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Procompetitive Industrial Policy – Note by Japan

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Japan

1. Introduction

1. The relationship between competition policy and industrial policy is complicated. They are sometimes complementary, and different in direction at other times. This note introduces some of the recent efforts of the Japan Fair Trade Commission (JFTC) regarding industrial policy[1], referring cases of competition law enforcement at the intersection of industrial policy in 2. below, and discussing some examples of advocacy activities in which the JFTC made recommendations related to industrial policy in 3. below.

2. Cases

2. This section discusses three examples of recent antitrust cases in the area of intersection with industrial policy, focusing on the relationship with industrial policy.

2.1. Electricity Cartel Case (cease-and-desist order and surcharge payment order, 2023)

3. In the past, the Electricity Business Act regulated entry into the electricity retail business, and 10 specific companies monopolized retail supply in their respective service areas. Since 2000, these entry regulations have been gradually eased or eliminated, and since April 2016, all users, including households, have been able to choose the electricity supplier with which they contract.

4. After around the fall of 2017, competition between Kansai Electric Power, one of the 10 ex-monopolists, and Chubu Electric Power, Chugoku Electric Power, and Kyushu Electric Power, which are the ex-monopolists in the adjacent areas, has gained momentum, respectively. With this background, Kansai Electric Power agreed with Chubu Electric Power that each of them refrains from engaging in customer acquisition activities in the other company's service area in order to prevent a decline in the level of electricity prices and to secure their own profits. Kansai Electric Power did the same conducts with Chugoku Electric Power and Kyushu Electric Power, respectively.

5. The JFTC found the conduct above violated the Antimonopoly Act and issued cease and desist orders and surcharge (administrative fine) payment orders against the relevant companies in March 2023. In addition, the JFTC provided information to the Electricity and Gas Market Surveillance Commission (EGC), the regulatory authority, regarding the former monopolists' violation of the Antimonopoly Act and the fact that they had been exchanging information regarding their sales activities. In response, the EGC conducted fact-findings (report collection) into the companies identified by the JFTC as violators, and based on the results, in July 2023, the Minister of Economy, Trade and Industry (METI) issued business improvement orders under the Electricity Business Act to the companies, ordering them to refrain from concluding cartel agreements among retail electricity

[1] For past situation, see the contribution from Japan available at https://www.oecd.org/daf/competition/44548025.pdf.

providers and formulating, publicizing and implementing a plan to prevent cartels among retail electricity providers[2].

6. In general, when pro-competitive industrial policies such as deregulation of entry restrictions are implemented, firms sometimes violate competition laws in order to restrict competition resulting from such policies. This case is one such example[3].

2.2. Niigata Taxi Cartel Case (Tokyo High Court, 2016)

7. This case involves a price cartel by taxi operators in Niigata Prefecture. Some of the violators filed a lawsuit to rescind the cease and desist order and surcharge (administrative fine) payment order issued by the JFTC in relation to the cartel. The issue in the rescission lawsuit included whether the plaintiffs' conduct was justified on the grounds that: (i) the conduct was in accordance with administrative guidance embodying professional policy judgment of the regulatory authority and (ii) that the administrative guidance of the regulatory authority resulted in the loss of freedom of decision-making.

8. The following facts exist as background to this case. The setting or changing of taxi fares requires the approval of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). In principle, the application for such approval must be accompanied by a cost accounting document describing the basis for the calculation of taxi fares. However, when a taxi operator seeks approval by applying for a price within the price range set by the MLIT (automatic approval fares), it is not necessary to attach a cost accounting document. If a taxi operator applies for approval for a fare below the automatically approved fares (hereinafter referred to as “fare below the Zone”), the application is examined on a case-by-case basis based on the cost accounting documents.

