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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by Japan

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INDEPENDENCE OF COMPETITION AUTHORITIES. FROM DESIGNS TO PRACTICES

-- Japan --

1. Introduction

1. The Antimonopoly Act (hereinafter referred to as the “AMA”) is a basic rule for economic activities. Thus, it needs to be enforced continuously and consistently by a neutral and fair organization that is free from any political influences. In Japan, the independence of exercise of authority of respective commissioners who make collectively decisions on law enforcement by the Japan Fair Trade Commission (hereinafter referred to as the JFTC) is clearly stipulated in the AMA. Also, in practical aspects, the JFTC independently makes decisions without any interference from other administrative bodies etc., regarding enforcement of cases of violations of the AMA.

2. In addition, it leads to preventing unjust intervention in each case that the competition authority clarifies its views on the application of the competition law, and enhancement of independence can be expected as a result. In this point, the JFTC has been drawing up guidelines on the application of the AMA and conducting positive public relations activities.

3. In this contribution paper, we would like to introduce the independence of the JFTC from institutional and practical aspects.

2. Legal and structural independence

2.1 *Independence of the chairman and commissioners’ performing their authorities*

4. As the JFTC makes a decision related to enforcement of the AMA depending on the result of discussion among chairman and commissioner, independence of the chairman and commissioners’ authorities need to be guaranteed so that chairman and commissioners are not unjustly interfered in order to realize neutral and fair law enforcement.

5. Article 28 of the AMA makes it clear that the authorities of the chairman and commissioners are independent by stipulating that “the chairman and commissioners of the Fair Trade Commission shall perform their authority independently”.

6. The term of office of the chairman and commissioners is five years (Article 30 of the AMA) and, in principle, a chairman or a commissioner may not, against their will, be dismissed from office while they are in office (Article 31 of the AMA). In addition, the remuneration of the chairman and commissioners may not, against their will, be reduced in amount while they are in office (Article 36 of the AMA). These provisions guarantee the statuses and the remuneration of them, so independence of their performing their authority is guaranteed.

7. Moreover, Article 66 of the AMA stipulates that meetings of the JFTC are not open to the public. This prevents outsiders from putting unjustly pressure on it, and keeps independence of its making decisions.

2.2 *Transition of organizational positioning*

8. The JFTC was positioned as an external agency of the General Administrative Agency of the Cabinet¹ in and before 2000, but when the central government ministries and agencies were reorganized in 2001, the Cabinet Office (hereinafter referred to as the “CAO”) was no longer able to treat practical affairs as an organization that carries out planning and comprehensive adjustment of important and specific matters relating to national politics. Accordingly, the JFTC once became an external agency of the Ministry of Internal Affairs and Communications (hereinafter referred to as the “MIC”)² that was applied to treat operations inappropriate for other ministries and government agencies.

9. However, the Prime Minister of Japan, Junichiro Koizumi and His Cabinet, which were formed after that, put the top priority on promoting economic structural reform in Japan and making the Japanese economy fair and free. This made more emphasis on the characteristics of the competition policy promoted by the JFTC as an administrative matter to be managed by the Prime Minister from the perspective of the entire government, which demonstrated the heightened importance of the competition policy.

10. While the independence of the JFTC was still assured based on the AMA described above (2.1) even under the MIC, several concerns about the independence and neutrality of the JFTC were expressed³ because the MIC treated not only operations inappropriate for other ministries and government agencies, but also regulations of telecommunications business, broadcast business and postal business etc.

11. In light of the changes in the environment around the JFTC mentioned above, The JFTC was then transferred from an external agency of the MIC to that of the CAO in 2003.

2.3 *Employment and education of officials*

12. With regards to the employment of officials, the JFTC independently employs persons who have passed the national civil servant examination. In addition, the JFTC sometimes employs persons under some of conditions even if such persons have not passed the national civil servant examination. As for training, in addition to the training program organized by the National Personnel Authority, there are many training programs implemented by the JFTC to build capacities of its officials. In this way, certain independence is also realized in terms of employment and education of officials.

