Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law on the Japan Fair Trade Commission's Draft Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges Implementing the Amended Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, the "Sections") take this opportunity to submit to the Japan Fair Trade Commission ("JFTC"), in accordance with its request for comments, the Sections' Joint Comments on the draft rules related to the implementation of the recent amendments ("Amendments") to the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act"). The views expressed herein are presented jointly on behalf of the Sections.[*] They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

The combined membership of the two Sections includes over 20,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, including in Japan, and some do so currently. Members of the Sections have substantial expertise with competition law enforcement in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. These Comments offer the perspective of the Sections, based on our members' experience in the United States in the fields of antitrust and international business law. The Sections hope that these comments will assist the JFTC in its implementation of the Amendments to the Antimonopoly Act.

Introduction and Summary

The Sections welcome the JFTC's invitation to interested parties, such as the Sections, to submit comments on the Amendments. The Sections believe that it will be beneficial to engage in a dialog with the JFTC about the establishment of specific formats for reporting information in the course of seeking immunity, and for the JFTC to establish detailed guidelines in order to provide clear guidance to immunity applicants regarding what will be required of them to obtain immunity or reduction in surcharges

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under the draft Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges (hereafter "the Leniency Rules").

The Sections regret that due to the deadline of August 03, 2005, they are unable to respond more thoroughly to the request for public comments on the many important issues raised by the Leniency Rules. The Sections' comments below will therefore focus on four key issues as follows, namely:

- ? Absence of complete confidentiality and the risk of disclosure of written reports submitted to the JFTC;
- ? Non-disclosure to third parties of the fact of the submission of the reports to the JFTC;
- ? Clarity in the conditions and consequences of a successful application for immunity; and
- ? Coordination of immunity applications under the Leniency Rules with applications in other major jurisdictions.

In this connection, the Sections would welcome further opportunities to submit more substantial comments to the JFTC on these as well as other secondary issues related to the implementation of the Amendments.[1] The Sections would appreciate the opportunity to employ their combined experience in working with leniency programs around the world to propose some suggestions as to how the issues raised in these Comments could be considered further by the JFTC.

Finally, the Sections would like to emphasize that due to the complication of translation between Japanese and English to allow submission by the August 03, 2005 deadline, these comments are limited to the Leniency Rules and do not purport to cover the Rules on Administrative Investigations by the Fair Trade Commission, Rules on Administrative Hearings by the Fair Trade Commission and Rules on Compulsory Investigation of Criminal Cases by the Fair Trade Commission.[2]

[1] For example, the impact on the effectiveness of the Leniency Rules of the levels of surcharges under various circumstances could be explored. As noted by JFTC Secretary-General Uesugi, the "mere introduction of a leniency program does not ensure its effectiveness. Sanctions must be powerful enough in order for a leniency program to be applied for." Enforcement of Competition Laws in Japan, delivered before the International Competition Enforcement Conference, April 20-21, 2005, in Tokyo, at 8, available at http://www.jftc.go.jp/e-page/policyupdates/speeches/050420uesugi.pdf.

[2] Depending on the timely availability of an English translation thereof, the Sections would welcome an opportunity to submit comments after the August 03, 2005 deadline on, for example, certain issues relating to the JFTC Draft Rules on Administrative Investigations, such as the limited access to the investigative file by the investigated parties.

Comments

1. Absence of complete confidentiality and the risk of disclosure of written reports submitted to the JFTC

The Leniency Rules provide that an applicant for immunity must submit to the JFTC a "written report" in both summary and long-form and in predetermined formats (Sections 1(1), 3 and 4 of the Leniency Rules).

Other than the usual protections for trade secrets in materials submitted to the JFTC and statements that the submissions cannot be provided to the competition authorities of other jurisdictions without consent of the applicant,[3] there appear to be no assurances of confidentiality of the written information submitted in the course of requests for immunity in these reports. Specifically, the Leniency Rules contain no guarantees that these written reports and associated documents could not be disclosed compulsorily from the JFTC to plaintiffs pursuing civil damages claims (through class actions or other litigation) against the applicant for immunity and all other companies identified in the written reports, most notably in jurisdictions such as the United States, Canada and in some EU member countries.

It is as yet unclear to the Sections whether the statutory protections for certain classes of information established under Japanese law (for example, under Section 39 of the Antimonopoly Act) would allow the JFTC to successfully resist an order by a court (domestic or foreign) requiring the disclosure of the form and contents of the written reports submitted by applicants pursuant to the Leniency Rules. Consequently, and pending a ruling from the Japanese courts on whether the existing protections for such information would extend to cover these written reports, the risk that such information will be subject to disclosure, including through an order of a Japanese or foreign court, will likely dissuade parties from seeking leniency due to the risk of such information being used in related proceedings, most acutely private treble damages actions in the United States.

