestic users.

16. In accordance with the relevant evidence enumerated above, the Tokyo High Court found that Toshiba Chemical Corporation knew that the other seven companies intended and agreed to raise the price of paper phenol copper clad laminates, and based on the prediction that the other seven companies would raise the price of paper phenol copper clad laminate, Toshiba Chemical Corporation raised the price, which is equivalent to the decision at the committee on June 10, 1987. Therefore, the Tokyo High Court concluded that there existed a concerted action based on "liaison of intention" to raise the price of paper phenol copper clad laminate, Toshiba Chemical Corporation had an intention to follow the other seven companies' price-raising, and the other seven companies were also aware of Toshiba Chemical Corporation's intentions. In other words, even though the companies did not make an explicit agreement to bind upon the related parties, "tacit agreement" among related parties can be found by proving (a) existence of previous exchange of their information and opinions, (b) information and opinions which had been exchanged was related to price-raising of the relevant products and (c) concerted act as a result.

17. Here is the excerpt of the Tokyo High Court decision which noted that showing an explicit agreement is not necessary to prove the liaison of intention regarding a horizontal cartel, but showing a tacit agreement is sufficient to prove the liaison of intention.

18. Lawsuit brought by Toshiba Chemical Corporation seeking to overturn a JFTC decision (Decision issued on September 25, 1995) (tentative translation)

In order to prove that the act of the plaintiff corresponds to "concerted actions," which is prohibited by Section 3 of the Antimonopoly Act as Unreasonable Restraint of Trade ("business activities, by which any entrepreneur, with other entrepreneurs, by concerted actions, mutually restrict or conduct their business activities in such a manner as to fix prices, etc., thereby causing a substantial restraint of competition in any particular field of trade" (Section 2(6)), it is necessary to show that "liaison of intention" among entrepreneurs existed at the time of price-raising by these entrepreneurs.

The said "liaison of intention" means that an entrepreneur recognizes or predicts implementation of the same or similar kind of price-raising among entrepreneurs and accordingly, intends to collaborate with such a price-raising. In order to prove "liaison of intention," it is not sufficient to show the recognition or acceptance of an entrepreneur's price-raising by another entrepreneur. However, explicit agreement to bind upon the related parties is not necessary to prove "liaison of intention." In other words, "liaison of intention" can be proved by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such a price-raising of another. (It is called "liaison of intention" by a tacit agreement.)

By the nature of such an agreement, when companies make an agreement considered as "Unreasonable Restraint of Trade," they usually try to prevent them making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove "Unreasonable Restraint of Trade," the entrepreneurs could easily slip through the meshes of the law and therefore, it is obvious that such an interpretation is not appropriate to the realities.

We should consider recognition and intention of the entrepreneurs by examining various circumstances before and after the price-raising and then, evaluate whether there is a mutual recognition or acceptance among entrepreneurs regarding the price-raising or not.

In that point of view, if an entrepreneur exchanges information of price-raising among other entrepreneurs and accordingly, takes the same or similar act with others, it is unavoidable for us to presume that the parties had a relationship to expect the concerted act each other and therefore, the said "liaison of intention" exists unless there is a special occasion to show that the price-raising was implemented individually by a company's own decision that the price-raising is capable of meeting price competition in the relevant market and there is no relationship between that company's price-raising with other companies'.

3. Description of the specific actions taken to solve this problem

3.1 Elimination measures

19. The JFTC ordered seven companies the elimination measures of the context below. (Decision was issued on August 8, 1989.) Tokyo High Court also ordered the same elimination measures to Toshiba Chemical Corporation. (Decision was issued on September 25, 1995.)

3.1.1 *The related parties shall abandon the agreement made on June 10, 1987, regarding the raising of the price for the domestic users of paper phenol copper clad laminates.*

3.1.2 *The related parties shall not take the concerted act to raise the price for the domestic users of paper phenol copper clad laminates in the future and shall decide the price of each party's own will.*

3.1.3 *The related parties shall notify their customers (distributors and consumers) of paper phenol copper clad laminates of the context of (a) and (b) above. (The way of notification shall be approved by the JFTC in advance.)*

3.2 Surcharge²

20. The JFTC ordered the seven companies, which accepted the recommendation issued by the JFTC ahead of Toshiba Chemical Corporation, the surcharge payment of a total of 547,190,000 yen (on July 11, 1990). The JFTC also ordered Toshiba Chemical Corporation the surcharge payment of 54,160,000 yen (on August 5, 1996).

4. Final outcome of the case

21. On June 6, 1989, the JFTC issued a recommendation to eliminate the conduct of Unreasonable Restraint of Trade (Price Cartel) to eight companies, and seven companies accepted this recommendation. (Decision was issued on August 8, 1989.) The surcharge payment orders (total: 547.19 million yen) were issued against seven companies on July 11, 1990.

22. However, Toshiba Chemical Corporation did not accept the JFTC's recommendation and requested to initiate the Hearing Procedures. Subsequent to a series of Hearing Procedures, on September 16, 1992 the JFTC issued a decision to eliminate the conduct of Unreasonable Restraint of Trade of paper phenol copper clad laminates by Toshiba Chemical Corporation, as well as by the other seven companies. Toshiba Chemical Corporation filed a lawsuit seeking to overturn the JFTC decision on September 16,

1992 and the Tokyo High Court reversed the decision and remanded the JFTC on February 25, 1994 as the court found the JFTC in violation of due process of the Hearing Procedures.

23. Following this ruling by the Tokyo High Court, the JFTC corrected the Hearing Procedures process and on May 26, 1994 issued a decision which was the same as the decision made on September 16, 1992. Toshiba Chemical Corporation challenged this JFTC decision again and filed a lawsuit to the Tokyo High Court seeking to have the decision overturned, but that claim was dismissed on September 25, 1995. Furthermore, Toshiba Chemical Corporation challenged the surcharge payment order which was issued by the JFTC on August 2, 1993 and requested to initiate the Hearing Procedures. The JFTC issued a final decision with a surcharge payment order of 54.16 million yen on August 5, 1996.

NOTES

1. The term “Unreasonable Restraint of Trade” as used in the Antimonopoly Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or transaction counterparties, thereby causing, contrary to the public interests, a substantial restraint of competition in any particular field of trade. (Section 2(6) of the Antimonopoly Act)
2. When an entrepreneur carries out any Unreasonable Restraint of Trade, the JFTC shall order the entrepreneur concerned to pay a surcharge to the Treasury in the amount equivalent to the total arrived at by multiplying the sales amount of such goods or services, computed in accordance with the method prescribed by the Cabinet Office, for the period from the date on which the entrepreneur was engaged in the business activities considered as implementation of such conduct to the date on which the entrepreneur ceased to engage in said business activities (in a case in which such period exceeds three years, the period shall be for three years retroactively from the date on which the entrepreneur ceased to engage in the business activities considered as implementation of such conduct) by a certain percentage.

At the time of this case (price cartel of paper phenol copper clad laminates), the said certain percentage was basically 1.5% (2% for a manufacturer, 1% for a retailer and 0.5% for a wholesaler). By the amendment of the Antimonopoly Act which was put into practice on January 4, 2006, the surcharge rate was raised to basically 10% (3% for a retailer and 2% for a wholesaler).