Unclassified **DAF/COMP/WD(2015)36**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **10-Jun-2015**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2015)36
Unclassified

Cancels & replaces the same document of 04 June 2015

HEARING ON OLIGOPOLY MARKETS

-- Note by Japan --

16-18 June 2015

This document reproduces a written contribution from Japan submitted for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

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JT03378206

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JAPAN

1. Introduction

1. In Japan, instruments concerning competitive issues in oligopolistic markets have been instituted by particular provisions in the Antimonopoly Act (hereinafter referred to as the "AMA") for the purpose of preventing anticompetitive behavior in those markets, and at the same time, measures have been taken against cartels, bid-rigging, or other violations of the AMA in oligopolistic markets.

2. In this contribution paper, we will introduce the instruments under the AMA targeting monopolistic and oligopolistic markets, basic attitudes from competition policy toward concerted actions in oligopolistic markets and competition law enforcement cases against violations in oligopolistic markets.

2. Regulations concerning monopolistic and oligopolistic markets

3. In 1977, provisions concerning (i) measures to be taken when there exist monopolistic situations and (ii) requirements for reports, etc. on parallel price increases were introduced in the AMA against the backdrop of growing market concentration mainly due to big mergers, appreciation of yen, progress of stagflation after the oil crisis, and the detection of oil cartels. The provisions concerning measures to be taken against monopolistic situations are still in force under the AMA, while those concerning requirements for report on parallel price increases were abolished in 2005.

2.1 Measures to be taken when monopolistic situations exist (Article 2, Paragraph 7, and Article 8-4 of the AMA)

2.1.1 Legislative intent

4. When the provisions were enacted, the Japanese economy was in a situation where it became difficult to expect fair and free competition due to the increased concentrations in several markets. If such a trend was left as it was, it would have been highly likely that monopolistic enterprises would have grown in various business segments, which would make it more difficult to ensure competition and the effectiveness of competition policies.

5. The existing AMA at that time entitled the JFTC to take such measures as issuing an injunction or cease and desist order to divest a part of its business against the enterprise which had committed private monopolization causing a substantial restraint of competition by excluding or controlling the business activities of other enterprises. However, when a monopolistic situation arose from the normal business activities of enterprises and caused adverse effects on the national economy, measures could not be taken to eliminate such a situation for restoring competition.

6. Given the situations above, provisions for measures to be taken against monopolistic situations newly came into existence in the AMA, which enable the JFTC to take measures to restore competition by issuing an order against enterprises to divest portions of their businesses, etc., against monopolistic situations where adverse effects actually arose from suppressed competition in addition to the said provisions against private monopolization. Furthermore, it was expected that introducing such new

provisions in the AMA would allow enterprises in a highly oligopolistic industry to manage their business without causing adverse effects.

2.1.2 Details of the measures against monopolistic situations

7. A monopolistic situation means circumstances in which each of the following market structures and negative effect in the market exist in any particular business field where the aggregate total value of goods or services supplied in Japan during the latest one-year period, exceeds 100 billion yen (50 billion yen at the time of the enactment of the legislation):

- A single enterprise's market share exceeding 50% or two enterprises' combined market share exceeding 75% during the relevant one-year period;
- The existence of conditions that make it extremely difficult for any other enterprise to newly enter said particular field of business;
- The existence of a remarkable increase or of a slight decrease in the price of the particular goods or services supplied by the relevant enterprise during a considerable period of time in light of the changes in the supply and demand, and changes in the cost of supply, for the particular goods or services, and the enterprise falling under any of the items during said period:
- (a) that said enterprise has earned a profit far exceeding the standard profit margin
- or (b) that said enterprise has expended selling and general administrative expenses which are considered to be far exceeding the standard selling and general administrative expenses (Article 2, Paragraph 7 of the AMA).

8. Whenever such a monopolistic situation exists, the JFTC may order the relevant enterprise to divest part of its business or to take any other measures necessary to restore competition with respect to the relevant goods or services.

9. The AMA stipulates that an order to take the above measures concerning monopolistic situations may not be issued if alternative measures that are found to be sufficient for restoring competition can be taken with respect to the relevant goods or services, and that a cautious procedure is required when issuing an order (Article 8-4 of the AMA).

