

Chapter 2 Direction for the Review of the Measures Provisions Against Monopolistic Situations (Section 8-4)

1 Direction of a Comprehensive Review – Emphasize Problems Such as Elimination of Conduct to Prevent Market Entry –

As the proper approach to monopoly and oligopoly regulation, we believe that rather than emphasizing market structure in a narrow sense, such as the degree of concentration, and making factors such as a high degree of concentration and excessive profit margins the basis for regulation, it will be effective and proper to focus on the fact that monopoly or oligopoly abuse is particularly egregious in cases where market entry is difficult, and ensure competition by taking action as promptly and effectively as possible against any conduct to prevent or obstruct entry (referred to below as “conduct to prevent entry”). For this purpose we believe the JFTC should conduct a comprehensive review to base its activities on a system that enables the JFTC to quickly and effectively eliminate conduct to prevent entry, rather than intervening directly in monopolistic and oligopolistic market structures.

Specifically we believe the JFTC should not make adopting structural measures centered on corporate division that look at static competitive conditions, such as large market share or price inflexibility in a downward direction and high profit margins, the base of such a system. Rather, we believe the JFTC should make the foundation for this system the examination of dynamic competitive conditions where market entry is being obstructed by specific conduct to prevent entry, and the adoption of the measures necessary to ensure opportunities for entry (see Appendix 29).

2 Areas Subject to Regulation

We believe situations where conduct to prevent entry should particularly be subject to prompt and effective regulation are those where essential facilities (see Part 3 Essential Facilities – Definitions) exist in sectors that are experiencing contemporary monopoly problems for the following reasons.

- ① The sector is one where the use market was being monopolized by businesses with exclusive ownership of the relevant facilities, but where competition has been introduced through deregulation in order to promote competition in the use market
- ② There is a unique market structure in which a business that exclusively owns the relevant

facilities has an overwhelming advantage in competition against competitors because the barriers to entry resulting from the existence of essential facilities is particularly high and competitors cannot conduct business activities when they cannot use the essential facilities

- ③ When conduct to prevent entry by a business that exclusively owns essential facilities is discovered and responding to this conduct promptly and effectively is recognized as an urgent issue for promoting competition

3 Conduct to Prevent Market Entry that Should be Prohibited

We believe the following types of conduct should be regarded as conduct to prevent entry and should be prohibited.

(1) Conduct by Entrepreneurs Who Independently Own, Exclusively or in Common, Essential Facilities to Prevent Market Entry

① Denial of facilities use, discrimination or trade restrictions or obligations

- (1) Conduct by businesses that independently own essential facilities, exclusively or in common, to cause competitive disadvantages to competitors, through treatment that is more disadvantageous than that for the business itself or related businesses, by means such as denial of use, discrimination, or trade restrictions or obligations, without just cause in the course of causing competitors to use such essential facilities.

- (2) Conduct by businesses to use their position of independent ownership of essential facilities, exclusively or in common, to create competitive disadvantages for competitors, other than the conduct in ① above

Conduct by a business that independently owns, exclusively or in common, essential facilities to create a competitive disadvantage for competitors, such as preventing or obstructing the movement of customers, by misusing information related to approval of use by competitors or by having the division that owns the facilities provide internal assistance to the sales and marketing division in the use market, without just cause, originating in the fact the division owning the essential facilities and the sales and marketing division in the use market are identical, when conducting its business activities in the use market.

(2) Conduct in Parallel by Two or More Entrepreneurs Who Have Been Exclusively Allocated

Use Rights for Essential Facilities by the Central Government or Other Public Institutions, to Prevent Market Entry

When several entrepreneurs who have been exclusively allocated the usage rights for essential facilities by the central government or another public institution overstep the range of fair and free competition (for example, a case where such entrepreneurs target and attack only specified competitors), and engage in conduct in parallel to prevent entry such as partial antagonistic price cutting or denial of use of available facilities, information, etc., and there is concern they will make the business activity of the competitors in question difficult through the cumulative effects of their actions.

