

Controlling Anticompetitive Action by the State: The Role of Competition Advocacy/ Competition Assessment - Japan's Experience –

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0. Greetings

Good morning, everybody. My name is Michiyo Hamada, and I am a commissioner of the Japan Fair Trade Commission (JFTC). It is a great pleasure for me to be here today attending this Conference.

I would like to speak on the Role of Competition Advocacy from the viewpoint of controlling anticompetitive state actions, referring to Japan's experience. I would also like to mention the Competition Assessment of Regulations in Japan, because we are now in the process of introducing it.

1. The Role of Competition Advocacy: Japan's Experiences

I would like to start with the role of Competition Advocacy.

(1) Competition Advocacy related to the Regulatory and Legal Framework

The JFTC has two main target areas for competition advocacy.

One comprises “Antitrust-Exempted Sectors.” The JFTC has worked out to repeal statutory antitrust exemptions because the purpose of most of them is to ease regulations on cartels.

The other comprises “Regulated Sectors”. We have to limit anticompetitive government interventions in those sectors and promote pro-competitive regulatory reforms.

(2) Dawn of Competition Advocacy

I would like to take a look at the history of Competition Advocacy in Japan.

The Antimonopoly Act, the Japanese competition law, was enacted in 1947. The JFTC was established as an independent commission to enforce the Act.

However, the JFTC had experienced a “WINTER SEASON” of as long as three decades. At that time in Japan, industrial policy was considered to be much more important than competition policy.

(3) Proliferation of Antitrust Exemptions and Government Regulations

This led to the proliferation of antitrust exemptions and government regulations.

Initially, antitrust exemptions were supposed to be stipulated within the Antimonopoly Act. However, government regulatory agencies started to establish antitrust exemptions in their own laws regulating their sectors, so that they could avoid the intervention from the JFTC. The number of antitrust exempted cartels increased up to 1,079 at its peak.

(4) Abolishing Antitrust Exemptions and Government Regulations

Even during the cold winter season, the JFTC struggled to promote competition. The tide finally started to change in the late 1970s.

An opportunity arose in 1979 when the OECD recommended that the member states reform government regulations and antitrust exemptions.

Based on this recommendation, the JFTC launched economic studies on 16 regulated sectors, and published a series of reports proposing that regulators abolish antitrust exemptions as well as government regulations in regulated sectors.

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Thereafter, with international momentum toward de-regulation, the Japanese government developed the “Program for Promoting Regulatory Reform” in 1995. Under this program, most antitrust exemptions were to be repealed. In the process of policymaking, the JFTC tried to persuade stakeholders to support the program.

Eventually, the cabinet submitted three packages of bills to repeal or reform antitrust exemptions. Three bills were successfully passed through the Parliament in 1997, 1999 and 2000 respectively.

For some laws where exemptions remained, the JFTC tried to introduce prior-consultation systems with the JFTC, so that the JFTC has the competence to examine the aims and objectives of regulations before cartels are granted by regulatory agencies.

(5) Some Comments

Now I would like to make some comments on our experiences.

Firstly, once antitrust exemptions and government anticompetitive regulations have been established, it takes a VERY long time to abolish them.

In Japan, it took about 4 or 5 decades.

Secondly, constant study and advocacy are essential to move forward with reforms in a timely manner. The JFTC studied many sectors and continued to publish reports to the public, which finally led to the tide toward competition.

Thirdly, a little reform is better than no reform. In some sectors where antitrust exemptions cannot be repealed, the JFTC tried to impose prior-consultation with the JFTC. The prior-consultation system impose greater accountability for the necessity of cartels. In addition, it gives the JFTC another significant opportunity to conduct Competition Advocacy.

(6) Advocacy Channels in the Government

The next slide shows the advocacy channels we usually use.

The first is a Sector Study on regulated industries and antitrust-exempted industries. The JFTC conducts fact-finding surveys and monitors competitive positions in those industries.

The second is the Expert Council. The JFTC set up an expert council named the “Study Group on Regulation and Competition Policy”. Through the council, the JFTC reports survey findings, gathers the opinions of members, and obtains enhanced proposals on the regulatory changes.

The third is preparing Joint Guidelines for liberalized industries with sectorial regulators to enforce both the Antimonopoly Act and sector-specific acts properly.

The fourth is urging sectorial regulators to adopt more pro-competitive regulations in the process of drafting laws.

(7) Recent Example 1: Emission Permit Trading

I would like to present two examples of our activities.

The first relates to emission permit trading.

Japan is now introducing an “Emission Permit” trading scheme. Before the Ministry of the Environment establishes the scheme, the JFTC has called for discussion by the expert council I just mentioned. Based on the report of the expert council, the JFTC published its opinions and pointed out several problems, including the following two.

1. If emission permits are allocated to trade groups, instead of individual companies, it would lead to collusion or the exclusion of particular firms.

