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**ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER
COMPETITION LAW**

-- Note by the Delegation of Japan --

This note is submitted by the delegation of Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON INFORMATION EXCHANGES BETWEEN COMPETITORS UNDER COMPETITION LAW

-- Note by Japan --

1. Introduction

1. Information exchanges between competitors can be pro-competitive and anti-competitive.

2. For example, if competitors exchange information about their own price level or trade associations provide the average price level among their member firms, this might hinder competition in that such actions might induce higher price levels in the market, or, on the contrary, such exchanges of information might promote price competition through making price levels more transparent. In other cases, when competitors exchange information about their R&D activities, there may be benefits if R&D becomes more active due to reduced R&D costs, mutual complementarities of technologies, etc., which could lead to further technological breakthroughs. At the same time, there may be a danger when competition in the market may substantially be restrained if technological information is shared among rival firms.

3. This contribution paper explains how information exchange activities among competitors are considered in identifying a violating conduct in previous court cases and at the same time, summarizes the JFTC's views on information exchanges among competitors by introducing the "Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act" (published on Oct. 30, 1995, finally revised on Jan. 1, 2010, hereinafter referred to as "Trade Associations Guidelines"). Then actual cases of prior consultations related to information exchange are presented.

2. Information exchanges among competitors under the Antimonopoly Act

4. Information exchanges alone are not considered a violation of the Antimonopoly Act. If the information exchanges between firms lead to agreements that restrict competition in terms of price, volume, clients, distribution channels, facilities, etc., thereby causing a substantial restraint of competition in any particular field of trade, then this falls under "unreasonable restraint of trade," which is prohibited by Article 3 of the AMA and is considered a violation under the Act.

5. Concerning the nature of information exchanges and agreements that follow, which become elements that constitute "unreasonable restraint of trade," the Tokyo High Court stated in the Toshiba Chemical Corporation case (Sept. 25, 1995) as follows, "The said 'communication of intent' means that an undertaking mutually recognizes or could predict the implementation of the same or similar kind of price increase among different undertakings and accordingly, intends to collaborate with such a price increase. In order to prove 'communication of intent,' it is not sufficient to show the recognition or acceptance of an undertaking's price increase by another undertaking. However, an explicit agreement that binds the related parties is not necessary to prove 'communication of intent.' In other words, 'communication of intent' can be proven by showing the mutual recognition of other undertakings' price increase and the tacit acceptance of such price increase of another." Therefore, the Tokyo High Court interpreted that identifying the conclusion of an agreement only needs the existence of tacit agreement instead of explicit binding

agreement. In addition, the Tokyo High Court mentioned, “If an undertaking exchanges information about a price increase with other undertakings and accordingly, takes the same or similar conducts with others, the court cannot but presume that the parties had a relationship where they expected the concerted action from each other; therefore, the said ‘communication of intent’ exists unless there is evidence that shows the price increase was implemented individually by an undertaking’s own decision and the price increase was made to meet price competition in the relevant market and there is no relationship between that undertaking’s price increase and that of other undertakings.”

6. In this ruling, it is necessary to prove the following conditions in order for the above case to be judged a violation of the AMA through tacit agreement: (a) there were communications and negotiations prior to the agreement, (b) negotiations were made regarding a price increase, and (c) each action taken after the negotiations by parties involved conformed to the negotiations. Thus, in order to establish an infringement, it is necessary to show not only the fact that information was actually exchanged between competitors, but also the fact that information exchanges were related to the price increase, and as a consequence the actions of the undertakings conformed to the content of the communications.

3. The JFTC’s views on information exchanges - The Trade Association Guidelines

7. As mentioned above, information exchanges between firms can be pro- or anti- competitive. The impacts on competition may vary depending on how and what information is exchanged.

