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**THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES -
Contribution from Japan**

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The Promotion of Competitive Neutrality by Competition Authorities

– Contribution from Japan –

1. Introduction

1. Japan's Antimonopoly Act (hereinafter referred to as the "AMA".) regulates anticompetitive conducts by enterprises, etc. If the national government or the local governments operate business activities, they are subject to the AMA in the same way as private enterprises. In order to achieve policy objectives other than competition policy, exemptions from the application of the prohibition provisions of the AMA are provided for certain activities in some fields, but they are limited.

2. The AMA does not have rules on government regulations or subsidies from the viewpoint of competition neutrality, but the Japan Fair Trade Commission (hereinafter referred to as the "JFTC".) has been making various efforts to ensure competition neutrality in markets.

3. We will explain the relations between the AMA and competition neutrality in Section 2, and then explain the JFTC's efforts to ensure competition neutrality in Section 3 through Section 5. In Section 3, we will explain "Checklist of Competition Assessment" established by the JFTC as an example of the JFTC's efforts to ensure competition neutrality when establishing, revising or abolishing regulation. In Section 4, we will explain the outline of the "Survey on Cashless Payments with QR code and barcode" published by the JFTC. Finally, we will explain the outline of the "Guidelines for Public Support for Revitalization in view of Competition Policy" in Section 5.

2. The AMA and Competition Neutrality

2.1. Application of the AMA to Public Enterprises (The scope of "enterprise")

4. Article 3 of the AMA provides that "An *enterprise* must not effect private monopolization or unreasonable restraint of trade". And article 2 (1) provides that "The term "*enterprise*" [...] means a person, who operates a commercial, industrial, financial or other *business*". Regarding the term "business", the Supreme Court in a past case¹ stated that "economic activities by entities, regardless of their legal nature, which recurrently and continuously receive counter-performance corresponding to their supply of economic benefits". Accordingly, if the national government or the local governments operate business activities, they are subject to the AMA as private enterprises are.

¹ The case on Shibaura Slaughterhouse operated by Tokyo Metropolitan Government (The Supreme Court decision on December 14, 1989).

2.2. Exemptions from Applications of the AMA

5. In order to achieve policy objectives other than competition policy, exemptions are provided to exclude certain activities in specific fields from the application of the AMA.
6. Some of the exemptions are provided for in the AMA itself², while others are provided for in laws other than the AMA.
7. Many of the exemptions were established in each industrial field over 50 years ago in order to achieve further development and strengthening of the industry. However, the review of the exemptions has been carried out as no sufficient effort has been seen by enterprises to achieve more efficiency, which may hamper innovation in business activities. Consequently, the 89 exemptions in 30 laws as of the end of March 1996 have been reduced to 25 in 18 laws as of the end of March 2021. As for the remaining exemptions, the JFTC has been consulting with relevant ministries and agencies to review them as necessary³.
8. Exemption of cartels on the grounds of specific laws are the most common existing exemptions from the AMA⁴. Approval of these exemptions is to be made by the competent ministers. The approval is granted when exemptions do not exceed the extent necessary to achieve the purpose prescribed in the specific laws; they are not unfairly discriminatory; the competent minister consult with the JFTC in advance.
9. As described above, the exemptions from the application of the AMA have been reduced in line with changes in the economic structure, and the remaining exemptions are constantly reviewed from the perspective of competition policy.

2.3. Relations between Regulations and Subsidies

10. The AMA stipulates regulations against anticompetitive conducts of enterprises and trade associations, but does not establish rules from the viewpoint of ensuring competition neutrality regarding government regulations and subsidies. Therefore, there is no scheme in which the JFTC files a lawsuit against government regulations and subsidies on the grounds that they are not competition-neutral. However, the JFTC has been making the following efforts to ensure competitive neutrality in government regulations and subsidies.

² Exemptions provided for in the AMA are concerning the exercise of intellectual property rights (Article 21), acts of certain partnerships (Article 22), and resale price maintenance contracts for books, etc. (Article 23).

³ For example, from January 2018, the JFTC conducted hearings with travel agencies, etc. that are users of international aviation with the aim of analyzing the impact on competition of the exemption from the application of the AMA in the field of international aviation provided for in the Civil Aeronautics Act. Based on the results of the hearings, in June 2019, the JFTC communicated to Ministry of Land, Infrastructure, Transport and Tourism its concerns about adverse effects of the exemption on competition.

