

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON MARKET DEFINITION

-- Note by the Delegation of Japan --

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ROUNDTABLE ON MARKET DEFINITION

-- Note by Japan --

1. Introduction

1. In Japan, when enterprises argue against the violation of the prohibition on the unreasonable restraint of trade, they usually dispute how the market is defined. In addition, enterprises sometimes dispute the “relevant products or services” (basis of calculation of surcharge payment amount which is ordered to be paid) when the JFTC issues surcharge payment orders against enterprises whose activities are found to be unreasonably restraining trade. Although the definition of “category of subject products” is the different concept from market definition (definition of particular field of trade), factors considered in defining market are used in the definition of “category of products which are subject to violations (hereinafter referred as “subject products”)” in the decision on “relevant products or services”.

2. In this written contribution, with a particular focus on unreasonable restraint of trade, we will describe how market definition functions in finding unreasonable restraint of trade, and how we define “category of the subject products” in decisions on “relevant products or services”.

2. How Market Definition Functions in Finding Unreasonable Restraint of Trade

3. Unreasonable restraint of trade is an enterprise’s activity which substantially restrains competition in that particular field of trade through mutually restricting business in concert with other enterprises by contracts, agreements or any other means irrespective of its name (Article 2, Paragraph 6 of the Antimonopoly Act). In Japan, “market definition” means defining the “particular field of trade”.

4. The basic idea of defining the “particular field of trade” was shown in the two cases of unreasonable restraint of trade, which will be introduced below.

2.1 *Asahi Ko-matsu Case (Tokyo High Court decision on June 13, 1986)*

2.1.1 *Overview of the Case*

5. The enterprises including the plaintiff implemented the cartel which restrained limestone supply in the Tamura district. The JFTC issued cease and desist order against them by the hearing decision. In response to this order, the plaintiff filed suit to rescind the hearing decision. The plaintiff claimed some mistakes included in the JFTC’s findings which determined the limestone market as a single field of trade although the limestone was used in different ways.

2.1.2 *The plaintiff’s Claim*

6. The limestone supply to cement manufacturers is different to that to powder cement manufacturers because they are traded differently. Therefore, they respectively compose different fields of trade.

2.1.3 *Decision by the Court*

7. The “particular field of trade” which is stipulated in Article 2 Paragraph 6 of the Antimonopoly Act means the extent to which substantial restraint of competition is brought down by a particular activity. This extent should be relatively defined depending on the specific behaviour, object of trade, or where and how trade was conducted.

8. The limestone which is mined in the Tamura District is supplied and demanded not only for manufacturing limestone powder but for manufacturing cement. The cartelists, including the plaintiff, have the capacity to supply limestone in terms of the amount of limestone they have. Therefore, the anticompetitive effect is supposed to be brought on the overall supply and demand of limestone, which is used in both ways described above in the Tamura district, when the limestone supply destination by the cartelists is restrained. Based on these facts, there are no irrational points in the JFTC’s findings.

2.2 ***Criminal Bid-Rigging Case for the Seal Ordered by Social Insurance Agency (Tokyo High Court decision, December 14, 1993)***

2.2.1 *Overview of the Case*

9. Four companies including the defendant had implemented the coordination of those who would successfully receive orders of the seals on advice of payment letters (hereinafter referred to as the “seals”) by the Social Insurance Agency (here in after referred to as the “SIA”). They were indicted by the prosecutors because their bid-rigging fell under unfair trade restraint (Article 89 Paragraph 1 Item 1 of the Antimonopoly Act).

2.2.2 *The Defendant’s Claim*

10. The “particular field of trade” in this case should be defined as the field where the enterprises made successful bids for the seals and received the orders from the SIA. However, in this series of biddings for seals, the defendant was not selected as a nominated enterprise by the SIA. Therefore, the defendant is not “the enterprise” in the field of trade described above.

2.2.3 *Decision by the Court*

11. Based on the judgment in the Asahi Ko-matsu case with respect to the definition of “particular field of trade” in general, Tokyo High Court rejected the defendant’s claim. The detail of the judgment will be introduced as follows.

12. Focusing on its stages of trade, the object of the agreement in this case can be classified into the following fields:

- Field A: The enterprises which win the bids and receive the orders from the SIA and their order price
- Field B: The enterprises which receive the orders from the successful bidders¹ (“intermediary enterprises”) and their order price

¹ They did not actually print and manufacture the seals, but acted as intermediaries between the enterprises which were the successful bidders and those which manufacture materials for the seals.

13. Although the defendant was not selected as a nominated enterprise by the SIA, it participated in the bid-rigging and the agreement. Given this fact, bid-rigging in the field A could not be effected without giving the defendant a chance to get the benefit as an intermediary enterprise. In addition, in order to equate the benefits among the enterprises involved in the agreement, it is necessary to control how much the successful bidders pay for the intermediary enterprises (how much the intermediary enterprises charge the successful bidders). Therefore, the agreements regarding the fields A and B have been formulated as an integrated one.

