"Health Insurance Cartel", in re *Dai-Nippon Printing et al.*

Translation of the Decision of the Tokyo High Court, June 6,1997 *

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1. The concurrent application of a surcharge order and a criminal penalty does not contravene the constitutional prohibition of double jeopardy.
2. The amount of turnover as stated in Sec. 7-2 Anti-monopoly Act has to be calculated including the 3% sales tax.

FACTS

At the end of the 1980s the plaintiffs were involved in a bid rigging scheme of a tender for plastic wrapping material used for health insurance books. The tender was published by the National Health Authorities under a designated bidding system, but only certain companies were permitted to participate, a situation which in the past led to a good many bid rigging activities.

The scheme was uncovered and, due to a change in the anti-monopoly policies of Japan at the beginning of the 1990s, also criminally prosecuted. The criminal prosecution resulted in a conviction of the companies involved and a fine in the amount of 4 million yen (Tokyo High Court, December 14, 1993, final).

The Fair Trade Commission, in a surcharge order dated September 24, 1993, claimed that the plaintiffs had engaged in a bid rigging scheme at least between November 11, 1989 and November 11, 1992. Based on Sec. 7-2(1) Anti-monopoly Act, the FTC may order surcharges in the amount of 6% of the turnover (3% until 1991) for a maximum period of three years, regardless of the actual profits derived from the cartel activities involved. Taking the different surcharge levels before and after 1991 into account, the FTC arrived at surcharge orders amounting to 41 million yen for the first plaintiff, 91.1 million yen for the second, and 37.3 million yen for the third plaintiff of this action. The plaintiffs have appealed against the surcharge order as this would amount to double jeopardy prohibited by Art. 39(2) Japanese Constitution. They plead in addition that the health authorities, upon uncovering the bid rigging scheme, have raised an action in court for restitution of the sums paid to the plaintiffs under the tender for reason of unjust enrichment. The health authorities demand 304 million yen from the first, 854 million yen from the second, and 363 million yen from the third plaintiff.

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* Hanrei Jihô 1621, 98-110 [1998].

This action is still pending. Further, the plaintiffs contest the FTC's basis of turnover calculation that includes the 3% sales tax.

As distinct from criminal sanctions, surcharge orders have to be applied in every case of unreasonable restraint of trade. The present case is the first opportunity for the courts since the introduction of the surcharge order system in 1977 to clarify the relationship between surcharge orders and criminal sanction on the one side, and private claims of unjust enrichment on the other. Dismissing the appeal, the Tokyo High Court gave the reasons below. Although decided by the Tokyo High Court's Antitrust Division, the reasons appear clumsy, repetitive and not particularly convincing. The case is currently under appeal before the Supreme Court.

REASONS

I. By introducing the system of surcharge orders, the Anti-monopoly Act sought to deprive the participants of a cartel of undue economic profit reaped therefrom. It was enacted to maintain social justice, to deter any wrongdoing and to maintain proper enforcement of the provisions prohibiting cartels. For the surcharge order to fulfil its proper functions, the defendant in this action, the Fair Trade Commission, has been empowered to initiate and conduct the proceedings according to the Anti-monopoly Act to order appropriate measures against those participating in a cartel. Therefore, the surcharge order system for once is meant as a deterrent against cartel activities and its function as punishment cannot be completely denied. However, it should stand to reason that the proper character of the surcharge order system is to maintain social justice by reaping the unjust economic awards from cartel activities. Therefore, the surcharge order is rather meant to accentuate the anti-social and incorrect tendency of a cartel scheme and is in itself a punishment against this. Criminal procedures for the purpose of invoking criminal fines have a different intent, purpose and character. Even if the plaintiffs have been ordered to pay a criminal fine in addition to the order by the defendant (the Fair Trade Commission) under Secs. 7-2, 54-2 of paying a surcharge, this does not violate the prohibition of double jeopardy under Art. 39 of the Constitution, as should be clear.

Moreover, and in addition to the final imposition of a criminal fine, the Japanese authorities on the basis of the cartel activities of the plaintiffs have sued in the Tokyo District Court for restitution of the undue profits obtained, since due to the cartel activities of the plaintiffs, the respective bids of the tender are null and void. According to the plaintiffs, since also the surcharge order is meant to deprive the participants of an unlawful cartel of the economic benefits reaped therefrom, this action would mean nothing else but another double jeopardy in connection with the surcharge order already issued. Further, this would contravene Sec. 39 of the Japanese Constitution.

For one, it has to be stated that the action for restitution of undue benefits initiated by the Japanese authorities is still pending before the Court of First Instance, and in fact the plaintiffs have not admitted that the bidding contracts for the wrapping material are indeed void, as argued by the Japanese authorities. It must therefore be concluded that under these circumstances and given the argument of both parties, the right of the Japanese authorities to claim restitution for unjust enrichment in principle and scope is far from clear a this point.

