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Japan's new commitment decision procedure for antitrust cases to catch more foreign companies?

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Recent amendments to Japan's Anti-Monopoly Act (**AMA**) that came into effect on 1 January 2019 give the country's competition regulator, the Japan Fair Trade Commission (**JFTC**), powers to accept voluntary commitments from companies suspected of having infringed the AMA. This will allow the JFTC to bring investigations to an end without the need to reach a formal finding of infringement. The JFTC will also be able to apply these powers in merger investigations to extract remedies from merging parties in more complex cases. The changes are likely to have significant implications for the way in which the JFTC deals with both infringement and merger control cases, and will bring the JFTC's powers into line with those of other competition authorities, including in the US and European Union.

On the enforcement side, the amendments make it easier for the JFTC to pursue a wider range of cases than was previously possible, in particular as decisions reached by consensus will effectively be shielded from judicial appeal by companies under investigation. This includes cases where existing Japanese law and practice have been less rigorous (for example surrounding unilateral conduct and abuse of dominance or superior bargaining position), allowing the JFTC to move away from more traditional domestic bid-rigging cases that have been the focus of the JFTC's enforcement efforts in recent years. This flexibility is likely to facilitate the authority's ambition to take on larger and more international investigations involving increasingly complex theories of harm, including in the online and digital arenas. Foreign companies whose business activities impact on the Japanese market are likely to find themselves in the JFTC's sights much more than was previously the case.

At the same time, within a merger context, the changes are likely to make the JFTC's remedies procedures more formal and public for both domestic and foreign companies alike.

Background

Until this year, the JFTC lacked the official power to end investigations by accepting voluntary commitments from parties, and could resolve cases in principle only through findings of infringement, either by issuing "cease-and-desist" orders, imposing fines, or alternatively much weaker legally non-binding tools such as "warnings" or unofficial closure of its investigations after companies voluntarily cease the conduct under investigation.

This contrasts with the heavy reliance in enforcement cases on the commitment decision procedure used by the European Commission (**EC**), or the consent order procedure used by the Federal Trade Commission (**FTC**) in the US. For both the EC and FTC, the respective procedures have proved to be more efficient and lead to quicker resolutions, since findings are not contested and the EC in particular can avoid the need

to draft detailed infringement decisions. Companies under investigation are able to avoid substantial fines, while the absence of a finding of infringement limits exposure to damages claims. For both sides, the voluntary and consultative nature of commitments and consent orders tends to lead to resolutions that are workable, grounded in the reality of the relevant markets, and provide certainty as to future conduct. From this perspective, the new JFTC procedure should be welcomed.

Notwithstanding the clear need for more flexibility in Japan, the impetus for the amendments to the AMA has in fact come as a result of Japan's ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) treaty, which requires each signatory to "*authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action*". The amendments entered into force together with the CPTPP itself at the beginning of 2019, after Australia became the sixth of 11 signatories to ratify the treaty on 31 October 2018.

Implications of the new procedure for companies

From our experience of dealing with the broader discretion of other overseas authorities, the severe bargaining with authorities which often takes place in commitment cases does not always lead to happy endings for companies, especially in the context of regulators' ambition to "expand the envelope" in new areas of enforcement.

Companies given the opportunity to offer commitments in future investigations and merger cases will need to carefully weigh up the advantages and disadvantages of doing so.

Overview of the JFTC's new commitment decision procedure

As of yet the JFTC has not announced its intention to apply the new commitment procedure in any existing investigations, and so the clearest indication of how the procedure will be employed in practice is a set of guidelines published by the JFTC in 2018 following a public consultation (the **Guidelines**). Based on the Guidelines, the procedure appears to follow a similar course to those in the EU and US.

How commitments are negotiated

The JFTC can initiate the procedure by a written notification to companies under investigation setting out an overview of the JFTC's concerns, and inviting them to offer commitments. Companies then have 60 days from notification to offer proposed commitments, and to demonstrate that the suspected infringement has ceased. Companies under investigation are also able to pro-actively approach the JFTC to explore the possibility of resolution by commitments. In either event, companies do not need to acknowledge the existence of an infringement in order to take advantage of the procedure.

Exemptions

The Guidelines provide that so-called "hard core" conduct (in particular cartel conduct, or bid rigging) is not eligible for commitment decision treatment, due to the overriding benefit of deterrence. The JFTC has also indicated that it will exclude cases involving criminal violations, and cases where the company under investigation has carried out an infringement of the AMA in the previous 10 years.