8. The JFTC has compiled and published various guidelines to enhance transparency in its law enforcement as well as predictability for firms, some of which highlight how the JFTC views information exchanges between businesses. Since trade associations do perform information gathering and dissemination for member firms as one of their principal functions, some part of the JFTC’s “Trade Association Guidelines” is devoted to this subject. “The Trade Association Guidelines,” which identify the kind of trade association activities that become problematic under the AMA, summarize points to be considered on information exchanges as below:

3.1 *Conduct suspected to constitute an infringement*

- Collecting or offering information from or to constituent firms, or promoting the exchange of information among the constituent firms, where such information specifically relates to important competition-related factors, concerning the present or future business activities of the constituent firms, such as the following: specific plans or prospects regarding the prices or quantities of goods or services supplied or received by the constituent firms, the specific contents of the constituent firms' transactions with or inquiries from customers, and the limits of anticipated plant investment.

3.2 *Conduct in principle not constituting a violation*

- Offering, for purposes of improving their convenience, information concerning such matters as the proper use of products or services supplied in the business field to the consumer.
- Collecting and offering general information that concerns such matters as technological trends, management expertise, market environment, legislative or administrative trends, and socioeconomic conditions in the field concerned, and that is provided by government agencies, private research organizations, and so forth.
- In order to obtain and disseminate information on general business performance in the field concerned, collecting, at the discretion of the constituent firms, general information regarding the

previous business performance of those firms, including collecting data relating to such matters as the quantities or monetary value of previous production, sales, and plant investment; statistically and otherwise objectively processing such information; and publicly disseminating that information in a summarized form, without disclosing the actual quantities or monetary amounts relating to individual constituent firms.

However, in cases where the constituent firm in question has already publicly announced its specific quantities or monetary amounts, the association may disclose relevant information.

- For the purpose of providing users and the constituent firms information concerning previous prices, collecting, at the discretion of the constituent firms, general information about those firms' previous prices; statistically and otherwise objectively processing such information; deriving an accurate indication of price distributions and trends; and offering such general information to the constituent firms and users without disclosing the prices of individual constituent firms.
- Offering the constituent firms and users informational materials, or technical indicators, that enable fair and objective comparisons of price-related matters such as expense items, degree of difficulty of operation, and quality of goods or services whose prices are difficult to be compared in the market.
- Collecting and offering general information concerning overall demand trends in the field of business concerned; or formulating and disseminating rough estimates of demand, based on objective facts.
- Collecting and offering to the constituent firms objective information concerning the credit standings of customers, for the purpose of ensuring the safety of transactions by the constituent firms.

9. As mentioned above, whether the case falls under an infringement of the AMA is decided by the fact that businesses undertake information activities relating to important dimensions of competition. It is not important whether information is “exchanged with each other” or information is provided in a “one-sided way.”

10. If a trade association undertakes information activities on competition related variables such as pricing, which make it possible for competing firms to predict each other's present or future business activities, and if an information activity of this kind results in a tacit understanding or common intent among members to restrain competition, the case shall in principle be found to constitute a violation of the Act.

4. Prior consultation cases from trade associations and the reply of the JFTC

11. The JFTC gives prior consultation services to provide advice regarding whether a specific action planned by an undertaking or trade association would be considered to be an infringement under the AMA. As mentioned above, since information exchange among competitors can be competition-promoting as well as competition-restricting, it is desirable that each party exchange information in the less competition-restrictive way.

12. The following introduces a case that would be considered to be an infringement under the AMA, as well as one that would not.

4.1 A case that would be considered an infringement under the Antimonopoly Act (FY 2005)

4.1.1 Consulting parties

- Industrial Association A (Association of construction component X manufacturers)

4.1.2 Summary of the consultation

13. Industrial Association A consists of 13 manufacturers producing construction component X. These member companies produce more than 95% of construction component X, out of which 3 top companies occupy a 70% share in the market, and this share has remained at the same level for a long time.

14. As a detailed technological standard is set for this construction component X, there is no difference in product quality, etc., among manufacturers.

15. Industrial Association A is considering compiling a demand forecast of construction component X, broken down into six sub-categories of this product, for a 5-year period every year, using the materials published by government offices and economic research institutes, etc., and making the forecast public on its website. Does such an activity constitute a problem under the AMA?

16. As mentioned above, the Industrial Association A intends to forecast the demand for construction component X at the level of the 6 sub-categories. While there are 13 member companies in the Industrial Association A, not all of the 13 members produce the product of each sub-category. At the sub-category level, a few companies produce the product.

