

Antitrust Aspects of Dealing with the Japanese Earthquake

13 May 2011

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The present On The Subject draws attention to two Communications issued by the Japan Fair Trade Commission (JFTC) on the extent to which industry coordination intended to deal with the aftermath of the great Tohoku earthquake catastrophe will or will not run afoul of Japanese antitrust rules.

The JFTC's guidance does not apply to business activities outside Japan. The extent to which Japanese producers can restrict or allocate supplies to customers in the United States of America and the European Union in order to deal with shortages caused by the catastrophe is a matter of US and EU antitrust law respectively, and on which we would be happy to advise specifically.

JFTC Communication on the Delivery of Relief Supplies

The first JFTC Communication, issued on 18 March 2011, is about industry coordination in the delivery of relief supplies to the disaster areas. The JFTC Communication clarifies that such coordination does not raise competition concerns under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Anti-monopoly Act).

The JFTC provides three reasons for its conclusion. First, arrangements between companies or by a trade association with respect to delivery routes or delivery service providers in the current crisis are based on the public objective of providing relief supplies to the disaster-stricken region quickly and effectively. Second, those arrangements are concluded during a period of serious shortage of supplies. Third, there will be no risk of discrimination against particular undertakings.

JTFC Communication in Respect of Power Saving

The second JTFC Communication, issued on 11 April 2011, lists seven practices that may be implemented in order to meet government power-saving targets during the peak summer season and that the JFTC considers as not giving rise to competition concerns under the Anti-monopoly Act. The practices can be organized either by trade associations or among companies.

The JFTC points out that if companies are forced to participate in or to comply with a particular practice, or if discrimination arises, the practice can be anti-competitive. The JFTC also warns against using the excuse of power-saving as a justification for engaging in price- or quota-fixing.

The seven authorized practices are:

- Requests made by a trade association to its members to meet the power-saving targets
- Coordination to shift operating hours in order to reduce peak power consumption in summer
- Arrangements to shift non-operating days in order to meet the power-saving targets during weekdays
- Indication by a trade association of time units used when shifting operating hours or non-operating days (e.g., an hour, half a day, a day, a week)
- Suggestions made by a trade association to its members to introduce energy-saving equipment
- Agreements on brightness of lamps, volume of loudspeakers, temperature of air conditioners or amounts of ventilation, as well as production of best practice guidelines in relation to such agreements
- Publication by a trade association of its members' energy-saving efforts, including announcements of changes of operating hours or non-operating days

Antitrust Q&As

The JFTC has also published a set of Q&As. These warn against recourse to price cartels and abuses of market position by way of capitalizing on the situation after the disaster. It is also pointed out that a prime contractor may not refuse to accept any goods ordered nor return them to a subcontractor solely on the ground that the subcontractor is located in Fukushima prefecture, where a nuclear power plant was badly damaged by the earthquake. Such a refusal or return may raise issues under the Sub-contract Act, an act complementary to the Anti-monopoly Act.

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