INFORMATION EXCHANGE 2019 KNOW HOW

Japan

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GCR INSIGHT

1 Describe the principal competition rules governing information exchange in your jurisdiction.

There are no specific rules governing information exchange in Japan. However, information exchange may constitute a type of violation of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 14 April 1947), as amended (AML), from the perspective of enforcement of behavioural conduct or merger control.

In addition, the Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act (30 July 1995), as amended (Trade Associations Guidelines), provide some guidance as to the legality of certain information exchange related activities. Although the guidance is intended for the activities of or within trade associations, it is also worthy of reference for undertakings in considering whether contemplated information exchange outside trade associations is allowed under the AML.

2 Which bodies are responsible for enforcing competition rules on information exchange in your jurisdiction?

The Japan Fair Trade Commission (JFTC) has primary jurisdiction over the enforcement of behavioural conduct and merger control under the AML. There are two types of procedures for a violation of the AML: administrative procedure and criminal procedure. The JFTC has sole authority to conduct administrative investigations and impose administrative sanctions (such as cease-and-desist order and surcharge payment order). Contrary to the administrative procedure, the JFTC has authority to conduct criminal investigations but it is unable to impose criminal sanctions (such as penalties or imprisonment). If the JFTC considers that the case in question deserves criminal sanctions, it has to file an accusation with the Chief Prosecutor and it is for the Prosecutor's Office (at its own discretion) to initiate any criminal proceedings.

3 Describe the types of information exchanges that may be caught under the competition rules in your jurisdiction.

As described at question 1, information exchange may be caught under the AML from the perspective of enforcement of behavioural control or merger control.

With regard to behavioural conduct, article 3 of the AML prohibits "unreasonable restraints of trade" that are a meeting of minds (ie, an agreement) between undertakings concerned (in particular but not necessarily limited to competitors) that mutually restricts business activities of undertakings concerned and that would substantially restrict competition in any particular market. The typical example of unreasonable restraints of trade is cartel or bid rigging. An agreement that constitutes an unreasonable restraint of trade is not limited to an express one but includes a tacit one. If a (tacit) agreement between undertakings concerned is made through or due to information exchange and would cause substantial restriction of competition in any particular market, such information exchange is then regarded as leading to a violation of the AML. In order to decide whether a tacit agreement has been concluded through information exchange, the JFTC (and the courts) take into consideration two facts namely: (i) existence of an exchange of competitively sensitive information (eg, intention of price increase); and (ii) subsequent synchronised actions of the undertakings concerned (eg, price increase within a short period of time). This is particularly the case if such information exchange was made with regard to prices, costs or other competitive terms and conditions.

As to merger control, the AML requires the parties to a business combination (eg, share acquisition, merger and business or asset acquisition) to submit a merger filing prior to the closing of the business combination if the relevant thresholds (mostly based on domestic turnover) are met. If the business combination is subject to a merger filing, the parties are prohibited from implementing the business combination prior to filing and the lapse of the statutory waiting period (30 calendar days). In this context, if competitively sensitive information (eg. prices, costs) is exchanged between the parties, in particular between their personnel in charge of sales, prior to making the filing or prior to the lapse of the statutory waiting period, such information exchange may be regarded by the JFTC as amounting to implementation of the business combination and then may fall into a violation of the suspensory obligation (ie, gun-jumping). However, there is no public information as to any case where the JFTC has found a violation owing to information exchange in the context of merger control.

4 Are some information exchanges regarded as more serious breaches of the competition rules than others?

Information exchange, in itself, does not constitute a breach of the AML (except in the context of merger control). However, as described at question 3, the act of exchanging competitively sensitive information may lead to hard core restrictions such a pricing cartel or bid rigging. In such cases, the JFTC would treat information exchange as constituting part of a conduct which falls into a more serious breach of the AML as compared with non-hard core restrictions such as joint production, research and development and distribution and standardisation.

5 To what extent is it necessary for an information exchange to have a negative effect on competition to prove a competition infringement in your jurisdiction?

