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ROUNDTABLE ON "PRICE DISCRIMINATION"

--Note by Japan--

29-30 November 2016

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

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JAPAN

1. Introduction

1. Basically enterprises are free to set the price of their goods or services. Therefore, price discrimination depending on trade partner does not necessarily result in a violation of the Antimonopoly Act (hereinafter referred to as the “AMA”).

2. However, if competition is restrained due to a price discrimination that is not deemed to be caused by a reflection or a result of competition, this may be problematic under the AMA.

3. In the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (hereinafter referred to as the “Exclusionary Private Monopolization Guidelines”), the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) clarifies the requirements for Exclusionary Private Monopolization. Furthermore, in the Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act (hereinafter referred to as the “Unjust Low Price Sales Guidelines”), the JFTC also clarifies the basic view of the price discrimination under the AMA.

4. This contribution paper explains the outlines of regulations and guidelines as well as the examples of the enforcement of the AMA, which are related to price discrimination in Japan, and introduces the “Survey of trade in B2C e-commerce such as electronic shopping malls” conducted by the JFTC in 2006.

5. In Japan, we have experienced “exclusive” price discrimination (made as a means of exclusionary conduct), but cases treating “non-exclusive” price discrimination are hardly found. Thus, this contribution paper focuses on exclusive price discrimination.

2. Overview of the regulations

2.1 *Private Monopolization*

6. The AMA prohibits “such business activities, by which any enterprise, individually or by combination or conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade” (Article 2, paragraph (5) of the AMA) as private monopolization (Article 3 of the AMA).

2.2 *Unfair Trade Practices (Discriminatory Consideration)*

7. With regard to Discriminatory Consideration, Article 2, paragraph(9), item (ii) of the AMA provides, "Unjustly and continually supplying goods or services at a price applied differentially between regions or between parties, thereby tending to cause difficulties to the business activities of other enterprises", and paragraph (3) of the Designation of Unfair Trade Practices provides, "In addition to any act falling under the provisions of Article 2, paragraph (9), item (ii) of Act on Prohibition of Private

Monopolization and Maintenance of Fair Trade, unjustly supplying or accepting goods or services for a consideration which discriminates between regions or between parties."

2.3 *Basic view of the guidelines*

2.3.1 *Exclusionary Private Monopolization Guidelines*

2.3.1.1 Exclusionary Conduct

8. Exclusionary Conduct refers to various conducts that would cause difficulty for other enterprises to continue their business activities or for new market entrants to commence their business activities, thereby would be likely to cause a substantial restraint of competition in a particular field of trade.

9. In the case that an enterprise supplies a low-cost and high-quality product by its own efforts such as improving efficiency, and if such conduct would make it difficult for competitors to continue their inefficient business activities, it does not fall under Exclusionary Conduct because it is a result of fair and free competition, which the AMA intends to promote.

10. But, any conduct falls under Exclusionary Conduct when it is highly likely to cause difficulties in continuing the business activities of other enterprises or commencing the business activities of new market entrants.

2.3.1.2 Price discrimination may fall under Exclusionary Conduct

- Margin squeeze

11. There are cases where an enterprise does business in the upstream market who supplies products that are necessary for carrying out business activities in the downstream market¹ and also carries out business activities in the downstream market. In this case, the conduct of setting a price of its product in the upstream market at a level higher than that in the downstream market or setting a price that are so close that the trading customers cannot counter by economically reasonable business activities (so-called "margin squeeze") may fall under Exclusionary Conduct.

12. Where the said conduct would cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market, the said conduct is regarded as Exclusionary Conduct.

13. The JFTC will comprehensively consider such factors that entire conditions of the upstream market and the downstream market (degree of market concentration, the characteristics of the products, economies of scale, the degree of differentiation of products, distribution channels, dynamics of the market, and difficulty in entry into the upstream and downstream markets.), positions of the said enterprise and its competitors in the upstream market (the market share of products, the rankings, brand value of the product, excess supply capacity, and business sizes of the trading customers and its competitors in the upstream market), positions of the trading customers in the downstream market (the market share of products, the rankings, brand value of the product, excess supply capacity, and business sizes of the trading

¹ Whether or not a product in the upstream market can be considered to be "a product necessary for the trading customers to carry out business activities in the downstream market" will be assessed from the viewpoint of whether or not a) the product is an un-substitutable and indispensable product for the trading customers to carry out business activities in the downstream market and b) it is impossible in reality for the trading customers to produce the product through the trading customer's own effort, such as investment and technological development.

customers in the downstream market), period of the conduct, conditions of the conduct(the prices of the products of an enterprise in the upstream market, the conditions and details of transactions with a trading customer, and the intention and purpose of the enterprise), in order to assess whether or not such conduct would cause difficulty in the business activities of the trading customers.

