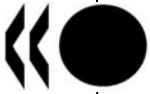

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Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- Japan --

14 June 2010

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1. Introduction

1. In this contribution paper, we would like to introduce (i) a survey by the Japan Fair Trade Commission (JFTC) on the actual situation of voluntary standards and certification by public interest corporations in 1998, and (ii) the JFTC's guidelines regarding standard setting as efforts in competition issues related to standard setting in Japan.

2. Survey on Actual Situations of Voluntary Standards and Certification by Public Interest Corporations (1998)

2. In 1998 the JFTC conducted a survey on voluntary standards and certification by public interest corporations from the viewpoint of competition policy. The points checked by the survey were, for example, whether new entries of entrepreneurs were unjustly restricted or whether the standards or certification substantially substituted for public regulations after deregulation. The summary of the published results are as follows.

2.1 Points Checked in the Survey

3. Regarding the activities related to voluntary standards and certification by public interest corporations, the survey was conducted mainly on the following points:

2.1.1 Appropriateness of the contents of voluntary standards and certification

- Check for the unjust prevention of supply of various products or the exclusion of certain entrepreneurs by the provision of unnecessary standards in the light of the purpose (excessive regulations) (Fitness for purpose)

- Check for the exclusion of new or foreign entrepreneurs by the provision of unfairly discriminatory contents for those entrepreneurs (Neutrality and fairness)

- Check for uncertainty resulting in the prevention of entry of new or foreign entrepreneurs by the provision of unclear standards (Clearness of contents)

- Check whether the contents of standards are set based on fair, neutral and appropriate procedures (Appropriateness of establishing procedures)

2.1.2 Appropriateness of inspection/certification methods and openness of system utilization

- Check whether the inspection/certification method is clearly provided in advance so that arbitrary operation is excluded (Transparency of operation)

- Check for unjustly discriminatory inspection/certification methods for new or foreign entrepreneurs (Neutrality and fairness of operation)

- Check for refusal of the utilization of voluntary standards or certification systems against entrepreneurs that are not members of public interest corporations or foreign entrepreneurs (Openness of system utilization)

2.1.3 Involvement by administrative organs

- Check for misunderstanding by entrepreneurs that the utilization of voluntary standards or certification systems is statutorily obliged due to involvement by administrative organs (Clear indication of non-arbitrariness of the system)

- Check for substantial substitution for public regulations after deregulation caused by administrative organs working on new public interest corporations to establish voluntary standards or certification systems or to use existing voluntary standards or certification systems (Exclusion of substitution for public regulations)

2.2 Summary of survey results

4. Out of all public interest corporations subject to the survey, 52 corporations have voluntary standards. Further, 32 corporations conduct inspections or tests to judge the fitness of the voluntary standards.

2.2.1 Contents of voluntary standards and certification

Purpose and Necessity of Voluntary Standards and Certification System

5. Most entrepreneurs admitted the necessity and usefulness of the system for the safety of products assured by inspection of a third party organization and for saving the costs of having inspection equipment themselves.

Contents of Voluntary Standards

- Fitness for purpose

  No entrepreneur pointed out that voluntary standards had inappropriate or unnecessary contents to achieve the purpose of the voluntary standards or certification system.

  - Relation with public standards

    In case voluntary standards are set in addition to public standards (statutory standards or Japan Industrial Standards), public corporations gave the insufficiency of public standards for specific products or specific applications and the difficulty in flexible approaches to changes in situations as meanings for the existence of voluntary standards.

  - Price clause

    Some voluntary standards were found to have clauses requiring appropriate price levels for products and services (price clause).

- Neutrality, fairness, clearness and transparency

  Most entrepreneurs did not recognize any problem. However, new entrepreneurs had complaints about the requirement of business results for a certain period before the application for certification or about unclear explanations of specific requirements in some voluntary standards.

  - International consistency

From the viewpoint of consistency with the international market, a change of standards on specifications to those on performance is in progress.

- Setting procedures

  No problem was pointed out by entrepreneurs.

2.2.2 Appropriateness of inspection/certification method and openness of system utilization

Inspection/certification method

- Transparency of Operation

  Entrepreneurs did not point out that the inspection/certification method and implementation procedures lacked transparency.

- Neutrality and Fairness of Operation

  Most entrepreneurs did not recognize any problem. However, some entrepreneurs showed concern that their engineering secrets might be known to other entrepreneurs through inspection.

