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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Japan --

16-18 June 2015

This document reproduces a written contribution from Japan submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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JAPAN

1. Introduction

1. In Japan, since there is no statute providing general disciplines for SOEs or subsidies to enterprises, no legal definition of “SOEs” or “competitive neutrality” has been made.

2. From the viewpoint of the competition policy, Japan’s Antimonopoly Act is applied to an anticompetitive conduct by an enterprise, etc., where the scope of the definition of “enterprise” is interpreted to include SOEs or government organizations. Also, there is no exemption system from the Antimonopoly Act on the grounds of being SOEs or government organizations. Accordingly, the JFTC will conduct rigorous enforcement against SOEs or government organizations as is the case against private companies when the violation of the Antimonopoly Act is found.

3. In addition to the enforcement of the Antimonopoly Act against violations, the JFTC coordinates with other government agencies on policies formulated or drafted by them from the point of view that such policies does not restrict or harm fair and free competition. Also the JFTC conducts survey and analysis of certain businesses or sectors and make proposals, etc. on the modality of their systems. Most recently, the Study Group on Competition Policy and Public Support for Revitalization had been held since August 2014 and its interim report was published in December 2014. Furthermore, responding to this report, the JFTC has started to prepare guidelines on the issues from the competition policy viewpoint that supporting organizations should keep in mind when providing public support for revitalization.

4. We will explain the scope of application of the Antimonopoly Act and the specific cases of the JFTC’s enforcement in section 2 and, in section 3, ex-ante coordination mechanism of policies between the JFTC and other government agencies, contents of the interim report of the “Study Group on Competition Policy and Public Support for Revitalization” published in 2014 and the future efforts by the JFTC responding to the report.

2. The scope of the application of the Antimonopoly Act and the enforcement cases

2.1 *The scope of the application of the Antimonopoly Act (enterprises and trade associations)*

5. The Antimonopoly Act applies to the acts of an “enterprise” or a “trade association”, and the term “enterprise” is defined as “a person who operates a commercial, industrial, financial or other business” by the article 2 (1) of the Antimonopoly Act.

6. According to the past ruling of the court, the meaning of “other business” is interpreted as an “economic activity which recurrently and continuously receives correspondent counter performance by providing certain economic benefits regardless of the legal nature of the entity”. (The Supreme Court decision on December 14, 1988 “the case on Shibaura Slaughterhouse operated by Tokyo Metropolitan Government”)

7. Accordingly, if the central government or the local government performs economic activities, they will be regarded as “enterprises” in this sense, and fall within the scope of the application of the Antimonopoly Act.

8. In fact, in a damage suit, filed by a private enterprise competing against former Ministry of Posts and Communications¹ in the issuance and sale of the post cards, claiming for constituting Unjust Low Price Sales (Paragraph 6 of former Designation of Unfair Trade Practices) in violation of article 19 of the Antimonopoly Act (unfair trade practices), the court ruled that former Ministry of Posts and Communications falls into the range of the “enterprises” (The Supreme Court decision on December 18, 1998 New Year's postal card case). Also, more recently, there was a court case in which a private competitor sought an injunction relief against former Japan Post² pursuant to article 24 of the Antimonopoly Act claiming that former Japan Post's fee structure in parcel delivery (“Yu-pack”) business constitutes the Unjust Low Price Sales in violation of the article 19 of the Antimonopoly act (The Tokyo high court decision on November 28, 2007 “Yamato Transport Co., Ltd. v. Japan Post”)

9. As explained above, Japan's Antimonopoly Act may apply to the acts of SOEs or the government itself. There is no specific exemption for SOEs, etc. in the Act. In addition, the Act (Article 28) ensures the independence of the JFTC's performing its authority.