9. With regard to the taxi sector, after the supply-demand adjustment regulations were abolished with the amendment of the Road Transport Law in 2002, demand decreased and the number of taxis increased significantly, and there were some areas that had problems such as the worsening of the profit base of taxi operators and the worsening of working conditions such as wages for taxi drivers. In response, the Act on Special Measures concerning Regulation of Taxi Services (Taxi Special Measures Act) was enacted and came into force in 2009 to address such problems as the worsening business conditions of taxi operators due to an oversupply of taxis, the worsening of working conditions for taxi drivers, and the increase in accidents. This Act stipulates that the criteria for defining the minimum approved taxi fare are as follows: the fare must be based on an appropriate cost under efficient management plus an appropriate profit margin, and there must be no risk of causing unjust competition among transportation operators.

10. On the occasions including briefings on the Taxi Special Measures Act, MLIT officials engaged in administrative guidance as follows: they had stated to taxi operators that they would strictly examine applications for fares below the Zone, and that they would request and instruct taxi operators to move to fares within the scope of the automatically approved fares.

[2] https://www.meti.go.jp/press/2023/07/20230714004/20230714004.html (Japanese)

[3] A more recent case is the gas cartel case in the Chubu region (cease and desist order and surcharge payment order in March 2024). In this case, a cartel agreement was concluded between an incumbent gas company and an incumbent electric company that had newly entered the gas business in the retail gas market, which had been liberalized through deregulation.

11. With this background, the plaintiffs agreed that they set taxi fares at a specific price within the range of automatically approved fares[4].

12. The plaintiffs primarily alleged that the agreement was justified for the following two reasons.

1. The MLIT issued administrative guidance that fares below the Zone should not be allowed and that a shift should be made to the automatically approved fares from the viewpoint that excessive price competition caused by fares below the Zone leads to overworking of taxi drivers, reduces safety and service quality, and harms the interests of taxi users. The administrative guidance embodies the professional policy judgment of the MLIT to achieve social and public purposes, and the agreement reached by the plaintiffs following the guidance is in accordance with the ultimate purpose of the Antimonopoly Act[5].
2. When taxi operators set fares below the Zone, they were required to report monthly, which was a heavy burden and was perceived by the plaintiffs as a strong pressure by the MLIT on the taxi operators setting fares below the Zone. Therefore, the agreement in question is deemed to have been forced by the administrative guidance of the MLIT, the regulatory authority, and the plaintiffs were unable to make free decisions.

13. The Tokyo High Court rejected both arguments (i) and (ii) above, holding that although the content of the administrative guidance suggests that MLIT officials encouraged the shift to automatically approved fares, the court found no coercion beyond the scope of a request or general guidance.

2.3. NTT East Case (Supreme Court, 2010)

14. In this case, the issue was whether NTT East committed exclusionary private monopolization (prohibited under Article 3 of the Antimonopoly Act) by the conduct of setting user fees for telecommunication services for detached houses using optical fiber facilities (FTTH services) at lower prices than charges for connection to optical fiber facilities for other FTTH service providers[6].

15. Under the Telecommunications Business Law, when NTT East is requested by another telecommunications service provider (a competitor in the user service market) to connect to its optical fiber facilities, NTT East is obligated, in principle, to comply with the request. NTT East is also required to stipulate the level of charges and conditions for such connection, and obtain approval from the Minister of Internal Affairs and Communications (MIC). The Minister may order an application for amendment of the connection charges and conditions when the Minister finds that the approved connection charges have become inappropriate in light of their cost and thus hinder the promotion of the public interest.

16. In addition, the Telecommunications Business Act requires service providers to notify the user fees for FTTH services to the MIC, and the Minister may order a service

[4] The plaintiffs also disputed the existence and content of the agreement, but the court rejected the plaintiffs' arguments.

[5] Among the purposes of the Antimonopoly Act stipulated in the Article 1, it is usually said that the ultimate purpose of the Act is "to promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers."

[6] The outlines of this case are described in the written contribution from Japan for the roundtable on "Monopolisation, Moat Building and Entrenchment Strategies" in June 2024.

provider to change the user fees when (i) the calculation method of the notified user fees is not appropriate or clear, (ii) the user fees unjustly discriminate against a specific person, or (iii) the user fees are extremely inappropriate and thus impede the interests of users.

