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Out-of-Market Efficiencies in Competition Enforcement – Note by Japan

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement.htm>.

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1. Introduction

1. This note discusses how out of market efficiencies, specifically, the benefits gained by consumers, enterprises and other entities outside the relevant market (including sustainability and safety), can be taken into account under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the “Antimonopoly Act”) (section 2 below), and describes specific cases related to out of market efficiencies (section 3 below) in Japan.

2. Legal framework

2. This section describes the provisions of the Antimonopoly Act to the extent that they are related to the consideration of out of market efficiencies (2.1 below), and then discusses how out of market efficiencies can be considered under the Antimonopoly Act (2.2 below).

2.1. Provisions of the Antimonopoly Act

3. Article 1 of the Antimonopoly Act stipulates that the purpose of the Act is "to promote fair and free competition, stimulate the creative initiative of enterprise, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers."

4. Among the requirements for violation of the Antimonopoly Act, there are two major types of requirements related to the effect on market competition, i.e. "substantial restraint of competition" and "tendency to impede fair competition." Substantial restraint of competition is the requirement for private monopolization, unreasonable restraint of trade (cartels and bid riggings), substantial restraint of competition by trade associations (Article 8, Item 1), and mergers¹, while the tendency to impede fair competition is the requirement for unfair trade practices. Furthermore, among the above, private monopolization and unreasonable restraint of trade must be conducted "contrary to the public interest" by the determinations under the Act.

5. "Substantial restraint of competition" is interpreted to mean establishment, maintenance, or enhancement of market power in the relevant market². Usually, the harm caused by "substantial restraint of competition" is not weighed against the degree of interests of consumers and enterprises outside the relevant market.

2.2. How can out of market efficiencies be considered under the Antimonopoly Act?

6. The Antimonopoly Act has the phrase "contrary to the public interest" (Article 2, Paragraphs 5 and 6) as a part of the definition of private monopolization and unreasonable

¹ Strictly, mergers are prohibited if they are considered to substantially restraint competition in the future.

² Tama Bid-rigging Case (Supreme Court, 2012), NTT East Case (Supreme Court, 2010)

restraint of trade. It is conceivable, at least theoretically, that out of market efficiencies could also be considered as a type of the "public interest." However, as discussed in section 3.1. below, the "public interest" has traditionally been interpreted in a very limited manner.

7. On the other hand, the interests of general consumers, such as safety, may be considered in determining whether the "substantial restraint of competition" requirement is satisfied³.

8. As for unfair trade practices, the Antimonopoly Act and other relevant rules contain the phrase "without justifiable grounds," "unjustly," or "unjust" as a part of the definitions. It is possible, at least theoretically, to interpret that conducts necessary to ensure sustainability, safety, or other proper benefits have "justifiable grounds" or are not "unjust"⁴.

3. Individual Cases

9. This section presents the major cases that may be related to out of market efficiencies.

3.1. Oil Price Cartel Criminal Case (Supreme Court, 1984)

10. In this case, the Japan Fair Trade Commission (hereinafter referred to as the "JFTC") accused petroleum distributors on the ground that they agreed to raise the prices of petroleum products.

11. The defendants alleged that the phrase "contrary to the public interest" should be interpreted to mean "contrary to the interest of the national economy in general, including both producers and consumers," which goes beyond the intent and purpose set forth in the Act. However, the Supreme Court decision did not accept this allegation, stating as follows. The words "contrary to the public interest" used in Article 2, paragraph 6 of the Antimonopoly Act, which defines "unreasonable restraint of trade," means, in principle, contrary to the free competitive economic system, which is the legal interest directly protected by the Antimonopoly Act. However, even if an actual conduct falls under this in form, in an exceptional case where the conduct is substantially not against the ultimate purpose of the Act, i.e. to "promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers," weighing the legal interests and the interests protected by the conducts, such a conduct should be excluded from "unreasonable restraint of trade."

12. In this case, the agreement by the oil distributors was found contrary to the "public interest," and was judged to be a violation of the Antimonopoly Act.

13. This precedent recognized that there may be a case in which an agreement that substantially restrains competition does not violate the Antimonopoly Act on the ground that it is not contrary to the "public interest," with respect to unreasonable restraint of trade. However, as described above, this is only an exceptional case, and it is interpreted that, in principle, the "contrary to the public interest" requirement is also satisfied if the other requirements are met. There is no case law that has clarified what specific conditions must

³ Japan Toy Gun Cooperative Association case (see 3.3. below) can be interpreted as an example where such considerations were given in the context of safety.

⁴ Toshiba Elevator Service case (see 3.2. below) and the Japan Toy Gun Cooperative case (see 3.3. below) can be interpreted as examples where such considerations were given in the context of safety.

be met so that a conduct is not considered "contrary to the public interest," and it is interpreted that a violation of the Antimonopoly Act is not established because of "the public interest" in an extremely limited case.

3.2. Toshiba Elevator Service case (Osaka High Court, 1993)

14. The defendant in this case was a subsidiary of Toshiba, an elevator manufacturer, and was a maintenance and inspection company for Toshiba elevators, while the plaintiff was an independent elevator maintenance and inspection business. In this case, when the plaintiff ordered the components needed to repair the elevators made by Toshiba from the defendant, the defendant said that they did not sell maintenance components only, and would not accept an order unless it was accompanied by an order for replacing components, repairs, and adjustment work. The issue in this case was whether the defendant's response constituted unfair trade practices (interference with a competitor's transactions or tie-in sales).

15. The defendant alleged that, considering that the components affected safety, the defendant itself should perform the replacement and adjustment work. In this regard, the court stated, "It goes without saying that ensuring the safety of goods ... contributes to the interests of general consumers, and in a broad sense, it should be considered to be related to public interest. Therefore, whether or not the trade practices are necessary to ensure safety is one of the factors to be considered in determining whether the trade practices were "unjustly" conducted."

16. In this case, the defendant's allegation was rejected because the court found no evidence that the safety of the elevators could not be ensured unless replacement and adjustment work is performed in conjunction with supply of the components.

3.3. Japan Toy Gun Cooperative Association case (Tokyo District Court, 1997)

17. The plaintiff in this case was a manufacturer of airsoft guns (a new entrant in the market), and the defendants were a trade association, whose members were airsoft gun manufacturers, and natural persons involved. The issue in this case was whether the defendant's request to retailers not to deal with the plaintiff's products constituted a substantial restraint of competition by a trade association (Article 8 (i)) or having the member businesses take unfair trade practices (concerted refusal to trade) by a trade association (Article 8(v)).

18. The defendants alleged that the conducts had a legitimate purpose, such as to ensure the safety of civil lives by excluding from the market the plaintiff's products that did not comply with the safety standards set by the trade association. In this regard, the court decided as follows.

1. If the purpose of setting the safety standards is acceptable from the perspective of competition policy, and if the content and implementation method of the standards are reasonable to achieve the purpose, there is room to find that justifiable reasons exist and that unfair trade practices are not established.
2. When weighing the interests by maintaining free competitive economic system, which is the legal interests protected by the Antimonopoly Act, and other interests protected by the conducts in question, if the conducts are considered not contrary to the ultimate purpose of the Antimonopoly Act, i.e. to "promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers," there is room to find that the conducts neither violate the

public interests nor substantially restrain competition in the relevant market, and do therefore not violate the Antimonopoly Act.

19. In this case, however, the defendants' allegation was rejected on the ground that the defendants' conducts were not reasonable as a method of implementation to achieve the purpose of ensuring safety.