

Antitrust/Competition

Japan Fair Trade Commission Watch

January 2011

Summary of Key Developments

- The JFTC issued its highest total surcharge ever, JPY 27 billion, in a bid-rigging matter against five companies.
- The JFTC issued final guidelines on the unfair trade practice of “abuse of superior bargaining position.”

**Legislative Developments**

On November 30, 2010, the JFTC released the “Guidelines on the Abuse of Superior Bargaining Position under the Antimonopoly Act,” articulating the agency’s approach to the unfair trade practice of “abuse of superior bargaining position” under the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (“Antimonopoly Act” or “AMA”).¹ This final version of the Guidelines is largely unchanged from the draft issued for public comment in June 2010, despite a large number of public comments having been submitted.²

The Guidelines are broad in scope. As drafted they apply to companies of all sizes and to a broad range of conduct (including a catchall provision that covers undefined “other” unjust conduct).

Under the Guidelines, “superior bargaining position” is relative; it addresses the parties’ comparative bargaining positions, not their overall dominance in the market. Superiority is analyzed based on the level to which the counterparty is dependent on the allegedly superior party’s business (specifically the counterparty’s sales to the party as a percentage of the counterparty’s total sales); the superior party’s position in the market (in terms of rank by market share); the counterparty’s ability to change customers and/or suppliers and the scope of the counterparty’s investment in its business relationship with the superior party; and a number of other factors, including the monetary value of their business relationship, the growth prospects of the superior party, and the difference in the sizes of the parties’ businesses.

The Guidelines forbid superior parties from using “abusive” business practices with inferior counterparties. Prohibited practices include: (1) coerced purchases of goods or services; (2) coerced financial contributions; (3) coerced provision of staff; (4) coerced provision of “other” types of economic benefits; (5) unjustifiable refusals to accept goods; (6) unjustifiable returns; (7) delayed or reduced payments; (8) unjustifiable price reductions, and (9) “other” unjustly disadvantageous conduct. Conduct is measured against “normal business practice” but conformity with this standard does not automatically justify such conduct.

Under the AMA, the unfair trade practice of abuse of superior bargaining position “performed on a regular basis” is now subject to a mandatory surcharge of 1% of the total value of sales or purchases between the superior and inferior parties.

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¹ The Guidelines are available at <http://www.jftc.go.jp/pressrelease/10.november/10113001.pdf> (Japanese only).

² See JFTC responses to public comments, available at <http://www.jftc.go.jp/pressrelease/10.november/10113001besshi2.pdf>.

Enforcement in 2010

Following a landmark enforcement year in 2009, with the JFTC assessing the highest total value of surcharge orders and the highest average surcharge order in the agency's history, vigorous JFTC enforcement continued in 2010. In 2010, the JFTC issued its highest total surcharge ever in a single case, for JPY 27 billion. Other noteworthy developments in 2010 included the first-ever revocation of a party's leniency status and the first-ever surcharge order against a non-Japanese company without a presence in Japan. The JFTC also showed a particular interest in pursuing unfair trade practices cases, including most notably in the area of abuses of superior bargaining position, including violations of the Subcontract Act. In all, the JFTC had a very active 2010, including the last quarter.

Cases

JFTC Orders

Cartels & Bid Rigging

Public Construction in Iwate Prefecture

On December 20, 2010, the JFTC issued surcharge orders to 30 of 106 construction companies that the JFTC had previously found colluded to rig bids on public construction in Iwate Prefecture and to which the JFTC previously issued cease-and-desist recommendation decisions in June 2005.³

On December 23, 2010, it was reported that Iwate Prefecture was considering claiming damages against 39 of the companies for JPY 1.5 billion. The prefecture's claims arose out of contracts between the companies and the prefecture requiring the companies to pay a penalty of 10% of the value of the rigged bids in the event that the JFTC found them to be involved in bid rigging.⁴