Openness of system utilization

- Refusal of nonmembers to use the system

  It was found out that nonmembers were treated differently from members in some cases: (i) the nonmember (entrepreneur who is not a member of the trade association) is not allowed to utilize the system, (ii) the applicant entrepreneur for certification is required to obtain a recommendation from a related entrepreneur organization (organization recommendation), or (iii) different charges are applied to members and nonmembers.

  Public interest corporations gave reasons for the treatment in these respective cases as follows: (i) the system is a service for members managed as their business, (ii) intellectual property rights need to be protected and the reliability of the standards need to be maintained, and (iii) nonmembers do not pay member fees or other costs.

- Access from overseas

  Utilization by foreign entrepreneurs or imported goods was not restricted in any system. However, according to some entrepreneurs, it was substantially difficult for imported goods to be inspected or certified in some systems assuming inspections at plants in Japan.

2.2.3 Effect of certification and system dissemination

Effect of certification

6. According to public interest corporations and entrepreneurs, statutory or administrative effects were observed in some cases where, for example, (i) inspection by an administrative agency is obliged under law or ordinance, but it is simplified if the products have been certified, or (ii) the administrative organ references certification when it gives authorization.

Dissemination of voluntary standards and certification

- Dissemination

  According to the written survey, public interest corporations answered that voluntary standards/certification systems were disseminated at least in their industry. Even when public interest corporations thought so, however, entrepreneurs did not always recognize the system very much.

- Recognition by Manufacturers

  In the case where the answer in the written survey was "Products that do not satisfy the voluntary standards are manufactured little," many of the manufacturers stated that they utilized the voluntary standards/certification system because they were able to have an advantage. It was pointed out, however, that some entrepreneurs thought such utilization disadvantageous but recognized (misunderstanding) that manufacturing products that did not satisfy the voluntary standards was prohibited by law, and some utilized the system just because they needed to do the same thing as other companies.

2.2.4 Others

7. Utilization of voluntary standards/certification system or coverage with specific insurance in relation to utilization of the system was not forced in any case (the latter case existed in the past, but it has been improved).

2.3 Recommendation from the Viewpoint of Competition Policy

2.3.1 Openness of system utilization

8. If requirements for certification include organization recommendations, utilization results, business results, or inspection at plants in Japan, they would prevent new entry of entrepreneurs or imports. This could be a problem under the Antimonopoly Act (AMA) in some cases.

2.3.2 Review of involvement by administrative organs

9. It is necessary for voluntary standards and certification with involvement by administrative organs to be constantly reviewed regarding their purpose, necessity and rationality.

10. For example, in the case where deregulation has been implemented but is not disseminated among entrepreneurs and they misunderstand that the utilization of voluntary standards or certification systems is obliged by law, the competent administrative organ should take appropriate measures to disseminate the contents of deregulation among entrepreneurs.

11. Further, if it is misunderstood that the acquisition of certification is statutorily required due to the involvement of an administrative organ, or if the inspection method by an administrative organ that is naturally available under law is not utilized because the contents and procedures are not clear, the competent administrative organ needs to be appropriately reviewed.

2.3.3 Review of Price Clause

12. It cannot be said that a clause for appropriate price levels is necessary to achieve the purpose for which voluntary standards and certification systems have been established. If the price clause is applicable, the unclearness of specific criteria about price appropriateness could result in arbitrary operation, including the exclusion of specific entrepreneurs or newly entering entrepreneurs.

2.3.4 Several organizations to conduct inspections or tests

13. In many actual cases, the public interest corporation authorized by the administrative agency (the designated corporation) to perform clerical work under the law or regulation for the inspection/test is limited to one organization per field. However, if several implementation periods can be set, it is preferable to have several organizations for such a purpose as far as possible in the future.

14. Similarly, even when the administrative agency recommends or authorizes the utilization of voluntary standards or certification systems of the public interest corporation, sufficient consideration is required to be taken so that such recommendation or authorization does not prevent fair and free competition among corporations if several public interest corporations are doing certification activities in a field.

3. The JFTC's guidelines regarding standard setting

15. With regard to standard setting, especially intellectual property rights, the JFTC has published the "Guidelines on Standardization and Patent Pool Arrangements" (hereinafter referred to as the "Patent Pool Guidelines") (2005) and the "Guidelines for the Use of Intellectual Property under the Antimonopoly Act" (hereinafter referred to as the "Intellectual Property Guidelines") (2007).

