

Japan FTC's Doors Are Open

Commission guards fair competition, keeps doors open to foreigners on patent, technology licenses

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The Antimonopoly Act of Japan (officially referred to as the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade) requires Japanese enterprises to file designated types of international contracts, including patent and technology licenses, with the Fair Trade Commission of Japan (JFTC) within 30 days after execution. The JFTC reviews such contracts, and if it identifies any possible violation of the Antimonopoly Act, remedial steps, including revision of articles in question, are advised. The full understanding and cooperation of foreign enterprises¹ is essential if the JFTC is to run the scheme effectively and smoothly. In order to enhance such understanding, I will explain some of the key aspects of the scheme, together with my own views on its advantages and disadvantages. I will primarily address the procedural aspects, and leave other more general aspects to the discussion in an earlier article.²

LEGAL STATUS OF PARTIES TO THE CONTRACT VIS-A-VIS THE ACT

The Antimonopoly Act requires filing of international contracts as a means for the JFTC to enforce the prohibition against contracts that constitute unreasonable restraint of trade or unfair trade practices (Article 6, Items 1 and 2). It is the Japanese party to a contract that has the obligation of filing. The JFTC can levy a fine on a Japanese enterprise of less than 2 million yen if the enterprise does not file. However, foreign enterprises are not under such an obligation, and consequently, they are not subject to a fine even if contracts to which they are a party are not filed.

Further, based on Article 7 of the act, the JFTC can order a Japanese enterprise to file a contract, or to cancel the contract that is in violation of the prohibition as stipulated in Article 6. In case the Japanese party does not comply with such an order, the JFTC can subject the party to its formal trial procedure. Foreign enterprises are legally free from such obligations and penalties.

All these differences in status between Japanese and foreign enterprises, which stem from jurisdictional limit of the Antimonopoly Act, compel the JFTC to

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treat Japanese enterprises differently from foreign enterprises. In spite of their lack of formal status, however, the JFTC gives due regard to foreign enterprises.

Review Standards

As stated earlier, the JFTC reviews contracts to see if they contain provisions that constitute an unreasonable restraint of trade or unfair trade practices. More specifically, "unreasonable restraint of trade" refers to "cartels" that are composed of enterprises that are horizontally related. On the other hand, when practices engaged in by those that are vertically related impede fair competition they are deemed "unfair trade practices". The JFTC has compiled the types of unfair trade practices that occurred often in patent and technology licenses, and has published them as guidelines (see Appendix).

I shall make three points regarding the standards the JFTC follows in reviewing contracts.

First, the JFTC does not apply the guidelines for unfair trade practices mechanically (i.e. it does *not* adopt per-se rules of legality). Rather, it always examines the effect of the contracts on competition in the market; it follows the "rule-of-reason" approach. In this examination, therefore, the JFTC considers worldwide economic and technological conditions.

As a corollary to this point, I shall mention something on the new approach toward regulating practices in vertical business relationships that has been adopted in the U.S. According to the new approach, as I understand, enterprises are not allowed to carry out the practices in the vertical relationships if they adversely affect the competition in the market, as compared to the previous approach where a wide range of practices was prohibited on the "per-se" basis. Thus, the JFTC's standards, including those for vertical business relationships, are similar to those of the U.S. at present.

Competitive Situation

Second, I point to the fact that the JFTC's review standards do not contain any element that is intended to protect the interest of Japanese industries. Instead, the JFTC looks solely into the effects that a contract may have on the competitive situation in the market. It is true that the JFTC looks into competition in the

1. The expression "Japanese enterprises" used in this paper should be interpreted to mean those enterprises that fall within the Japanese jurisdiction. Accordingly, "foreign enterprises" mean those enterprises that do not fall within the Japanese jurisdiction.
2. *International Transactions and the Antimonopoly Act of Japan*, TOSHIKAZU NASU in the *Japan Business Law Journal* Vol. 3 No. 7 (July 1982).

Japanese market only, but this is because of the jurisdictional limit of the act. This is also true with respect to anticompetitive legislation in any other country. Clearly, the focus on the Japanese market is something quite different from protection of the interest of Japanese enterprises.