- Setting a price exclusively either in the sales territory where an enterprise competes with others or for customers, for whom an enterprise competes with others

14. In addition to the above, these guidelines explain that setting a price exclusively either in the sales territory where an enterprise competes with others or for customers for whom an enterprise competes with others may fall under Exclusionary Conduct (See below 3.2).

2.3.2 *Unjust Low Price Sales Guidelines*

15. In economic activities, the practice of setting different transaction prices according to the transaction quantity, terms of settlement, shipping conditions, or other factors is widely observed. It is also a general practice to set different transaction prices according to differences in the supply-and-demand balance between regions. In light of such perspective, even when different transaction prices or transaction terms are set, it is not considered, by nature, to impede fair competition if the difference is based on a fair difference in costs, such as the difference in the transaction quantity, or reflects the supply-and-demand balance of the goods.

16. However, when an influential enterprise, in order to eliminate a particular competitor, engages in price cutting only for sales territories or customers over which said enterprise is in competition with said competitor, and by doing so harms the fair competition order, such act gives rise to problems concerning the AMA.

17. In addition, when an influential enterprise deals with a certain goods in a discriminatory manner with regard to the transaction price or any other transaction terms, without reasonable grounds, and exerts a direct and serious negative effect on the competitive function of the discriminated party, thereby impeding the fair competition order, such act also gives rise to problems concerning the AMA.

18. Whether or not an individual act is regarded as Discriminatory Consideration or similar offence under the AMA is determined on a case-by-case basis, by comprehensively taking into consideration the intention of the person who committed the act or the purpose of the act, the extent of difference in the transaction price or transaction terms, the relationship between “the costs required for the supply” and the price, the statuses of the person who committed the act and its competitors in the market, the situation of the other party of the transaction, the characteristics of the goods, and the mode of transaction, as well as considering the harmful effect of the act on the competition order in the market.

2.3.3 *Guidelines for Promotion of Competition in the Telecommunications Business Field*

2.3.3.1 Practices concerning establishment of telecommunications service² charge and other conditions, etc

19. Following practices of telecommunications carriers with relatively large market shares violate the AMA.

² Refers to intermediating communications of others through the use of telecommunications facilities, or any other acts of providing telecommunications facilities for the use of communications of others, according to Article 2, item(iii) of Telecommunications Business Law (TBL).

- Setting service charge lower than its own connection charge or wholesale telecommunications service charge only in an area where a competitor started or expanded business, consequently to make the competitor's business operation difficult. (This falls under the categories of private monopolization and/or discriminatory consideration.)
- Setting charge of telecommunications services which are provided through a connection with its own or its affiliates' network lower than those which are provided through a connection with competitors' network, consequently to make competitors' business operation difficult. (This falls under the categories of private monopolization and/or discriminatory consideration.)

2.3.3.2 Practices concerning establishment of wholesale telecommunications service³ charge, etc.

20. There are some cases where telecommunications carriers with relatively large market shares set wholesale telecommunications service charge at a low price, and thereby telecommunications carriers who received such a wholesale telecommunications service provide retail services at a low price, consequently to make telecommunication carriers' business operation difficult who hold their own facilities and provide services in the retail market.

21. Therefore, when telecommunications carriers with relatively large market shares prevent the competitors' new entry into the market or make competitors' operation difficult by setting wholesale telecommunications service charge remarkably lower than the cost for providing the services or setting the unjustly lower wholesale telecommunications service charge only in an area or for a customer, they violate the AMA.

22. Under such views, the following practices of telecommunications carriers with relatively large market shares violate the AMA.

- Providing wholesale telecommunications services at rates remarkably lower than the cost for providing the services, consequently to prevent the entry of competitors into the whole sale telecommunication service market or retailing service market or to make their business operation difficult. (This falls under the categories of private monopolization and /or unjust low price sales.)⁴
- Setting the unjustly lower wholesale telecommunications service charge only in an area where a competitor started or expanded business or an area where competitors provide the same services and thereby making it possible for the telecommunications carrier who received such a wholesale telecommunications service to provide the retailing services, consequently to make competitors' business operation difficult in the wholesale telecommunications service market or retailing service market. (This falls under the categories of private monopolization and/or discriminatory consideration.)

³ Refers to a telecommunications service for the use of telecommunications business of a telecommunications carrier.

⁴ Telecommunications carriers, for example, can commit sales promotion and other business-related operations to its affiliate at a remarkably low cost. They also buy specific telecommunications services from their affiliates at a remarkably low cost. Telecommunications carriers thus receive virtual cross-subsidies from their affiliates. When such cross-subsidies make it possible to lower the cost of telecommunications and other related services, actual cost will be calculated for judgement.