Information exchange in the context of unreasonable restraints of trade must lead to an agreement or practice that has substantive negative effects on competition in any particular market. The JFTC assesses the degree of the effects as to unreasonable restraints of trade (in both hard core restrictions and non-hard core restrictions) by taking into consideration various factors such as market shares, pressure from other competitors, imports, new entrants, neighbouring markets and customers as well as efficiency gains (although such gains are unlikely to be accepted in the case of hard core restrictions) and by comparing procompetitive effects and anticompetitive effects. Based on past precedents, the JFTC tends to find unreasonable restraints of trade when the entities involved have market power (eg, where the aggregate market share of all undertakings concerned exceeds 50 per cent, although this is not a "safe harbour"). It should be noted that the JFTC tends to narrowly define relevant markets by analysing the object of the agreement in question. This may result in the JFTC identifying multiple relevant markets that can be narrower than a product (eg, by reference to only a particular group of customers or a particular geographical area or even particular bids).

With regard to a violation of the suspensory obligation under the merger control rules, the key factor is to consider whether the fact of the information exchange can be regarded as implementation of the business combination in question. Therefore, theoretically speaking, it is not necessary for such information exchange to have a negative effect on competition. However, there is no precedent of the JFTC finding a violation of the suspensory obligation due to prohibited information exchange. In addition, it is not legally clear that information exchange can constitute a violation of the suspensory obligation because the AML does not adopt the concept of control as a triggering event for a merger filing but provides specific forms as a triggering event for a merger filing (eg, share acquisition, merger, business or asset acquisition), which raises the question of whether information exchange can be regarded as implementing such triggering events. Having said that, careful analysis of the actual risks of such information exchange is needed (even where negative effects on competition do not necessarily arise from such information exchange).

6 What types of information exchanges are not caught by the competition laws in your jurisdiction? For example, are certain types of information exchanges viewed as pro-competitive?

Information exchange may raise concerns under the AML because it may lead to cartel or bid rigging (ie, unreasonable restraints of trade). In this sense, all information exchanges do not necessarily cause a competition problem but only the exchanging of competitively sensitive information would cause such concerns. Therefore, information exchange with regard to non-competitively sensitive information (such as environmental issues, safety, technological issues, general market conditions, political climate, legal and regulatory amendments, public information), in principle, would not be caught by the AML as leading to a violation.

Part II, section 9-3 of the Trade Association Guidelines lists certain types of information exchange which usually do not have the effect of restricting competition and thus in principle do not constitute violations of the AML while Part II, section 9-2 of the Trade Association Guidelines briefly introduces a few cases where the JFTC found unreasonable restraints of trade involving practices prohibited (such as price fixing) in addition to information exchange.

Information listed as not normally having the effect of restricting competition:

- Such matters as the proper use of products or services for purposes of improving consumers' convenience;
- General information on technological trends, management expertise, market environment, legislative or administrative trends and socioeconomic conditions which is provided by government agencies, private research organisations;

- General information regarding the previous business performance such as quantities or value of previous production, sales and plant investment (provided that such information must be statistically and otherwise objectively processed and the information of individual undertakings must not be disclosed);
- For the purpose of providing consumers, previous prices (provided that such information must be statistically and otherwise objectively processed and the information of individual undertakings must not be disclosed);
- Materials or technical indications regarding expense items, degree of difficulty of operation and quality of products/services whose prices are difficult to compare;
- Rough forecasts of demand; and
- Customers' credit standings.

It should be noted that even the above type of information may be caught by the AML under certain circumstances. This would be the case if such information exchange was intended to monitor price restrictions or the information exchanged gives a common indication of current or future prices.

7 To what extent can public information be caught under the competition rules governing information exchange in your jurisdiction?

The exchange of publicly available information would not in principle cause competition concerns under the AML even if it falls under the category of competitively sensitive information. However, as described at question 6, if the undertakings concerned collectively or respectively publish their own competitively sensitive information, in particular prices, in order to have a common understanding of price trends, such information exchange may lead to "unreasonable restraints of trade" and thus constitute a part of a violation of the AML because it gives the undertakings concerned a common indication of current or future prices.