Interior Wiring Products

On November 18, 2010, the JFTC issued a cease-and-desist order to two manufacturers of electrical cables (Yazaki Corporation and Fujikura Dia Cable Ltd.) and surcharge orders to four manufacturers of electrical cables, with total fines of JPY 10.84 billion, for conspiring to fix prices of interior wiring products from 2005 to 2009. Yazaki Corporation was ordered to pay JPY 7.26 billion; Sumiden Hitachi Cable Ltd., JPY 2.04 billion; Fujikura Dia Cable Ltd., JPY 1.07 billion; and Furukawa Elecom, JPY 465.05 million. Although the JFTC found that a fifth cable manufacturer, SWCC Showa Cable Systems Co., had participated in the cartel, the company was exempted from fines because

it was the first company to apply for leniency. Sumiden Hitachi Cable, as the second leniency applicant, had its fine reduced by 50%. Furukawa Elecom and Yazaki Corporation were subsequent leniency applicants and therefore had their fines reduced by 30%.⁵ According to the JFTC, the Japanese market for interior electric cables is approximately JPY 200 billion per year.⁶

Incinerators

On November 10, 2010, the JFTC issued a hearing decision upholding a March 23, 2007 surcharge order against five incinerator manufacturers for bid-rigging between April 1994 and September 1998. The total surcharge of JPY 27 billion was the highest in JFTC history. Within days, these companies filed a lawsuit in Tokyo High Court seeking to overturn the hearing decision.⁷ The JFTC's hearing decision followed long-running appeals over the cease-and-desist recommendations first issued to the five companies in 1999. The dispute over these recommendations ended in October 2009, with the Supreme Court rejecting the companies' appeal from the lower court.

Public Construction in Kagoshima

On November 9, 2010, the JFTC issued a surcharge order totaling JPY 1.4 billion to 27 companies and a cease-and-desist order to 31 companies in connection with bid-rigging of public construction in Kagoshima. According to the JFTC, the companies agreed to take joint action on or after April 1, 2006, including deciding which company or joint venture would receive the order and the bid price for the designated successful bidder.⁸

Mail Sorting Machines

On October 25, 2010, the JFTC issued a hearing decision upholding a 2004 surcharge order totaling JPY 4.2 billion against Toshiba and NEC for bid-rigging of mail-sorting machines. The companies plan to file a lawsuit to overturn the JFTC decision in Tokyo High Court. The separate, initial cease-and-desist order for this conduct was issued in 1998.⁹ This order was successfully overturned in Tokyo High Court but the court's judgment was then annulled in 2007. The companies' renewed suit on the cease-and-desist order was rejected by the Tokyo

3 The hearing procedures applicable were the pre-2005 amendment procedures that did not permit simultaneous issuance of surcharge and cease-and-desist orders. Under the pre-2005 procedures, cease-and-desist orders were adjudicated before the issuance and adjudication of a surcharge order.

4 "Iwate Prefecture will claim damages against 39 companies with JPY 1.5 billion because of bid-rigging on construction," Nihon Keizai Shimbun, Tohoku Edition, December 23, 2010; "Bid-Rigging with 91 Companies, JFTC Surcharge Order for 30 Companies with JPY 360 million, Iwate Prefecture," Asahi Shimbun, December 23, 2010 (morning edition).

5 "List of Companies that applied for Leniency in FY 2010," available at the JFTC website at http://www.jftc.go.jp/dk/genmen/tiran22.html#k101118_1. Only companies that consented to the JFTC's reporting their leniency status are listed.

6 See "JFTC Cease and Desist Orders and Surcharge Orders against Manufacturers and Distributors of Electric Wires for Construction and Distribution (Tentative Translation)" (November 18, 2010), available at <http://www.jftc.go.jp/pressrelease/10.november/10111801.pdf>.

7 See "JFTC Hearing Decision" (November 12, 2010), available at <http://www.jftc.go.jp/pressrelease/10.november/1011201.pdf>.