16. Also, with regard to the activities of trade associations, the JFTC has referred to the principles under the Antimonopoly Act (AMA) regarding standard setting activities by trade associations in the "Guidelines concerning the activities of trade associations under the Antimonopoly Act" (hereinafter referred to as the "Trade Associations Guidelines") (1995).

17. The contents of these guidelines are as follows.

3.1 Patent Pool Guidelines (June 2005; amended September 2007)

18. In the Patent Pool Guidelines, the JFTC has presented (i) principles of the application of the AMA to activities to standardize specifications, and (ii) perspectives of problems under the AMA with activities to pool patents for specifications.

3.1.1 Principles of application of the AMA to activities to standardize specifications

19. If the activity restricts competition in related markets or threatens to impede fair competition with restrictions as follows, it poses legal issues with the AMA.

Restrict the prices of new products with specifications

20. Competitors in the activity jointly fix prices, quota outputs, limit marketing activities, etc., of their new products with specifications. (Unreasonable restraint of trade, etc.)

Restrict the development of alternative specifications

21. Competitors in the activity mutually restrict, without due cause, the development of alternative specifications or adopt alternative specifications to produce and distribute products with them. (Unreasonable restraint of trade, dealing on restrictive terms, etc.)

Unreasonably extend the scope of specifications

22. Competitors in the activity jointly extend the scope of specifications when doing so is not necessary to ensure compatibility among their products, but only to mutually restrict competition in developing new products. (Unreasonable restraint of trade, etc.)

Unreasonably exclude technical proposals from competitors

23. Competitors deliberately, without due cause, prevent technical proposals by a specific competitor from being adopted in the development or improvement of the technologies for specifications. (Private monopolization, discriminatory treatment in a concerted activity, etc.)

Exclusion of competitors from the activities

24. Competitors deliberately exclude specific competitors from the activity in a case in which the competitors are largely not involved in developing and distributing the products with the specifications and do not participate in the activity, and are at risk of being excluded from the market. (Private monopolization, etc.)

3.1.2 Problems under the AMA with activities to pool patents for specifications

Basic viewpoint

25. If many competitors license their patents for specifications through the pool, imposing on licensees certain restrictions--with the exception of obviously anti-competitive ones such as fixing the product price or quota--will not pose problems under the AMA when (a) the market share of the pool is no more than 20% in the related markets or (b) if market share is inappropriate for analyzing the effect on competition, there are at least four other available specifications.

Perspectives in examining problems under the AMA in the activity to pool patents

- Technological characteristics of patents

  – If only patents essential to the specifications are pooled

    Because essential patents are mutually complementary for adopting the functions and utilities for the specifications, competition among the patented technologies is not restricted when only the essential patents are pooled and licensing conditions are fixed. To exclude completely the risk of violating the AMA, it is necessary to limit patents in the pool to essential patents only.

  – If patents not essential for specifications are pooled

    If patents that are not essential for specifications are pooled, given the following effects on competition among the technologies associated with the specifications, the activity is likely to restrict competition and represent a legal problem under the AMA.

    – When a number of patents on alternative technologies are pooled and licensed with fixed conditions, because the patents on these technologies are competing based on their licensing conditions, competition among these alternative technologies is restricted.

    – When there are a number of patents on alternative technologies and some are pooled and licensed as a package with essential patents, the technologies with the patents not pooled are hardly adopted by licensees of the pool and are excluded from the technology market.

To summarize, when a patent not essential for specifications is pooled, the anticompetitive effects are not negligible. As a consequence, it is necessary to comprehensively evaluate, on the basis of market conditions, the effect on competition of pooling such patents, taking the following factors into account:

- Whether or not pooling the patents is reasonably necessary or has pro-competitive effects.
- Whether or not patent holders pooling their patents can license their patent without going through the pool. And the businesses can select the necessary patents and accept licenses only for them.

- Analysis of constraints on licensees in a license agreement through a patent pool

  - Setting differential licensing conditions

    Licensing agreements through a pool imposing differential conditions on specific businesses without due cause, such as refusing to license the patents, requiring extremely high licensing fees compared with other licensees and limiting the scope of the authorized use of the patents, are at risk of violating the AMA when such activities have a direct and serious impact on the competing functions of licensees that are suffering discrimination. (Private monopolization and discriminatory treatment on transaction terms) To prevent a violation of the AMA it is necessary to grant licenses on a non-discriminatory basis as long as there is no reasonable necessity to make differential conditions.

