

1 Definition

The following three conditions can be considered to be the fundamental prerequisites of essential facilities¹⁹:

- ① Assets having natural monopoly characteristics (declining cost on the supply side, substantial investment requirement) or network externalities, or assets such as facilities, rights and information deliverables that are scarce resources for which the usage rights are exclusively allocated by the central government or other public institutions;
- ② Assets whose use is necessary and indispensable when supplying goods or services;
- ③ Facilities and other assets in question, and facilities that enable firms to effectively compete, which entities conducting or thinking of conducting business activities in certain business sectors for goods and services (referred to below as “competitors”) find markedly difficult to construct on their own because of economic, technical, legal or other reasons.

Accordingly, because any new provisions will be provisions for taking an especially prompt action against conduct to prevent market entry in situations where essential facilities exist, by easing the prerequisites for identifying violations of the law, facilities or assets should not be made subject to regulation immediately if the three prerequisites described above are fulfilled but only when the following conditions have been satisfied.

That is, when defining the essential facilities that should be subject to regulation, in situations where an entrepreneur has constructed facilities or assets under competition and at its own investment risk and another entrepreneur has requested access to those facilities or assets, it will be necessary to consider whether an intention to undertake new research and development or new investment is being obstructed and whether competition at a long-term, dynamic level such as technology development or capital investment will be distorted.

On the other hand, even in situations where the degree of investment risk is substantial and there will be an influence on competition at a long-term, dynamic level, we believe there will also be situations in which it will be necessary to allow competitor or other parties to use such essential facilities under appropriate conditions if the scale of the use market is large and the

¹⁹ Generally, we believe facilities that are positioned as assets or other indispensable facilities in the Commercial Code to correspond to essential facilities that should be subject to regulations under this comprehensive review.

competitive benefits that will be gained by approving access are taken into consideration.

For this reason, in addition to the basic requisites of the natural monopoly characteristics or network externalities and the need for, indispensable nature of and difficulty of constructing competing facilities or assets outlined in ① through ③ above, it will be necessary to make “determining there is a need to allow competitors or other parties to use such essential facilities under appropriate conditions” a prerequisite and, as described below, consider ① the influence on competition at a long-term, dynamic level such as technology development or capital investment, against the backdrop of the investment risk of the facilities in question and ② the size of the use market.

- ① For example, beginning with situations where government specified aid (grants, etc) or patents (public enterprise rights) have been granted, the necessity to consider the influence on competition at a long-term, dynamic level such as technology development or capital investment, against the backdrop of the investment risk in question, is relatively strong for facilities constructed by a business at its own investment risk, compared to facilities that were constructed under conditions where investment risk was reduced.
- ② When the size of the use market for the essential facilities is extremely large, because the competitive benefits from approving appropriate use of the facilities in question are large, even when the facilities were constructed at a company's own investment risk, the necessity to approve the appropriate use of the essential facilities in question is relatively strong.

2 Certification of Essential Facilities

From the standpoint of ensuring entrepreneurs' predictability or the transparency of application of the law, we believe it is necessary to limit the activities that will be subject to regulation by clarifying as much as possible what essential facilities will be subject to regulation. Considering that change is quite rapid, however, particularly with regard to technological standards, it will be difficult for the JFTC to exhaustively list up such essential facilities in advance based on laws and ordinances. Because the transparency into applications of the law will be diminished when viewed from the standpoint of entrepreneurs as well if the JFTC gives no indications concerning the interpretation of “essential facilities,” however, we believe the JFTC should disclose in advance, as concretely as possible, its thinking concerning essential

facilities, including illustrating the main items that will be considered as essential facilities as they are understood by the Fair Trade Commission under current circumstances.

3 Review of the Applicability of Essential Facilities

Changes in technological standards in particular are ordinarily quite intensive. We believe it will be necessary to continuously verify specifically, for a specified period of time, whether an item corresponds to essential facilities, and to remove items from the list subject to regulation at the point in time when such items are believed to no longer correspond to essential facilities.