8 See "JFTC Cease and Desist Orders against Participants in Bidding for Offshore Work ordered by Kagoshima Prefecture (Tentative Translation)" (November 9, 2010), available at <http://www.jftc.go.jp/pressrelease/10.november/101109.pdf> for Japanese and <http://www.jftc.go.jp/e-page/pressreleases/2010/november/101109.pdf> for English.

9 As noted above, under pre-2005 amendment procedures, it was required to adjudicate cease-and-desist orders prior to the issuance and adjudication of a surcharge order.

High Court in 2008, and on December 5, 2010, the Supreme Court denied the companies' request for further appeal.¹⁰

Prestressed Concrete Bridge Construction

On September 24, 2010, the JFTC ended its investigation into construction company SMC Concrete, after further investigation by the agency into the company's conduct. This was only the fifteenth case since the AMA became effective in 1947 where the JFTC has issued a "not guilty" decision. This case grew out of a cease-and-desist order issued to a number of construction companies for bid-rigging for construction of a bridge in 2004. SMC Concrete, which had been issued a cease-and-desist order, was one of 11 companies that sought a hearing but so far is the only one that has received a decision of "not guilty." The JFTC did not find any record of SMC Concrete bidding on the bridge construction project during the relevant period.¹¹

Subcontract Act

Between September and December 2010, the JFTC issued a number of recommendations (kankoku) under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors ("Subcontract Act").

DoggyMan Hayashi

On November 29, 2010, the JFTC issued a recommendation to DoggyMan Hayashi, a manufacturer of pet food and equipment, for unjustly reducing subcontractor fees by approximately JPY 31 million between June 2008 and July 2009. DoggyMan Hayashi has already paid back this amount to the 12 affected subcontractors on November 11, 2010.¹²

Tostem Viva Corporation

On October 21, 2010, the JFTC issued a recommendation to Tostem Viva Corporation, a home improvement chain, for violating the Subcontract Act. Tostem Viva had unjustly charged subcontractors various fees, including rebates and transaction fees, in order to maintain its profits. This conduct took place from December 2008 to March 2010. Overcharges totaled approximately JPY 52 million. Tostem Viva Corporation had paid back the affected 51 subcontractors on October 6, 2010.¹³

Honeys Co., Ltd.

On September 28, 2010, the JFTC announced that it had issued women's apparel manufacturer Honeys Co., Ltd. a recommendation under the Subcontract Act for imposing discounts on subcontractors. Honeys had unjustly charged its subcontractors shipping and distribution costs between March 2008 and February 2009. In addition, between March 2008 and May 2009, Honeys charged subcontractors a fixed percentage of the sales price for returned goods in order to reduce costs. Honeys refunded these amounts to the affected 115 subcontractors on September 21, 2010.¹⁴

SSK Corporation

On September 28, 2010, the JFTC announced that it had issued SSK Corporation, a manufacturer and importer/exporter of sporting goods, a recommendation for violating the Subcontract Act. SSK had unjustly reduced subcontractors' commissions from March 2009 until April 2010. These unjust reductions totaled roughly JPY 13 million, which was refunded to 24 subcontractors on September 3, 2010.¹⁵

Union KK

On September 27, 2010, the JFTC announced that it had issued a recommendation to Union KK, a manufacturer of architectural hardware. Union had unjustly reduced subcontractors' commissions by approximately JPY 32 million between March 2009 and April 2010. This amount was refunded to the 125 affected subcontractors on September 15, 2010.¹⁶