17. In general, there were no laws or rules regulating the relationship between user fees and connection charges for FTTH services, but the MIC provided administrative guidance to telecommunications carriers to ensure that user fees do not fall below connection charges.

18. The user fees and connection charges set by NTT East in this case had also been notified to or approved by the MIC in accordance with the regulations of the Telecommunications Business Act described above. The MIC gave NTT East administrative guidance requesting NTT East to make improvements, claiming that if the situation at that time were to continue thereafter, it would fall under (ii) (unfair and discriminatory treatment) or (ii) (extremely inappropriate and thus detrimental to users' interests) above. However, the MIC didn't order NTT East to apply for the change of connection conditions or to change user fees.

19. In the lawsuit, NTT East argued that when the MIC, which has jurisdiction over the Telecommunications Business Act and has expertise in information and telecommunications policies, did not order enterprises to apply for changes of the connection conditions or to change user fees, it should be concluded that no violation of the Antimonopoly Act occurred, unless there were special circumstances.

20. The Supreme Court rejected the NTT East's argument, stating that the fact that neither an application to change the connection conditions nor a change in user fees was ordered does not indicate that the conduct in question was judged to be lawful under the Antimonopoly Act, nor does it affect the evaluation under the Act.

3. Advocacy

21. This section highlights three examples that the JFTC made recommendations related to industrial policy through advocacy activities in recent years.

3.1. Green Guidelines

22. The Japanese government declared its targets for reducing greenhouse gas emission by fiscal 2030 and for achieving carbon neutrality by 2050 in the "Plan for Global Warming Countermeasures" (Cabinet decision, October 22, 2021), and has implemented a number of policies, such as promoting innovation, encouraging the introduction of solar power, and supporting initiatives by enterprises, to realize a "green society."

23. Under these circumstances, the JFTC published "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act" (hereinafter referred to as the "Guidelines") in March 2023, for the purposes of preventing anticompetitive conducts that stifles innovation regarding the creation of new green technologies, and of encouraging the activities of enterprises toward the realization of a green society by further improving transparency and predictability for enterprises in the application and enforcement of the Antimonopoly Act to the activities of enterprises[7].

[7] For more information on the contents of the Guidelines, see (Japan's Contribution Paper on Competition in the Circular Economy, June 2023).

24. Since the publication of the Guidelines, the JFTC has been disseminating and explaining contents of the Guidelines to enterprises and has been receiving consultations from enterprises regarding specific initiatives. Based on the results of these consultation cases and exchanges of views with enterprises, the JFTC revised the Guidelines and published them on 24 April, 2024.

25. The revised Guidelines further clarify the views of Antimonopoly Act concerning joint disposal, joint procurement and other initiatives to realize a green society. For example, the Guidelines declare that even if the activities involve information exchange on important means of competition, such as production volume, or restriction on such means, no problem may be found under the Antimonopoly Act, to the extent that such joint activities are not aimed at restricting competition and are necessary for equipment renewal, technological development, etc. for decarbonization, and that there is no alternative means less restricting competition.

26. The above initiative can be considered as an example of competition policy collaborating and coordinating with other policies, including industrial policy, to achieve the specific policy goal of realizing a green society.

3.2. Market Studies on Fintech-based Services

3.2.1. Introduction

27. In light of the situation where fintech firms were entering the financial sector and providing new financial services such as code payment[8] services, the JFTC conducted a market study on the code payment service sector and published a report (hereinafter referred to as the "Code Payment Report")[9] in April 2020, making recommendations to promote competition in the sector[10].

28. Subsequently, in order to further improve the competitive environment in the fintech field, promote innovation, and enhance user convenience, the JFTC conducted a follow-up study and published a report (hereinafter referred to as the "Follow-up Report")[11] in March 2023.

29. While the contents of the above two reports are wide-ranging, the major points related to industrial policy are as follows.