  - Restricting research and development activities

    In the case of licensing patents for specifications through the pool, any restriction on licensees with respect to research and development concerning the technologies for the specifications or competing technologies independently or jointly with third parties will make it difficult to develop those technologies or specifications and will run the risk of restricting competition in the product and technology market. (Private monopolization, unreasonable restraint of trade)

    On the other hand, if developing specifications is regarded as substantially a joint research and development activity such that a small number of competitors confidentially develop core technologies for the specifications, restricting the research and development of technologies for the specifications or competing technologies independently or jointly with third parties could be recognized as falling within reasonable restrictions. However, even in a case such as this, once the specifications have been developed, limiting research and development by licensees in the licensing agreements through the pool may not be deemed to be reasonably necessary and will pose a legal problem under the AMA.

  - Obligation to grant a license for patents on improvements or developments of the technologies for the specifications through a pool (grant back)

    When licensing patents through a pool, requiring licensees to grant licenses for patents on improvements or developments of the technologies for the specifications through the pool will restrict competition in the technology market with the following effects:

    - This obligation will reinforce the advantageous position of the pool in the markets associated with the specifications. By accumulating in the pool the improvements or

developments, by licensees, of the technologies for the specifications the obligation will make it difficult to develop alternative technologies for the specifications or alternative specifications.

– If improvements or developments by licensees accumulated in a pool provide an alternative function or utility to that provided by other patented technologies in the pool, competition among these technologies is restricted.

On the other hand, there may be a case in which patents on improvements or developments by licensees are essential to the specifications. In this case, imposing the obligation on the licensees generally does not pose a problem with the AMA if it means obliging a licensee to pool the essential patent and license it non-exclusively through the pool, and if it is accompanied by no other restrictions on the use of the essential patent and imposes on the licensee non-discriminatory treatment in, for example, the distribution of licensing fees compared with others pooling their patents.

– Measures against filing a petition for the invalidation of patents (Non-challenge clauses)

In the case of licensing through patent pools, imposing on licensees a non-challenge clause will deprive licensees of the opportunity to contest the validity of any patent included in the pool if doing so is accompanied by a measure to terminate licensing agreements with the licensee for all the patents in the pool. This measure has a greater impact on licensees' business activities than simply terminating licensing agreements with the licensee for the patent that is the subject of the licensee's petition for invalidation.

Imposing on licensees a non-challenge clause will create a legal issue under the AMA if it is accompanied by a measure to terminate licensing agreements with the licensee for all patents in the pool. (Concerted Refusal to Deal)

On the other hand, if the measure is to terminate licensing agreements with the licensee only for the patent subject to the invalidation claim, for instance by taking out the patents from the pool, imposing on licensees a non-challenge clause will not deprive licensees of the opportunity to contest the validity of any patent included in the pool. Imposing such a clause does not pose a legal problem under the AMA.

– Non-assertion of patent rights against patent holders and other licensees (NAP)

In the case of licenses through patent pools, imposing on licensees a non-assertion of patents (NAP) clause and prohibiting the exercise of patent rights they are obtaining or will obtain against patent holders in the pool and any other licensees will effectively result in the accumulation of licensees' patents in the pool. This means that imposing on licensees such a clause has the risk of reinforcing the advantageous position of the pool, restricting licensees' ability to compete with alternative technologies and substantially restricting competition in the technology market.

On the other hand, there may be cases in which licensees obtain or will obtain an essential patent associated with the specifications. In this case, imposing on licensees a NAP clause generally does not violate the AMA if it means obliging a licensee to pool the essential patent and license it non-exclusively through the pool, provided it is accompanied by no other restrictions on the use of the essential patent and imposing on licensees non-discriminatory

treatment in, for example, the distribution of licensing fees compared with the others pooling their patents.

3.2 Intellectual Property Guidelines (September 2007)

26. In addition to the Patent Pool Guidelines [above (1)], in the Intellectual Property Guidelines, the JFTC has presented (i) activities to inhibit the use of technology, and (ii) activities to impose conditions on the use of technology, as questioned conducts regarding standard setting in light of the AMA.

3.2.1 Inhibiting the use of technology

Interception

27. Where a technology is found to be influential in a particular product market and is actually used by numerous entrepreneurs in their business activities, it may fall under the exclusion of the business activities of other entrepreneurs if any one of the entrepreneurs obtains the rights to the technology from the rights holder and refuses to license the technology to others, preventing them from using it.