2.1.3 Actual implementation of the provision

10. In order to ensure the proper implementation of the above provision of Article 8-4 of the AMA (measures against monopolistic situations), the JFTC developed "Guidelines concerning the Interpretation of Specific Business Fields as Defined in the Provisions of Monopolistic Situations" (the "Monopolistic Situation Guidelines") and revised the Guidelines regularly according to the results, etc. of the "Survey on the Trends of Production/Shipment Concentration Ratios", which has been conducted for the purpose of understanding the actual conditions of economic concentration in Japan. Industry segments recognized as corresponding to market structure requirements under the Guidelines are indicated therein and the JFTC focuses efforts on monitoring the activities of enterprises in the above industry segments with particularly high concentrations, in terms of the trends in their production, sales, pricing, production costs, technology innovation, and profit margins by industry segment, etc., in accordance with the respective requirements under Item (ii) (difficulty of new entry) and Item (iii) (downward rigidity of price and excessive profit margins or excessive selling and general administrative expenses) of Article 2, Paragraph 7 of the AMA.[1][2]

[1] http://www.jftc.go.jp/dk/guideline/unyoukijun/dokusentekijotai.html (Original Japanese version)

2.2 Requirements for reports, etc. on parallel price increases (abolished when the AMA was amended in 2005)

2.2.1 Legislative intent

11. When the provisions were introduced into the AMA, concentration had increased in highly oligopolistic industries, which resulted in a situation where these enterprises might not compete seriously in prices and could increase them by almost the same amount or ratio in parallel in short periods of time without explicit agreements like cartels.

12. Given the fact above, provisions concerning requirements for reports, etc. for cases where enterprises raised their prices in parallel were introduced into the AMA with a view to facilitating competitive pricing among enterprises, by requiring the major enterprises that have increased the price in parallel to report the reasons for the price increases to the JFTC, and the JFTC announced the summary of the reports in its annual reports submitted to the Diet.

13. In the original draft of the provision, the JFTC requested that enterprises also disclose their costs on the ground that "under coordinated oligopoly, so-called price leadership and conscious parallelism tend to cause price increases across the board almost at the same time. However, regulating such price increases under the existing legislation would be very difficult in many cases in terms of setting requirements and presentation of evidence. Accordingly, in a highly oligopolistic industry where there was no price competition but it was difficult to take effective measures under the AMA, requesting enterprises that planned to raise the price of particular goods or services for disclosure of the costs may inhibit arbitrary price increases by enterprises through monitoring by the society, and thus lead to the restoration and promotion of competition."[3]

14. However, the business community opposed to the draft, claiming that "disclosing the costs of goods or services would eliminate competition among enterprises and deny pricing freedom. Also, checking the appropriateness or otherwise of prices of individual goods or service was not an issue to be handled by the JFTC." As a result, it was determined that only reporting of the reasons for price increases should be required.

2.2.2 The content of the requirements for reports, etc. in cases where enterprises raise their prices in parallel

15. It was established by the AMA that in cases where enterprises raise their prices in parallel in an oligopolistic industry almost at the same time (price hikes keeping pace with peers), the JFTC could require the enterprises to report the reasons for price hikes.

16. The conditions of parallel price increases to be required for reports were when, in a particular field of business where the aggregate total value of particular goods or services supplied in Japan during the latest one-year period exceeded 60 billion yen (30 billion yen at the time of the enactment of the legislation) and the top three enterprises' combined market share exceeded 70% during the relevant one-year period, two or more major enterprises (meaning an enterprise with a market share of 5% or more

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2 The JFTC revises the list of industry segments subject to monitoring by the JFTC shown in the Appendix attached to the Monopolistic Situation Guidelines in a sequential manner mainly according to the results of the Survey on the trends of Production/Shipment Concentration ratios. Currently, 26 industry segments are designated as those subject to such monitoring.

3 "The Outline of the Proposal for Amendment of the AMA" published by the JFTC on September 18, 1974.

ranked within the top five players in the market) including the top enterprise raised standard prices applied in transactions within 3 months by the same or similar amount or ratio.

