

JAPAN

JFTC applies Antimonopoly Act beyond borders for first time

ABE & Partners
Osaka



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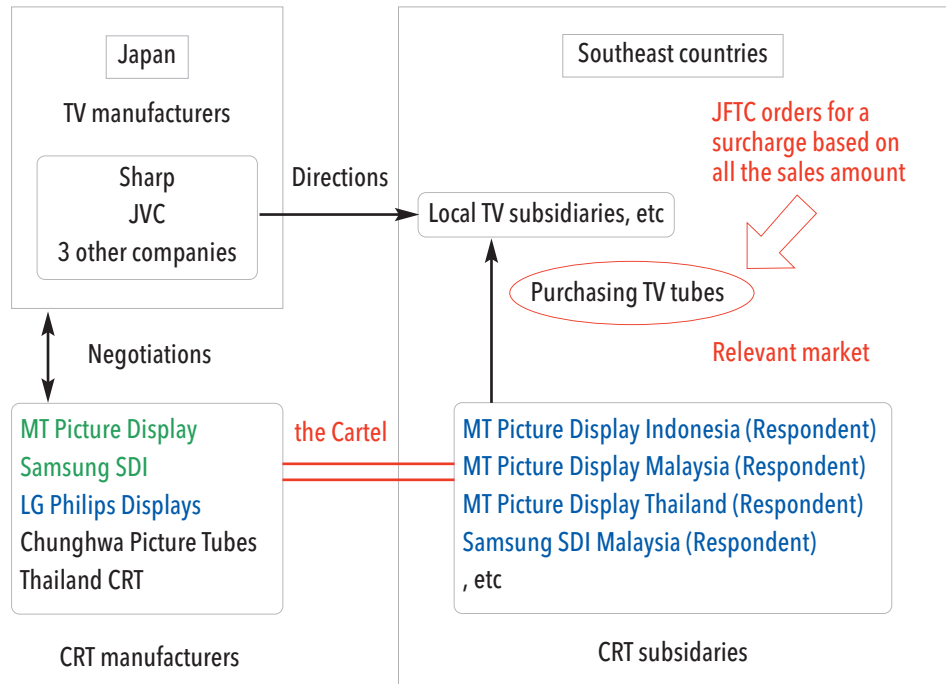
On May 22 2015, the Japanese Fair Trade Commission (JFTC) rendered a decision granting orders for a surcharge to four cathode-ray tube (CRT) manufacturers in southeast Asia based on the Japanese Antimonopoly Act. The total surcharges amounted to about ¥3.2 billion (\$26 million). The companies subject to the order are MT Picture Display Indonesia, MT Picture Display Malaysia, MT Picture Display Thailand, belonging to Panasonic group, and Samsung SDI Malaysia, belonging to Samsung group. The CRT manufacturers in southeast Asia and their parent companies were found to have formed a price cartel in selling CRTs to TV manufacturers in southeast Asia.

In October 2009 and February 2010, the JFTC applied the Japanese Antimonopoly Act to this cartel and ordered surcharges of great amounts on CRT manufacturers. In the orders, the JFTC calculated the amount of surcharges based on all the sales amounts of CRTs outside Japan.

This was the first cartel case in which the JFTC ordered foreign companies who do not have their subsidiaries or branches in Japan to pay a surcharge.

Summary of the case

Sharp, JVC and the three other companies (TV manufacturers in Japan) had their subsidiaries, etc for manufacturing TVs in southeast Asia (local TV subsidiaries). TV manufacturers in Japan selected suppliers of CRTs from CRT manufacturers and let their local TV subsidiaries purchase CRTs. TV manufacturers in Japan negotiated with selected suppliers about the design of CRTs, purchase price and purchase amount.



Green: Companies subject to cease and desist order

Blue: Companies subject to surcharge order

Eleven CRT manufacturers in total (MT Picture Display, Samsung SDI, LG Philips Displays, Chungghwa Picture Tubes, Thailand CRT and their local subsidiaries in southeast Asia including the above four companies) had meetings continuously outside Japan, which they attended from around May 22 2003 to March 30 2007. The purpose of the meetings was to keep steady the sales price of CRTs to be sold to local TV subsidiaries. In the meetings, they formed a cartel to set a minimum target sales price of CRTs to local TV subsidiaries to be kept by each participating company.

In October 2009 and February 2010, the JFTC rendered orders that the cartel fell on "unreasonable restraint of trade" in the Japanese Antimonopoly Act. The JFTC rendered cease and desist orders to two companies: MT Pictures Display and Samsung SDI. The JFTC also rendered orders to pay a surcharge to six companies who had manufactured and supplied CRTs. The surcharges amounted to about ¥4.3 billion (\$36 million) in total.

