

Whole Concept on Evaluation of Illegality of Non-Hard-Core Cartels (Summary)

This report analyzed the assessment framework and the benchmarks of the evaluation of the illegality of non-hard-core cartels centered on the environment sector from the perspective of comparative legal research in Japan, the U.S. and the EU. The results of the analysis show that the assessment framework and the benchmarks in the three jurisdictions are independently adopted under the competition laws of each jurisdiction. Reflecting the continued increase in the interest of society in issues such as environmental preservation, it is expected that joint activities to deal with issues such as environmental issues will increase on a global scale, and that the types of such activities will also diversify in the future. Accordingly, the report proposes that, while keeping an eye out for the assessment related to non-hard-core cartels in Japan, the U.S. and the EU, it is important to understand the change or non-change of the assessment framework.

The summary of the assessment framework and the benchmarks of the evaluation of the illegality of non-hard-core cartels in Japan, the U.S. and the EU is as follows.

1. Evaluation of the illegality of non-hard-core cartels under EU law

More than one assessment framework about agreements related to social and public purposes, such as environmental preservation, have been confirmed. They are (i) the assessment framework in which subsection 1 of Article 101 of the TFEU (provision on prohibiting anti-competitive concerted activities) is not applicable, (ii) the assessment framework of making comparisons and balancing based on subsection 3 of the article above (provision on the exemption of the application of subsection 1 if strict requirements, such as the improvement of benefits of consumers, are met) and (iii) the framework in which the purposes especially including the necessity are taken into account and the anti-competitive effects brought intrinsically and in a proportional manner by the achievement of the purposes are assessed. However, there is not necessarily a well-established theory. Still, in practice, the exemption of the application of the competition law is not accepted immediately or without any restrictions merely because there are simply social and public purposes. It appears that assessment is made based on various consideration factors.

2. Evaluation of the illegality of non-hard-core cartels under U.S. law

It has been confirmed that, in assessing illegality, the issue is essentially the effects of activities on the competition, and no analysis is made from any viewpoints other than the effects on the competition. As for “social and public purposes,” which are terms used in

Japan, most cases are able to be dealt with without affecting the competition, and, on the contrary, justifying activities that have negative effects on the competition on the grounds of the social and public purposes is considered to be something that denies the *raison d'être* of federal antitrust laws. On the other hand, the viewpoints, other than the promotion of competition, are considered to be dealt with by other public institutions. As a result, it is possible that the social and public purposes, such as environmental preservation, are handled under the legal theory of the exemption of application by common law, such as the state action doctrine.

3. Evaluation of the illegality of non-hard-core cartels under Japanese law

In Japan, with respect to voluntary regulations for social and public purposes, benchmarks have been adopted under the “Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act.” Accordingly, voluntary regulations are judged (i) by taking into account the factor of whether or not the benefits of consumers are unjustly hampered through the restriction of competitive measures, (ii) by referring to benchmarks as to whether or not business operators are exposed to unfair discrimination, and (iii) by considering the factor of whether or not voluntary regulations are within the scope of reasonable necessity based on legitimate purposes, such as social and public purposes. Consequently, compulsory enforcement is generally problematic.

Examinations of consulting the guidelines, cases about the environment and other matters and the response and other actions at times of emergency, such as earthquake disasters, have revealed cases, for example, (i) in which the benchmarks of voluntary regulations as described above are adopted, (ii) in which it is considered that competition is not substantially restrained, and (iii) in which it is considered that there is no communication.

In conclusion, no cases were found in which the interpretation and the application of the requirements of the Anti-Monopoly Act had been changed on the grounds of social and public purposes, such as the environment, or at the time of an emergency, such as earthquake disasters.