Since information exchange itself does not constitute a behavioural type of violation under the AML, the ease with which the information can be accessed is not always a key factor. For instance, some information disclosed by a third party (eg, a research company) is made available only to subscribers who need to incur a relatively large amount of subscription fees. Exchanging such information may give a common indication of current or future prices to the participants of the information exchange. However, if such information is exchanged in a way that information of each individual undertaking cannot be identified (eg, by anonymising the data or otherwise processing it), the information exchange is unlikely to lead to an agreement between the participants to the information exchange on current or future prices.

8 Are there any specific competition rules in place for certain types of information exchange or certain sectors?

There are no specific competition rules that provide safe harbours for information exchange. Competition concerns caused by information exchange under the AML are, as described in question 3, those that lead to 'unreasonable restraints of trade' or those that violate the suspensory obligation under the merger control rules.

In the case of unreasonable restraints of trade, the JFTC assesses whether an agreement between the undertakings concerned would substantially restrict competition in any particular market. As described at question 5, the JFTC tends to find the existence of a substantial restriction of competition when the aggregate market share of all undertakings concerned exceeds 50 per cent. However, this percentage is not a legal safe harbour threshold but a mere practical indication. In addition, in case of hard core restrictions (eg, pricing cartel, bid rigging), the JFTC also tends to narrowly define the relevant market which makes it easier for it to find a substantial restriction of competition. Therefore, this practical indication of 50 per cent market share should not be heavily relied on, in particular, where the information that is exchanged is of a competitively sensitive nature.

In case of non-hard core restrictions such as joint production, research and development and distribution and standardisation, the JFTC also assesses the legality of the conduct (including accompanying information exchange) under the same framework as for hard-core restrictions (ie, substantial restriction of competition in any particular market). However, in those cases, efficiency gains are also taken into account in the JFTC's assessment, so the aggregate market share of all undertakings concerned is not always a decisive factor.

In addition, if such collaboration is conducted through the creation of a joint venture, the safe harbour rules for business combination provided in the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (31 May 2004), as amended (Merger Guidelines), apply. It should be noted that even if such collaboration is made without any capital tie (eg, other than through a joint venture arrangement), the safe harbour

rules under the Merger Guidelines are practically referenced in the JFTC's assessment. The thresholds of the safe harbour rules under the Merger Guidelines are:

- For horizontal cases:
  - The Herfindahl-Herschmann Index (HHI) after the business combination is not more than 1,500;
  - HHI after the business combination is more than 1,500 but not more than 2,500 while the increment of HHI is not more than 250; or
  - HHI after the business combination is more than 2,500 while the increment of HHI is not more than 150.
- For non-horizontal cases:
  - The aggregate market share of all undertakings concerned after the business combination is not more than 10 per cent in any particular market; or
  - The HHI is not more than 2,500 and the aggregate market share of all undertakings concerned after the business combination is not more than 25 per cent in any particular market.

Further, there are anti-trust immunity rules in certain sectors which are provided under the relevant business laws such as in relation to shipping alliances (eg, the big four shipping alliances such as 2M, G6, CKYHE and Ocean Three) and aviation alliances. Parties to an alliance which is exempted from the application of the AML upon necessary filing to the relevant authorities can exchange even competitively sensitive information to the extent that such exchange is conducted within the alliance, unless unfair trade practices are used or the benefit of consumers is unduly impeded by substantially restricting competition in any particular market.

9 Have public bodies in your jurisdiction published any guidance on the competition rules governing information exchange?

As described at section 1 above, there are no specific guidelines that provide guidance on how information exchange is treated under the AML. However, the Trade Association Guidelines delineate the information activities that are allowed or prohibited under the AML. Although the guidance is intended for the activities of or within trade associations, it can be used as a reference for undertakings that are considering whether a contemplated information exchange outside trade associations can be allowed under the AML.

Please refer to the discussion at question 6 as to Part II, section 9-3 of the Trade Association Guidelines which lists certain types of information exchange which do not usually have the effect of restricting competition and thus in principle do not constitute violations of the AML.