Unfair Trade Practices

Johnson & Johnson

On December 1, 2010, the JFTC issued a cease-and-desist order to Johnson & Johnson K.K. ("J&J KK") regarding the unfair trade practice of trading on restrictive terms. The JFTC required J&J KK to show that it had stopped its promotional program restricting retailer advertising for Acuvue contact lenses. The JFTC found that, to maintain price levels, J&J KK had stopped retailers from displaying prices in advertisements for the company's one-day lenses. This conduct, which began in December 2008, ended with the JFTC's raid on the company in March 2010. According to the JFTC, J&J KK allegedly planned to share some of the resulting profits of this arrangement with its retailers, leading most of the retailers to follow J&J KK's instructions. In addition to permanently ceasing this conduct and publicizing this change, J&J KK was required to draft precautionary marketing guidelines, establish an antitrust compliance training program and have its legal department regularly audit the marketing plans. The company stated that it accepted the JFTC's order.¹⁷

10 "Toshiba • NEC Haisokakutei, Yubinkubunnkidangou, Saikousai, Joukoku Shirizokeru" [The Supreme Court denied the Request by Toshiba and NEC on Mail Sorter Bid-rigging Case], Nihon Keizai Shimbun, December 5, 2010 (morning edition).

11 The JFTC Press Release is available at <http://www.jftc.go.jp/pressrelease/10.september/10092401.pdf>, and the hearing decision is available at <http://www.jftc.go.jp/pressrelease/10.september/10092401shinketu.pdf>, "Konkuri Kyouryou Dango, Tochigi Issha no Kanyo Mitomezu" [1 Company in Tochigi found not guilty on Bid-rigging of Concrete Bridge Construction], Nihon Keizai Shimbun, September 15, 2010 (morning edition).

12 See JFTC press release (November 29, 2010), available at <http://www.jftc.go.jp/pressrelease/10.november/10112901.pdf>.

13 See JFTC press release (October 21, 2010), available at <http://www.jftc.go.jp/pressrelease/10.october/10102101.pdf>.

14 See JFTC press release (September 28, 2010), available at <http://www.jftc.go.jp/pressrelease/10.september/10092801.pdf>.

15 See JFTC press release (September 28, 2010), available at <http://www.jftc.go.jp/pressrelease/10.september/10092802.pdf>.

16 See JFTC press release (September 27, 2010), available at <http://www.jftc.go.jp/pressrelease/10.september/10092701.pdf>.

17 See "JFTC Cease and Desist Order against Johnson & Johnson <Tentative Translation>" (December 1, 2010) available at <http://www.jftc.go.jp/pressrelease/10.december/101201.pdf>.

Trade Associations

Construction Association in Gunma

On January 19, 2011, the JFTC issued a warning to the GBX Industrial Association, a construction association in Gunma, for restricting competition on sales of special ditches.¹⁸ The association allegedly restricted competition on sales of these special ditches by: (1) granting intellectual property licensing for the special ditches to association members and limiting the scope of the license to transactions involving the association; and (2) agreeing which association member could buy the special ditches for sales to specific construction companies and setting the target price for such sales.

Mergers and Other Transactions

Google, Inc. and Yahoo Japan Corp.

On December 2, 2010, the JFTC released its opinion on its investigation into a proposed collaboration between Google, Inc. and Yahoo Japan Corp., stating that the arrangement would not “immediately” contravene the Antimonopoly Act. Under this alliance, which was initially proposed in July, Yahoo Japan will use Google’s technology to run its internet search engine and search-linked advertisement distribution system, and Google will use the search terms used on Yahoo to refine its own engine. Once fully implemented, the alliance will result in 90% of all Japanese-language searches in Japan being run through Google’s data centers.¹⁹

In reasoning that the collaboration did not necessarily violate Japanese competition law, the JFTC found that “[a]s the two companies will remain competitive with each other, [Google] will not be holding 90% of the consumer service market.” In addition to the continuing independence of the two companies, the JFTC also indicated that it found no potential collusion regarding advertisements or advertising banners because the companies had created firewalls to prevent the sharing of information on advertising clients and pricing. The JFTC conducted its investigation in response to requests by Microsoft Corp. and Rakuten, Inc.²⁰ The JFTC indicated that it would continue to collect information on the collaboration.