Concentration of rights

28. In a case in which an entrepreneur conducting business activities in a particular technology or product market collects all of the rights to a technology that may be used by its actual or potential competitors but not for its own use and refuses to license them to prevent the competitors from using the technology, this activity may fall under the exclusion of business activities of other entrepreneurs.

Falsity in establishing the product standards

29. Under the circumstances in which a product standard has been jointly established by several entrepreneurs, it may fall under the exclusion of the business activities of other entrepreneurs when the rights holder refuses to grant licenses so as to block any development or manufacture of any product compliant with a standard, after pushing for the establishment of that standard, which employs a technology of the rights holder, through deceptive means, such as falsification of the licensing conditions applicable in the event the technology is incorporated into the standard, thereby obliging other entrepreneurs to receive a license to use the technology.

30. This also applies in a case in which an entrepreneur holding rights to a technology refuses to grant licenses so as to prevent other entrepreneurs from participating in the bidding after deceiving a public institution into setting out specifications of the product it will be purchasing through bidding that can be satisfied solely by the use of the technology, thereby creating a situation in which no bidder can manufacture any product meeting the specifications without receiving the license to use the technology.

3.2.2 Imposing conditions on the use of technology

31. When the rights holder to a technology concerned with product standards or the technology essential for business activities in the technology or product market ("essential technology") prohibits the development of any alternative technology when granting a license to other entrepreneurs, it corresponds in principle to the act of controlling the business activities of licensees. Preventing licensees from adopting alternative technology corresponds in principle to the act of excluding business activities of other entrepreneurs.

32. When the rights holder to essential technology imposes an obligation to obtain a license on any technology other than that concerned or to purchase any product designated by the licensor without

reasonable grounds when granting a license to other entrepreneurs, it may constitute an act of controlling the business activities of the licensees or the act of excluding the business activities of other entrepreneurs.

3.3 Trade Associations Guidelines (October 1995)

33. Furthermore, in the Trade Associations Guidelines, the JFTC has presented the principles under the AMA regarding voluntary regulations, standards, certification, authorization, etc., by trade associations.

34. In the Trade Association Guidelines, for example, the JFTC has presented the principles of judgments to the case that trade associations establish voluntary standards for rationalizing production and distribution systems or enhancing consumer convenience as follows.

3.3.1 Judgments of substantial restraint of competition

35. Even if the activity in question takes the form of self-regulation, self-imposed certification, authorization, and so forth, it violates the AMA as a cartel made by trade associations if it substantially restrains competition in a market.

3.3.2 Judgments of tendency to impede fair competition

36. The judgments as to whether or not self-regulation or related conduct constitutes an impediment to competition under the AMA are made on the basis of the considerations outlined in sub-paragraph a) below, "judgments regarding Self-Regulation, etc." Similarly, judgments regarding self-imposed certification, authorization, and so forth, are made on the basis of the considerations outlined in sub-paragraph b) below, "Judgments concerning Self-imposed Certification, Authorization, etc.," in conjunction with the considerations outlined in sub-paragraph a) below.

Judgments concerning self-regulation, etc.

37. The following factors should be considered when judging whether or not a given self-regulation activity constitutes an impediment to competition. The following factors (i) and (ii) are the main criteria for judgment, and the factor (iii) is a sub-element that should be taken into account in making a judgment:

- Whether the activity unjustly harms the interests of users by restricting the means of competition;
- Whether the activity unjustly discriminates among firms; and
- Whether the activity is within the necessary rationalized scope to achieve social or other rightful purposes.

Judgments concerning self-imposed certification, authorization, etc,

38. With regard to autonomous certification, authorization, and similar conduct, the following will be considered in addition to the factors described in sub-paragraph a) above.

- The use of self-imposed certification, authorization, and so forth should be left to the discretion of constituent firms; a trade association forcing a constituent firm to use self-imposed certification, authorization, and so forth is likely to pose a problem in light of the AMA.
- Under conditions where it is difficult for a firm to conduct business without receiving self-imposed certification, authorization, and so forth from the association, the association is likely to

be in violation of the AMA if it imposes restrictions on a specified firm with respect to the use of said certification, authorization, and so forth without rightful reasons. Therefore, under such conditions, the use of self-imposed certification, authorization, and so forth should be open to firms, including non-constituent firms. (Charging a reasonable amount of money from non-constituent firms as payment for expenses related to the use of self-imposed certification, authorization, and so forth, does not pose a problem.)