

US thinktank advises JFTC to fine-tune sanctions regime

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George Mason University (Credit: Ron Cogswell/Flickr)

Japan's Federal Trade Commission should adjust its fining regime, particularly its sanctions methodology and settlement procedure, to avoid penalising potentially pro-competitive behaviour, the Global Antitrust Institute at George Mason University's Antonin Scalia Law School has said.

The GAI submitted several recommendations to Japan's competition authority on Saturday, responding to a consultation initiated by the JFTC in July on possible reforms to its administrative fining regime.

The institute, which was established in 2014 and is led by former officials of the US antitrust agencies, said the JFTC should adjust how it calculates administrative surcharges, improve due process and reconsider when to agree settlements with violators of the country's competition rules.

Penalties

“We agree with the JFTC that the current inflexible system of surcharges is unlikely to accurately reflect the degree of economic harm caused by anticompetitive practices,” it said in its response to the consultation.

The institute advised the competition enforcer to restrict punitive surcharges to matters where a violation is clear; the harm caused by it can be calculated; that calculation of harm is the basis for any penalty; and no alternative remedies would provide adequate deterrence.

“At the very least, we strongly urge the JFTC to expand the circumstances under which it will not seek punitive surcharges to include two types of conduct that are widely recognised as having efficiency justifications: unilateral conduct, such as refusals to deal and discriminatory dealing, and vertical restraints, such as exclusive dealing, tying and bundling, and resale price maintenance,” it said.

“We also strongly urge that the surcharge system not apply to violations, such as unfair trade practices, that do not require a showing of harm to competition.”

Kimitoshi Yabuki at Yabuki Law Offices in Tokyo said the JFTC ordinarily sanctions companies that commit unfair trade practices, so how likely the competition enforcer is to adjust in this respect remains unclear.

“The important point is to scrutinise what the optimal penalty should be depending on types of unfair trade practices such as abuse of a superior bargaining position,” he said.

Yabuki welcomed many of the other GAI recommendations, agreeing that optimal penalties should be calculated based on economic analysis.

“The penalties should vary depending on types of violations such as cartels and dominance,” he said. “Particularly, I agree that the JFTC should carefully construct its penalty regime on dominance cases.”

Settlements

Commenting on the Japanese enforcer’s settlement procedures, the institute recommended that the JFTC establish safeguards to prevent settlements that are unrelated to the original infringement, while limiting the use of extended monitoring programmes.

“In our observation, consent decrees and commitments extracted to settle a case too often end up imposing abusive remedies that undermine the welfare-enhancing goals of competition policy,” the institute said.

If companies are settling merely to avoid the costs of fighting the charges, “an agency may be able to extract more restrictive terms on firm behaviour by entering into an agreement than by litigating its accusations in a court,” the GAI said.

While settlements may be a more efficient use of scarce agency resources, the institute said, any savings may “come at the cost of potentially stunting the development of the common law” that arises through adjudication.

The think tank also advised the JFTC to “adopt the core features” of a fair

and transparent due process system: ensuring that legal representation is provided to those under investigation; that notification is given of an investigation; and that the parties are allowed to offer up a defence.

The GAI is headed by former US Federal Trade Commission commissioner Joshua Wright, former FTC intellectual property and international antitrust counsel Koren Wong-Ervin, US federal appellate judge Douglas Ginsburg, and law professor Bruce Kobayashi. The JFTC's consultation closes at the end of August.

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