3. Cases

3.1 *Supreme Court decision on NTT East case (December 17, 2010)*

23. NTT East was engaged in the regional telecommunications business in eastern Japan and had an extremely large market share in almost all areas of eastern Japan in terms of the volume of holdings of subscriber optical fibre facilities, which were indispensable for providing optical fibre telecommunications services, and in terms of the number of optical fibre telecommunications to the home (hereinafter referred to as the “FTTH services”). Therefore, it was extremely important for those who had no subscriber optical fibre equipment to connect with the subscriber optical fibre equipment owned by NTT East in the subscriber optical fibre equipment connection market (upstream market) to provide services in the FTTH service market (downstream market). Under the circumstances, NTT East provided the FTTH services at a price of the user fee, which was lower than the connection fee paid to NTT East by other telecommunications carriers. Therefore, in order to win users, other telecommunications carriers had to set a user fee that could counter against the user fee of NTT East while paying NTT East the connection fee; further, the other telecommunications carriers would be forced to suffer a large deficit, because it would generate negative margins. It has virtually become extremely difficult for other telecommunications carriers to enter the FTTH service business. Such conduct by NTT East was deemed to exclude the business activities of other telecommunications carriers who intended to connect the subscriber optical fibre equipment owned by NTT East and provide the FTTH services.

3.2 *The Case against Yusen Broad Networks Co., Ltd. and Nihon Network Vision Co., Ltd. (2004 (Recommendation) No. 26)*

24. Since August 2003, Yusen Broad Networks Co., Ltd. and Nihon Network Vision Co., Ltd. (hereinafter referred to as the “two companies”) focused on poaching customers from Can System Co., Ltd., their only major competitor, by successively running campaigns and the like. For example, during the campaign period, a monthly listener’s fee of less than 3,675 yen, or no monthly listener’s fee for more than three months including the month in which a tuner was installed, was offered only to customers of Can System on condition of switching contracts⁵.

25. By such conduct, the two companies conspired together and substantially restricted competition in the particular field of music broadcast for service establishments in Japan.

26. Given the above findings are in violation of Article 3 of the AMA (private monopolization), the JFTC made a recommendation decision.

3.3 *Warnings against Kagoshima Prefecture Concrete Cooperative Association (March 27, 2012)*

27. Kagoshima Prefecture Concrete Cooperative Association (hereinafter referred to as the “Kagoshima Co-op”) was engaged in joint selling activities. In this framework, when the Kagoshima Co-op received an order, it purchased road concrete products from the members of the Kagoshima Co-op according to the proportion determined in advance, and sold such products to civil engineering work contractors⁶. Since August 2009, when selling road concrete products to civil engineering work contractors

⁵ A replacement subscription contract on music broadcast to be concluded with a customer who has previously signed a subscription contract with another enterprise.

⁶ Article 22 of the AMA provides “Act do not apply to acts by a partnership (including a federation of partnerships) which conforms to the requirements listed in each of the following items and which has been formed pursuant to the provisions of the Act; provided, however, that this does not apply if unfair trade practices are employed, or if competition in any particular field of trade is substantially restrained, resulting in unjust price increases: (1) The purpose of the partnership is to provide mutual support to small-scale

in the Kagoshima homeland regions, the Kagoshima Co-op lowered its selling price to a price that was excessively below the cost required for supply of such products only for civil engineering work contractors for which the Kagoshima Co-op competed with the road concrete products manufacturers which were not a member of the Kagoshima Co-op (hereinafter referred to as the “Non-Member Companies”), in order to have the Non-Member Companies participate in a joint selling activities and prevent a fall in selling prices of road concrete products. As a result, such conduct of the Kagoshima Co-op was likely to make it difficult for Non-Member Companies to do business activities.

28. Such conduct of the Kagoshima Co-op could fall under Article 2, paragraph (9), item (ii) of the AMA resulting in a violation of the provision set forth in Article 19 of the AMA. Therefore, the JFTC issued a warning against the Kagoshima Co-op so that it would cease such conduct and not engage in such conduct in the future.

3.4 Case against Toyo Linoleum Co, Ltd. and other thee companies (1979 (Recommendation) No. 8)

29. Toyo Linoleum Co, Ltd (hereinafter referred to as “Toyo Linoleum”), Tajimaohyohkakoh Co, Ltd. (hereinafter referred to as “Tajimaohyohkakoh”), Nitto Boseki Co., Ltd. (hereinafter referred to as “Nittobo”), and Shin-Etsu Polymer Co., Ltd. (hereinafter referred to as “Shin-Etsu Polymer”) (hereinafter the above four companies are referred to as the “Four Companies”) formed agreements to raise or maintain the selling prices of 2mm thickness vinyl tiles (so called “market goods”) which the Four Companies are providing to companies which were engaging in flooring work business (hereinafter referred to as the “Construction Shops”) directly or through wholesalers.

