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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

-- Contribution from Japan --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. A cartel agreement is generally reached behind closed doors among entrepreneurs. It is a very important challenge for a competition authority to determine how to detect and prove the existence of such an agreement. As entrepreneurs have recently been more skillful in establishing cartel agreements for fear of being prosecuted by competition authorities, it is becoming more and more difficult to detect direct evidence of agreement in a cartel. Thus, in cartel cases without direct evidence, it is essential to prove the existence of cartels reasonably by the accumulation of relevant facts which are established based upon indirect evidences. The Japan Fair Trade Commission (hereinafter referred to as the "JFTC"), the competition authority in Japan, bases its approach on the theory that explicit agreement among the entrepreneurs is not necessary to prove a cartel agreement; i.e., "liaison of intention," and a tacit agreement suffices. In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court recognised this theory.

2. The following describes sanctions of cartels as "Unreasonable Restraint of Trade" and how a violation is proven in cartel cases without direct evidence of agreement.

2. Enforcement against cartels in Japan

2.1. Unreasonable Restraint of Trade

3. In RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS, a "hard core cartel" is defined as the following:

- A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by (i) competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce; and (ii) is not reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies[1].

- There is no clear definition regarding a "hard core cartel" in the Antimonopoly Act in Japan; however, the JFTC prohibits a "hard core cartel" as defined in the above OECD Recommendation of the Council as a form of "Unreasonable Restraint of Rrade"(Section 3 of the Antimonopoly Act).

- Unreasonable Restraint of Trade is defined as the following: when any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its name, with other entrepreneurs, mutually restricts or conducts their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade (Section 2 (6) of the Antimonopoly Act).

2.2 Measures

4. The JFTC conducts necessary administrative investigations based upon Section 47 of the Antimonopoly Act when the JFTC suspects that there exists any violations, based upon the information the public provided and/or any facts that the JFTC detects. When the JFTC finds a violation, the JFTC can issue orders for elimination measures such as an injunction of the violation, and will order a surcharge payment in the case including hard core cartels.

5. The revised Antimonopoly Act, which was enacted on 20 April 2005 and enforced on 4 January 2006, imposes stricter measures on violating firms. In order to give an incentive to defect from a cartel and to pursue rapid restoration of competitive order, a leniency program has also been introduced in the revised Act[2].

2.3 Criminal sanctions

6. Criminal sanctions as well as administrative actions such as orders for elimination measures and a surcharge payment are imposed in the case of a serious violation of the Antimonopoly Act, such as that of cartels. Criminal sanctions shall be considered only after an accusation of the JFTC has been filed (Section 96 and 74 (1) of the Antimonopoly Act). Regarding criminal sanctions, the JFTC published its policy on criminal accusations regarding antimonopoly violations in 1990. The JFTC established the policy of actively accusing in order to seek criminal sanctions. As compulsory measures for criminal investigations and a leniency program were introduced by enforcement of the revised Antimonopoly Act on 4 January 2006, the JFTC revised the above policy and published its new policy on criminal accusations and compulsory investigation of criminal cases regarding antimonopoly violations (on 6 October 2005)[3].

3. Establishment of cartel cases in Japan without direct evidence of agreement

3.1 Proof of cartels

7. Typically, a cartel agreement is reached behind closed doors between two or more entrepreneurs, making it extremely difficult for an outsider to know what specific arrangements have been made in the cartel agreement. As anti-cartel enforcements have been tightened in recent years, violating firms have become increasingly careful not to leave any material evidence of cartel agreements such as minutes and memoranda of meetings among the parties to the cartel. Without direct evidence, it is essential to prove the existence of cartel reasonably by accumulating relevant facts which are established based upon indirect evidences.

3.2 Finding of agreement

8. In order to satisfy the requirements for Unreasonable Restraint of Trade as provided in Section 2(6) of the Antimonopoly Act, one must find that a "liaison of intention" existed among the entrepreneurs concerned. Any concerted action among the entrepreneurs does not in itself provide sufficient proof of the "liaison of intention." In the Toshiba Chemical case (Tokyo High Court Judgment on 25 September 1995), the court found that a "liaison of intention" means that an entrepreneur recognizes or anticipates implementation of the same or similar kind of price-raising among entrepreneurs and accordingly intends to collaborate with such price-raising. Thus, explicit agreement binding the related parties is not necessary in order to prove "liaison of intention;" a tacit agreement will suffice.