However, given the potential efficiencies for the JFTC in resolving investigations by commitments, it is not immediately obvious why the JFTC has determined to limit its discretion in this manner. The scope of the exclusion for recidivism, for example, is wide enough to capture entirely unrelated infringements that may have occurred in different product markets and under different market conditions. While the Guidelines do not have the force of law, and accordingly the JFTC can depart from them in

principle, in practice it will be reluctant to do so.

Nature of commitments and market testing

In order to be accepted by the JFTC, commitments offered by companies must both be sufficient to address the JFTC's concerns, and capable of being implemented in practice. Interestingly, the Guidelines indicate that this may include reimbursements to companies that have been subject to overcharging or bundling, in lieu of a public fine. This may well provide a solution to the current inflexible and therefore frequently debated fine calculation methodology applied for "abuse of superior bargaining position".

The JFTC may "market test" and seek public comments on proposed commitments in order to determine whether they are capable of meeting these criteria, although this is not mandatory as it is in the EU. As yet the JFTC has provided no additional guidance on the circumstances in which market testing will be appropriate.

Decisions and public summary of commitments

Where the JFTC takes a commitment decision, however, the Guidelines require it to announce the decision and provide a public summary of the commitments accepted. Importantly, this decision does not amount to a finding of infringement in respect of the conduct addressed by the commitments, potentially rendering the JFTC's decision less useful to claimants in follow-on damages claims. However, the decisions will nevertheless include descriptions of conduct, and so companies will need to proactively discuss with the JFTC before publication in order to make sure this does not lead to an effective implicit finding of infringement.

Monitoring

Unlike the EC, the JFTC is unable to penalize companies that fail to comply with their commitments, and instead can only revoke its decision and resume its earlier investigation. The lack of a power to impose penalties was seen as a key weakness in the EC's informal settlement practice prior to the introduction of the EU commitment decision procedure in 2003. Currently, the Guidelines do not make clear what role, if any, there will be for monitoring trustees, which also play a key role in enforcement of commitments in the EU.

The experience in the EU and US

The experience with both commitment decisions in the EU and consent orders in the US has demonstrated, although there are some debates, certain benefits for both competition authorities and the companies under investigation. Although the commitment decision procedure was originally introduced in the EU as an alternative to prohibition decisions, commitment decisions have in fact represented almost two-thirds of all EC unilateral infringement decisions since 2003. The use of consent orders by the FTC is even higher still.

At the same time, both the EU commitment procedure and the US consent order procedure have met with criticism. The resolution of investigations without a finding of infringement means that authorities are able to avoid articulating a theory of harm in cases where infringements are less clear-cut, providing limited guidance for third parties. Although commitments are formally offered by the companies, in practice authorities have wide discretion to accept or reject them, which means that authorities play a big role in shaping those commitments. In the case of the EU, some have suggested that this allows the EC to effectively regulate by fiat, by bringing about lasting changes to whole-of-industry practices reflecting EC policy aims.

This approach has been particularly visible in cases where the EC investigated novel or less common types of infringement. The same concerns will be relevant for the new

Japanese rules, for example for e-commerce or technology-related cases where the JFTC is showing growing interest.

Application in merger control

As a unique deviation from the EC commitment system, the JFTC has taken the position that the commitments system under the Guidelines applies equally to merger review as to enforcement. Although, as noted above, the JFTC has an existing power to impose remedies on merging parties, this operates under a less formalised procedure and timeline based on consultation with the merging parties. The more formal procedure under the Guidelines has several potential benefits over the existing system from the perspective of the JFTC. The 60 day window to negotiate commitments will give the JFTC more time to test and fine tune remedies than under the 30 day Phase I review period (and potentially provides the JFTC with "cover" to slip into a more detailed Phase II review). Properly utilized, the greater structure and transparency of the market testing process may also make it more attractive in complex or politically sensitive cases, deflecting criticism that the JFTC is too timid in demanding remedies.

Interestingly, the JFTC appears to intend to keep the existing system for remedies in parallel with the new commitment system. Amendments to the JFTC's Merger Guidelines appear to imply that companies will have the discretion to proceed under the new system or under the traditional system, and so companies should carefully evaluate the practical advantage of using the new system and how the JFTC presents its preference between them in actual cases.