Third, it is important to note that the JFTC's review standards have been made public in the act itself and, more substantially, in the form of the guidelines. Therefore, a foreign party to a contract can check the JFTC's comments against such published materials when the comments are conveyed to it by its Japanese party. Actually, many representatives of foreign as well as Japanese enterprises have obtained copies of the guidelines as translated into English and made available at the JFTC.

CONSULTATION AND ADVICE

The JFTC accepts consultation requests with respect to international contracts from foreign as well as Japanese enterprises. In fact, discussions with representatives of foreign enterprises are no longer a special event for the JFTC and are held on a routine basis. In most cases, the representatives come to the JFTC accompanied by their Japanese counterparts, but the JFTC has accepted and will continue to accept consultations solely with foreign enterprises.

The JFTC accepts such requests at all stages. Consultations at the drafting stage of a contract seem to be useful by enabling parties concerned and the JFTC to avoid revisions in the contract at a latter stage when it is already executed. Some foreign enterprises want to explain to the JFTC the background and intention of the parties and the contract provisions at the time of filing the contract with the JFTC.

If the JFTC identifies potential problems in a contract, it will first ask the Japanese enterprise about background, intention and justification. This inquiry may be made over the phone, or may require visits by the Japanese enterprise representatives to the JFTC. Through this inquiry process, the JFTC evaluates the contract's effect on the competition in the market, and advises, if necessary, as to the way the contract should be revised.

Representatives of the foreign enterprises are also welcome to attend the discussions. During the five-year period from Fy 1977 to Fy 1981, the JFTC advised revisions with respect to about 14% of the total number of the contracts filed, whereas it undertook such inquiry on a much greater number of contracts.

Upon receiving the JFTC's advice, the Japanese enterprise conveys it to the foreign party and negotiates necessary revisions of the contract. The JFTC does not inform the foreign party of the advice. This is partly because, legally, the Japanese party represents the contract to the JFTC, and partly because the JFTC is open to discussions with the foreign party whenever the party wants. Although foreign parties learn of the JFTC's advice initially through their Japanese counterparts, this should not cause hardship on the foreign parties because they can check the information with the JFTC whenever necessary. It should be noted that foreign parties take

advantage of the opportunity to visit and check with the JFTC on a regular and routine basis.

CLEARANCE

The JFTC normally reviews contracts within two months after they are filed. Therefore, if enterprises do not hear from the JFTC during this period, or if the JFTC does not request for revision in the contract after inquiry, parties to the contract can assume that their contract has been cleared by the JFTC.

Until June 1968, when the government of Japan removed restrictions on foreign capital and licenses, patent and technology licenses required prior approval by the relevant ministers pursuant to the Foreign Capital Act. In order to avoid duplicate review process—one for the Foreign Capital Act and the other for the Antimonopoly Act—a joint review was conducted. Approval constituted acceptance under both acts. Although the approval under the Foreign Capital Act has not been necessary since June 1968, the filing and review procedure for the Antimonopoly Act remained. The need to maintain a competitive market was not eliminated even when Japan emerged as a developed country.

The change in 1968 may have caused some confusion regarding the nature of the clearance that the JFTC gives at present. Contracts must be filed so that the JFTC can enforce the provision to ban anticompetitive contracts as stipulated in Article 6 of the act. Therefore, no action by the JFTC after its review of a contract simply means that there is no reason to question any contract provisions at that stage on the then available information and conditions.

However, the JFTC has the authority to review the contract at anytime in the event subsequent changes in conditions relating to the contract result in anticompetitive effects, or additional information not disclosed earlier is judged to result in anticompetitive effects.

Thus, it must be understood that the JFTC merely gives a de facto and not a de jure clearance to contracts.

The clearance is limited by the two factors, i.e. change in conditions and the addition of new information. However, this is not really different from the formal clearance schemes of other countries. For example, those in the U.S. and EC also attach these conditions. Even before June 1968, the nature of "approval" was exactly the same as that of the present clearance as far as the effect of the Antimonopoly Act was concerned.

EFFICIENT AND OPEN SCHEME

I believe that the JFTC's filing and review scheme will gain increasing importance as a means to monitor international transactions, since such transactions will have increasingly greater influence over the state of competition in Japan in the future. While other countries are also trying hard to monitor such transactions no country has developed a scheme which, to my mind, are as effective and efficient as those of the JFTC.