10 What defences are available for information exchanges caught by the competition laws in your jurisdiction.

In case of information exchange that occurred in the context of a hard core restriction (eg, pricing cartel or bid rigging), the JFTC is highly unlikely to accept efficiency arguments because the JFTC considers that efficiency gains from hard-core restrictions do not exist per se and that even if they did exist, such efficiency gains would not overcome the anticompetitive effects on the defined market. The only possible consideration that could be taken into account is that a broader market should be defined so as to avoid the finding of a substantial restriction of competition, but this argument is also unlikely to be accepted by the JFTC.

When information exchange is conducted as part of non-hard core restrictions, efficiency gains obtained from the agreement in question (eg, joint production, research and development and distribution and standardisation) can be available as a possible defence. In particular, information exchange that is limited to non-competitively sensitive information and that contributed to consumer benefits is more likely to be accepted by the JFTC.

In addition, in case where competitively sensitive information is to be exchanged (for instance, purchase prices of raw materials, production costs and volume for joint production and distribution costs, list of customers for joint distribution), the establishment of appropriate information barriers between sales personnel of the undertakings concerned can be possible defences to mitigate competition concerns arising out of such collaboration.

11 What is the standard of proof and on whom does the burden of proof fall in information exchange cases? Are there any scenarios in which the burden of proof is or could be reversed?

Whether or not information exchange is concerned with hard core restrictions or non-hard core restrictions, the JFTC always assesses and must prove whether an express or tacit agreement was concluded which mutually restricts business activities of undertakings concerned (ie, existence of an agreement) and whether the agreement would substantially restrict competition in any particular market (ie, effects test) under the framework of the assessment of "unreasonable restraints of trade".

As described at question 3, when deciding whether a tacit agreement was in place the JFTC and the courts infer the existence of such agreement from two facts: existence of an exchange of competitively sensitive information (eg, intention of price increase); and subsequent synchronised actions of the undertakings involved (eg, price increase within a short period of time). However, this is a rebuttable presumption and the undertakings concerned can argue, for instance, that the subsequent synchronised actions were conducted independently from the information exchange in question and thus no agreement was concluded between the undertakings concerned.

Similarly, if information exchange is concerned with a violation of the suspensory obligation under the merger control rules, the JFTC bears the burden of proof that the undertaking(s) concerned substantively implemented the business combination by the information exchange in question.

12 What are the sanctions for anticompetitive information exchanges in your jurisdiction?

When information exchange leads to unreasonable restraints of trade, there are administrative sanctions and criminal sanctions.

As for administrative sanctions, the JFTC can issue a cease-and-desist order (to take any measures necessary to eliminate conduct which violates the AML) and/or an order imposing a fine on the undertakings concerned that conducted the unreasonable restraints of trade. The amount of fines is calculated by multiplying the sales revenue of the products/services (for a maximum of three years) subject to the agreement concluded between the undertakings concerned by a certain percentage which is predetermined based on types of main businesses of the undertakings concerned under the AML (10 per cent in principle, but 3 per cent for retailers and 2 per cent for wholesalers). A leniency application can be made to try and reduce the administrative fines in case of unreasonable restraints of trade. Full immunity is bestowed on the first applicant, 50 per cent reduction and 30 per cent is respectively available to the second applicant and the third applicant if the leniency application is made prior to the initiation of the JFTC's investigation (normally, a dawn raid). A 30 per cent reduction may be also given to the fourth and fifth applicants (in case of application prior to the initiation of the JFTC's investigation) and to the first three applicants (where the application is made following the JFTC's investigation) as the case may be.

With respect to criminal sanctions, imprisonment for up to five years or fines up to Y5 million may be imposed on individuals who were involved in the unreasonable restraints of trade. To date, however, there has been no case where a prison sentence without stay of execution was imposed on individuals. In addition, fines up to Y500 million may be imposed on the undertakings that either employed those individuals or where such individuals had executive (or similar) positions.

In case information exchange falls into a violation of the suspensory obligation in the context of merger control, a criminal penalty of up to Y2 million may be imposed on individuals (likely a representative) and/or the undertakings concerned to which the individuals belonged. To date, there has been no case where a criminal penalty was imposed for this kind of information exchange.