4 Legal Position for the Relationship of New Regulations to Regulations Currently in Force

Below we examine the legal position for the relationship to the provision to prohibit private monopolization (Section 3 Premise) and the provision to prohibit unfair trade practices (Section 19) currently in force when establishing provisions that can be used as prompt and effective measures against conduct to prevent entry by the exclusive owners of essential facilities.

(1) Conduct by Entrepreneurs that Independently Own, Exclusively or in Common, Essential Facilities to Prevent Market Entry

Because conduct by entrepreneurs that independently own, either exclusively or in common, essential facilities to prevent entry has, by its very nature, a probability of substantially restricting competition¹⁰, we believe that to ensure fair, all competition conduct to place competitors at a competitive disadvantage should be made illegal so long as such conduct is without just cause, and the JFTC should be given the ability to enact any necessary measures promptly and effectively.^{11,12}

¹⁰ Meaning making it difficult to display the competitive function of the market (prescribed transaction sectors), by creating a situation of market control or formation of ability to control the market, including situations to maintain and enhance such a situation.

¹¹ Situations where entrepreneurs still lack influence in the use market will also be included in situations subject to regulation.

¹² Europe and the U.S. use the concepts of a "monopoly lever" (also known as monopoly leverage; the concept that says governments should control the conduct of firms having the power to control one market when they attempt to use that ability to expand their influence related markets as well) and "attempted monopolization" (Under Article 2 of the Sherman Antitrust Act, highly dangerous conduct by firms that do not have monopoly power at the present time to acquire monopoly power ("attempted monopolization") is also prohibited).

A. Relationship to provisions prohibiting private monopolizations

To the extent that control, elimination conduct and substantially limiting competition are considered prerequisites, for conduct to prevent market entry by entrepreneurs who independently own, exclusively or in common, essential facilities, the provisions prohibiting private monopolization can be used to establish a provision with the intent of making illegal any conduct to create a competitive disadvantage for competitors without reasonable cause, and enabling the JFTC to enact the necessary measures, as long as there are discussions concerning the extent to which any conduct that by its very nature has a high probability of substantially restricting competition must actually restrict competition in order to be considered in violation of the provisions prohibiting private monopolization.

B. Relationship to provisions prohibiting unfair trade practices

To the extent the excessiveness of the conduct or the danger of unfair competition are considered requisites¹³, with regard to conduct to prevent market entry by entrepreneurs who independently own, exclusively or in common, essential facilities, the provisions prohibiting unfair trade practices can be used to establish a provision with the intent of making illegal any conduct to create a competitive disadvantage for competitors without reasonable cause, and enabling the JFTC to enact the necessary measures, if there is a high probability of substantially restricting competition based on the nature of the conduct itself, as long as the danger of preventing fair competition, is believed to patently evident from the very nature of the conduct.¹⁴

This is the concept that the government should be able to address conduct to prevent market entry in markets where essential facilities exist by incorporating provisions to prohibit private monopolization in the interpretive arguments (or clarify such conduct by amending the definition provisions). We believe there would be great significance, however, to incorporating the two concepts described above into legislation, particularly when limited to situations involving conduct to prevent market entry in market where essential facilities exist, in order to quickly achieve greater market activity through deregulation, which currently is such a critical topic in Japan.

¹³ The form of conduct that becomes the prerequisite for "unfair" in the provision prohibiting unfair trade practices means it is not possible to immediately determine the disruptiveness to fair competition merely from the external form of the conduct, and it is necessary to look at the intent and purpose and the effect and influence of the conduct in question. In this situation, the influence on competition frequently is not clear from only the relation between the party reporting the conduct and the party engaged in the conduct, and a certain level of information gathering and analysis is required, such as having to investigate and compare a number of precedents. Because conduct to prevent market entry in situations where essential facilities exist has a high probability of substantially restricting competition by its very nature, however, it is possible to prove the existence of a competitive disadvantage using simpler evidence than the normal evidence of disruptiveness to fair competition and based on this, we believe there is sufficient meaning in making it possible to declare such conduct illegal to the extent such conduct lacks reasonable cause.

¹⁴ We believe there would also be great significance in clarifying by legal statute that discrimination with its own activity by an entrepreneur that independently owns, exclusively or in common, essential facilities will be a problem under the Antimonopoly Act.