17. With regard to reports submitted to the JFTC on the reasons for price increases, the JFTC was required to describe the summary of such reports in its annual reports submitted to the Diet.

2.2.3 Actual operation of the provisions

18. There have been 75 cases during 1978-2005 where reports on the reasons for parallel price increases were made as required by the above provision. Among those were 1) reports by four enterprises on raising the prices of automotive tires and tubes in fiscal year 1980; and 2) reports by four enterprises on raising the prices of beer in fiscal year 1989. Regarding 1), each of the four companies stated in their replies that the reasons for the price increases were steep increases in raw material costs, labor costs and manufacturing costs. Regarding 2), each of the four companies stated in their replies that the reasons for the price increases were mainly increases in advertising and promotion expenses and transportation costs at the manufacturers' phase and increases in logistics costs and labor costs at the distributors' phase.

19. With respect to 2), with a view to promoting fair and free competition, the JFTC made a request in 1990 to the four beer manufacturers, based on the concern about the possibility that trade practices in the beer industry might also have been one of the factors which facilitated the maintenance of the price level, stating that "they promptly should take measures to widely disseminate not only among wholesalers and retailers but also among consumers the information that the manufacturers' suggested wholesale prices or suggested retail prices indicated to wholesalers or retailers are nothing more than reference prices for the wholesalers or retailers and that wholesalers or retailers are not in any way bound by such suggested wholesale prices or suggested retail prices and are able to freely and independently set their prices." Responding to this request, the beer manufacturers made statements in advertising that suggested retail prices were nothing more than reference prices.

2.2.4 Abolition

20. This reporting requirement was abolished in 2005 with the relevant provisions of the AMA deleted.

21. This was because there were significant changes in the actual circumstances surrounding these provisions after about 25 years since the introduction of the system. For example, while monitoring and requirements for reports under the system targeted the parallel price increases in national markets, actual parallel price increases were often implemented in each market segment divided on the basis of user or region, resulting in the gap between monitoring targets and the actual situation. In addition, it was pointed out that acts of parallel price increases were repeatedly implemented with respect to certain commodities among those subject to monitoring, possibly leading to misunderstanding that the act of price increases could be socially accepted as long as the price increases was reported. It was therefore recognized that the provision had weaker preventive and deterrent effects to address the acts of parallel price increases than originally expected.

22. Moreover, other issues were raised such as burdens on enterprises and administrative costs. Accordingly, a policy decision was made to abolish the provisions requiring reports on the reasons regarding such acts of parallel price increases without a 'communication of intent' among the enterprises. Instead, it was considered more important to devote the resources to the effective detection of cartels.

3. Basic notions of concerted practices

23. The AMA prohibits 'unreasonable restraint of trade' under Article 3 thereof. Unreasonable restraint of trade is defined as such business activities, by which any enterprise, in concert with other enterprises, mutually restricts business activities, thereby causing a substantial restraint of competition in any particular field of trade[4]. It is provided that "in order to prove that the act of the said enterprise corresponds to activity in concert with other enterprises, it is necessary to show that a 'communication of intent' existed among the enterprises", as described in the court decision of the "Toshiba Chemical Corporation case" in 3.1.2 below.

24. In this regard, according to judicial precedents and JFTC decisions, in order to prove the existence of 'communication of intent', it is considered not necessary to show a so-called explicit agreement but it is enough if the presence of a tacit agreement is shown. On the other hand, if, as a result of separate decision-making by each individual enterprise, uniformity exists in their acts ('conscious parallelism'), it is considered not to constitute a tacit agreement and unreasonable restraint of trade. For this reason, in actual cases, the primary concern is determining the boundary between a tacit agreement and conscious parallelism when tacit concerted practices were found in an oligopolistic market.

25. Below are outlines of the cases and court decisions about two leading cases in Japan, where the interpretation of 'communication of intent' was shown.