BHP Billiton & Rio Tinto

On October 18, 2010, Australian mining giants Rio Tinto and BHP Billiton announced that they were abandoning a US\$120 billion joint venture for the production of iron ore. This followed inquiries by the antitrust regulators in Australia, Europe and Asia (including by the JFTC). The JFTC had indicated on September 27, 2010 that it had told the companies that their joint

venture could substantially reduce competition, and had offered the companies the opportunity to submit counterstatements.²¹

Recent JFTC Raids

LP Gas Pressure Adjusters

On December 1, 2010, the JFTC conducted raids on Katsura Seiji Seisakujo KK, Yazaki Corporation, Ito Koki Co., Ltd., and Fuji Koki, Ltd. in connection with a suspected price cartel with respect to liquefied petroleum gas pressure adjusters.²²

Edion KK

On November 16, 2010, the JFTC raided the headquarters and nearly 20 outlets of consumer electronics retailer Edion, for suspected abuse of superior bargaining position, an unfair trade practice. Edion is suspected of having illegally used its superior bargaining position to coerce its suppliers, primarily home appliance manufacturers, to send their employees to Edion’s new or re-opened outlets to carry products into the stores, display products, deal with customers and reduce product prices during sales.²³

Bid-Rigging in Ibaraki Prefecture

On September 7, 2010, the JFTC raided approximately 30 construction companies and prefectural government facilities in Ibaraki in connection with suspected collusive bidding done at the initiative of the Ibaraki prefectural government.²⁴

Court Decisions

Iwate Bid-Rigging Case

On November 19, 2010, the first hearing was held in the Tokyo High Court lawsuit by six construction companies in Iwate (Omori Kogyo Co. Ltd., Toishita Construction Co. Ltd., Takumi-Kensetsu, Takamitsu Construction, Takaya Corporation, and Minamikensetsu Co., Ltd.) seeking to overturn the JFTC’s hearing decision upholding cease-and-desist orders in a bid-rigging case.²⁵ (See related description above regarding surcharge orders in this matter.)

18 See JFTC press release (January 19, 2011), available at <http://www.jftc.go.jp/pressrelease/11.january/11011901.pdf>.

19 See JFTC press release (December 2, 2010), available at <http://www.jftc.go.jp/pressrelease/10.december/10120202.pdf>.

20 “Yahoo Japan’s Use of Technological Service Such As Search Engine Provided by Google <Tentative translation>,” available at <http://www.jftc.go.jp/e-page/pressreleases/2010/December/101213.pdf>.

21 “The JFTC closed its prior consultation’s review on the proposed joint venture for iron ore production between BHP Billiton and Rio Tinto <Tentative Translation>” (October 18, 2010), available at <http://www.jftc.go.jp/e-page/pressreleases/2010/October/101018rev.pdf>.

22 “Kousei Torihiki inkai Karuteru de Tachiiri” [Raids by JFTC, Suspected Cartel], Sankei Shimbun, December 2, 2010 (Tokyo morning edition).

23 See <http://www.edion.co.jp/press/pdf/2010111612202782.pdf>.

24 “Ibarakiken Hacchu Koji de Kanseidango Utagai” [Suspected Collusive Bidding at the Initiative of Government Agencies on Public Construction in Ibaraki], Sankei Shimbun, September 8, 2010 (Tokyo morning edition).

25 “Dangou Ninteisinketsu Torikeshi Soshou Koutorii Zenmenteki ni Arasou Shisei” [6 Companies File a Lawsuit to Overturn JFTC’s Decision], Tokyo Yomiuri Shimbun, November 20, 2010.