These concerns are substantially increased by the fact that, unlike other major antitrust jurisdictions that have or are developing leniency programs, neither the Japanese courts nor the Japanese administrative bodies (including the JFTC) recognize the concept of privileged communications between a client and its attorney.

Perhaps more fundamentally, there is the concern that any written submission is subject to the risk of compelled disclosure from the author of the document or the party seeking leniency. In fact, the requirement of written reports does not follow the increasing international trend towards a paperless process for immunity or leniency

[3] See A. Uesugi, Enforcement of Competition Laws in Japan, delivered before the International Competition Enforcement Conference, April 20-21, 2005, in Tokyo, at 8, available at http://www.jftc.go.jp/e-page/policyupdates/speeches/050420uesugi.pdf ("Of course, information provided with competition authorities in accordance with the leniency program shall be treated as confidential and cannot be provided to the competition authorities of other jurisdictions without consent of the applicant.").

applications. The unavailability of a procedure using solely oral disclosure of the required information may in itself act as a disincentive because of the disclosure risks and, in certain circumstances, disclosure obligations that may arise from the creation of written reports by the immunity applicant.

Currently, the United States Department of Justice ("DOJ") and Canada permit paperless applications in their leniency or immunity programs. Proposals from the Australian Competition and Consumer Commission would permit such a change from their current practice of requiring applications by facsimile.

The European Commission's DG COMP ("EC") has also attempted to limit disclosure and currently permits oral leniency applications, but with transcript certification by the immunity applicant and subsequent distribution with the Statement of Objections to the parties. Recognizing some of the significant difficulties for immunity applicants associated with this approach, the European Commission is currently re-drafting its Leniency Notice[4] to further reduce the risk of disclosure of the minutes of oral leniency applications by treating the written version of such an application purely as an internal resource (as opposed to probative evidence) describing a violation of the EU antitrust law.

These concerns – the lack of any guarantees of confidential treatment by the JFTC of the reports and associated documents submitted by the immunity applicant, combined with the absence of privilege against disclosure of attorney-client communications in Japan and the possibility of compelled disclosure from the leniency applicant – will seriously alter the balance of advantages and disadvantages that any prospective immunity applicant must consider for and against using the procedures set out in the Leniency Rules.

Finally, the integrity of the Leniency Rules would be significantly enhanced if the JFTC were – either in the Leniency Rules themselves or in separate administrative public guidance – to clarify the answers to the following questions. First, would the JFTC share information submitted in the context of a leniency application with other branches of the Japanese government, for any other purpose? Second, could information submitted by the first applicant for immunity be used by the Public Prosecutor in a prosecution against a second or subsequent applicant?

[4] Commission notice on Immunity from fines and reduction of fines in cartel cases, Official Journal of the European Union, No. C 45 of February 19, 2002, pages. 3-5, available at http://europa.eu.int/comm/competition/antitrust/leniency/.

2. Non-disclosure to third parties of the fact of submission of the reports to the JFTC

The three Forms of Reports annexed to the Leniency Rules all provide that:

> *"Without the approval of the Fair Trade Commission, [the applicant for immunity] shall not disclose to third parties the fact that we have made the following report."*

Such a requirement will place parties considering seeking immunity in a difficult position if they are also seeking immunity, or considering doing so, in other jurisdictions.

Immunity applicants under the leniency programs operated by other major antitrust jurisdictions are not required to agree to such non-disclosure. On the contrary, for example, early in the process of considering leniency applications, the DOJ, the EC and the Canadian Department of Justice routinely ask leniency applicants about their infringing conduct worldwide (and not just in the US, the European Union or Canada), including whether leniency has been or will be sought in other jurisdictions.[5]

In fact, such information sometimes *must* be provided to antitrust authorities in order to satisfy the requirements of leniency in their jurisdictions. For example, the DOJ imposes a condition on an immunity applicant to report the infringing conduct "with candor and completeness." An applicant that fails to disclose a leniency application to the JFTC (and thereby obeys language in the current draft Forms), imperils its leniency application to DOJ by risking being seen as having provided less than candid and complete information.

Similarly, one of the pre-conditions for a successful application for either immunity or leniency under the EC's Leniency Notice (cited above) is that the applicant:

> *"… cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement" (paragraph 11(a), emphasis supplied).*

The requirement under the Leniency Rules that the applicant for immunity or leniency to the JFTC not disclose this fact to the EC where the infringing conduct concerned potentially affects the markets of the EU 25 member countries could violate the above requirement of continuous and expeditious cooperation with the EC's investigation.

[5] One of the practical reasons for such requests from these agencies is that the information provided by the applicants enables the requesting agency to act to establish contact with any other agency to which such applications have been or will be filed.