Chapter 4 Enforcement

1 Content of Enforcement

Because new regulations against conduct to prevent market entry in situations where essential facilities exist will be measures to promptly and effectively eliminate this conduct, as a rule enforcement will take the form of an order to fully cease said conduct to prevent market entry. Nevertheless, considering the unique market structure characteristics of a monopoly resulting from exclusive ownership of essential facilities, when there is a strong possibility that conduct in violation of the law will be repeated because the division owning the essential facilities and the sales and marketing division that provides services using those assets are not functionally separate, and measures to address this situation effectively and properly have not been enacted under business or other law, in addition to measures to ensure the fair use of the essential facilities and eliminate the prohibited conduct it will be necessary to clarify the fact that supplemental measures to restore competition in the market where the facilities or other indispensable assets are used (disclosure of information on conditions of use of the essential facilities, isolation of information between the division owning the essential facilities and the sales and marketing division in the use market, prohibition against internal assistance to the use market using the profits related to the essential facilities, etc.) can be adopted as JFTC measures to restore competition. Furthermore, the measures to restore competition described above should be used only in situations where particularly necessary, such as when cessation of the conduct does not have a sufficient effect, and only within the range necessary to restore competition.

In addition, because the intent of this comprehensive review with regard to leaving unchanged the corporate division measures as enforcement under new regulations is to promptly and effectively eliminate conduct to prevent market entry in situations where essential facilities exist, we believe firm division measures should aim for prudent procedures and are not compatible with this intent. In situations where it is believed the measures to restore competition described above will not be able to stop conduct to prevent market entry in the future or achieve the purpose of the law even if they are carried out, however, in this case it will be necessary to investigate an appropriate policy, taking into consideration the balance between the prerequisites of the new regulations for identifying violations of the law and structural separation measures, even though making it possible to carry out vertical structural separation

is believed to be necessary.²⁰

2 Separation of the Roles of Business Laws and the Antimonopoly Act

From the standpoint of competition law, defining the essential facilities across industry classifications and promoting market entry by eliminating conduct to prevent market entry in situations where such assets exist is the fundamental role of competition law. From the standpoint of competition policy, the JFTC should aggressively carry out such policies as it is requested to strengthen its market surveillance function in the IT and public utility sectors.

On the other hand, there are cases in individual business laws as well where rules for the fair use of essential facilities, measures to isolate information between divisions that own essential facilities and the sales and marketing divisions in the use market, and prohibitions against internal assistance to use markets using profits from essential facilities have been stipulated from the standpoint of business policy, including the standpoint of encouraging competition. We believe that in situations where the rules of use set down in individual business laws are functioning effectively and appropriately, problems under the Antimonopoly Act normally will not occur. When business laws are not being observed and entrepreneurs' conduct violates the Antimonopoly Act, however, appropriate measures should be taken not only under business law but also under the Antimonopoly Act. In addition, for cases such as entrepreneurs engaging in conduct that has not been anticipated by business laws, the JFTC should apply the Antimonopoly Act.

In any case, even if an entrepreneur is acting in accordance with the rules of business laws, because disturbances will result if its conduct is charged with a violation of the Antimonopoly Act, the JFTC must act to prevent such disturbances from occurring. To this end, the competent authorities for business that establish the specific rules of use for essential facilities based on actual conditions inherent in each industry and the JFTC, which is responsible for the Antimonopoly Act, the basic set of rules governing competition, must adequately coordinate their activities. At a time when the JFTC has achieved a certain level of success concerning coordination between the Antimonopoly Act and business law, through actions such as drafting

²⁰ The possibility of carrying out corporate divisions as an elimination measure is also being discussed under the Antimonopoly Act currently in force for private monopolizations that substantially restrict competition through the control or elimination of other firms.

common guidelines and participating in deliberative councils with the competent authorities for business, the JFTC must use similar means to continue such coordination between business law and the Antimonopoly Act in the future as well.

Furthermore, for sectors where specialization inherent to an industry is particularly necessary, such as in the case of connection rules, it is important that both institutions exercise their capabilities in their respective fields of expertise, such as the competent authorities for business establishing specific rules and the JFTC aggressively acting to eliminate anticompetitive conduct in accordance with examination procedures, and laws must be applied in a manner that avoids discrepancies in administration.

3 Procedures

With regard to procedures when establishing new provisions against conduct to prevent market entry in situations where essential facilities exist, it would be reasonable to make ordinary case disposition procedures the general rule because elimination of conduct to prevent market entry is assumed to be the basis for any measures. In addition, even in situations where measures to restore competition taken incrementally in addition to cessation of the illegal conduct are required, it should be possible to take the measures as part of elimination measures enacted through the regular examination procedures.