2.2 *Enforcement by the JFTC*

10. What follows is a case of enforcement of the Antimonopoly Act by the JFTC against Nippon Telegraph and Telephone East Corporation (NTT East) which is not a pure SOE but a 100% subsidiary of the Nippon Telegraph and Telephone Public Corporation (NTT) of which the government was required to hold not less than one-third of the total number of the issued shares based on the stipulation by special law.³

11. While NTT East provides FTTH service directly to individual users, NTT East is obliged, under the Telecommunications Business Act, to accept a request from another telecommunications carrier to interconnect the telecommunications facilities of the requesting telecommunications carrier with the telecommunications facilities of the NTT East. There are two types of ways to provide FTTH service using the telecommunications facilities of the NTT East: “branch system” under which a single optical fiber between a station of NTT East and a user's residence is split by branching devices so that multiple users can share it and “direct cable connection system” under which a single optical fiber cable is occupied by only one user. Under the branching system, as the multiple users use a single optical fiber cable simultaneously, data transmission speed may be slower than that under the direct cable connection system.

12. Though NTT East set user fee (to be paid by the final users) and interconnection charges (to be paid by other carriers) for its own FTTH service at the level applicable for the branch system, it actually used the direct cable connection system to provide the service and set the user fee for the prices lower than

¹ Now, Ministry of Internal Affairs and Communications (MIC). In Japan, Ministry of Posts and Communications have provided postal services as a business operated by the government until 2003 when the postal business was separated from the government and established as the Japan Post. In 2007, the Japan Post was privatized and turned into stock corporation, named as Japan Post Holdings Co., Ltd. Though Japanese government is currently a 100% shareholder of this corporation, its stock is planned to be listed as public corporation.

² Now, Japan Post Holdings Co., Ltd.

³ Article 4 of Act on Nippon Telegraph and Telephone Corporation, etc. provides that “the Government shall always hold one-third or more of the total number of the issued shares of the Company.”

the interconnection charges that the other telecom service providers pay to NTT East to provide FTTH service by interconnections with optical fiber equipment of NTT East.⁴

13. Thereby this conduct had the effect of excluding the business activities of other telecom service providers that provided the FTTH service for individual houses through interconnecting with the optical fiber equipment of NTT East, and caused a substantial restraint of competition in the field of the FTTH service for houses in eastern Japan.

14. Accordingly, on March 29, 2007, the JFTC issued a hearing decision that NTT East was in violation of Article 3 (prohibition of private monopolization) of the Antimonopoly Act.⁵⁶

3. The tools other than enforcement to address the distortion of competition

3.1 *Ex-ante policy coordination*

15. When administrative bodies propose to enact or amend a law or ordinance from the standpoint of a specific policy requirement, and if the law or ordinance contains provisions regarding the exemption from the Antimonopoly Act or the measures taken by the administrative bodies which are likely to have restrictive effects on competition, then, based on the consultation from these bodies in the phases of the planning and the proposal of the enactment or the amendment, the JFTC acts to ensure coordination between the proposed provisions and the Antimonopoly Act as well as the competition policy.

16. Furthermore, the JFTC provides consultation for administrative bodies such as central government offices and local public entities about whether the policies proposed by these administrative bodies give cause for concerns from the viewpoint of the Antimonopoly Act and competition policy, which includes the case regarding supports or subsidies by public organization that may have effects on competition.⁷

17. Besides, since October 2007, as a general rule, each ministry is obliged to implement an ex-ante evaluation of regulations when it implements the institution, revision or abolition of the regulation. On this occasion, each ministry also implements the analysis of impacts of regulation on competition (Competition Assessment) and describes the results in the report on ex-ante evaluation of regulation. Competition Assessment has been started experimentally since April 2010. Each ministry is expected to fulfill the checklist regarding the impacts on competition and its analysis (Competition Assessment Checklist), and then submit this to the Ministry of Internal Affairs and Communications (MIC) with the Report. Thereafter, MIC submits the Competition Assessment Checklist fulfilled by each ministry to the JFTC.

⁴ Other carriers were forced to bear a large amount of deficit to set the user fee to be competitive with that of NTT East while paying the above interconnection charges to NTT East. Therefore, it was impossible for other carriers to continue providing the service while maintaining competitiveness with NTT East.