Private Litigation

Inzai Business Association v. JFE Engineering

On December 28, 2010, the Inzai Business Association filed a lawsuit against JFE Engineering in Tokyo High Court, seeking approximately JPY 475 million for losses caused by bid-rigging of incinerators. The association alleges that JFE's conduct unjustly raised incinerator prices. This lawsuit follows a JFTC hearing decision in 2006 that five companies, including JFE, rigged bids for incinerators.²⁶ The association had previously sent a request for compensation to JFE in June 2010 that JFE rejected.²⁷

Niigata City Construction Case

On December 28, 2010, Niigata District Court dismissed a lawsuit filed by Niigata City against construction company Kindai Doboku Kogyo, seeking damages in connection with collusive bidding conducted at the initiative of a government agency. The court found that the city had failed to satisfy the statute of limitations, having filed its case in March 2010, after the limitations period ended. At the latest, the statute began to run in August 2005, when the city received reports about the case from the JFTC. Niigata City has appealed the District Court decision to the Tokyo High Court, arguing that the lower court applied the statute of limitations incorrectly.²⁸

Sasebo City and Kawasaki Heavy Industries

On November 13, 2010, the press reported ongoing settlement negotiations between Kawasaki Heavy Industries and Sasebo City in connection with alleged bid-rigging for incinerators, in 1997. Kawasaki Heavy Industries' settlement offer of JPY 463 million is considerably less than Sasebo City's request for JPY 920 million. Sasebo City is threatening to file a private lawsuit against the company unless the matter is resolved.²⁹

Commentary

Recent Trends Regarding Abuse of Superior Bargaining Position

By Jiro Tamura, Professor of Law, Keio University and Special Advisor to White & Case

The concept of abuse of superior bargaining position is becoming more important than ever in antitrust practice. This is a result of the introduction of surcharges for abuse of superior bargaining position, which are applied on an immediate basis to

each offense. This differs from the previous situation whereby surcharges for unfair trade practices were only imposed on offenses that had been repeated within a ten-year period. This major change in the sanctions imposed against unlawful practices means that lawyers and businesspeople need to have a proper understanding of abuse of superior bargaining position.

In 2009, the JFTC established an internal task force to increase the restrictions in place against abuse of superior bargaining position. In the future it is predicted that the JFTC will crack down on abuses of superior bargaining position and that there will be an increase in such cases.

However, references to abuse of superior position in the law are couched in abstract terms. This has resulted in a lot of discretion being given to the JFTC, which led to the criticism that it is difficult for companies to predict whether a given act will be lawful. The JFTC responded to this criticism by publishing its Guidelines Concerning Abuse of Superior Bargaining Position in November 2010, which attempt to clarify the JFTC's position on the implementation of the law. These guidelines do not introduce any new criteria, but rather reflect existing JFTC practices.

What we must be most aware of is the criteria applied when determining whether abuse of superior bargaining position has occurred. Unlike the concept of "dominant position" under European competition law, its Japanese counterpart is assessed on the basis of not only the company's rank in the market but also the degree to which the counterparty depends on its business. For example, in a case where a large-scale retail outlet asked a supplier to make monetary payments towards a store opening, under the pretext of a "contribution" (this refers not to a request to invest, but rather to a request to make a monetary contribution that carries no prospect of a return), at issue was not only the degree of influence of the large-scale retail outlet in the market but the trading relationship between the large-scale retail outlet and its supplier. This means that even a retailer with a small market share may be deemed to enjoy a superior bargaining position in relation to its supplier on the basis of the trading relationship. Obviously the higher the retailer's ranking in terms of market share, the greater the chance of its being judged to enjoy a superior bargaining position. Therefore even more caution is required if the company in question has a large market share. It should also be noted that superior bargaining position does not only affect transactions that involve the delivery of merchandise. Indeed, one banking corporation was found to have violated the Antimonopoly Act when it requested that recipients of loans purchase interest swap products.