In addition, rules of civil procedure in numerous jurisdictions, including the United States, may obligate an applicant to disclose information regarding leniency applications during the course of discovery. For example, interrogatories served by plaintiffs in U.S. litigation often request such information. The Federal Rules of Civil Procedure require that the recipient of such a discovery request answer it truthfully and completely, unless the information is privileged. Information regarding whether a party has sought leniency from the JFTC would not be privileged, and thus must be disclosed.

Unless the Leniency Rules delete this non-disclosure requirement, many potential applicants for leniency, weighing the typically larger fines imposed on applicants that do not cooperate fully with the agencies in the US, EC and other jurisdictions, will likely decide to forego leniency in Japan.

3. Clarity of the conditions and consequences of a successful application for immunity

The Leniency Rules do not specify what level or standard of disclosure of the facts of a particular violation of the Law is sufficient to obtain immunity. To increase the transparency and predictability of the leniency process, the JFTC should consider adopting the DOJ's practice of making publicly available a model conditional amnesty letter specifying the conditions that attach to a grant of amnesty, including the scope of cooperation obligations.

Specifically, some clarification should be given regarding the consequences of an applicant's inability to supply all of the detail required in the notes to the Forms, and whether a "partial" disclosure is sufficient to obtain immunity.

Potential applicants would also benefit from an explanation of whether, and if so in what circumstances, an immunity granted by the JFTC could be revoked.[6] For example, will leniency applicants be expected to disclose to the JFTC involvement in any and all offenses or otherwise risk losing their status under the Leniency Rules?

To bring the Leniency Rules into closer conformity with international norms, the JFTC should consider incorporating into the rules a clear obligation to provide immunity to applicants that submit a qualifying report prior to the starting date of the investigation. The Sections note for example that the EC's Leniency Notice (cited above) clearly states that provided the Commission can verify that the nature and content of the evidence submitted by the immunity applicant meet the Commission's standards and the evidence is submitted on time, then the Commission will grant the undertaking conditional immunity from fines in writing (see paragraph 16).

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[6] In *Stolt-Nielsen S.A. v. United States*, 352 F. Supp.2d 553 (E.D. Pa. 2005), a U.S. district court enjoined the DOJ from prosecuting and indicting a company after the DOJ had agreed to extend immunity to the company in exchange for cooperating in the investigation of alleged coconspirators. The DOJ contended that the company had breached its agreement by misrepresenting that it had ceased involvement in the alleged antitrust conspiracy earlier than it had done so, and that its failure to correct that alleged misrepresentation after the immunity agreement was executed constituted non-cooperation. This case is currently pending on appeal to the U.S. Court of Appeals for the Third Circuit.

Because the Public Prosecutor appears to have an independent discretion in cases where the JFTC has received and has granted immunity to an applicant under the Leniency Rules, the value of the Leniency Rules to potential applicants would be significantly enhanced if the JFTC could clarify whether, and if so in what circumstances, the JFTC could guarantee that immunity granted by them will not result in any separate action by the Public Prosecutor against the immunity applicant.

The Leniency Rules should state clearly that employees of the first applicant to successfully obtain immunity shall be able to share in the immunity granted to the applicant by the JFTC. The Leniency Rules should also clarify whether that guarantee would extend only to current employees of the first successful applicant or would also benefit former employees, directors and other officers of the first successful applicant. Canadian policy covers cooperating current employees and is negotiable with others.

Finally, potential applicants would benefit from clarification in the Leniency Rules regarding whether and under which procedures the JFTC could request additional information from applicants for immunity or leniency.

4. Coordination of immunity applications under the Leniency Rules with applications in other major jurisdictions

Where immunity applicants are considering the risks and advantages of filing multiple immunity applications with antitrust agencies operating their separate leniency programs around the world, it is vital for first applicants to be able to coordinate their immunity applications in all major jurisdictions affected by the infringing conduct. In the absence of substantive and effectively coordinated rules governing applications for immunity in two or more jurisdictions, steps taken in one jurisdiction to improve or even preserve the applicant's position with one antitrust agency can prove detrimental to the same applicant's interests in other jurisdictions.

Though coordination of multiple immunity applications is a complex issue without easy solution, the JFTC should seek, to the extent feasible and consistent with Japanese policy, to create a leniency program that allows multijurisdictional immunity applicants to receive equivalent (or at least, similar) treatment in the different affected jurisdictions.

Conclusion

The Sections appreciate the opportunity to submit these comments and hope they are helpful to the JFTC. We regard leniency programs as critically important elements of cartel enforcement worldwide, and therefore consider the issues raised in these Comments to be of particular importance. The Sections look forward to continuing to discuss these matters with the JFTC.

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