

The Commitment Case for the First Time at the Japan Fair Trade Commission – MFN Clauses

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On October 25, 2019, the Japan Fair Trade Commission (“JFTC”) announced that it approved a commitment plan proposed by Rakuten, Inc. (“Rakuten”). As a result, the JFTC closed its investigation without finding violation or imposing penalties¹. This is the first case for which the JFTC applied the Commitment Procedure since its introduction on December 30, 2018.

The Commitment Procedure is a procedure by which a competition authority and an investigated company may agree to resolve an alleged violation. This new authority would give the JFTC the ability to negotiate with companies to settle antitrust cases. The concept for the JFTC’s Commitment Procedure is borrowed from the EU Commitment Procedure. It is equivalent to a consent decree or a consent order in the United States.

When the JFTC finds it necessary from the perspective of promoting fair and free competition, it may notify a suspected company that it will proceed with the Commitment Procedure. The JFTC clarifies in the Policies Concerning Commitment Procedures (September 26, 2018)² that (i) hardcore cartels, including bid-rigging and price fixing, (ii) recidivism (a second violation within ten years of the first), or (iii) a malicious and substantial violation that should be subject to criminal penalties, should not be resolved using the Commitment Procedure.

The JFTC has been investigating Rakuten with suspicion of Trading on Restrictive Terms, one of the unfair trade practices (i.e., single firm conduct). Rakuten operates online travel reservation services called “Rakuten Travel” where it provides online services, including those to connect accommodation facilities and consumers who are looking for accommodation.

According to the JFTC Press Release, Rakuten required the accommodation facilities to (i) provide more rooms than the number previously set as the minimum requirement and (ii) provide equal or better conditions with respect to the prices and the number of rooms compared to those available through other distribution channels (e.g., Rakuten Travel’s competitors). These kinds of conditions are known as most-favored nation (“MFN”) clauses or parity clauses.

The JFTC conducted a dawn raid at Rakuten in April of this year. On July 23, 2019, the JFTC notified Rakuten that it would proceed with the Commitment Procedure. In response, Rakuten proposed a commitment plan where it agreed, among various things, to discontinue the MFN clauses described above over the next three years.

¹ The JFTC English translation of the JFTC Press Release is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html>

² The JFTC English translation of the Policies is available at https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/policies_concerning_commitment_procedures.pdf

On October 25, 2019, the JFTC approved Rakuten's proposed commitment plan and closed the investigation. The JFTC did not find any violation conduct by Rakuten nor did it impose any penalties against Rakuten.

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