Chapter 5 Need for and Direction of a Comprehensive Review of the Reporting Provision Concerning Parallel Price Increases (Section 18-2)

1 Intent of the System

The managed price problem, in which prices in oligopolistic markets were rigid in a downward direction under the price inflation experienced from the latter half of the 1960s, was looked at closely. Under the Antimonopoly Act systems in place prior to amendment of the Act in 1977, however, the JFTC had no method to effectively deal with this problem, and a competition policy-based system for relationships to commodity price problems as well was deemed necessary.

Because it was not possible under the cartel regulations to understand conduct by firms to raise prices in concert when firms do not communicate intent, a provision to report on parallel price increases was introduced by the 1977 amendment of the Act for this purpose.

This provision was established with the expectation it would contribute to encouraging free and fair competition, by resulting in more prudent pricing decisions at firms, if the JFTC were able to request information from firms concerning the reasons for their price increases when parallel price increases were implemented and report a summary of its findings in the JFTC's annual report to the Diet, even if the parallel price increases did not involve any communications of intent among firms and were not a violation of the Antimonopoly Act.

2 System Administration Conditions, Etc.

(1) Examination Concerning Structural Requirements

A. Market structure prerequisite – Divergence between “homogeneous goods and services” and items that actually require examination

The provision currently in force applies to “homogeneous goods and service of the same type” in markets throughout Japan, but actual price increases are implemented by sub-markets, for different product categories and uses or different users, for example, and for regional markets. In cases involving this type of sub-market price increase, situations are seen where price increases are only partial increases if the entire market is looked at and thus not subject to information gathering.

On the other hand, because the items subject to examination under the report gathering provision concerning price parallel increases cover only a small portion of all related items (high

tensile steel, specialty cold rolled broad sheet steel, newsprint rolls, etc.) even when prices for all related products are increased in parallel, information is limited to the items in question and cases can be observed where the JFTC cannot explain all of the parallel firm conduct even through it requests information on the reason for price increases, such as cost or profit margin.

B. Conduct prerequisite – Actual changes related to “prices uses as the criteria for transactions” (trade standard prices)

When the system was created, oligopolistic manufacturers had the power under the economic environment at the time to control prices, and trade using quoted prices and trade using standard prices were widespread in the market. After introduction of the system, however, quoted prices for manufacturing materials were abolished or became a dead letter, and trade prices that differ for each user were adopted. This is the reason the JFTC requests information on individual trade prices before and after a price hike, uses this information to calculate weighted averages and applies this by viewing the results as standard prices.

For consumable materials, in cases where manufacturer suggested retail prices have been set, in contrast to conditions when the system was established, actual conditions in which manufacturer shipment prices will also be raised if manufacturer suggested retail prices have been raised have disappeared. In this case, the JFTC considers the shipment price to be the trade standard price, but there are also instances where determining parallelism has become difficult because actual prices are determined through negotiations with each distributor and prices differ according to the trade conditions in each case.

In addition, with regard to “identical or approximate amounts or percentages,” it has become harder to specify a single price increase amount by entrepreneur and authorize the parallelism of price increase amounts among companies because the trade standard prices for each sub-market frequently will differ, and trade standard prices that are applied uniformly to all customers also are believed to no longer exist.

(2) Examination Concerning Restraint Capabilities

A. Evaluation of restraint capabilities looked at from actual application conditions

Section 18-2 provides that markets where the total price of goods or services of the same description supplied in Japan is in excess of 60 billion yen and the ratio of the total amount of such goods or services supplied by the three highest ranking companies in Japan exceeds 70%

are markets subject to examination. The number of items subject to examination that satisfy this market structure requirement has risen since the system was introduced, and currently includes 82 items. When we review the items that have become subject to the reporting requirement, other than 19 items such as beer, whiskey and general daily national newspapers for which the JFTC has repeatedly received reports (currently 13 items are listed for reporting), most items have never been subject to the reporting requirement, and those that become subject to the system represent only a very small portion of all of the items subject to the examinations currently in force. On the other hand, although it is believed many markets exist where firms can engage in conduct to increase prices in parallel even without fulfilling the market structure prerequisites described above (example: institution of Saturday ATM usage fees by major banks (March 2003)), the JFTC cannot address these conditions using Section 18-2 because these markets do not correspond to business sectors subject to examination.

