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Former FTC commissioner, US judge submit comments to Japan's competition regulator

PaRR Confirmed

A US federal judge, a former Federal Trade Commission (FTC) commissioner and others have submitted a comment to the Japan Fair Trade Commission (JFTC) “strongly” urging the agency to adopt a “fair and transparent” due process.

The Global Antitrust Institute at George Mason University’s law school made a submission on 6 August in response to the JFTC’s solicitation for comments on a study group report reviewing the current antitrust violation surcharge system.

US federal judge Douglas Ginsburg, former FTC commissioner Joshua Wright, law professor Bruce Kobayashi and the institute’s director Koren Wong-Ervin authored the report.

Koren told *PaRR* that the JFTC needed to provide fundamental due process. In addition to legal representation for parties at all times, the JFTC should ensure the right to appeal for access to all evidence possible in cases.

She said surcharges should be based on the economics of optimal penalties, which means penalty fines should be set at a “level sufficient to induce offenders to internalize the full social cost of their illegal conduct” and nothing more.

Koren also criticized the inclusion of abuse of superior bargaining position in Japan’s competition framework.

The GAI comment said the current JFTC surcharge system was “inflexible” and “unlikely to accurately reflect the degree of economic harm caused by anticompetitive practices.”

The GAI said the JFTC should limit punitive surcharges to certain matters, including only those where the antitrust violation is clear and the harm caused by the violation can be easily calculated.

According to the comment, the JFTC should extend the situations under which it will not go after punitive surcharges to violations widely regarded as having efficiency justifications, such as unilateral conduct and vertical restraints. The GAI said surcharges imposed should rely on economic analysis rather than sales volume to evaluate the harm caused by violations.

A senior JFTC official told *PaRR* all comments received will be relayed to the study group reviewing the surcharge system.

The JFTC study group with 16 members, comprised mostly of academics, is assessing whether adopting a system to simplify the calculation of base fines may improve the agency’s operational efficiencies.

The JFTC study group has been discussing ways to incentivize firms to cooperate in antitrust investigations through better incentives, such as discounting fines for those who cooperate.

by Yuri Nagano in Los Angeles

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