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TOP ANTITRUST LAWYERS

Changes in Japanese cartel law to increase investigations and civil lawsuits in California?

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The Northern District of California has been a primary location for government antitrust investigations and civil lawsuits involving Japanese companies. There are many reasons for this, including the presence of a United States Department of Justice, Antitrust Division office, a strong plaintiffs' bar, and the United States headquarters of many Japanese subsidiaries. Most of these investigations and lawsuits were initiated by the self-disclosure of antitrust issues to the DOJ under its leniency program. Companies with direct sales into the United States often negotiate with the DOJ to obtain leniency. Other countries also have leniency programs designed to encourage self-disclosure of antitrust issues. Japan recently approved the expansion of its leniency program to provide additional benefits to corporations that cooperate with the Japan Fair Trade Commission and additional punishments for those that do not. It remains to be seen whether these upcoming changes will encourage additional disclosures under the Japanese leniency program and whether that will lead to the public revelation of additional antitrust issues that could result in increased litigation in California.

Leniency programs provide certain benefits to those that self-report antitrust issues. Under the DOJ's leniency program, "[c]orporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program." The DOJ describes the leniency program as "its most important investigative tool for detecting cartel activity." Similarly, Japan's leniency program encourages self-disclosure of antitrust issues. The JFTC has said that the purpose of its revised leniency program "is to deter 'unreasonable restraint of trade'" by "increasing incentives for enterprises to cooperate in the JFTC's investigation."

Under the new leniency system, there is no longer a maximum number of applicants before the start of an investigation, and the JFTC can adjust the amount of the surcharge reduction based on the applicant's degree of cooperation.

The DOJ's leniency program has been the genesis of many criminal and civil cases in the Northern District of California against Japanese companies. For example, over the past six years alone, the Antitrust Division has reportedly investigated numerous Japanese electronics manufacturers for potential cartel behavior related to the sale of capacitors, resistors and inductors. Class actions quickly followed rumors about, or public disclosure of, each DOJ investigation. These passive components cases followed the same pattern observed over more than a decade of cartel enforcement in the Northern District of California involving Japanese companies and employees, including manufacturers of TFT-LCD flat panels, cathode-ray tubes and optical disk drives. In several of these recent cartel cases, such as capacitors, there were parallel investigations by the DOJ and the JFTC.

Despite leniency programs' success, there has been widespread discussion among the antitrust defense bar about deficiencies in the programs' current structure. Many believe that the risk/reward ratio of applying for leniency is out of balance because of substantial costs associated with leniency, such as the potential need to seek leniency in multiple jurisdictions around the world and potential exposure in follow-on litigation in the United States. The number of criminal antitrust cases that the DOJ has filed has sharply dropped. The JFTC has seen a steady decrease over the past 10 years in the number of leniency filings. At its peak in 2011, the JFTC reported 143 leniency filings; last year, it reported only 72. Japanese companies face particularly strong disincentives to report conduct under the DOJ's leniency program. Many Japanese companies conduct limited business in the United States. So their potential fines and damage exposure here may be relatively small, which makes the benefits of leniency less valuable. Further, an antitrust investigation often leads to worldwide investigations and expensive civil lawsuits in the United States. These factors may have weighed against Japanese corporations self-disclosing misconduct to the DOJ.

But Japanese corporations may soon have stronger incentives to self-report under

Japan's leniency program. On June 19, 2019, Japan enacted an amendment to its Antimonopoly Act, which will amend the leniency program. The JFTC promulgated proposed rules and guidelines to implement the new leniency program on April 2, 2020. The amendment is scheduled to take effect on Dec. 20, 2020 and, once finalized, would bring significant changes to Japan's antitrust leniency system.

Under Japan's existing leniency system, companies that apply for leniency and report antitrust offenses to the JFTC are entitled to reductions in administrative fines, known as "surcharges." Under the current system, the first applicant to file for leniency before the start of an investigation receives a 100% reduction (i.e., no surcharge), the second applicant receives a 50% reduction, and the third to fifth applicants receive 30% reductions. Once an investigation has started, up to three applicants may receive a 30% reduction each. The maximum number of applicants is five.

Because the amount of reduction is strictly based on the order in which the leniency applications are filed, the JFTC has no ability to make adjustments based on cooperation. Thus, an applicant who manages to fax in an application moments before another applicant is automatically entitled to a larger reduction, even if the later applicant provides much more substantive evidence to the JFTC. And because the number of applicants is limited to five, participants in large cartels may have less (or no) incentive to seek leniency.

Under the new leniency system, there is no longer a maximum number of applicants before the start of an investigation, and the JFTC can adjust the amount of the surcharge reduction based on the applicant's degree of cooperation. The first applicant to file before the start of an investigation would still receive a 100% reduction, but the second applicant would receive a baseline 20% reduction, the third to fifth applicants would receive a baseline 10% reduction, and subsequent applicants would receive a baseline 5% reduction. Based on its determination of how helpful the leniency applicant has been to the investigation, the JFTC can further reduce the surcharge by as much as an additional 40% over the baseline reductions. After the investigation start date, additional applicants may file for leniency up to a maximum of five (including applicants who filed before the start date); the first three of those would receive a baseline 10% reduction, subsequent applicants would receive a baseline 5% reduction, and the JFTC may reduce the surcharge up to an additional 20%. The amendment further encourages leniency applications by significantly increasing the potential penalties for participating in unreasonable restraints of trade, such as price fixing and bid rigging. These include extending the statute of limitations, extending the calculation period for surcharges, and recognizing gains on the part of entities that made no sales as part of the cartel agreement.

These changes to Japan's cooperation benefits and non-cooperation punishment should incentivize more leniency applications and the submission of more substantive evidence of antitrust violations to the JFTC. If the applications and evidence have (or could be argued to have) any relationship to the United States, then applicants will need to consider whether they will be exposed to potential fines and damages in the United States. Leniency applications and evidence often become public, one way or another, which could expose Japanese companies and their subsidiaries to additional cases in the United States and in the Northern District of California, in particular. ■

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