

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



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

Competition Advocacy

related to the Regulatory and Legal Framework

- Target Area
 - Antitrust Exempted Sectors
 - Repealing Statutory Antitrust Exemptions
 - Regulated Sectors
 - Promoting Pro-competitive Regulatory Reforms

Dawn of Competition Advocacy

- Antimonopoly Act : Enacted in 1947
- The Japan Fair Trade Commission (JFTC) :
Established to enforce the Act
- BUT,
the JFTC experienced a “WINTER SEASON”.
Industrial Policy exceeded Competition Policy.

Proliferation of Antitrust Exemptions and Government Regulations

- Antitrust exceptions were initially supposed to be stipulated in the Antimonopoly Act.
- But, government regulatory agencies started to establish antitrust exemptions in their own laws to avoid intervention from the JFTC.
- The Number of Antitrust Exempted Cartels: 1,079 (in 1966) at its peak.

Abolishing Antitrust Exemptions and Government Regulations

- In 1979, the OECD recommended that the member states should reform government regulations and antitrust exemptions.
- The JFTC studied regulated sectors and published a series of reports proposing that regulators should abolish antitrust exemptions as well as government regulations in regulated sectors .

Abolishing Antitrust Exemptions and Government Regulations (cont'd.)

- The Japanese government developed the “Program for Promoting Regulatory Reform” in 1995, stating that most antitrust exemptions should be repealed.
- Three package bills to repeal antitrust exemptions passed the Parliament in 1997, 1999 and 2000.
- In laws where exemptions remained, prior-consultation systems with the JFTC were introduced.

Some Comments

- Once antitrust exemptions and government regulations have been established, it takes a long time to abolish them.
- Constant study and advocacy are essential for reforms in a timely manner.
- In some sectors where antitrust exemptions cannot be repealed, introduction of prior consultation with competition authority is better than no reform.

Advocacy Channels in the Government

- Sector Study on Regulated/Antitrust-Exempted Industries
- Expert Council: “Study Group on Regulation and Competition Policy”
- Preparing Joint-Guidelines for Liberalized Industries with Sectorial Regulators
- Urging Sectorial Regulators to Adopt More Pro-competitive Regulation in the Process of Drafting Laws

Recent Example 1: Emission Permit Trading

- Before the Ministry of the Environment established the emission trading scheme, the JFTC published its opinion*, based on the report of the Expert Council.
- In the opinion, the JFTC pointed out:
 - Allocating emission permit to trade groups, not to individual companies, would lead to collusion or exclusion of particular firms.
 - The free-of-charge allocation of tradable permit would establish a barrier to entry unless some free-of-charge allowances are spared for new entrants.

* Issues on Competition Policies regarding Countermeasures Using Market-Based Instruments in the Measures against Global Warming: Discussion Points in the Japanese Emissions Trading Scheme (Interim Report)
<http://www.jftc.go.jp/e-page/pressreleases/2010/March/100331new.pdf>

Recent Example 1: Emission Permit Trading (cont'd.)

- The Minister for the Environment stated:
The Ministry of Environment would respect the JFTC's suggestions when it comes up with details for the emission permit trading system.

Recent Example 2: Liberalization of Electricity Sector

- Barriers to entry were abolished for high-voltage electricity users.
- However, simple abolishment of the existing entry barriers would not lead to fair and free competition.

Recent Example 2 (cont'd.)

Liberalization of Electricity Sector

- The JFTC and the Ministry of Economy, Trade and Industry (the Agency for Natural Resources and Energy) jointly published guidelines.*
- The guidelines illustrate possible unlawful conduct by incumbents, such as exclusive contract, contractual tying, etc.
- The JFTC/METI revised the guidelines several times with the progress of liberalization.

* Guidelines for Proper Electric Power Trade
<http://www.jftc.go.jp/e-page/legislation/ama/electric.pdf> (English Translation only available for year 2002 Version)

Some Comments

- Advocacy at an Early Stage of Policy-making Process
 - More Substantial Influence on Policy-making
- How to Frame the Issue
 - “Competition Works for the Initial Aim of the Regulation.”
- Constant Follow-ups
 - In liberalized sectors, the dynamic nature of business environment entails constant follow-ups.

Outcome of the JFTC's Competition Advocacy efforts

- The Number of Antitrust-Exempted Cartels in 1966:
1,079
- The Number of Exemptions in 2010:
28

2. Introduction of Competition Assessment in Japan

Introduction of Competition Assessment

- Along with the development of the OECD's "Competition Assessment Toolkit", the Japanese government started introducing it in April 2010 as a part of Ex-ante Evaluation of Regulations.
- Most newly-established/amended regulations have been subjected to the Competition Assessment.

