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**This issue covers the following topic:****ANTITRUST AND COMPETITION / ANTITRUST AND COMPETITION LAW ADVICE****Key takeaways for system vendors from the Japan Fair Trade Commission's survey report on procurement of information systems by government offices****ANTITRUST AND COMPETITION / ANTITRUST AND COMPETITION LAW ADVICE****Key takeaways for system vendors from the Japan Fair Trade Commission's survey report on procurement of information systems by government offices****I. Introduction**

On 8 February 2022, the Japan Fair Trade Commission ("JFTC") published its "survey report on procurement of information systems by government offices" ("Report")<sup>1</sup>.

The report was prepared on the basis of a fact-finding survey conducted by the JFTC and with reference to discussions held at the "Opinion exchange meeting on procurement of information systems," which was also convened by the JFTC. In the context of a government-wide initiative to "promote the digitalisation of public administration," the JFTC initiated the fact-finding survey to understand the actual status of information system procurement by national and local authorities in Japan, with a particular focus on avoiding 'vendor lock-in'<sup>2</sup>. As such, although the Report is derived from the fact-finding survey of information systems in the public sector, it also presents some ideas under the Japanese Anti-Monopoly Act ("AMA," Japanese competition law) that can be useful for transactions involving information systems in the private sector as well. This newsletter<sup>3</sup> summarises the main points of the Report and examines the points to bear in mind, from the perspective of competition law compliance, in transactions relating to information systems procurement whether in the public or private sector.

**II. Summary of the Report – five categories of behaviour**

The Report analysed five types of conduct in the context of the AMA and noted a number of points to be considered by system vendors to ensure compliance with the AMA. Table 1 below provides a summary of the Report findings and recommendations. As stated above, although the JFTC's fact-finding survey focussed on avoiding 'vendor lock-in,' 'vendor lock-in' itself is not immediately regarded as problematic under the AMA; instead, the Report states that an infringement of the AMA could occur when an instance of specific conduct (such

<sup>1</sup> [https://www.jftc.go.jp/houdou/pressrelease/2022/feb/220208\\_system.html](https://www.jftc.go.jp/houdou/pressrelease/2022/feb/220208_system.html) (available only in Japanese)

<sup>2</sup> 'Vendor lock-in' is defined as a situation where a company is forced to continue using a particular system vendor because other vendors cannot carry out tasks necessary to continue using the information system, such as software functional modifications, version upgrades and hardware maintenance.

<sup>3</sup> The Report not only examines an approach towards several categories of conduct under the AMA but also considers desirable situations and responses in terms of competition policy, systems of procuring public authorities, and recommendations to the Digital Agency and other relevant ministries.

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as the following) occurs and causes an anti-competitive effect in the market.

