

ABSTRACT

In analyzing conduct excluding rival firms from the market in the antitrust law enforcement, we need to examine carefully whether the conduct is “undue” exclusion or “competition on the merit”, since competition itself is a process of excluding rivals. This issue is particularly important in the Japanese Antimonopoly Act, because there is regulation against “unfair trade practices,” as well as private monopolization regulation. In the unfair trade practices regulation, conduct which “tends to impede fair competition” is prohibited, even if it is not so anticompetitive as to “substantially restrain competition.” In this paper we tackle the issue of what is “competition on the merit” and what is “undue” exclusion, based on the recent literature and policy statements in the United States and Europe.

One idea is to weigh pro-competitive effect against anti-competitive effect of the conduct, without taking into consideration what type of exclusion it is. This idea involves some problems, such as i) whether the objective of the law enforcement is maximization of the consumer surplus, or that of social surplus, and ii) that firms have difficulty in deciding whether their own conduct is lawful or not.

Another idea is to take the competitive process into consideration and condemn the “exclusion” unjustifiable under particular tests. Several criteria are proposed from this perspective. For example, some argue for “profit-sacrifice test/ no-economic-sense test”, and others argue for “as-efficient competitors test,” but neither seems to serve as a unified criterion for any exclusionary conduct.

Competition authorities and other relevant organizations have launched discussion on appropriate rules on exclusionary conduct, but so far these arguments have not reached clear-cut criteria. We argue that what is needed is to establish criteria for each type of exclusionary conduct, rather than to search for a unified test. As a starting point for future discussion we look into “loyalty rebates” and examine the practice both from i) the perspective of price-based exclusion and ii) that of non-price-based exclusion.