⁵ Though, NTT East filed a suit to rescind the decision described above, the Tokyo High Court made a decision to dismiss this appeal on May 29, 2009. Following the Tokyo High Court's decision, the Supreme Court dismissed the NTT East's final appeal on December 17, 2010; consequently the JFTC's hearing decision became final and binding.

⁶ For the details of the case, please refer to Japan's contribution to the roundtable on "Margin Squeeze" at the WP2 meeting in October 2009. <http://www.oecd.org/daf/competition/sectors/46048803.pdf>

⁷ Basically, these cases of consultation are not published.

3.2 *Interim Report of the Study Group on Competition Policy and Public Support for Revitalization (2014)*

18. In addition to the above ex-ante co-ordination of the policy, the JFTC has conducted surveys and analysis on certain sectors where competitive concerns are occurring and has provided proposals from the view of competition policy.⁸

19. In 2014, recognizing that it is important to minimize the effect of public support⁹ for revitalization of enterprises on competition on the relevant markets, the “Study Group on Competition Policy and Public Support for Revitalization” was held and specific analysis was conducted, which resulted in the publication of the interim report about the state of public support for revitalization. The main contents of the report are as follows.

3.2.1 *Purpose and objectives of the Study Group on Competition Policy and Public Support for Revitalization*

20. In Japan, public support for revitalization is provided to achieve various policy objectives such as maintaining community health care, public transportation, and other infrastructures, securing employment, stimulating the local economy, and preventing chain-reaction bankruptcy. Under these circumstances, the “Study Group on Competition Policy and Public Support for Revitalization,” which is made up of experts, has been held since August 2014 in accordance with the decision of the Minister of State for Special Missions, Cabinet Office, recognizing that it is important to minimize the effect of public support for revitalization on competition on the relevant markets. In the study group, specific analysis was conducted from the viewpoint of the competition policy, which resulted in the publication of the interim report in December 2014.¹⁰

21. Public support for revitalization is provided when a business needs to be revitalized for the benefit of society, but cannot be revitalized without this support. At the same time, it is pointed out that public support for revitalization for these enterprises, which would otherwise exit from the market as a result of financial failure, has shown to affect competition in the market.

22. Therefore, the Study Group conducted a detailed examination of the feedback received from organizations providing public support for revitalization (the “supporting organizations”), enterprises receiving this support (the “beneficiaries”), competitors of these beneficiaries, and experts regarding the systems for and the actual state of public support for revitalization in Japan, EU, and the United States. It then prepared an interim report of the public support for revitalization in view of the competition policy.

⁸ In 2006 when the laws on the privatization of the postal services were enacted, from the perspective of ensuring equal footing with enterprises engaged in similar services, the JFTC analysed issues on competition policy and published the report, etc. “Issues Concerning Postal Services and Competition Policy Coinciding with the Enactment of the Laws on the Privatization of the Postal Services” (July 21, 2006) http://www.jftc.go.jp/en/pressreleases/yearly_2006/jul/2006_july_21.files/2006-July-21.pdf “JFTC’s opinion under the Antimonopoly Act concerning Postal Savings Service and Postal Life Insurance Service etc. with the Postal Service Privatization” (October 18, 2006)(Japanese) <http://www.yuseimineika.go.jp/iinkai/dai11/sirou2.pdf>

⁹ “Public Support for Revitalization” is the support for business revitalization by the corporations, etc. which are sponsored by the national government, to help enterprises recover their abilities to continue business when they faces financial difficulties despite of possessing useful management resources.

¹⁰ “Study Group on Competition Policy and Public Support for Revitalization Interim Report”(December 19, 2014). <http://www.jftc.go.jp/en/pressreleases/yearly-2014/December/141219.files/141219report.pdf>

3.2.2 *Basic recognition of public support for revitalization in view of the competition policy*

3.2.2.1 *Assessing public support for revitalization in view of the competition policy*

23. Public support for revitalization interferes with the market mechanism in which more efficient enterprises survive. This support distorts the market mechanism and competition much more than the case without such support.

24. When public support for revitalization distorts competition, such effects on the market may arise as hindering the transfer of demand and resources from inefficient enterprises to efficient enterprises and lessening the incentive to improve business efficiency.