9. In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court found that the existence of a tacit agreement is sufficient proof of a "liaison of intention." In order to prove "liaison of intention," though the mere recognition or acceptance of an entrepreneur's price-raising by another entrepreneur is not sufficient, explicit agreement binding the related parties is not necessary. In

other words, "liaison of intention" can be proven by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such price-raising by another. The court gave the following reason for this interpretation: "By the nature of such an agreement as "Unreasonable Restraint of Trade," companies usually try to avoid 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 get around the hands of the law, and therefore it is obvious that such an interpretation is not appropriate in reality."

10. As regards the proof of a tacit agreement, the court in the Toshiba Chemical case stated: "Recognition and intention of the entrepreneurs should be considered by examining various circumstances before and after the price-raising, and then evaluation of whether there is mutual recognition or acceptance among entrepreneurs regarding the price-raising or not." Thus, in the absence of any explicit, mutually-binding agreement, the existence of a tacit agreement may be proven by indirect evidence attesting to: (i) the existence of prior exchange of information and opinions among the parties concerned; (ii) the content of negotiations among the parties concerned; and (iii) a concerted act as a result.

3.3 Cases finding a tacit agreement without direct evidence of an explicit agreement

11. Different cases require different forms of evidence to prove the existence of a "liaison of intention." In particular, judgment on a tacit "liaison of intention" has to be made on a case-by-case basis. The three criteria identified in the Toshiba Chemical case would require that the following indirect facts, for example, be found:

- Existence of prior exchange of information and opinions among the parties concerned
  - Frequent meetings prior to the price increase
  - Telephone conversation or e-mail on such meetings
- Content of negotiations among the parties concerned
  - Current condition of the industry
  - Exchange of information on current price, etc.
  - Declaration of intention to raise the price
  - Discussion of measures to be taken against discounters
- Concerted act as a result
  - Actual price-raising by the entrepreneurs
  - Entrepreneurs' pricing decision process

12. The following are two of the cases where a tacit agreement was found in the absence of any direct evidence of an agreement.

3.4 Kyowa Exeo case – judgment against claim seeking to overturn a JFTC decision (Tokyo High Court judgment on 29 March 1996):

3.4.1 Outline of the case

13. The JFTC ordered the payment of a 22.12 million yen surcharge by Kyowa Exeo Corporation, a company mainly involved in the construction and storage of various types of telecommunication facilities, electrical facilities and their ancillary equipment (Surcharge Payment Order of 30 March 1994). The JFTC found that Kyowa Exeo colluded with nine other companies in the same industry to designate in advance who would make the successful bid in a tender offered by the U.S. Pacific Air Force Contracting Center (hereinafter referred to as the "Contracting Center") for the operation and maintenance service of telecommunication facilities. The other bidders agreed to cooperate to ensure that the designated company would be awarded the contract. By substantially restricting competition in the market of the operation and maintenance service of telecommunication facilities ordered by the Contracting Center the practice constituted "Unreasonable Restraint of Trade" as provided in Section 2(6) of the Antimonopoly Act and therefore violated Section 3 of the Act. The practice also pertained to the price of services to which the surcharge stipulated in Article 7-2(1) of the Act is applicable.

14. Kyowa Exeo filed an appeal with the Tokyo High Court requesting the decision to be overturned on the grounds that the JFTC's decision had not been established by substantial evidence attesting to the facts at issue including a basic agreement on bid-rigging. The Tokyo High Court rejected the appeal and supported the JFTC's decision.

3.4.2 Outline of indirect evidence and fact-finding

15. In this case, no direct evidence attested to the existence of a basic agreement to allocate received orders among Kyowa Exeo and the other nine competing companies. Nonetheless, the Tokyo High Count found that a basic agreement on bid-rigging may be inferred from the following indirect facts, among others:

- Background and objective of establishing the Kabuto Club

  By March 1981 at the latest, Kyowa Exeo, along with the other nine competing companies, had established the "Kabuto Club" for smoothly receiving orders from the Contracting Center for the operation and maintenance service of telecommunication facilities (operation and maintenance service for telecommunications and micro communications). Kyowa Exeo claimed that the Kabuto Club had been established to promote personal relationships between counterparts in the industry, and not to maintain anticompetitive practices. The Tokyo High Court, however, found that a common interest among the parties concerned was behind the establishment of the Kabuto Club, which was intended to facilitate communication in receiving orders as well as to promote friendship between counterparts. In addition to this background, it should be noted that after the Club was established, a meeting was held, sometimes preceded by an informal gathering to see whether each member was willing to participate in the bidding, with regard to each of the orders to be placed by the Contracting Center, which was then followed by cooperation in the bidding to help the designated bid-winner receive the order. In light of the fact that such practices, which had been carried out only by the members of this group, ceased with the disbandment of the Club, the establishment of the Club was in itself a valid indirect fact that attested to the existence of a basic agreement.