13 Describe any recent cases in the area of information exchange of note in your jurisdiction, how they were decided and which sections they concerned.

Although there are few cases that focused on information exchange because information exchange itself does not constitute an unreasonable restraint of trade, the conclusion of an agreement through information exchange is always necessary in order for the JFTC to find a violation under the AML. Therefore, in most previous cases of unreasonable restraints of trade in which information exchange was involved, the JFTC found the existence of an agreement on prices or a market sharing agreement and treated information exchange as indirect evidence for such finding.

A typical case in which the JFTC found an agreement for unreasonable restraints of trade by way of information exchange is the recent electrolytic capacitors cartel in the electronic components sector against which the JFTC issued cease-and-desist orders and orders imposing fines on 29 March 2016. According to the JFTC's findings, the participants to the cartel communicated their respective intension to raise their own sales prices of electrolytic capacitors at monthly-held meetings or through bilateral discussions. The JFTC considered that the information exchange helped the participants to conclude an agreement as to jointly raising the sales prices of the products.

In addition, although not a recent case, the decision of the Tokyo High Court regarding Toshiba Chemical's referral back case (25 September 1995) in the chemical components sector is important in considering how information exchange is assessed in the context of unreasonable restraints of trade. As introduced above, the Tokyo High Court explained in the decision that if there is information exchange as to a price increase and subsequent synchronised actions, it is unavoidable to infer that there was a relationship between the undertakings concerned that mutually expected concerted practices and that there was a meeting of minds regarding the price increase. This is unless there are particular circumstances that show that the subsequent synchronised actions were independently arrived at by each of the undertakings concerned and were also independently implemented by taking into consideration the anticipated price competition (which would have existed if the cartel under investigation had not taken place) in the relevant market.

14 Describe any recent changes to legislation in your jurisdiction that may have an impact on information exchanges.

Pursuant to the conclusion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the bill on the introduction of the commitment procedure was submitted to the National Diet and passed on 29 June 2018. The commitment procedure is similar to the commitment system under EU competition law in that it is aimed at resolving suspected violations against the AMA voluntarily by consent between the JFTC and the undertaking(s) concerned. The effective date of the commitment procedure was the date of entry into force of the CPTPP in Japan, ie, December 2018. Under the new system, undertakings that conducted a certain type of violation of the AMA may avoid the issuance of an infringement decision if the JFTC decides to apply the commitment procedure for the resolution of the suspected conduct. More details of the commitment procedure are as follows:

- It covers most of AMA violations including private monopolisation, unreasonable restraints of competition and unfair trade practices. However, the commitment procedure cannot be applied to: (i) hard core cartels such as bid rigging, price fixing cartel, output limitation cartels; (ii) cases that constitute a repeat offence within 10 years; and (iii) particularly serious violations that the JFTC considers deserve to be resolved by application of the criminal procedure. Therefore, only non-hardcore restrictions are impacted by the introduction of the commitment procedure in the context of information exchange.
- Undertakings can benefit from the commitment procedure only at the JFTC's discretion.
- Under the commitment procedure, the undertaking has to submit a plan for commitment measures that must include measures that remedy the suspected violation (or, when the suspected violation stopped, a plan for commitment measures to ensure that the suspected conduct has been eliminated) to the JFTC. In order to obtain approval of the plan from the JFTC, the commitment measures included in the plan must meet the following two requirements: (i) that they are sufficient for eliminating the suspected conduct (or to ensure that the suspected conduct has been eliminated) (the Sufficiency Requirement); and (ii) that they are expected to be reliably implemented (the so-called Reliability Requirement). According to the JFTC's policy on the commitment procedure, there are various types of commitment measures that may be accepted by the JFTC. As examples of measures that meet the Sufficiency Requirement, the JFTC's policy lists a resolution of the decision-making body of the undertaking to confirm that the suspected conduct has been eliminated, notice of such a resolution having been made to trading parties, amendments of contracts with trading parties, transfer of the relevant businesses of the undertaking and restitution of monetary value provided by the trading parties. As for the Reliability Requirement, the JFTC provides the example of establishment of a compliance program by the undertaking and periodical reporting on the state of implementation of other commitment measures.
- The JFTC has a right to seek public comments on the plan for commitment measures submitted by the undertaking or to conduct interviews with third parties including customers and competitors in order to obtain opinions on whether the commitment measures meet the Sufficiency Requirement and Reliability Requirement.