In order to constitute abuse, the act in question must be unjust in the context of normal business practice. Conduct is particularly likely to be deemed abuse if it does not benefit the other party to the transaction whatsoever. However, the range of conduct that can be found to violate the Act is very broad, and includes late payment, non-payment, unjust returns of house brands and other unjust returns, and "negotiation of the amount of

²⁶ The hearing decision is available in Japanese at <http://www.jftc.go.jp/pressrelease/06.june/060628.html>

²⁷ "Gomishoukyakurodango de Songai" Inzaichiku Jigyokumiai ga Kyousha teiso/Chibaken" [Inzai Business Association Sues JFE for losses by Bid-Rigging], Asahi Shimbun, December 29, 2010 (morning edition).

²⁸ "Dangoumeguru Songaibaishouseikyuu, Niigatashi no Uttae Kiyaku Chisai" Seikyuuken wa Shoumetsu" [Niigata District Court dismisses a lawsuit over bid-rigging], Asahi Shimbun, December 29, 2010 (morning edition).

²⁹ "Kawasaki Juukou, Dangobaishou Moushida Saseboshi ni 4 oku 6 sennmanner/Nagasaki" [Kawasaki Heavy Industries Offers a Compensation to Sasebo City], Asahi Shimbun, November 13, 2010 (morning edition).

consideration payable for a transaction” (See (5)(a) of 4,3 of the Guidelines). Negotiation of the amount of consideration payable for a transaction is deemed to refer to “a case where a party that enjoys a superior bargaining position arbitrarily orders a party with which it trades to accept an extraordinarily low or high price, and said other party is forced to accept out of fear of jeopardizing future business.” The Guidelines also state that “when determining whether conduct constitutes abuse of superior bargaining position, a holistic assessment is performed, taking into account how the amount of consideration was determined (e.g., whether the parties carried out sufficient discussion in advance), whether the treatment of the other party could be seen to be discriminatory when compared with that afforded to other trading partners, whether the consideration paid was lower than the wholesale price paid by the vendor, and to what extent the sale/purchase price of the merchandise differed from the normal rate, in addition to the supply of/demand for the merchandise or service in question on the market.” This means that careful analysis must be performed in order to determine whether the details of contracts entered into between the parties could result in a violation.

When analyzing practices relating to abuse of superior bargaining position, the “Subcontract Act” is more useful than the Guidelines. While the Subcontract Act is applied in such a way that only certain types of entities can be deemed to violate it, almost all case studies of abuse of superior bargaining position given in the Guidelines are in fact cases that resulted in violations of the Subcontract Act. It follows that Subcontract Act case studies should be considered in order to understand the Guidelines.

The term “abuse of superior bargaining position” is generally seen as referring to the act of exploiting a subcontractor or other entity in a weaker position than oneself for one’s own

benefit. Therefore, media coverage of JFTC raids or cease-and-desist orders may damage the image of that company. However, unlike cartels or collusion, in the case of abuse of superior bargaining position, whether or not an act constitutes abuse of said superior bargaining position is determined on an individual and specific basis. Therefore irrespective of how detailed the Guidelines may be, the JFTC still needs to perform careful analysis and evaluate evidence when determining the illegality or otherwise of a given case. While companies for their part must obviously avoid any blatant violation, an overly cautious approach will actually have the result of impeding free competition. For this reason, when issuing cease-and-desist orders the JFTC needs to describe in detail what criteria it used to determine illegality. For their part, companies should seek expert advice when establishing whether given conduct would violate the restrictions on abuse of superior bargaining position.

Further Reading

JFTC Responses to Public Comments on Draft Guidelines on Abuse of Superior Bargaining Position (November 30, 2010) (Japanese only):

<http://www.jftc.go.jp/pressrelease/10.november/10113001besshi2.pdf>

JFTC’s Press Release regarding Guidelines on Abuse of Superior Bargaining Position (November 30, 2010) (Japanese only):

<http://www.jftc.go.jp/pressrelease/10.november/10113001.pdf>

Guidelines on Abuse of Superior Bargaining Position: (Japanese only):

<http://www.jftc.go.jp/pressrelease/10.november/10113001besshi1.pdf>

Notes

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