Furthermore, we believe there are situations where simply eliminating the conduct in question is not adequate, such as when there is a strong possibility such conduct to prevent market entry will be repeated when the division that owns the essential facilities and the sales and marketing division in the use market are not functionally separate. In situations where measures such as the measure to gather and publicly disclose information on matters such as the use conditions for the essential facilities, measures to ensure the division that owns the essential facilities does not provide internal assistance to the sales and marketing division in the use market and measures to prevent information from being used for purposes other than its intended purpose (example: separation from accounting, isolation of information by division) are not being effectively and appropriately enacted under the Commercial Code or other statutes, we believe it is necessary to enact such measures as measures to restore competition. In the elimination measures⁸ against unfair trade practices (Section 20), because there is a controversy concerning whether it is possible to enact such measures to restore competition, from the standpoint of ensuring legal stability we believe there would be great significance in confirming and clarifying the JFTC can enact, in addition to orders to cease and desist conduct to prevent entry, the measures necessary to restore competition, reflecting the unique characteristics of the market, in situations where essential facilities exist.

(2) Conduct in Parallel by Entrepreneurs that have been Exclusively Allocated Usage Rights for Essential Facilities by the Central Government or Other Public Institution, to Prevent Parallel Market Entry

In situations where two or more entrepreneurs have been exclusively allocated usage rights for essential facilities by the central government or other public institutions and are exclusively holding their rights, responding against parallel conduct by two or more of the entrepreneurs acting without collusion against specific competitors to prevent market entry is extremely difficult under the law currently in force, because in the absence of collusion the JFTC must determine if there is a substantive restriction on competition from each separate entrepreneur's conduct, and if each separate entrepreneur's conduct does not result in substantive restriction of competition it is difficult to respond using the provision prohibiting

private monopolizations.¹⁵

However, conduct in parallel to deny the use of available facilities when competitors are engaged in business¹⁶, or conduct to engage in partial antagonistic price cutting in parallel that targets specified competitors or other parties¹⁷, for example, differs from conduct within the range of fair and free competition to provide goods or services at a good price, and the anticompetitive nature of such conduct to prevent market entry by selectively targeting certain competitors, even when conducted independently, is extremely strong. On the other hand, there are situations where, with regard to parallel conduct to prevent market entry, if entrepreneurs carry out their respective conduct at the same time and by the same means, there is a danger the cumulative effect will, on the whole, make it difficult for the competitors in question to conduct their business activities¹⁸. Where a situation has arisen where a competitor's business activity may be difficult when viewed overall, rather than by closely examining whether the respective conduct by each individual entrepreneur creates a situation where the business of the competitor in question becomes difficult, it is necessary to respond more effectively by enabling the JFTC to declare the conduct by two or more entrepreneurs to prevent market entry on the whole illegal, and enact the necessary measures against such conduct. In this case, however, only situations where the conduct in question to prevent entry was carried out by overstepping the bounds of fair and free competition should be subject to regulation.

Moreover, we believe the necessity to eliminate such parallel conduct to prevent market entry is particularly strong because markets where the usage rights for essential facilities have been exclusively allocated are thought to normally possess certain characteristics, such as

- ① A high probability of substantially limiting competition in a manner identical to cases involving collusion;

¹⁵ When substantive restriction of competition occurs because of independent exclusionary conduct, it becomes possible to respond using private monopolization

¹⁶ For example, at airports, several airline companies with airport reception counters refuse the loan of their counters only to selected competitors, in parallel but without collusion.

¹⁷ For example, on certain airline routes, several existing businesses that account for a proportionate share of take-off and landing slots reduce prices on flights close in time to the routes of certain competitors that have recently entered the market, in parallel but without collusion.