The JFTC will approve the plan for commitment measures as long as it meets the Sufficiency Requirement and the Reliability Requirement. If the JFTC approves the plan for commitment measures, it will not issue a decision that finds a violation of the AML. However, if the undertaking did not implement the commitment measures approved by the JFTC or obtained approval of the plan for commitment measures based on false or wrongful facts, the JFTC can and must rescind the approval.

15 Are there any proposals to reform the rules governing information exchange in your jurisdiction?

The Japanese government adopted a bill to revise the AML, following which: (i) the JFTC would have flexibility in deciding the amount of fines imposed on violators of unreasonable restraint of trade, on the one hand, and (ii) undertakings would be able to enjoy attorney–client privilege that will be first introduced in Japan, on the other hand. The government aims to pass the bill at the National Diet during the current Diet session ending in June 2019 and, if this happens, the new system will be put in force by the end of 2020. This reform concerns information exchange that leads to an unreasonable restraint of trade (ie, hardcore restrictions such as pricing cartel and bid rigging).

The primary revisions included in the bill are:

- to extend the limitation of the term of violation for the purpose of calculating the basic amount of the fine from the current three years to 10 years;
- to extend the term of the statutory limitation period from the current five years to seven years;
- to abolish the exceptional percentage for the calculation of fines applied to retailers (3 per cent) and wholesalers (2 per cent) (so that 10 per cent will be applied to all undertakings);
- to change the leniency programme. As described at question 12, the percentage of leniency reduction is prefixed under the current leniency programme. After the new leniency programme enters into effect, the percentage of reduction will be decided by summing up the prefixed percentage and the variable percentage that is determined by the JFTC taking into consideration the value of the evidence voluntarily submitted by the leniency applicants. According to the bill, the prefixed percentage is 20 per cent for the second applicant, 10 per cent for the third to fifth applicant and 5 per cent for the sixth or after applicant (if the leniency application is made prior to the initiation of the JFTC's investigation) and 10 per cent for the first three applicants as the case may be and 5 per cent for the fourth or after applicants (where the application is made following the JFTC's investigation). The JFTC can vary the leniency percentage up to 40 per cent if the leniency application is made prior to the initiation of the JFTC's investigation and up to 20 per cent where the application is made following the JFTC's investigation. The JFTC will issue guidelines on how it will assess the value of evidence to determine the variable percentage; and
- to introduce attorney–client privilege. Under the current AML attorney–client privilege is not recognised, so the JFTC is theoretically able to seize and use any documents including attorney–client communications as evidence to prove unreasonable restraints of trade. After the new AML enters into force, undertakings will be able to request that the JFTC returns certain types of attorney–client communications that were seized. Communications with in-house counsel will also be subject to attorney–client privilege if it is apparent that the in-house counsel conducts legal affairs independently from and under no control of his or her employer, after the violation in question is revealed and this independence and lack of control is based on the employer's instructions. Also, communications with overseas attorneys will be subject to attorney–client privilege under certain circumstances.

16 Are there any other noteworthy characteristics or practical examples specific to your jurisdiction?

As described above, information exchange itself does not constitute a violation of the AML (except for merger control) and thus information exchange is always assessed under the framework of unreasonable restraints of trade. Unlike some other major jurisdictions, there is no per se illegality or rule of reason test for such conduct. In that context, information exchange is relevant to the JFTC's determination as to whether an agreement or practice that resulted in negative effects on competition, to a substantial degree, existed.

As for merger control, although the law does not expressly provide that information exchange itself can constitute a violation of the suspensory obligation and there are no precedents in this area, there are risks in engaging in such practice prior to obtaining clearance from the JFTC.

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Anderson Mōri & Tomotsune

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