3.1 Rescission of the Hearing Decision Case by Toshiba Chemical Corporation (Decision of the High Court in Japan on September 25, 1995)[5]

3.1.1 Overview of Cases

26. Toshiba Chemical Corporation (hereinafter referred to as "Toshiba Chemical") and seven other companies in the same industry (hereinafter referred to as "the eight companies") held a special meeting consisting of each director in charge of paper phenol copper clad laminates on June 10, 1987 (hereinafter referred to as "special meeting in question"), at a time when a rising trend of export prices of the paper phenol copper clad laminates was becoming known. In the special meeting in question, they exchanged opinions on raising the price of copper clad laminates including the paper phenol copper clad laminates used in printed circuit boards sold to domestic customers, based on the trend of export prices, etc. Out of the eight companies, the three largest initially declared that they would raise prices while the remaining five were requested to follow the big three by raising their own prices. The five companies, including Toshiba Chemical, did not express an opinion opposing the request.

27. Following that special meeting in question, the management of the eight companies respectively instructed relevant departments to raise the price of the paper phenol copper clad laminates in their company. Then, they notified their domestic customers of the price increase and requested their consent.

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4 Article 2, Paragraph 6 of the AMA provides that "the term 'unreasonable restraint of trade' as used in this Act means business activities by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade."

5 For the details of the case, please refer to our contribution in "DAF/COMP(2008)24" (http://www.oecd.org/daf/competition/41472165.pdf) and DAF/COMP(2012)17" (http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf).

3.1.2 Overview of Decision

28. The court stated as follows: "In order to prove that the act of the plaintiff corresponds to 'concerted actions', which is prohibited by Article 3 of the AMA as 'unreasonable restraint of trade,' it is necessary to show that a 'communication of intent' among enterprises existed at the time of the price increases by these enterprises.

29. The said 'communication of intent' means that an enterprise recognizes or predicts the implementation of the same or similar kind of price increases among enterprises and accordingly, intends to collaborate with such a price increases. In order to prove 'communication of intent,' it is not sufficient to show the recognition or acceptance of an enterprise's price increases by another enterprise. 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 enterprises' price increases and the tacit acceptance of such price increases of another.

30. If an enterprise exchanges information about price increases with other enterprises and accordingly, does the same or a similar act with them, the court cannot but presume that the parties had a relationship where they expected each other to act cooperatively, therefore, the said 'communication of intent' exists unless there is a special fact which showed that they undertook a price increase based on an independent judgment to be able to survive the competition in the market irrespective of the acts of other enterprises".

3.2 Bid-rigging Case for Automatic Postal Code Reading and Sorting Machines Ordered by the Former Ministry of Posts and Telecommunications (Decision of the High Court in Japan on December 19, 2008)[6]

3.2.1 Overview of the Cases

31. Both the Toshiba Corporation and the NEC Corporation were registered as qualified bidders in the open competitive bidding for automatic postal code reading and sorting machines (hereinafter referred to as "postal sorting machines") which was placed by the [former] Ministry of Posts and Telecommunications (hereinafter referred to as the "Ministry"). Between fiscal years 1995 and 1997, they participated in the competitive bidding for postal sorting machines. As a matter of fact, during the above mentioned period, the two companies received 70 orders out of the total of 71 orders for postal sorting machines. (The two companies each received roughly half of the total value of orders placed by the Ministry.) In reality, prior to the opening of competitive bidding, the two companies mentioned above received information on the bidding (such as the type of postal sorting machine, number of units, the location of post offices where the machines would be deployed, the timetable for deployment, etc.) for which they respectively were supposed to bid from the Ministry officials in charge. Only the company which received the above information would participate in the particular bidding while the other company would not participate. For that reason, bids for that particular bidding would be submitted only by the company that had received the information while the remaining company, which had not received the information, would decline to submit the bid. With the result, the one company that submitted a bid would receive the order.

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6 For the details of the case, please refer to our contribution "DAF/COMP(2012)17" (http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf)

3.2.2 Overview of Decision

32. Based on the facts that, among others, (i) only one company which received an unofficial notice participated in bidding and the other company which did not receive an unofficial notice declined for many years, (ii) the two companies requested that open competitive bidding be discontinued and unofficial notices be continued, and (iii) the two companies respectively participated in bidding only when unofficial notice was provided to them and the bid acceptance ratio exceeded 99.5%, it was held that:

33. "based on the fact that only the company which received information from the official in charge of procurement of the Ministry participated in bidding while the company which did not unofficially receive information did not participate in bidding, it was fully recognized that at least there was tacit communication of intent that only the company which unofficially received information from the official in charge of procurement at the Ministry would receive the order."