¹⁸ For example, at the time an existing business engaged in antagonistic price cutting against specified competitors, this alone cannot be called exclusionary because it does not produce an exclusionary result and applying the provision prohibiting private monopolization would be difficult, but in a case where the flights of the competitor in question are in time bands close to those of existing businesses, when identical conduct by several existing businesses overlaps we believe this will lead to a situation where there is a danger the competitor in question would have difficulty in conducting business. However, this

② The usage rights in question are not opened to competitors and the possibility of competition is limited to just the entrepreneurs to which the rights have been allocated, similar to situations where essential facilities are independently owned, exclusively or in common;

③ Such markets have extremely high barriers to entry because of ②, there are few entrepreneurs and the market structure enables the entrepreneurs to easily understand each other's activities, and there is a high probability the entrepreneurs firmly believe conduct in parallel and will engage in conduct to prevent market entry and such conduct will be successful even without a monopolistic position and without engaging in collusion;

④ Under such a market structure, it is possible without collusion to engage in conduct that distorts competition in a manner that makes it impossible to conduct business without a monopoly position;

⑤ When entrepreneurs engage in partial antagonistic price cutting in parallel to target specific competitors, conduct of business can easily become difficult if competitors with a small share of the business find it hard to respond to price cutting by expanding supply, because the competitors sometimes cannot easily expand the rights to essential facilities once they have been allocated;

⑥ When conduct to prevent market entry once is tolerated because entry was difficult originally due to the existence of essential facilities, the incentive to enter the market will be lost for not only for those competitors but also for potential competitors that have a possibility of entering the market in the future;

⑦ Promoting competition by responding swiftly and effectively against conduct to prevent market entry, especially in the public utility sector where encouragement of competition is being demanded through the introduction of competition though deregulation, is believed to be liked to increasing economic welfare.

In light of such market characteristics, even if there is no collusion limited to the prescribed conduct to prevent market entry, when there is concern the business activities of certain competitors will become difficult as a result of this conduct it is possible to make such conduct illegal and establish enact the necessary measures to enforce the law.

5 Conclusion

Considering the arguments discussed above, Japan has reached a point that demands prompt and effective action under the Antimonopoly Act against problems originating in the existence of exclusive ownership of essential facilities. It is necessary to study establishing new regulations that will permit actions that are faster and more effective than is possible under the regulations currently in force.

Furthermore, in Part 1 we proposed the introduction of surcharges into the provision prohibiting private monopolizations. When this type of measures review is conducted, the respective character and positions of the provision prohibiting private monopolizations and new monopoly regulations become more precise. In other words, the provision prohibiting private monopolizations is a measure to regulate conduct that substantially restricts competition through control or exclusion, and the new regulations are measures to outlaw conduct that creates a competitive disadvantage for competitors when essential facilities exist and there is no reasonable cause for such conduct, and to enable prompt and effective action by enacting the necessary measures. To achieve this end, measures based on new regulations will include cease and desist orders against conduct to prevent market entry, and the measures to restore competition that are necessary for this purpose.

Moreover, the intent of this comprehensive review is not to remove conduct to prevent market entry from behavior subject to regulation in situations where essential facilities do not exist, but to continue the regulations against conduct to prevent market entry based on the Antimonopoly Act and extend them to all industries, and to separately establish regulations to address the problem of conduct to prevent market entry in cases where essential facilities exist, a particularly modern-day problem. Accordingly, even in situations where essential facilities do not exist, naturally there will be situations where the exclusion of business activities by other entrepreneurs as a result of conduct to prevent market entry will be recognized – for example, just because essential facilities do not exist, this does not mean the application of the provision prohibiting private monopolizations or the provision prohibiting unfair trade practices (refusal of independent dealing, etc.) against conduct related to the denial of use of the facilities to competitors by entrepreneurs that independently and exclusively own the facilities is disturbed – and we believe the provisions of the Antimonopoly Act currently in force should be applied just as in the past.

Furthermore, it need not be said that new regulations will continue to be vitally important as a means to provide action against monopoly problems in sectors recognized as natural monopolies, sectors where technological standards are created by network externalities and sectors where usage rights to essential facilities are exclusively allocated by the central government or other public institutions and, separately from markets with such unique characteristics, in situations where there is concern a monopolistic market structure may be formed by changes such as firm mergers that leads to anti-competitive results, regardless of whether new regulations to regulate firm mergers are enacted for preventive regulation of such conduct.