

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

Working Party No. 2 on Competition and Regulation

THE REGULATED CONDUCT DEFENCE

-- Japan --

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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 February 2011.

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1. Introduction

1. The Antimonopoly Act (hereinafter, referred to as the “AMA”) institutes systems for exempting the application of the AMA’s prohibition provisions to certain conducts in specific fields with a view to achieving certain objectives of economic policies, such as rationalising firms. These systems are stipulated in the AMA as well as in individual legislations. There are currently 21 exemption systems stipulated in 15 legislations. Moreover, in past experiences of enforcing the AMA, there have been cases where businesses claimed regulated conduct defence.

2. Presented below are the views of the Japan Fair Trade Commission (hereinafter, referred to as the “JFTC”) on regulated conduct defence and its efforts toward resolving the conflicts that arise between the competition authority and the regulatory authorities when formulating regulations.

2. View on regulated conduct defence

3. It is conceivable that claims are made such as “cases where the AMA and other regulations share the same objectives are exempt from the application of the AMA” or “it is permissible to violate the AMA by complying with another regulation” regarding the relationship between the AMA and other regulations.

4. In past experiences of enforcing the AMA, there have been no cases where complying with another law directly led to the violation of the AMA. However, there have been cases in the past where businesses claimed regulated conduct defence in response to a cease and desist order from the JFTC and the JFTC presented its view on the matter in hearing decisions.

5. Such an example is a private monopolization case in the telecommunications industry. In this case, as a point at issue, there have been discussions on whether the application of the AMA should be exempt for conducts permitted under sector-specific laws, on the grounds that sector-specific laws provide more detailed regulations than the AMA with the same objective of promoting fair competition. In the hearing decision, it was noted that the provisions of different laws regulating business activities should be implemented consistently, and that their implementation should not differ depending on whether the laws share the same objectives or not. On the other hand, it was also noted that a conduct will not be exempt from the application of the AMA just because it does not violate sector-specific laws possessing the characteristics mentioned above, unless there is an explicit exemption provision precluding its application.

6. Furthermore, in a cartel case in the transportation industry, a view was presented regarding exceptional situations where cartels do not “substantially restrain competition.” Here, it was explained that cartels on fares, in principle, fall under the provisions of the AMA and are subject to cease and desist orders, but when the competition which the cartel is attempting to limit concerns illegal trading terms prohibited by other legislations with criminal punishment, etc., for example, when the fare collection agreement restricts the illegal competition below approved fares that is prohibited by a law, it has been stated that, as an exception, competition is not construed to be substantially restrained.

3. Relationship between the Competition Authority and regulators

7. There is a general framework within the Japanese government through which ministries and agencies coordinate the contents of draft bills with each other before bills are submitted to the Diet (parliament) so as to ensure policy coherence within the government. The JFTC utilises this process to harmonise draft bills with competition law and policy. From our viewpoint, the primary aim of this coordination is preventing other governmental agencies from making legislations which preclude the application of the AMA and which will induce cartels and other anticompetitive conducts by businesses. Recently, firms are hardly likely to claim regulated conduct defence as new regulations have left little

latitude to allow anticompetitive conducts. As the JFTC has been actively participating in this coordination process, an increasing number of ministries and agencies approach the JFTC for consultation on possible negative impacts on competition prior to official drafting and circulation of bills to all ministries and agencies for more general coordination.

8. Additionally, all draft bills and cabinet orders introducing and changing regulation on businesses are subject to competition assessment, which was initiated in April 2010 as a part of general regulatory impact analysis (hereinafter referred to as “RIA”). Competent ministries and agencies should fill in a “Competition Assessment Checklist”¹. The ministries and agencies are able to easily assess the general impact of envisaged regulation on competition by answering questions on the checklist. The competition assessment is still at a stage of trial implementation. However, once it is officially implemented, which is due at an appropriate point after FY 2011, ministries and agencies are expected to describe the possible impact on competition as a social cost on RIA reports, when they find that a proposed regulation would have an effect on competition. The JFTC has been strongly supporting the implementation of competition assessment in various manners such as providing seminars on competition policy, and distributing the “Competition Assessment Checklist Guidance” to ministries and agencies.

9. The JFTC has also devoted sustained efforts for ex-post impact assessment through reviewing existing government regulations and AMA exemptions. The “Study Group on Government Regulations and Competition Policy”² at the JFTC has been examining the necessity of AMA exemptions in various sectors and based on those reports the JFTC has so far requested a fundamental review of AMA exemptions in several sectors, such as international aviation and the international shipping industry.

10. Furthermore, the JFTC has been taking a strong position against administrative guidance³ which is conducted by competent ministries with a view to prevent excessive competition or stabilize the market. The fact that competent government ministries give those kinds of administrative guidance may be utilised as a defence by defendants who are alleged to have violated the AMA, as has actually been done in past cases, as described above. As concerns about the relationship between administrative guidance and cartels were raised, the JFTC initially published the “Interpretations Concerning the Relation between the Antimonopoly Act and Administrative Guidance” (the former Administrative Guidance Guidelines) in March 1981. The JFTC sent the guidelines to the relevant ministries and agencies with a request to consider them in their policy decisions. The JFTC later reviewed the former Administrative Guidance Guidelines and formulated new “Guidelines Concerning Administrative Guidance under the Antimonopoly Act”⁴ in June 1994, which show the agency’s views on administrative guidance. The guidelines clarify that any conduct by a firm is by no means exempt from the application of the AMA, even if it was brought about through administrative guidance, and provide concrete examples indicating categories of administrative guidance that may pose a problem under the AMA, such as restriction of entry and price competition.

¹ The Japanese version of competition assessment checklist, which was compiled by the JFTC, based on the OECD Competition Assessment Toolkit version 1.0.

² As of March 2010, this study group consists of 8 members comprising academics and experts that meet with the purpose of reviewing public regulations as well as policies for securing and promoting competition in related fields, by considering the changing social and economic environment in Japan.

³ The meaning of Administrative Guidance is currently stipulated in Article 2, Paragraph 6 of the Administrative Procedure Act (Act No. 88 of 1993): “recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions”

⁴ <http://www.jftc.go.jp/e-page/legislation/ama/administrative.pdf>.