**Table 1: Five categories of behaviour and points for vendors for compliance with the AMA**

Vendor Conduct	Interpretation under the AMA	Notes for Compliance
Inclusion of functions by vendor that only it can provide when specifications are being prepared	If a vendor provides inaccurate information to ensure bidding is based on specifications that only it can provide, and makes it difficult for other vendors to participate in the bidding process, that conduct is likely to infringe private monopolisation or unfair trade practices provisions of the AMA.	<ul style="list-style-type: none"> <li>- Vendors should clearly state whether it is providing its own product or a function which only it can provide.</li> <li>- Vendors should not provide false explanations or incorrect information in the preparation of specifications or the determination of the bidding method.</li> <li>- Vendors should provide a rational basis for including requirements that cannot be met by other providers if such requirements are considered necessary.</li> </ul>
Refusal to disclose specifications or transfer data without reasonable grounds	Refusal to disclose specifications or transfer data, to the extent permitted as a legitimate exercise of its intellectual property rights, is not itself problematic under the AMA. However, if the existing vendor engages in that conduct without reasonable grounds and prevents other vendors from participating in the bidding process or receiving orders, such conduct is likely to infringe the AMA as interference with competitors' transaction.	<ul style="list-style-type: none"> <li>- Vendors should fully explain the costs involved in the disclosure of specifications and transfer of data (including the breakdown and rationale).</li> <li>- When refusing the disclosure of specifications or data transfer, vendors should fully explain the reasons for such refusal to the ordering party.</li> </ul>
Request by the existing vendor to place a blanket order for separate goods and services	Merely proposing a combination of several goods and services in one bidding process is part of normal course of business and does not raise any issues under the AMA per se. However, forcing the ordering company to place a blanket order, including across separate goods and services, by attempting to discredit other systems or providing false explanations is likely to infringe the AMA as constituting trading on restrictive terms.	If it is beneficial for the ordering company to place a blanket order, vendors should fully explain the rationale (e.g., technical necessity) and provide a cost breakdown in advance.
Low-priced bidding	Repeatedly placing bids that are significantly below the cost which is likely to cause difficulties to the business activities of rival vendors may fall within unjust low price sales and infringe the AMA.	The JFTC has issued several warnings and cautions on low-priced bidding cases <sup>4</sup> . In light of this, vendors should pay particular attention when placing bids at exceedingly low prices.
Coordination between vendors (including suppliers and consultants of the vendors)	Inappropriate collaboration and cartel-like behaviour (e.g., bid-rigging) among vendors will clearly infringe the AMA. Furthermore, where a supplier of the bidding vendor facilitates the coordination among vendors or makes it difficult for other vendors to participate in bidding by including specifications that can only be provided by one vendor, such conduct (by the supplier or the consultant) is also likely to infringe the AMA.	It should be noted that the Report by the JFTC clearly states that not only vendors at the same level of trade but also the suppliers or consultants of the vendors can violate the AMA under certain circumstances (e.g., when involving in bid rigging by allocation of work to vendors and consultancies).

### III. Comment

The JFTC's fact-finding survey asked public authorities in Japan whether they had experienced first-hand or had observed any of the five categories of conduct listed in the Report. The results showed that the percentage of positive responses was quite low (between 0.5% and 3.9%), which suggests that such behaviour is not widely

<sup>4</sup> Case against NTT DATA CORPORATION (JFTC's caution on 12 April 2002), Case against Matsushita Electric Industrial Co., Ltd. (JFTC's warning on 14 December 2004), and Case against Yahoo Japan Corporation and SHINWA Art Auction Co., Ltd. (JFTC's warning on 9 December 2005)

practiced in Japan's public sector. Nevertheless, in light of the concepts and theories presented in the Report and recent enforcement actions and trends of the JFTC, we believe there are some key takeaways to be discussed (in addition to the points to be noted by vendors for compliance in right column of Table 1 above).

(i) Inclusion of functions by vendor that only it can provide when specifications are being prepared

When drawing up specifications, especially in the case of the initial development (i.e., development from scratch), the ordering party may ask potential vendors for their opinion and advice. The vendor's sales personnel might occasionally have an incentive to include the company's unique proprietary specifications or functions in the specifications so that they are awarded the order. Even under such a scenario, assuming that the vendor did not engage in any unfair conduct, the mere fact that the bid specifications included specifications and functions that were proprietary to a particular vendor does not automatically give rise to an infringement of the AMA.

In this respect, the Report, referring to the well-known Paramount Bed case<sup>5</sup> in Japan, clarifies that the allegation of exclusionary private monopolisation (exclusionary conduct) may be established if all the following elements are found to be present<sup>6</sup>:

- (a) Providing inaccurate information to enable bidding based on specifications that can only be handled itself;
- (b) Raising rival's costs and making it difficult for them to participate in the bidding process by incorporating its own specifications; and
- (c) Having the ordering party conduct a bid against its procuring policy.

In case of the procurement of systems, if element (a) above is satisfied, then element (c) is also likely to be satisfied. This type of conduct, especially when all of the above elements (a) to (c) are satisfied, would be most likely to be considered as an infringement of the AMA among the five categories of conduct identified in the Report, and therefore deserves special attention.