30. The Four Companies recognized it very effective for the maintenance of the prices of vinyl tiles to strengthen the organization of the vinyl tiles work business cooperative association (hereinafter referred to as the “Vinyl Co-op”) composed of Construction Shops, they gave assistance for the establishment and operation of the Vinyl Co-op, and then in order to promote participation of the Construction Shops in the Vinyl Co-op, the Four Companies considered setting a gap of approximately 5 yen per sheet for the transaction price of market goods between the Construction Shops that do not join the Vinyl Co-op (hereinafter referred to as the “Non-Members”) and the members of Vinyl Co-op at the board of directors meetings of the industry association that were held several times from around Autumn of 1976 to the middle of December of that year. After that, Toyo Linoleum and Tajimaohyohkakoh set the price of market goods selling to Non-Members at approximately 53 yen per sheet from around March 1977 and in case of supply via wholesalers, they had been supplying market goods to the Non-Members at a price higher than that for the members of the Vinyl Co-op by setting a gap (about 4 yen per sheet) between market goods for the members of the Vinyl Co-op and those for the Non-Members regarding selling prices applied to wholesalers.

31. In addition, the Four Companies discussed payment of rebates of 1.50 yen per sheet to the members of the Vinyl Co-op via the Vinyl Co-op depending on the volume of market goods purchased by such members at the meeting of the board of directors held around March 1978. After that, when the members of the Vinyl Co-op used market goods supplied by Toyo Linoleum, Tajimaohyohkakoh, and Shin-Etsu Polymer, such three companies paid rebates of 1.50 yen per sheet to the members of the Vinyl

enterprises or consumers,(2) The partnership is voluntarily formed, and the partners may voluntarily participate in and withdraw from it, (3) Each partner possesses equal voting rights, (4) If a distribution of profits among partners is contemplated, the limits of the distributions are prescribed by laws and regulations or in the articles of partnership”.

Co-op from March 21, 1978, and thereby they had been supplying market goods to the Non-Members at a price higher than that for the members of the Vinyl Co-op.

32. The JFTC concluded that they were supplying market goods with discriminatory consideration depending on purchasers without justifiable grounds and this conduct fell under an unfair trade practices resulting in the violation of provisions in Article 19 of the AMA. Therefore, the JFTC made a recommendation decision.

4. “Survey of trade in B2C e-commerce such as electronic shopping malls” (published in December 2006)

33. Regarding the businesses of so-called electronic shopping malls, which constitute of one form of e-commerce for consumers (hereinafter referred to as “B2C e-commerce”), the JFTC surveyed (1) transactions between operators of so-called electronic shopping malls (hereinafter referred to as “mall-operating enterprises”) and enterprises running shops in such malls (hereinafter referred to as “mall-participating enterprises”), and (2) the relationships between enterprises aspiring to enter and develop their business in the B2C e-commerce field and supplying enterprises. Subsequently, the JFTC published its opinions under competition policy and the AMA in December 2006.

4.1 *The features of the market*

34. The B2C e-commerce business, which scale had been expanding yearly, was conducted by mall-participating enterprises opening virtual shops on the internet, mall-operating enterprises managing virtual shopping malls that were composed of virtual shops on the internet and consumers. The existence of B2C e-commerce was important and could be advantages for mall-participating enterprises, for example, by having different outlets available to sell and potentially increasing sales, and on the other side, the wide selection of goods and the low prices were merits for consumers. The B2C e-commerce transactions were concentrated in the top three mall-operating enterprises.

4.2 *Assessment of vertical restraints in the consumer e-commerce market under the AMA*

35. In the assessment of vertical restraints in the consumer e-commerce market under the AMA that were uncovered by surveys regarding the industrial structure and trade situation in the e-commerce market, price discrimination related issue was mentioned below.

- Internet sales prohibitions

36. In transactions between mall-participating enterprises and their supplying enterprises, some supplying enterprises prohibited mall-participating enterprises from selling certain products on the Internet or set supplying prices higher. Prohibiting mall-participating enterprises from selling products on the Internet — because mall-participating enterprises might sell them in lower prices — or setting supplying prices so high that mall-participating enterprises have difficulty in procuring products falls under dealing on restrictive terms and discriminatory pricing which were prohibited under the AMA.