4.1.3 The JFTC's view

17. In this case, the issue is to determine the impact of the demand forecast planned on competition.

18. Generally, the activity by a Trade Association to compile a demand forecast of a product supplied by the member companies by collecting objective information does not immediately constitute a problem under the AMA. However, if this demand forecast gives a specific target to the member companies for their future supply volume, this will constitute a problem under the AMA. (Article 8, No. 1, and No. 4)

19. When Industrial Association A compiles a demand forecast based on material which already was published, and if its contents are aggregated and summarized, such a forecast is unlikely to give a specific target of future supply volume for each member company.

20. However, construction component X is standardized and product quality is not differentiated. In addition, the market is oligopolistic and its market share remained more or less at the same level for a long time, where more than 95% of the market is dominated by member companies of Industrial Association A, with the top 3 companies holding 70%. Furthermore, only 2 or 3 companies manufacture construction component X at the sub-category level.

21. Considering the above situation, compiling demand forecasts for each sub-category cannot remain a general forecast of the industry trend. It can serve as a concrete target of future supply volume for the member companies, and it is highly likely for them to be used as a tool to adjust supply volume.

22. Summing up the above mentioned, even the activity to compile and publish a demand volume forecast may constitute a problem under the AMA.

4.1.4 *The JFTC's reply*

23. Such activity by the Industrial Association A to compile and publish a demand volume forecast will be problematic under the AMA.

4.2 *A case that would not be considered an infringement under the Antimonopoly Act*

4.2.1 *Consulting parties*

- Association of Exploration Companies (FY 1997)

4.2.2 *Summary of the consultation*

24. Since the exploration work requires the use of specific machinery and the knowhow to use it, the association provides lectures, sets a standard of working skills needed, etc., and administers examinations on firms' skill. According to the result of this examination, qualifications are given by the level of working skill, serving as the evaluation criteria on the exploration work.

25. Since the exploration work involves new technology that has not yet been spread in the market, the Association of Exploration Companies is considering to clearly present the characteristics and costs, etc., for exploration work using this new technology by compiling the standard calculation material, so that related parties can properly calculate the cost.

26. The Association also plans to include items such as the technology fee in the calculation of the exploration costs because it considers the exploration work should be evaluated by taking into account its technology level and know-how and hopes that the calculation of the exploration cost will include factors such as the technology level of firms.

27. The standard calculation material contains items such as the steps that are necessary for conducting exploration, the formula to calculate the exploration fee, and the adjustment coefficient, etc. (When the exploration is undertaken under severe environmental conditions causing a deterioration in working efficiency, this figure is multiplied on the total cost.) This material does not include specific figures such as standard prices, etc., for each cost item.

28. Does such an activity of the Association of Exploration Companies to compile the standard calculation material and distribute it to the ordering parties as well as the association's member companies constitute a problem under the AMA?

4.2.3 *The JFTC's view*

29. Regarding the products or services whose prices are difficult to be compared in the market, the approach of the Trade Association to provide the material or the technological indicators dedicated to the fair and objective comparison of the price-related factors such as the cost item, level of difficulty in exploration work and quality, etc., to the related party, including the users, will not constitute a problem under the AMA in principle, unless such material and indicators suggest a common target price among related parties.

30. In order to appropriately calculate the exploration work, the activity of the Association of Exploration Companies to compile and provide the standard calculation material defining items such as the general cost, level of skill/technology and time, etc., necessary for the exploration work to not only the members but also the ordering parties will not constitute a problem under the AMA in principle, unless such material includes the standard price of each cost item, thereby not giving a common target amount of

calculation. However, if this material provides factors which can be used for price-setting by such means as creating a man-hour chart or establishing a numerical rating through the comprehensive evaluation of each factor for the exploration work, it will constitute a problem under the AMA, since such material would give a common target price.

4.2.4 The JFTC's reply

31. The activity of the Association of Exploration Companies to identify the items such as the cost criteria necessary for the exploration work, the standard formula for calculation, and the definition of difficulty in exploration work, etc., does not constitute a problem under the AMA.