[8] A payment method in which payments are made by scanning a QR code or barcode using a payment app on a smartphone.

[9] https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20042104.pdf

[10] In addition, the JFTC conducted a market study on other fintech-based services, i.e. household accounting services for individuals and accounting services for small and medium-sized enterprises and one-person businesses, and published the report, titled "Survey on Household Accounting Services." (https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20042103.pdf)

[11] https://www.jftc.go.jp/file/230317EN4.pdf

3.2.2. Code Payment Report (April 2020)

Facts Found

30. There are two types of providers of code payment services (hereinafter referred to as "code payment provider(s)"): banks, and non-bank financial companies including fund transfer service providers[12].

31. For using the code payment service, the user generally increases the account balance managed by the code payment provider on the payment app in advance (hereinafter referred to as "charge(s)"). When the user purchases a product, mostly the code payment provider deducts an amount corresponding to the price of the product from the user's account balance and makes payment to the member merchant. The methods of charging include charging from a bank account or by using credit card. There are also methods of payment in which no account balance is used: including direct debit from the user's bank account based on the user's instruction for payment using a code (hereinafter referred to as "link(ing)" with a bank account); or cases where the payment is treated as the direct use of a credit card.

32. Legislation does not allow any wage payment to accounts other than bank accounts, including those of fund transfer service providers[13]. For this reason, charging from or linking with a bank account is a method of high importance for non-bank code payment providers.

33. Non-bank code payment providers deposit the amount equivalent to the price of goods purchased by the user at the merchant shops into the merchant's bank accounts by ex-post bank transfer, and mostly the transfer fees are borne by the non-bank code payment providers. In such cases, the banks dealing with the non-bank code payment providers pay interbank fees to banks dealing with member merchants, and interbank fees are passed on to the transfer fees above as part of the costs. Interbank fees have not changed since February 1979 at the latest, and are much higher than the actual administrative costs arising. In addition, in some cases, deposit transfer transactions in other countries do not require fees corresponding to interbank fees.

34. For the above-mentioned charges from bank accounts and bank transfers to merchants' accounts, the relevant banks use the National Bank Data Telecommunication System (Zengin System), an interbank network system. Banks can use the Zengin System when conducting code payment business, but non-bank code payment providers cannot use the Zengin System. Therefore, non-bank code payment providers including fund transfer service providers incur costs, such as transfer fees to banks, that are not incurred when banks conduct code payment business.

Recommendations

35. The report made the following points including recommendations.

1. If non-bank code payment providers registered as fund transfer service providers will be able to receive users' wages or other source of income directly to their own accounts, then it would enable them to provide users with code payment without relying on bank accounts. In this regard, the government is considering permitting

[12] Enterprises other than banks that are registered based on the Payment Services Act and engage in exchange transactions of an amount corresponding to one million yen or less as a business.

[13] Article 24 of the Labor Standards Act, Article 7-2 of the Ordinance for Enforcement of the Labor Standards Act.

payment of wages to accounts of fund transfer service providers, and if it will be permitted in practice, it would have a desirable effect on securing an equal footing in competitive conditions between banks and non-bank financial companies providing code payment services.

2. Each bank should work to correct the current situation where interbank fees have been maintained for many years at levels far higher than the actual administrative costs incurred.

3. It is desirable to consider opening access to the Zengin System to fund transfer service providers that meet certain conditions.

3.2.3. Follow-up Report (March 2023)

36. The Follow-up Report first reviewed the situation after the publication of the Code Payment Report, and then made recommendations.

Situation after the publication of the Code Payment Report

37. Among the situations described in the Follow-up Report after the publication of the Code Payment Report, those related to 3.2.2.2 above are as follows.

38. Regarding (1) above, after the publication of the Code Payment Report, the relevant ordinance[14] was amended (promulgated in November 2022) to allow employers to pay wages to accounts of fund transfer service providers upon the consent of the workers, and the amendment came into effect in April 2023.