25. Therefore, in view of the competition policy, public support for revitalization should only be provided after giving careful consideration to the effects on competition in advance.

3.2.2.2 *Principles to consider when providing public support for revitalization*

26. Public support for revitalization should be provided based on the following three principles.

- Principle of subsidiarity

Public support for revitalization should be provided to complement the functions of the private sector only when the business cannot be revitalized smoothly through efforts of the private sector, and public support for business revitalization must be provided by the supporting organizations in order to achieve various policy objectives.

- Principle of minimum necessity

Public support for revitalization should be provided within the minimum means/ways necessary to achieve various policy objectives only when these objectives cannot be achieved without the revitalization of enterprises in financial difficulty.

- Principle of transparency

Information about individual cases, as well as information about general matters such as support standards or procedures, should be made as open as possible, ensuring the promptness and accessibility of information. This makes it possible to identify the specific effects of public support for revitalization on the market mechanism, and enable competitors to provide feedback about these effects and take appropriate actions in response to the acts of beneficiaries.

3.2.2.3 *Effects of public support for revitalization on competition and action on these effects*

- Varying degree of effects on competition

The effects of public support for revitalization on competition basically vary according to (i) the market structure and (ii) specific details of support.

As for the market structure, when the absolute business size and market share of beneficiaries are large, public support for revitalization has a major impact on competition.

In regards to specific details of support, when the scale of support is large, the period of support is long, or support is frequently provided, the effects on competition will be great.

In addition, public support for revitalization is divided into financial support and non-financial support, based on the means in which support is provided.

In regards to the means of financial support, liquidity support such as loans and the capital injections are the primary forms used. The capital injections will have a greater impact on competition than loans and other types of liquidity support.

As for the means of non-financial support, coordination among creditors and dispatch of experts are the primary forms used. The effects of non-financial support on competition will vary according to the conditions of the support plan, the quality of experts dispatched, and other conditions.

- Minimizing the effects of public support for revitalization on competition

- *Necessity of consideration based on the market structure*

When the absolute business size or market share of beneficiaries is small, the effects on competition are also small. Thus, it is generally less necessary to consider the effects of public support for revitalization on competition in this case than in other cases.

- *Minimizing the effect through the arrangement of specific support*

Period/frequency of support. The period or frequency of support should be kept as short as possible and should not be extended, on the basis of ensuring business revitalization and with a view to limit the period of distorting the market competition. In addition, support should only be provided once so as not to harm the incentives of the beneficiaries to improve the efficiency.

Scale of support. Beneficiaries should be required to secure self-financing in advance, and their shareholders, etc. should be required to bear losses before public support for revitalization such as liquidity support and capital injections is provided in order to limit the scale of support to the minimum extent necessary, but without impeding business revitalization.

Method of support. In providing financial support and non-financial support in common, it is required to consider the necessity and specific details of support based on the principle of subsidiarity. The provision of support is ensured by considering the minimum means/ways necessary to achieve the policy objectives based on the principle of minimum necessity. Financial support including capital injections and loans should be provided by restricting the purpose of expenditure and use of the support to business revitalization so as not to make the scale of the support more than necessary. In addition, based on the fact that loans and other liquidity support will have less impact on competition than the capital injections, the needs of beneficiaries for financial support must be ascertained in advance and the necessity of capital injections in addition to the provision of loans and other liquidity support should be considered thoroughly to ensure the appropriate level of financial support. In providing liquidity support, interest should be imposed at a level close to the conditions of loans from private financial institutions. In addition, when capital injections are needed, as capital injections will have a great impact on competition, supporting organizations should seek contributors in the private sector first and inject capital into beneficiaries by themselves only when it is impossible to find any contributors in the private sector.

– *Concurrent application of legal liquidation*

The concurrent application of legal liquidation and public support for revitalization may result in excessive support beyond the extent necessary for business revitalization and a greater impact on competition. Therefore, in general public support for revitalization and legal liquidation should not be concurrently applied. However, if there is a pressing need to apply the unique functions of legal liquidation that are not available under public support for revitalization, legal liquidation may be used in addition to the provision of public support. The concurrent application of public support for revitalization and legal liquidation should involve a full prior examination of their necessity. Even when this necessity is considered to exist, the details of public support for revitalization should be strictly adjusted after full consideration of the impacts of the legal liquidation, so as not to make the support excessive.