14. Based on these facts, a series of trades from the SIA to intermediary enterprises, which includes receiving orders and selling, is the object of the agreement and the extent where the competition would be restrained by this agreement. Therefore, these trades should be understood as the “particular field of trade” in this case.

3. How to define the “Category of Subject Products” in the Decision on “Relevant Products or Services” in the Surcharge Payment Order against Cartelist

15. Factors considered in defining market are also used in the definition of “category of subject products” in the decision on “relevant products or services” which are basis for calculating surcharge payment amounts against cartelists.

3.1 *The “relevant products or services” and the definition of the “category of subject products”*

16. The cartelist that implemented a price cartel is to be ordered to pay a surcharge by a surcharge payment order. The amount of the surcharge is to be calculated based on the sales amount of “relevant products or services” (Article7 Paragraph2 Item1).

17. Regarding the definition of “category of subject products” in the decision on “relevant products or services”, the JFTC decided as follows in the hearing decision of Tokyo Radio Taxi Co-Operative Association (October 11, 1999).

18. Given the property of the case of price cartels, the “relevant products” can be interpreted as follows.

19. Where there is a violation which substantially restrains competition in the particular field of trade, “relevant products” are the products that have been subject to the restraint caused by the violation, which is included in the category of the subject products.

20. The “category of the subject products”, according to the content of the violation, should be defined depending on the type of product, trading area, stage of trade, and trading partner.

3.2 *Exclusion from the category of subject products*

21. The products which belong to the category of subject products of the cartel are presumed as the “relevant products or services”, unless the following type of specific facts are shown by the cartelists.

- i) Cartelists excluded the products from the subject of the cartel intentionally.
- ii) The product has been typically excluded from the object of the restraint by the cartel with rational reason that can be regarded as equal to fact i).

- The elements considered in defining market, such as the type of product, trading partner or substitutability of the product are used for deciding whether there is a “specific fact” or not (see the Annex 1).

22. In this case, the JFTC does not have to verify the following facts.

- Whether the product belonging to the category of subject products of the cartel was actually the subject of the agreement.
- Whether the price of the product was actually increased.

23. On the other hand, the enterprises which intend to dispute the extent of the “relevant products or services” have to claim and verify the “specific fact”.

ANNEX 1. CASES WHERE THE “RELEVANT PRODUCTS” WERE DISPUTED

1. **Can special products be the “relevant products”? (Hearing decision against Toshiba Chemical Corporation [August 5, 1996])**

1.1 Overview of the case

1. The JFTC issued a surcharge payment order against the respondent because they had implemented a price cartel over paper phenol copper clad laminates (hereinafter referred to as the “paper phenol CCLs”). In response to this order, the respondent requested a hearing. In their request, the respondent claimed that part of paper phenol CCLs should not be the basis for calculating the amount of a surcharge payment because they were not “relevant products” in terms of their specialty. Based on their request, the hearing was initiated.

1.2 The respondent’s claim

2. The prices of the special paper phenol CCLs are high, which is due to their specialty. In addition, they lack general marketability because of their limited trading partners. Therefore, the sales amount of the special paper phenol CCLs should be excluded from the basis for calculating the surcharge payment amount in this case.

1.3 Decision by the JFTC

3. The JFTC decided that there are special reasons to exclude the special paper phenol CCLs from the subject products based on the following facts concerning the special paper phenol CCLs:

4. The respondent had no choice but to set the price of special paper phenol CCLs higher than that of standard products. Therefore, they couldn’t set the price of special paper phenol CCLs using surface ratio, etc. based on the price of the standard products.

5. Special paper phenol CCLs were priced respectively, and limited number of clients had traded with the respondent. Therefore, these products did not compete with or substitute other standard products, etc.

6. Consequently, the JFTC excluded special paper phenol CCLs from the basis for calculating the surcharge payment amount.

2. **Can new products sold after the violation be “relevant products”? (Hearing decision case by Chugoku Marine Paints, Ltd. [February 24, 1996])**

2.1 Overview of the case

7. The JFTC issued a surcharge payment order against the respondent because they had implemented a price cartel over marine vessel paints. In response to this order, the respondent requested a hearing. In their request, the respondent claimed as follows: the new product was not the “relevant

product” and should not be the basis for calculating the surcharge payment amount because the respondent had started to sell it after the cartel formation. Based on their request, the hearing was initiated.

2.2 *The respondent’s claim*

8. The respondent started to sell the new paints for marine vessels after the cartel implementation. This new product enabled a significant cut down in painting costs by a special function which other similar products don’t have. The new product is not subject to the violation and not a “relevant product” because it does not compete with similar products for the same uses.

2.3 *Decision by the JFTC*

9. The JFTC decided that the new product was a “relevant goods”, rejecting the respondent’s claim based on the following facts regarding the product:

- The new product belonged to the category of “paints for marine vessels etc.” which was subject to the violation.
- The new product had substitutability with typical subject products.
- The new product competed with existing products that are similar in their uses.
- There was no specific fact that, explicitly or implicitly, the respondent intentionally excluded the new product from the subject products.