3.3 Implication regarding communication of intent

34. It may be interpreted that, based on the two decisions described above, the existence of an tacit agreement and communication of intent among enterprises may be recognized when it is proved (i) that there were communications and negotiations prior to the agreement, (ii) that negotiations were made regarding a price increase, and (iii) that each action taken after the negotiations by parties involved conformed to the negotiations. Such a situation constitutes an act "in concert with other enterprises" as set forth in the Antimonopoly Act.

4. Recent Enforcement Case by the JFTC

35. A recent enforcement case by the JFTC based on the framework of the basic concept about concerted practice described above is shown below.

4.1 Hearing Decision on Sharp's Liquid Crystal Displays (Hearing Decision of July 31, 2013)

4.1.1 Overview of the Cases

36. Enterprises which were capable of manufacturing TFT liquid crystal display modules used for the display screens of hand-held gaming devices called "Nintendo DS Lite," manufactured and sold by Nintendo Co., Ltd. (hereinafter referred to as the “LCD module for DS Lite”), were limited to Sharp Corporation (hereinafter referred to as the “Sharp”) and Hitachi Displays, Ltd (hereinafter referred to as the “Hitachi Displays”). Sharp and Hitachi Displays formed a common intent that they regard a certain price as a target price concerning the price for Nintendo of LCD module for DS Lite applicable to orders received from January to March 2007 (hereinafter referred to as the “the first quarter of fiscal year 2007”).

4.1.2 Overview of Hearing Decision

37. Sharp and Hitachi Displays had their respective marketing personnel exchange information about the price, etc. for LCD modules for DS Lite between them and report such information to their respective personnel who were to determine the price, etc. before starting the sale thereof to Nintendo in order to prevent the decrease of the price for Nintendo of LCD module for DS Lite.

38. The following facts were acknowledged: (i) On September 5, 2006, Sharp informed Hitachi Displays that Sharp would propose *P* yen to Nintendo as the price for the modules for the first quarter of fiscal year 2007; (ii) Based on said information, Hitachi Displays changed the price for the module from *Q* yen to *R* yen and proposed the price to Nintendo on September 11, 2006; (iii) At the time of the information exchange between Sharp and Hitachi Displays on November 7, 2006, Hitachi Displays

conveyed the information that it had already proposed *R* yen as the price for the module for the first quarter of fiscal year 2007 and Sharp conveyed the information that it had not yet proposed the price for the first quarter of fiscal year 2007; (iv) On November 17, 2006, Sharp proposed to Nintendo several prices for the first quarter of fiscal year 2007 based on the information conveyed from Hitachi Displays and agreed on a compromise figure of *R* yen; and (v) On November 9, 2006, Hitachi Displays proposed *R* yen to Nintendo as the price for the first quarter of fiscal year 2007 based on the information conveyed from Sharp and as a result of negotiation, agreed on the compromise figures of *R* yen for January and February of the said first quarter and *S* yen for March thereof.

39. It can be assumed that Sharp and Hitachi Displays agreed on the target price of *R* yen as the price for LCD modules for the DS Lite for the first quarter of fiscal year 2007 on around November 7, 2006 upon the information exchange as described in (i) to (iii) above and that, under the agreement, Sharp and Hitachi Displays respectively took action as described in (iv) and (v) above.

40. Therefore, it is recognized that Sharp and Hitachi Displays agreed on the target price of *R* yen as the price for LCD modules for DS Lite for the first quarter of fiscal year 2007 on around November 7, 2006 and thus it was acknowledged that communication of intent (tacit agreement) to mutually recognize and accept that they take action based on the agreement and to come into line with each other was formed between the two companies.

41. Sharp claimed that communication between Sharp and Hitachi Displays did not constitute a mutual information exchange but merely one-way conveyance of information because Sharp did not indicate its proposed price on November 7, 2006 when Hitachi Displays showed its proposed price to Sharp. However, in the Hearing Decision, the JFTC acknowledged that there was a mutual information exchange because, on that day, Sharp told Hitachi Displays that it had not yet proposed a price and conveyed information about its quantity, and thus that a mutual information exchange existed.