39. Regarding (2) above, after the publication of the Code Payment Report, the interbank fees were abolished and the domestic exchange system operation fees were introduced instead. The level of the operation fees was set at approximately 40-50% of the interbank fees, and was to be reviewed every five years considering the costs to keep it at a reasonable level. Following the introduction of the domestic exchange system operation fees, most banks lowered their transfer fees.

40. Regarding (3) above, the eligibility for participation in the Zengin System was subsequently expanded in October 2022, allowing fund transfer service providers to use the system as well.

Recommendations

41. The key recommendations made in the Follow-up Report are as follows.

1. With regard to permitting payment of wages to accounts of fund transfer service providers, it is appropriate for the relevant ministries and agencies to identify the needs of users who have a wish of receiving wages through the accounts of fund transfer service providers, and to work to resolve any problems that may arise.

2. Although most banks have reduced transfer fees, some banks set higher transfer fees for a transfer of 30,000 yen or more due to the previous tradition or other reasons. If this has no rational reason[15], banks should consider changing this practice.

[14] Ordinance for Enforcement of the Labor Standards Act

[15] Interbank fees were set higher for transfers of 30,000 yen or more, but domestic exchange system operation fees, which was introduced to replace interbank fees, are fixed regardless of the amount of the transfer.

3. With regard to the Zengin System, the connection by API gateway is being considered for the purpose of facilitating access by fund transfer service providers, and it is desirable to continue to review operational systems, etc. so that they contribute to improved convenience, securing an equal footing of competitive conditions between banks and fund transfer service providers.

3.3. Market Study on the Electric Vehicle (EV) Charging Service (2023)

42. The JFTC conducted a market study on EV charging services on expressways and published the report in July 2023.

43. The Japanese government aims to achieve carbon neutrality by 2050 and has set a goal of 100% of new car sales to be electrified vehicles (electric vehicles, fuel cell electric vehicles, plug-in hybrid electric vehicles and hybrid electric vehicles) by 2035. Also, the government intends to promote the installation of charging infrastructure, and aims to achieve the same level of convenience as gasoline vehicles by 2030 at the latest. Consequently, the EV charging service sector is expected to grow rapidly and the market environment is expected to go through dynamic change.

44. With the above situation as a background, this market study was conducted with the aim of promoting fair and free competition in the development of the charging infrastructure and encouraging the realization of a green society by stimulating new entries and promoting innovation. The study dealt with EV charging services on expressways, where charging is particularly needed to prevent EVs from running out of charge during long-distance travel.

45. The key findings of the report are as follows.

46. The METI and the MLIT released the “Package of measures to Accelerate the Development of Electrification Infrastructure on Expressways” in March 2023, stating that they aim to develop the environment in which EV drivers can charge their EVs with comfort at any time by promoting the massive increase in EV chargers with higher output and multiple outlets. At the same time, three major expressway companies announced that they have a plan to install EV chargers with approximately 1,100 outlets in total in the rest areas of their expressways by fiscal 2025.

47. As described above, the installation of EV chargers on expressways is expected to progress rapidly in the future. However, almost all EV chargers in rest areas on expressways have been kept installed by a certain company so far, and it is assumed that this certain company will continue to be responsible for the installation of EV chargers in the future. In contrast, there are other companies that provide EV charging services by installing their own EV chargers outside of expressways.

48. The report made recommendations including that expressway companies should select EV charger installers from among two or more companies and they should promote new entry of EV charger installers in the future. The report also stated that it is desirable for the METI and the MLIT, the relevant ministries, to discuss policies for the development of EV charging infrastructure from the perspective of ensuring competition on EV charging services, and that the JFTC would participate in such discussions.

49. After the publication of the report, the three expressway companies announced in a press release that, as a result of the consideration in light of the recommendations by the

JFTC, the companies are working in the direction of publicly inviting the installers for EV chargers to be installed in rest areas on expressways after fiscal 2026[16].

[16] https://www.e-nexco.co.jp/pressroom/head_office/2024/0419/00013725.html (Japanese)