(ii) Coordination between vendors and consultant for vendors

Coordination of a bid where competing vendors jointly decide the outcome of the bidding process is a typical violation of the AMA (i.e., cartel activity). However, as pointed out in the Report, the scope of the entities that can be implicated in the coordination of a bid is not limited to only the vendors. For example, if a consultant, which provides support services to a vendor, behaves in a way that facilitates the coordination of a bid between vendors or makes it difficult for other vendors to effectively bid by including specifications that can only be met by one particular vendor, that consultant may also be in violation of the AMA, as a party to cartel or private monopolisation.

In recent years, among the cases in which the JFTC has taken formal enforcement action, there have been several private monopolisation cases<sup>7</sup> and cartel cases<sup>8,9</sup> involving companies that provide support services for vendors. In particular, in contrast to previous approaches to enforcement, it no longer seems unusual for the JFTC to broaden the scope of the companies who they have found to have violated the AMA; for example, by including companies at a different level of trade (i.e., not only identifying vendors at the same level as the violating vendors) on a cease and desist order.

In view of the above, not only system vendors but consulting companies, which provide support services to system vendors, should understand and take note of this point as it is set forth in the Report.

<sup>5</sup> Case against PARAMOUNT BED CO., LTD. (JFTC's Recommendation Decision on 31 March 1998, Heisei 10 (Kan) No. 3)

<sup>6</sup> Although the Report examines this type of conduct mainly with private monopolisation in mind, there may be cases where similar conduct constitutes an 'interference with competitor's transaction', one of the unfair trade practices designated by the JFTC. To illustrate, the JFTC reportedly conducted an unannounced on-site inspection of Smart Value, an information system development company, on 2 November 2021, for the suspected violation of the AMA because of an interference with competitor's transaction. In this case, Smartvalue Co., Ltd. and its business partner were reportedly suspected of obstructing the entry of their competitors by encouraging local authorities to include in their system specifications a restriction to use open-source software. The JFTC's investigation was terminated by way of a commitment decision on 30 June 2022.

<sup>7</sup> Case against the JA Fukui Prefectural Economic Federation of Agricultural Cooperatives (JFTC's cease and desist order on 16 January 2015, Heisei 27 (So) No. 2). In this case, a cease and desist order was issued against the Economic Federation for violating the AMA as constituting private monopolisation, on the grounds that it controlled the business activities of the companies participating in the bid process by designating who would win the bid and instructing the participants on the bidding price so that the designated company could prevail.

<sup>8</sup> Case against distributors of uniforms ordered by All Nippon Airways Co., Ltd (JFTC cease and desist order on 12 July 2018, Heisei 30 (So) No. 13). In this case, a cease and desist order was issued against not only distributors of uniforms but also the company who had been contracted by ANA to prepare specifications, as cartel participants, because it was found that the uniform distributors had agreed that the company contracted by ANA would also be involved in the transaction to ensure that a distributor (to win the bid as agreed among them) would be awarded with the order.

<sup>9</sup> Case against dealers of activated carbon provided for local governments in east Japan and Kinki areas (JFTC cease and desist order on 22 November 2019, Reiwa 1 (So) No. 9). In this case, a cease and desist order and surcharge payment order were issued not only against suppliers of activated carbon but also against the company who acted as an intermediary in the supply of activated carbon to the local authorities and was actually involved in the cartel.

#### IV. Concluding remarks

The Report was based on a fact-finding survey published as part of the JFTC's advocacy activities, not as part of any specific case investigation. In addition, it should be noted that the categories of conduct that have been identified and examined in the Report, as well as the approaches and theories mentioned, are not particularly new and are relatively orthodox.

However, as mentioned at the outset, the approaches and theories of the AMA presented in the Report should not be viewed as limited to only system procurement in the public sector, but recognised as also applicable to a wide range of information system procurement transactions in the private sector. In addition, for many of the categories of conduct, in relation to which the approaches under the AMA have been presented in the Report, the JFTC has some enforcement experience which can be used as a reference point or precedent for specific investigations in the future. It is therefore important for vendors and other companies involved in supporting the bid process to understand the approaches and ideas in the Report, as well as the categories of conduct examined, and to revisit their compliance with the Japanese AMA once again.

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