– *Measures for minimizing effect*

Essentially, the effects of public support for revitalization on competition must be minimized by making adjustments for specific support. However, distortion of competition that cannot possibly be ignored may remain after making adjustments for specific support.

In this case, measures must be also taken to minimize effects of public support for revitalization on competition (the “measures for minimizing effects”) in addition to the adjustments for specific support.

For instance, if public support for revitalization leads to an increase in production facilities and investment that would not have been possible without public support for revitalization, and the absolute business size or the market share of beneficiaries are expected to expand, providing them with a highly competitive advantage, measures to restrict the business activities of the beneficiaries (the “behavioral measures”) may be taken.

In specific, for instance, investment in new production facilities and new business fields may be restricted for a certain period, or the beneficiaries may be required to periodically submit reports to the supporting organizations about their business activities and investment plans.

In addition, if the absolute business size or the market share of the beneficiaries is sufficiently large when determining the specific support, and the beneficiaries are expected to gain highly competitive advantage by leveraging the public support for revitalization upon its completion, measures to reduce the market presence of beneficiaries (the “structural measures”) may be taken in advance.

As specific examples of the structural measures, a business transfer or the disposal of production facilities and other assets may be conducted to reduce the production capacity of the beneficiaries.

The necessity of implementing measures for minimizing effects and their respective details must be specified in advance when determining whether to provide support and in principle, the measures for minimizing effects should be implemented during the period of support.

- Framework for securing the appropriateness of public support for revitalization

- *Division of roles between the Japan Fair Trade Commission and the supporting organizations*

The Japan Fair Trade Commission should prepare and publish cross-industry guidelines containing matters in view of the competition policy that supporting organizations should keep in mind when providing public support for revitalization.

Each supporting organization should consider and evaluate the effects on competition based on the aforementioned guidelines, cooperating with regulatory agencies as needed, when determining the specific support for each case.

- *Ex-post measures to restore competition*

The adoption of ex-post measures to restore competition is considered to be inappropriate when beneficiaries gain a greater competitive advantage than initially expected because it may impair the incentive of beneficiaries to carry out business revitalization, or the incentive for beneficiaries' stakeholders to commit themselves to business revitalization. In addition, measures financially disadvantageous to beneficiaries are considered difficult to be taken in light of the legal system.

- *Relevant business regulations, etc.*

When beneficiaries and their competitors are subject to a public regulatory system, the regulatory agencies may impose actions for disposition, including actions concerning the granting of licenses, permits, etc. to correct distortion in competition and ensure a competitive environment.

In this case, the regulatory agencies should consider the specific actions to ensure a competitive environment by promoting the stimulation of competition in the market.

- *Ensuring transparency*

- *Supporting organizations.* In principle, the supporting organizations should publicly announce the general standards for the examination of and the procedures for the provision of public support for revitalization to improve the predictability of beneficiaries, their competitors, and their stakeholders. In addition, if the impact on competition is considered to be great, the supporting organizations should publicly announce the details of the support plans for individual cases and their assessment of the effects of public support for revitalization on competition to the greatest extent possible. Moreover, when supporting organizations assess the impact on competition, they should obtain feedback from competitors, etc. as needed, to the extent not impeding business revitalization.

- *Regulatory agencies.* When regulatory agencies decide to consider the effects of public support for revitalization on competition in taking actions, etc., it should promptly and publicly announce that fact to the greatest extent possible. Likewise, when it actually considers the effects of public support for revitalization on competition in taking actions, it should publicly announce the details of the actions, etc. and its assessment of the influence on competition to the greatest extent possible.

3.3 *Future effort by the JFTC*

27. As an effort to address the competitive issues that are examined in the interim report as above, the JFTC started to develop guidelines containing matters that supporting organizations should take into account in determining the specific support.