

### The Supreme Court of Japan fines several companies for bid-rigging (Japanese construction companies)

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A public corporation, Shin-Tokyo Shintoshi Kensetsu Kosya (the “Ordering Party”), was inviting tenders for the construction of a sewage system. The Japan FTC investigated construction companies, found that many of them were engaged in bid-rigging, and ordered 34 companies to pay administrative fines in 2001. After the Japan FTC’s hearing decision in 2008 that affirmed the order, 25 companies further appealed to the Tokyo High Court to rescind the order. Five chambers were assigned the case, and only one chamber rescinded the Japan FTC’s hearing decision, stating that the Japan FTC failed to demonstrate that the companies’ overarching agreement was effectively binding the companies’ free and independent business activities. The Japan FTC then appealed to the Supreme Court.

The overarching agreement found by the Supreme Court was as follows : (i) in the cases where companies are informed by the Ordering Party of upcoming tenders that are “A” rank or higher (i.e. tenders where the Ordering Party’s budget is 160 million JPY [1.3 million EUR] or more), a company that will be a successful bidder will be designated to (a) the company who is familiar with the specifications or the location of the tender, if such company is only one, or (b) the company that is designated as the successful bidder through negotiations between such companies, if such companies are not less than two ; and (ii) the designated successful bidder will determine its own bid price and other bidders will cooperate to ensure that the successful bidder is awarded the tender.

According to the Supreme Court, the 33 companies have been successfully awarded 34 out of 72 tenders during the period of the bid-rigging activities, and in most of these 34 tenders, the price was higher than 97% of the ordering party’s budget for each tender.

#### Comments

This judgment is significant as this is the first Supreme Court judgment in the 65-year-history of Japanese antitrust law that made clear the definitions of the basic principles and concepts

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concerning bid-rigging. This judgment is therefore regarded as the guidelines for conducting assessments in future bid-rigging cases.

Article 3 of the Japanese antitrust act prohibits bid-rigging as an unreasonable restraint of trade. The “unreasonable restraint of trade” is defined as business activities that mutually restrict business activities in concert with other companies, and thereby cause a substantial restraint of competition in any relevant market.

Analysis of bid-rigging is conducted separately for an overarching agreement that would cover multiple future tenders and provide basic rules of allocating bids to members to such agreements (i.e. “mutually restrict their business activities in concert with other companies”) and for subsequent coordination that would be required in each tender. Under the Japan FTC’s practice, overarching agreements need to sufficiently cause unfair restraint of trade on their own without following coordination in each tender. Having said that, subsequent coordination would be used as circumstantial evidence to demonstrate the existence of such an overarching agreement, especially in the cases where the Japan FTC failed to collect direct evidence of such an overarching agreement. The judgment affirmed this understanding of mutually restricting or conducting “their business activities in concert with other companies” and determined that there was such an overarching agreement between 33 companies.

As to the requirement of unreasonable restraint of trade, the Supreme Court for the first time made clear its definition in the context of bid-rigging : the court stated that substantial restraint of competition would be interpreted as the situation where the function of the relevant market is harmed. In the context of bid-rigging this would further be construed as freely controlling the market, to a certain extent, by influencing conditions, including price, quality, or quantity of the products to be sold to customers.

The judgment determined that the competition had been unreasonably restrained in this Tama case by taking the following facts into consideration : (i) cooperation from companies other than the members of the overarching agreement was also generally expected in addition to cooperation from the members of the overarching agreement, and (ii) in most tenders the prices of the successful bidders were more than 97% of the ordering party’s budget for each tender.

In reaching this conclusion regarding unreasonable restraint of trade, the judgment defined the relevant market as tenders by the Ordering Party for engineering works of “A” rank or higher (i.e., tenders where the Ordering Party’s budget is 160 million JPY [1.3 million EUR] or more), and found a restraint of trade within this market. This deviates from the established Japan FTC’s practice in which the relevant market in bid-rigging cases is defined based on the scope of the overarching agreement itself (and the Japan FTC therefore defined a narrower market in its hearing decision in 2008), but the judgment is understood as carefully avoiding such a subjective measure, instead adopting a more objective market definition.

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