As this indicates, it cannot necessarily be claimed companies can easily engage in parallel price increases merely because there is a market structure where the three largest companies account for 70% or more of all goods or services supplied. On the other hand, entrepreneurs that engage in parallel price increases repeatedly engage in price-raising conduct.

B. Changing corporate awareness

It is believed that in recent years, firms believe there is no violation of the law if they engage in conduct in parallel provided there is no collusion, and that such conduct will not be a problem even if conducted in this manner. We believe such corporate awareness is not being inhibited by the existence of the provision to report on parallel price increases.

Furthermore, it has also been noted that causing firms to submit reports on the reasons for price increases will not necessarily lead to results that make conduct to increase prices "socially justifiable."

When these matters are taken into consideration, we believe it is difficult to say the provision currently in force sufficiently demonstrates the power to restrain conduct to increase prices in parallel.

(3) Costs for the System Currently in Force

Criticism concerning the items (currently 82 items) and peripheral items subject to examination claims that, to the extent the JFTC continually conducts examinations into market

size or share from the standpoint of whether or not products or services correspond to items subject to inspection and periodically amends the list of items subject to examination based on its findings, in addition to the considerable administrative cost required by this activity, firms are being made to perform superfluous activities such as being requested to submit reports on the reasons for their activities even though they are engaging in proper business conduct.

3 Examination of Response Based on Operating Improvements to the System Currently in Force

(1) More Frequent Public Disclosure of Reasons for Price Increases

For example, in addition to its annual report to the Diet, allow price increases to be quickly exposed to criticism by normally disclosing the reasons for price increases. Considered from past precedent, however, several dozen items are subject to reporting, and what is more this would not change the fact that firms are being made to report the reason for price increases they implement within the range of normal business conduct, and we believe deterrence will not function immediately even if the JFTC increases the frequency of disclosure of the reasons for price increases, since firms understand they are being asked to report the reasons for conduct that is within the range of normal business conduct.

(2) Application of the Information Gathering System as the First Step Towards Detection of Cartels

For example, enabling the JFTC to selectively examine information contained in the collection of reports on the reasons for price increases under Section 18-2 from the standpoint of determining whether there is a cartel can also be assumed to be the first step towards detection of a cartel. But surely this is no different from examinations under the cartel regulations. We dare not retain Section 18-2 solely for that purpose, and we believe it is not necessary to establish this type of regulation just for items subject to examination.

(3) Prohibition of Prior Public Disclosure of Price Increases

Because of the concern it will induce other firms to increase prices in parallel when a certain firm in an oligopolistic market announces in advance it will increase prices, a means to prohibit such prior announcements is being pondered. Because prior announcement of price increases

also functions to provide information that is beneficial when other firms make management decisions on matters such as advance purchasing plans, however, such announcements are difficult to separate from normal business conduct and there is a concern any measure will become excessive regulation that causes normal business activity to wither markedly.

4 Direction of the Comprehensive Review

It is theoretically possible to classify parallel price increases into

- ① Cartel conduct that skillfully communicates intentions without making them clear and seems not to communicate intentions; and
- ② Parallel conduct that in fact involves absolutely no communication of intentions

With regard to ① the JFTC should take as its base responding against cartels that skillfully conceal the communication of their intentions by developing a procedure such as a leniency program to more effectively expose such cartels. In contrast to this, conduct corresponding to ② can be left alone as an area of conduct the JFTC cannot address under the cartel system because it is not conduct intended to mutually restrict competitors or other parties and artificially avoid competition.

With regard to this area of conduct, if investigations concerning the application circumstances or actions through measures such as changing corporate awareness and improving applications of the law as described above are taken into consideration, for policy we believe it would be appropriate as the JFTC to exclusively invest efforts into effective exposure of cartels aimed at ① above and apply the resources being used for ②, rather than undertake separate actions such as reports on the reasons for price increases based on the Antimonopoly Act.

For competition policy, however, it will continue to be critically important that there be no change in the concept that parallel conduct is undesirable and taking this into consideration in investigations of firm mergers against merger conduct that artificially creates oligopolistic markets where parallel conduct can easily take place.

Finally, rather than prepare a network of regulations just for the industry classifications or price increases limited in advance such as Section 18-2, if there is parallel conduct considered undesirable for competition policy, whether it involves price increases or some other factor, it is also possible within the framework of the law currently in force to separately investigate this

conduct, such as requesting the reason for the conduct, and we believe it is desirable to continue separately conducting investigations of actual conditions in the same manner as in the past.