I also believe that the JFTC scheme is in the best interests of the parties to the contract. Here again, my view is that JFTC's scheme is most pragmatic and effi-

cient. An enterprise has only to supply the JFTC with a copy of the contract together with a few sheets of basic information.

In many cases passage of the two-month period results in a de facto clearance. If the JFTC finds a problem during its review, it can be resolved easier than later when the contract has been implemented based on illegal provisions. I feel strongly that the use of oral advice rather than a formal written order provides the degree of flexibility necessary to reach the best solution in the most efficient and effective manner.

The JFTC scheme also differs from the negative clearance schemes of other countries in that the JFTC's scheme does not provide a public announcement that the contract was cleared. I believe that the use of oral communication in place of written orders substantially reduces the amount of time and effort re-

quired by both the parties and the JFTC. Although business review letters of the U.S. Department of Justice are made public, their effect seems to be the same as that of clearance with the JFTC; for instance, neither testifies in any way that the case is lawful. Furthermore, under the business review letter scheme, some information supplied by the enterprises must be disclosed publicly. All this points to the practical advantages of the JFTC's scheme.

In summary, I have repeatedly stressed that the JFTC's scheme permits discussions with the JFTC by either parties to an international agreement at any stage. Numerous parties, both Japanese and foreign, have been using and continue to use this opportunity. The JFTC has never turned down a request from a foreign enterprise for consultations, or treated unfavorably the foreign enterprise that urged it to have discussions with them.

ANTIMONOPOLY ACT GUIDELINES FOR INTERNATIONAL LICENSING CONTRACTS

May 24, 1968

Fair Trade Commission

I. Among the restrictions which are likely to come under unfair trade practices in international licensing transactions on patent rights or utility model rights (hereinafter referred to as patent rights) the following are outstanding:

(1) To restrict the area to which the licensee may export the goods covered by the patent rights (hereinafter referred to as the patented goods).

However, in cases coming under a), b), or c) listed below, the restriction is permissible.

a) In case the licensor has registered the patent rights for the area to which the licensee's export is restricted (hereinafter referred to as the restricted area);

b) In case the licensor is regularly selling the patented goods in the restricted area; and

c) In case the licensor has already granted to a third party an exclusive license to sell in the restricted area.

(2) With respect to the case where the licensee exports the patented goods, to restrict prices or quantities of the exports, or to make it obligatory for the licensee to export through the licensor or a person designated by the licensor.

However, the restrictions are permissible when the export is to the area coming under either of the preceding a), b), or c) and when the restrictions are within reasonable extent.

(3) To restrict the licensee from manufacturing, using or selling the goods, or employing the technology that are in competition with the licensed subject.

However, the restrictions are permissible when the licensor grants the license exclusively to the licensee and does not impose that restriction on goods already being manufactured, used or sold, or technology already being employed by the licensee.

(4) To make it obligatory for the licensee to purchase raw materials, parts, etc. from the licensor or a person designated by the licensor.

(5) To make it obligatory by the licensee to sell the

patented goods through the licensor or a person designated by the licensor.

(6) To restrict the resale prices of patented goods in Japan.

(7) To make it obligatory for the licensee to inform the licensor of knowledge or experience newly obtained regarding the licensed technology, to assign to the licensor patent rights with respect to an improved or applied invention by the licensee, or to grant the licensor licenses thereon.

However, such obligations are permissible when the licensor also bears similar obligations and the obligations of both parties are balanced in substance.

(8) To charge royalties based on sales of the goods that are manufactured without the licensed technology.

(9) To restrict the quality of raw materials, parts, or patented goods.

However, such restrictions are permissible when they are required to maintain creditability of registered trademarks or to insure the effectiveness of the licensed technology.

II. The aforementioned guidelines may be applicable also to international know-how licensing contracts.

III. For international licensing contracts on patent rights, the following acts shall be deemed as the exercise of rights stipulated in the Patent Act or the Utility Model Act:

(1) To grant a license limiting its scope to manufacturing, using or selling.

(2) To grant a license for a limited period of time within the life of the patent rights or for a limited area within the area covered by the patent rights.

(3) To grant a license limiting the scope of the licensed technology to the manufacture or the sales of certain goods.

(4) To grant a license on patented processes limiting to certain purposes.

(5) To restrict the amount of output or the amount of sales of the patented goods, or to restrict the frequency of the use of the patented processes.