2. If the government allocates tradable permits without charge to existing companies, it would establish a barrier to entry unless some free-of-charge allowances were spared for new entrants.

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Directly after publication by the JFTC, the Ministry of the Environment would NOT listen to these opinions. However, the JFTC insisted that introducing a competition-neutral system would lead to a decrease in the entire volume of emissions, because all of the companies would seek more energy-efficient ways of doing business when new entrants came under equal conditions.

As a result, the Minister for the Environment stated that the Ministry of the Environment would respect the JFTC's suggestions when they came up with details of the emission permit trading system. (The bill to establish the system has not been submitted to the Parliament yet.)

(8) Recent example 2: Liberalization of Electricity Sector

The second relates to liberalization in the electricity sector.

In Japan, barriers to entry were abolished for high-voltage electricity users in 2000.

However, simple abolishment of existing barriers to entry in the electricity market would not lead to fair and free competition as long as the incumbents continue to own the power-line network.

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Therefore, the JFTC and the Ministry of Economy, Trade and Industry which is the agency responsible for natural resources and energy, jointly published guidelines ahead of the liberalization. The guidelines illustrate possible unlawful conduct by incumbents such as exclusive contract and contractual tying.

Since then, the JFTC and the Ministry of Economy, Trade and Industry have revised the guidelines several times along with the progress of liberalization. For instance, the present version includes an example of a very long contract with a cancelation penalty, as such conduct would deprive entrants of the opportunity to get new contracts.

(9) Some Comments

I would like to comment briefly again.

Firstly, acting earlier is better. After the sectorial regulators have built a consensus among stakeholders and written a final draft of new regulations, there is no room left to exercise substantial influence on policy-making.

Secondly, have a strategic viewpoint on how to frame the issue. We need to say to sectorial regulators “Competition works well for the initial aim of the regulation.”

Thirdly, constant follow-ups are needed. In liberalized sectors, the dynamic nature of the business environment entails constant follow-ups.

(10) Outcome of the Competition Advocacy efforts

I said the number of antitrust-exempted cartels was 1,079 at its peak in 1966. This number had decreased to 28 by 2010.

I think this decrease might be considered the outcome of the JFTC's steady and persistent competition advocacy efforts.

2. Introduction of Competition assessment in Japan

In the second part of my talk, I would like to speak about Japan's Ex-ante Evaluation of Regulations, focusing on the introduction of competition assessments.

(1) Introduction of Competition Assessment

One of the earliest measures to prevent anticompetitive regulations is the Ex-ante Competition Assessment.

With the development of the OECD's "Competition Assessment Toolkit", the Japanese government started introducing it in April 2010 as a part of its Ex-ante Evaluation of Regulations. Although introduction is still at a trial stage, most of newly-established or amended regulations have already been subjected to the Competition Assessment.

(2) Ex-ante Evaluation of Regulations

In Japan, “Ex-ante Evaluation of Regulations” became obligatory in 2007 under the Government Policy Evaluation Act. The number of cases subject to evaluation reached 157 in FY 2008 and 107 in FY2009.

Under the Ex-ante Evaluation system, regulators should make Evaluation

Reports that include analysis of cost-benefit relationships as well as comparisons with alternatives.

The Ex-ante Evaluation Reports should be publicized within a designated period.

(3) Competition Assessment (Currently Trial)

The current competition assessment uses checklists to determine whether an analysis of impacts on competition is likely to be required or not. Sectorial regulators should submit responses to checklists along with the Evaluation Reports to the Ministry of Internal Affairs. The Ministry then transfers the responses to checklists to the JFTC. The checklist, however, are not publicized, unlike Evaluation Reports, because introduction of the Competition Assessment is now only at a trial stage.

The purpose of the Competition Assessment is to identify important negative impacts on competition. As the OECD's report shows, we should identify various negative effects, such as impacts on number or range of suppliers, impacts on ability of suppliers to compete, and impacts on incentives of suppliers to compete.

(4) Competition Assessment Checklist

This flow chart shows how the Checklist is used. The JFTC made the Checklist with reference to the OECD's Competition Assessment Toolkit Ver. 1. The JFTC usually holds briefing sessions with other sectorial regulators to provide guidance on the Checklist.

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After having completed the checklist, respondents are requested to describe the effects of the designated items concretely.

(5) Some Comments

Here, I would like to make my last brief comments.

Firstly, the Competition Authority should support sectorial regulators to improve their Competition Assessment. In cases in which Sectorial Regulators lack experience and expertise of economic analysis, consultation and guidance of the Competition Authority is all the more necessary for the staffs of Regulatory authorities.

Secondly, incentives are necessary for sectorial regulators to make Competition Assessments in a positive manner. Sectorial regulators may be fed up to completing lists only to identify negative impacts. To offer more incentives for sectorial regulators, a more comprehensive coverage, including positive impacts on markets if any, might be set for In-depth analysis in Competition Assessments.

Thank you very much for your attention.