3. **Independence relating to practice of law enforcement**

3.1 *Decision-making on law enforcement*

13. As stated above, the independence of respective commissioners’ authority is given in legal aspect and practically, the JFTC is enforcing the AMA without any unjust intervention from other government organizations.

14. In the investigation into antimonopoly violation cases, the JFTC is making every decision independently regarding which case is subject to investigation, how the violation is identified, and what

¹ Predecessor of the current CAO that existed before the reorganization of the central government ministries and agencies

² The MIC newly established when the central government ministries and agencies were reorganized.

³ The OECD had carried out the similar indication (Regulatory reform in the Telecommunications Industry (1999) <http://www.oecd.org/japan/2506744.pdf>)

kind of disposition is imposed, in a process from the beginning of investigation to an administrative disposition.

15. In a review of business combination, when the JFTC makes a decision, it does independently in every case as well.

3.2 Enforcement of the AMA in business sectors

16. Sector regulatory agencies carry out enforcement and application of a business law in that business sector, while the JFTC can exercise its authority set forth in the AMA independently of the regulatory agencies, because the AMA is basically applied to all of business sectors. In fact, the JFTC has enforced the AMA in a variety of business sectors, such as agricultural, automotive and financial business sectors.

17. In addition, the JFTC applies the AMA to a violative act of an enterprise or trade association, even if the act was induced through the direction or guidance of a regulatory authority, and can take legal action, etc. against the enterprise or trade association. The JFTC clarifies this in certain guidelines⁴.

4. Advocacy activities based on independence

18. For the purpose of promoting competition in regulated sectors, the JFTC has conducted survey on competition policy issues in the sectors and expressed our viewpoints toward ministries and agencies in charge of the regulations.

19. For example, the JFTC examined the status of childcare sector that is under the jurisdiction of other administrative organizations, published “Study Report on Childcare Sector⁵” which compiled views and recommendations regarding competition policies, and sent the report to the relevant ministries and agencies, etc. In addition, the report pointed out that some municipalities did not admit the entry of stock companies, etc. and the entry of diverse enterprises was still insufficient. Because of this, the JFTC explained the contents of the report to the respective municipalities and made an effort to have them understand the report deeply. In this report the JFTC recommended promotion of new entry of a wide range of operators, enhancement of information disclosure / third party evaluation, and expansion of additional services in view of promoting competition in the childcare sector.

20. In addition, as with the above, the JFTC examined the status of nursing care sector that is under the jurisdiction of other administrative organizations, and published “Study Report on Nursing Care Sector⁶.” In this report, it was pointed out that it is important to make an environment where an entry by diverse enterprises can be made from the viewpoint of competition policies, and the JFTC recommended that desirably the existing entry regulations should be abolished so that medical corporations, stock companies, etc. can enter in the sector with equal conditions to social welfare corporations, because the main entity that can open a special elderly nursing home is limited to a social welfare corporation, etc. in current systems.

⁴ Guidelines Concerning Administrative Guidance under the Antimonopoly Act (June 30, 1994, amended January 1, 2010) http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/administrative.pdf

⁵ <http://www.jftc.go.jp/en/pressreleases/yearly-2014/June/140625.html>

⁶ http://www.jftc.go.jp/houdou/pressrelease/h28/sep/160905_1.html (Japanese only)

5. Ensuring Transparency of competition authority which resulting in increasing its independence

21. When views on application of competition laws are clarified and published, transparency of law application is secured and thereby foreseeability of enterprises is enhanced. In addition, when bases and theories for determination are made public in individual cases, consistency between such bases and theories for dealing with individual cases and views shown in guidelines, etc. published in advance is confirmed by third parties, and thereby administrative decisions likely to create inconsistency between individual cases and guidelines due to unjust intervention that authorities cannot explain would be eliminated. As a result, this leads to prevention of unjust intervention in decisions of competition authorities and increase in its independence.

22. In this point, the JFTC has shown its views on the application and procedures of the AMA by formulating tens of guidelines for specific types of conducts and specific business sectors. In addition, the JFTC publishes the cases that are subject to an administrative disposition and cases regarding business combinations for which the secondary investigation was carried out.