- Participants in, and contents of, individual meetings

Kyowa Exeo claimed that only four contracts had been specifically identified as results of negotiation among members by the JFTC's decision, which was not sufficient to prove the existence of the alleged basic agreement. Regarding this point, the Tokyo High Court noted that participation in other contracts, which only involved asking about the intention to receive the order, was also limited to those Club members who were interested in the contract and attended an on-site briefing session. The fact that the participants remained unidentified did not necessarily prevent the assumption that a basic agreement had existed. Even if only four contracts had actually been results of negotiation among members, Club members gathered on the occasion of on-site briefing sessions, etc. for other contracts to see if any of them was willing to receive the order. No further negotiation ensued just because only one of the members was willing to bid for the contract. In the final analysis, a system had been maintained among the Club members to ensure discussion on all contracts offered by the Contracting Center. Thus, the facts regarding the participants in, and contents of, individual meetings provided compelling evidence of the alleged basic agreement.

3.5 Case against Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative (JFTC Decision of 24 June 1997)

3.5.1 Outline of the case

16. In its decision, the JFTC found that the Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative, an association of retailers primarily dealing in petroleum products in a specific area of Hiroshima Prefecture (hereinafter referred to as "the Federation") had decided in its Executive Working Group meeting on 18 August 1992 to raise the retail price of regular gasoline by four yen except for large users, effective from 1 September 1992, and to instruct every member to follow suit. The ensuing retail price increase was apparently based upon this decision. As the Federation was a trade association as defined in Section 2(2) of the Antimonopoly Act, it effectively restricted competition in the regular gasoline retail market except for large users in the Hiroshima area by deciding to raise the retail price of regular gasoline supplied by the members. Thus, the practice violated the provision of Section 8(1)(i) of the Antimonopoly Act.

3.5.2 Outline of indirect evidence and fact-finding

17. In this case, little material or oral evidence was found which directly attested to an agreement among entrepreneurs, i.e. the decision by the Federation's Executive Working Group to raise members' retail price by four yen, effective from 1 September 1992. In its decision, however, the JFTC found that the executives, members and secretariat personnel had been systematically instructed not to keep any potential evidence of wrongdoing such as a memorandum on price, for fear of detection by the JFTC. In particular, the secretariat personnel in charge of clerical work for the Federation were strictly required to follow the instruction. They were actually discouraged against telling the truth, and were asked to pretend that they knew nothing if interviewed by a JFTC investigator. Under these circumstances, it was natural that no direct evidence could be found. The decision went on to recognize the existence of a cartel, as it inferred from relevant evidence that the Executive Working Group meeting on 18 August had indeed decided to raise the retail price by four yen and instructed each member to follow suit. The JFTC based its decision on the following indirect evidence:

- The timing and extent of price-raising by the Federation members in the Hiroshima area were uniform and therefore suspicious.

  The wholesale price increase by suppliers differed somewhat in timing and extent, which resulted in considerable differences in the timing and extent of retail price increases in other

prefectures as well as in other parts of Hiroshima Prefecture. In view of this, it was highly unique and unusual that in the Hiroshima area alone, the retail price had risen almost across the board by four yen on 1 September. Thus, it was natural to suspect that someone had orchestrated the price increase.

- The Federation had been involved ten times in price-fixing, including decisions to raise or lower members' retail price.

  The Federation adopted the policy of linking its members' retail price to the wholesale price of suppliers ("up when up, down when down"). Under this policy, the Federation (or the Branch Federation, its predecessor) held 10 consultation meetings from May 1989 through April 1992 to decide on adjusting the retail price to the fluctuation of the wholesale price, a decision to be followed by each member. Retail prices were also monitored at the level of service stations, to ensure that those decisions were actually implemented. Thus, individual members were virtually forced to raise or lower their retail price in accordance with the policy of the Federation or the ex-Branch Federation.

- The Executive Working Group meeting on 18 August was not a simple annual luncheon.

  With regard to the Executive Working Group meeting on 18 August, during which the retail price-raising was decided upon, the Federation contended: "Although it is true that the executives of the Federation got together in the meeting room of the Cooperative's office, that was only for a luncheon meeting regularly held at that time of the year in recognition of executives' services. No consultation or decision was to be made on any particular topic." However, the "Executive Working Group," composed of the chairman, vice-chairman and branch directors of the Federation, was a consultative organ distinct from the Executive Board, the Federation's formal governing body. It was also recognised as such among the parties concerned. Moreover, it was found that the Executive Working Group meeting (i.e. meeting among the chairman, vice-chairman and branch directors) on 18 August had actually been an emergency meeting convened at 11:00 am in the Cooperative's office, and secretariat personnel had notified the Working Group members to that effect by telephone. The members were also aware that an emergency meeting would be held on that day, to be followed by an annual luncheon in a restaurant. Clearly, the Executive Working Group members were not convened in the Cooperative's office at 11:00 am on 18 August simply to wait for an annual luncheon to begin.