Therefore, the plaintiff's arguments that the surcharge order, criminal fine and the restitution of undue benefits as a consequence of the cartel amount to an unconstitutional treble jeopardy are not well founded. In determining to what extent the surcharge order system contravenes Art. 39 of the Constitution, it is irrelevant and makes no difference that a criminal fine is added to the surcharge order. The plaintiffs' referral to a possible unlawfulness occurring in the future is irrelevant for the present. The levy of the surcharge order, as explained above, is an administrative measure that at the present moment has the quality of a disciplinary measure and nothing else. Accordingly, the levy of the surcharge does clearly not contravene Art. 39 of the Constitution.

As mentioned above, the system of surcharge orders under the Anti-monopoly Act is meant to protect social justice by skimming off the unjust awards of those who have participated in a cartel. In view of this economic consequence of the surcharge, a certain similarity with the civil law system of unjust enrichment cannot be completely denied. Even if the plaintiffs had not been made subject to an order under Sec. 7-2, 48-2 Anti-monopoly Act, they could be made to repay the object of the surcharge order, namely the profit made by a rise in prices, under the action of unjust enrichment, giving rise to the question of the constitutional prohibition of double jeopardy.

However, skimming off undue economic profits under the system of surcharge orders provided by the Anti-monopoly Act, in other words, skimming off the results of the cartel is a system whereby those participating have to return their unjust profits in accordance with the economic result achieved. The proper technical construction of the system and the economic rationale of the law, when properly taken into account, show that the concrete and individual economic profits of a cartel are irrelevant, but rather a general percentage levy is applied to the profits as a calculation method. The amount is therefore calculated on the general basis of what in the normal course of events would have been achieved as an economic profit, Sec. 7-2 Anti-monopoly Act. In contrast to this, the system of unjust enrichment under the Civil Code is based on what has been economically obtained without proper reason, and at the expense of someone else. Thus, it is a system of restitution based on the doctrine of equity. A restitution order has to limit the amount of what has to be returned to the extent of loss. Thus, the system of unjust enrichment under civil law rests on equity and the proper allocation of rights and duties as mapped out under private law. Intent and purpose are therefore different from the surcharge order system. While both from the viewpoint of legal requirements and result may not necessarily be different, the actual concept certainly is. While the system

of unjust enrichment requires a restitution according to the precise amount of profit, in regard to a levy of surcharge under the same circumstances no amount is indicated as to what actually should be restituted, but rather an abstract concept. Unjust enrichment depends on the individual and concrete circumstances upon which a decision has to be made. Further, a surcharge order according to the Anti-monopoly Act has to be made by the defendant (Fair Trade Commission) against those who have participated in a cartel once the legal requirements are met. There is no discretionary power in that respect, nor is there any leeway in the conditions of calculating the surcharge order, but the calculation method for the surcharge has been generalised and stated as a general obligation under Sec. 7-2 Anti-monopoly Act.

II. Further, it has to be examined to what extent the amount of sales tax the plaintiffs have received under the contract for wrapping material from the Japanese authorities can qualify as "unjust economic profits". In order to clarify intent and purpose of the surcharge order system, one should first bear in mind that the plaintiffs under the contract for wrappings have received the respective amount of sales tax from the Japanese authorities under such contract, while Sec. 6 of the Executing Provisions under Sec. 7-2 Anti-monopoly Act provide "the monetary amount as stipulated by the contract" as a basis of calculating the amount of surcharge order, which may leave us none the wiser as to its deeper justification. In the present case, the amount of surcharge order was calculated on the basis of the contracts for wrappings entered into by the plaintiffs, and the monetary amount to be paid thereunder. According to the defendant, one should bear in mind that the transaction value of the sale of goods is not necessarily the price or value of such goods and the correct amount of sales tax to be paid by the Japanese authorities under the contract for wrappings is not necessarily what the Japanese authorities have actually paid, but what they were due to pay to the plaintiffs, even though they might have withheld a portion thereof with the plaintiff's consent. In other words, the method of calculating the surcharge order on the basis of the unjust economic profits made by those involved is not based on what the actual profits for a certain cartel were, but rather an abstract and general calculation of the amount of sales, of which a certain percentage rate is figured is then abstractly assumed as being the undue profit made by the entrepreneurs. Based on this concept, the defendant has issued its surcharge order and calculated the amount the plaintiffs were due to pay. Regarding the argument made by the plaintiffs that including the sales tax to be paid by the Japanese authorities under the contract for plastic seals, and the addition of such sales tax to "the sales price established by the contract" under Sec. 6 of the Executive Provisions, there is no support that this method of calculation is contrary to Sec. 7-2 Anti-monopoly Act.