15:25～16:25　Summaries of Panel discussion and Floor discussion

The Competition Policy Research Center(hereinafter "CPRC") summarizes the Panel discussion and Floor discussion in the CPRC 5th Open seminar on 20th of September, 2005, under its responsibility. All possible mistakes in the summary are CPRC's.

1. Panel Discussion

Main opinions in the panel discussion are as follows.

- It is said that the essential facility doctrine is already gone in the United States. I think that happens as a result of the fact that essential facility as a phrase had been abused without any determined definition.

- Prof. TANAKA analyzed which factors were important for the consumer to select the OS taking the environment such as market structure of the time as given. The method is great. However, we should be very careful to turn the result into a policy conclusion because all of those elements depend on the whole of competitive history.

- It is very difficult to judge a case such as the Aspen case[1] and the Trinko case[2]. Because, first of all, we need to define what is monopoly. Some might say that monopoly means that one company has lion's share in the market. However, is it really true "monopoly = lion's share"?

There are other technical questions on the method of analysis Prof. Tanaka did and the model Prof. Gilbert showed.

2. Floor Discussion

After the panel discussion above, the discussion between lecturers and the floor took place. The main discussion was as follows.

Question: In the Trinko Judgment[3], an essential facility doctrine is said to be dead, but to the extent that I know the Supreme Court did not grant the decision on this case, that is, the Supreme Court says that plaintiff is already compensated for and additional compensation is not necessary, thus the plaintiff's suit was rejected by

[1] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)
[2] Verizon Communications Inc. v. Olaw Office of Curtis C. Trinko, LLP, 124 S. Ct. 872 (2004)
[3] See the footnote2 above

Supreme Court. Therefore, I think, an essential facility doctrine itself is not really dead in the US.

Answer: There was compensation in the regulatory framework to AT&T from Verizon, about $10 million or something like that. However, that kind of compensation does not matter for the antitrust issue because it was done at the regulatory level. The telecommunications regulatory level is separate from the antitrust level, and the Supreme Court did say in its decision that it believed that there was legitimate antitrust claim. However, the Court rejected the claim in the end as not being valid.

Question: Regarding an essential facility doctrine, why are there different views in the US and EU

Answer: Main difference is that the EU has a legal structure that emphasizes potential abuse of dominant position, whereas the US has the Sherman Act, which, as it applies to dominant firms, would be Section 2 monopolization and these two legal structures have developed in very different ways.

Question: I believe it is too drastic to take such a measure as making interfaces open because of possible anticompetitive demerit, even in absence of anticompetitive conduct.

Answer: In the case of an ordinary antitrust or antimonopoly law, as long as anticompetitive action is prohibited, then inefficient monopoly is supposed to go away, but this presumption is lacking in the case of network externalities. For example, if there is very large scale merit and if you leave it untouched, that would lead to monopoly. There has to be special treatment and some kind of treatments such as public firms are to be done. Similarly, if there exists a strong network externality and if you leave it untouched, it would lead to monopoly. Hence something has to be done. That is the basic idea on this matter.

Question: It is in some ways related to the discussions we had on essential facilities. Is it desirable to have a compulsory licensing of patented technologies that are truly essential for technological standard? If so what price should be used?

Answer: We have not resolved the questions like, what is a critical interface, what does openness really mean, what is the reasonable royalty for the patent, etc. All of those questions are really difficult.

Question: On the version-up in the OS, if the version-up was done not for purely technological version upgrades but for anticompetitive purpose such as expanding its market power, could it be illegal activity, i.e. technological tying?

Answer: The upgrades itself do not involve technological tying. Suppose you have a company without any competitors or without any strategic motivation at all.In this industry you would have to have OS upgrades in order to continue to sell systems to the installed base of consumers. So it would be hard to say that it is an anticompetitive conduct unless you were clearly relating the conduct to something else.