- Measures were taken to avoid detection by the JFTC.

  It was apparent that from the autumn of 1991, both the Federation and the Hiroshima Prefecture Petroleum Retailers' Cooperative, in response to the so-called enhanced implementation of the Antimonopoly Act, had systematically directed the parties concerned, particularly secretariat personnel, to pay great attention not to keep any memorandum or other records that might provide potential evidence of wrongdoing for the JFTC. It was also found that both the Federation and the Cooperative had systematically attempted to avoid detection by the JFTC by discouraging those interviewed by an investigator from telling the truth.

- A note attested to the fact that the Executive Working Group on 18 August had discussed the necessity of passing a cumulative increase in the wholesale price on to the retail price.

The following entry was found in a note by a secretariat clerk of the Federation dated 18 August and entitled "Executive Working Group:" "The market price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." The Federation claimed that it was a private memorandum of a secretariat clerk and did not necessarily indicate that such a statement had actually been made in the meeting. However, the wording had a striking similarity with some expressions found in other notes by the same clerk regarding statements made in other Cooperative meetings which he had attended. Since those notes were preserved as an integral part of the minutes of plenary Executive Board meetings, it may be presumed that the note in question accurately reflected a statement made in the Executive Working Group meeting on 18 August. Moreover, the expression "to move toward a more favorable condition" is frequently used in industry journals and newsletters to signify preparation for a retail price increase and efforts to ensure its effectiveness. Thus, the above statement – "The retail price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." – may be construed to mean that, as the retail price is expected to follow an uptrend at the national level, now is the time to cooperate in building favorable condition for implements, a price increase, followed by an effort to ensure its effectiveness. This was, without a doubt, the meaning of the note.

4. Conclusion

18. Even if no direct evidence is found to prove the existence of an agreement in a cartel case, indirect evidence may enable a reasonable assumption that the "liaison of intention" existed for a cartel. Accumulation of small pieces of evidence such as the existence of a prior exchange of information and opinions may still prove to be instrumental in establishing key facts of a basic agreement. In light of this, strenuous and persistent investigation is necessary even when there is no direct evidence. We consider that strict measures must be taken against flagrant violations of the Antimonopoly Act, using indirect evidence as proof of even the most cunning cartels that leave no direct evidence of agreement.

NOTES

1. Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

2. See the document below for more information about the Amendment of the Antimonopoly Act.

OECD Annual report on competition policy developments in Japan (2004), page 2

I Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislations
1 Amendment of the Antimonopoly Act

3. The Fair trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (abstract)
1. The Policy on Criminal Accusation
The JFTC will actively accuse to seek criminal penalties on the following cases:
(1) Vicious and serious cases which are considered to have widespread influence on people's livings, out of those violations which substantially restrain competition in certain areas of trade such as price-fixing cartels, supply restraint cartels, market allocations, bid rigging, group boycotts and other violation.
(2) Among violation cases involving those firms or industries who are repeat offenders or those who do not abide by the elimination measures, those cases for which the administrative measures of the JFTC are not considered to fulfil the purpose of the Act.

However, the JFTC will not file accusations against the following persons:
a. The first entrepreneur that submitted reports and materials concerning the immunity from the surcharge before the investigation start date*. (The entrepreneur that submits reports and materials pursuant to the provision of Section 7-2 (7) of the Act. However, the JFTC will not apply this provision to the entrepreneur that is found to be fallen under any of the paragraphs of Section 7-2 (12) of the Act; the said reports or documents contains false information, the said entrepreneur fails to submit the reports or materials or submits false reports or materials in response to the additional requests by the JFTC, and the said entrepreneur coerced another entrepreneur to commit the violative act or blocked another entrepreneur from ceasing to commit of the violative act.)
b. The officer, employee, or other person of the said entrepreneur who commit the violative act of the Act and is deemed to be in a circumstance appropriate to be treated as same as the said entrepreneur, regarding the said entrepreneur's submission of reports and materials to the JFTC, response to the investigation by the JFTC following the said submission, and others.
* "The investigation start date" means the date when the JFTC initiates its on-the-spot inspection, official inspection and search, etc., regarding the case relating to the violative act.