Ex-ante Evaluation of Regulations

- Obligatory from 2007 under the Government Policy Evaluation Act
 - Number of Cases: 157(FY2008) ,107(FY2009)
- Evaluation reports should include an analysis of cost-benefit relationship as well as comparison with alternatives.
- Evaluation reports should be publicized no later than the following step:

– Law:

No later than the Cabinet's approval of the bill

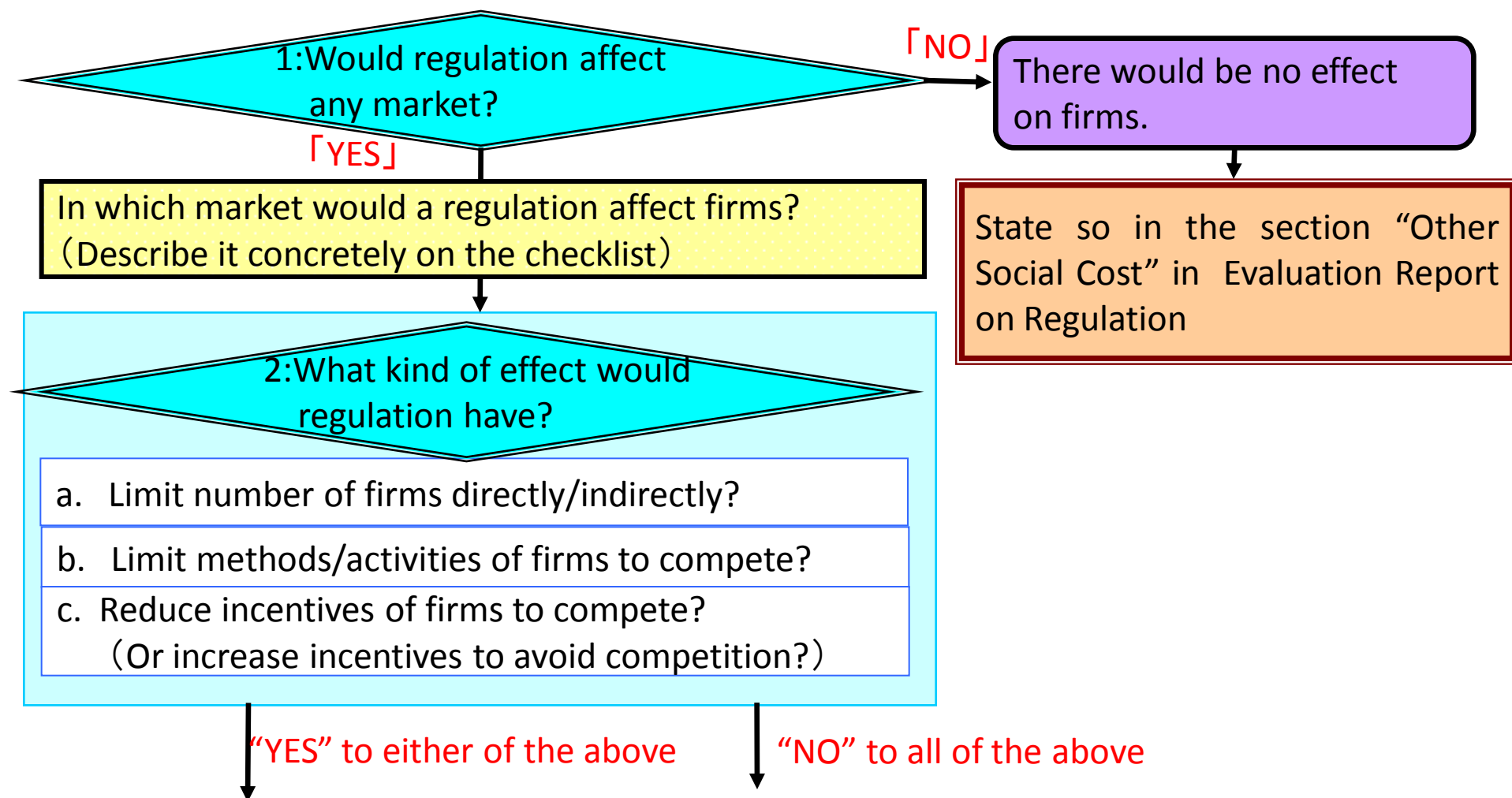
– Cabinet order
or ordinance:

No later than the commencement of public consultation
procedures (30 days) under the Administrative Procedure Act

Competition Assessment (Currently Trial)

- Method:
 - Checklist to determine whether an analysis of impact on competition is likely to be required
 - Regulators should submit a checklist (see the next slide) before they enact new regulations.
- Purpose:
 - Identifying negative impacts on competition
 - (1) Impacts on number or range of suppliers
 - (2) Impacts on ability of suppliers to compete
 - (3) Impacts on incentives of suppliers to compete

Competition Assessment Checklist



Competition Assessment Checklist(cont.)

“YES” to either of the above

→It is clear that a regulation would affect
competition.

How a regulation would affect firms,
regarding the item above to which the
answer is “YES”
(Describe it concretely in the checklist)

Describe concretely the affects of the items
above in the section “Other Social Cost” in
Evaluation Report on Regulation

“NO” to all of the above

State so (“no effect”) in the section
“Other Social Cost” in Evaluation Report
on Regulation

Some Comments

- Importance of Competition Authority's Support to improve Assessment by Sectorial Regulators
 - Need for Consultation and Guidance for staff of Regulatory Authorities
- Incentives for Sectorial Regulators to make a Competition Assessment
 - Wide coverage including positive impact on market

Thank you very much for your attention !



<http://www.jftc.go.jp/e-page/index.html>

Opinions expressed in this presentation are those of the speaker and are not necessarily those of the JFTC.