Among them, two companies filed oppositions with the JFTC against cease and desist orders and four companies filed oppositions against orders to pay a surcharge. We introduce the latter oppositions.

Here the issues were: (1) whether the Japanese Antimonopoly Act could be applied to the cartel and (2) whether the surcharge amount could be calculated based on all the sales amounts outside of Japan.

Decision of the JFTC

Issue 1: the JFTC held the Japanese Antimonopoly Act could be applied to this case as below.

Basic view whether Japanese Antimonopoly Act could be applied to cases outside Japan: Even if companies had conducted unreasonable restraint of trade outside Japan, the Japanese Antimonopoly Act could be applied if the competition in the market is regarding the consumers inside Japan and conducts substantially restrained the competition.

Relevant market: The relevant market in this case is the market in which local TV subsidiaries of TV manufacturers in Japan purchased CRTs from CRT manufacturers in southeast Asia.

Consumers: The JFTC found the facts below and decided that TV manufacturers in Japan were "consumers" of CRTs in

this case.

TV manufacturers in Japan controlled the TV enterprise by local TV subsidiaries, as a whole.

TV manufacturers in Japan negotiated with CRT manufacturers. Through negotiations, they decided important transaction conditions such as purchase price. Thereafter, they directed local TV subsidiaries to purchase CRTs based on their decision and let them purchase CRTs. Without these negotiations, decisions and directions, local TV subsidiaries could not purchase CRTs on their own. Considering these roles played by TV manufacturers in Japan, both TV manufacturers in Japan and their local TV subsidiaries were deemed as having purchased CRTs unitedly, even though local TV subsidiaries were a direct purchaser.

Further, 11 CRT manufacturers and their subsidiaries regarded TV manufacturers in Japan as trading partners, and per a company group, competed for important transaction conditions such as sales price. Thus, TV manufacturers in Japan could expect the competition to be performed among 11 companies.

Considering all of the above, TV manufacturers in Japan were “consumers” in the relevant market and the competition in the relevant market was regarding mainly the consumers inside Japan.

Restraint of competition: The JFTC found that 11 companies substantially restrained the competition in the relevant market because they could control the price of CRTs in the market through the cartel.

Summary: In conclusion, the JFTC decided that Japanese Antimonopoly Act could be applied because the competition in the relevant market was regarding mainly the consumers inside Japan and the competition was restrained substantially.

Issue 2: Next, the JFTC concluded that the amount of surcharges should be calculated based on all the sales amounts of CRTs under the cartel sold to local TV subsidiaries.

The relevant goods whose sales amount

becomes a basis for calculating the amount of surcharges should belong to the category of the goods targeted by a cartel and be under mutual restriction brought by the cartel.

Here, CRTs supplied to local TV subsidiaries belong to the category of the goods targeted by the cartel, and they were under the mutual restriction brought by the cartel. Thus, the surcharge amount should be calculated based on all the sales amounts of CRTs targeted by the cartel supplied to local TV subsidiaries.

Practical tips

The JFTC for the first time ordered foreign companies to pay a surcharge in a cartel case.

According to the decision, the Japanese Antimonopoly Act could be applied even if all business activities, from holding meetings to closing of the contracts, that is the execution of the agreement, are conducted outside Japan and the companies outside Japan are trading partners, if companies inside Japan substantially conduct negotiations, decisions and directions behind the scenes. In addition, according to the decision, foreign companies cannot escape the application of the Japanese Antimonopoly Act even if they are not aware of Japanese companies’ negotiation, decisions and directions behind the scenes. Thus, it has become more difficult for foreign companies to anticipate the scope of the Japanese Antimonopoly Act’s application.

The JFTC held that the amount of surcharges should be calculated based on all the sales amounts of CRTs purchased by local TV subsidiaries. The JFTC did not consider whether CRTs purchased by local TV subsidiaries were supplied inside Japan or to be supplied inside Japan contrary to the prior major theory.

According to Commissioner Odagiri’s concurring opinion, if the JFTC calculates the amount of surcharges based on all the sales amounts supplied outside Japan, and a FTC outside of Japan orders surcharges under the antitrust law of their countries, the foreign companies may suffer double adverse dispositions. It may

bring a remarkable disadvantage to foreign companies. To avoid such disadvantages, one should first investigate substantial consumers of the goods, considering who substantially makes negotiations and decisions about transaction conditions. If they find companies inside Japan make substantial decisions, they should also consider filing an application for leniency with the JFTC.

Recently, as economic globalisation develops, FTCs in various countries such as the US, EU, and China are positive on extraterritorial application of their antitrust laws. To what extent the JFTC will extend the extraterritorial application of the Japanese Antimonopoly Act to conduct outside Japan should be watched closely.