⁴ There are provisions regarding exemption of cartels in Insurance Business Act (concerted action of non-life insurance companies), Road Transportation Act (Joint management to secure routes for daily life and joint management to set operating time schedules that contribute to the convenience of passengers), etc.

3. Regulations and Competition Neutrality

3.1. Competition Assessment

11. In Japan, national administrative organs shall conduct a regulatory impact analysis (RIA) in advance when they intend to establish, revise or abolish regulations by enacting, revising or abolishing laws or cabinet orders delegated by laws⁵. In the process of the RIA, the national administrative organs conduct an analysis of the effects of the new regulations on society, economy, etc., which includes an analysis of how the new regulations impact competition in the markets (competition assessment). The national administrative organs conduct competition assessment based on "Checklist of Competition Assessment" (checklist) established by the JFTC. The competition assessment system was introduced on a trial basis in April 2010 and moved to the full-scale implementation phase in October 2017.

12. The extract of the latest version of the checklist published in July 2020 are described in the following box. The JFTC made this checklist based on the "Competition Assessment Toolkit" (the second edition) made by OECD, and the knowledge compiled through the trial stage.

(1) Limitations on the number of business operators

Q1: Does the regulation establish an administrative approval as a requirement for business activities?

Q2: Does the regulation restrict the geographic area where businesses operate?

Q3: Does the regulation impose a larger cost on new entrants compared with incumbents, or does it impose sunk cost on new entrants?

(2), (3), (4) (Omitted)

13. The national administrative organs conducting the competition assessment shall respond to each question with "Yes" or "No" and state the reason for the response specifically. Based on the answers to each question, they shall describe how the establishment, revision, or abolition of the regulation affect the competition. If they find that the establishment, revision or abolition of the regulation may have a negative impact on competition, they are required to include the impact in the prior evaluation report of the RIA and to set some indexes for the ex-post evaluation of the regulation (In principle, unless all of the answers to the questions on the checklist are "No", the regulation is evaluated that it may have a negative impact on competition.). After conducting the competition assessment, the national administrative organs shall submit the completed checklist to the Ministry of Internal Affairs and Communications (hereinafter referred to as the "MIC".) with the evaluation report of the RIA. Then, the MIC sends the copy of the received checklist to the JFTC⁶. It is not mandatory for national administrative organs to publish the completed checklist⁷, but they are encouraged to do so voluntarily from the viewpoint of fulfilling their accountability to the public. Regarding competition neutrality, (1) Q3 of the questions on the checklist described

⁵ Item 1 of Article 9 of the Government Policy Evaluations Act and item 6 of Article 3 of the Order for Enforcement of the Government Policy Evaluations Act.

⁶ In FY 2020, the JFTC received 125 completed checklists from MIC.

⁷ Evaluation reports of the RIA will be made public.

above is to grasp the negative impact of the regulation on competition, which, for example, can be seen in cases where the costs borne by new entrants become higher than those of incumbents, and therefore incumbents gain advantage.

14. The competition assessment is carried out by the national administrative organs which intend to establish, revise or abolish regulations on their own initiative. Therefore, it is not designed for the JFTC to directly intervene the content of regulations in the process of individual competition assessment. However, because of the existence of competition assessment, it is expected that national administrative organs carefully consider the impacts on competition when designing new regulations, and as a result, the introduction of regulations which restrain competition will be prevented.

15. The JFTC published a manual to enable national administrative organs to smoothly conduct competition assessment, and is providing a consultation for the implementation of competition assessment. In addition, the JFTC closely examines the completed checklists received from the MIC, and has been holding competition assessment review meetings with experts in economics and in regulatory policy evaluation in order to examine further improvements of the competition assessment.

3.2. Legal Consultation

16. Drafts of laws and cabinet orders submitted by the Cabinet to the Diet are in advance circulated and consulted among national administrative organs. The JFTC shall closely examine drafts of laws and cabinet orders from the viewpoint of competition neutrality, etc., and if the JFTC finds they contain provisions that may distort competition, the JFTC shall submit opinions to the competent ministries or agencies requesting to revise such provisions.

4. Consultation and Fact-finding Survey

4.1. Consultation

17. The JFTC provides consultations on various measures implemented by national and local governments other than establishment of new regulations, including administrative guidance and subsidies from the viewpoint of the AMA and competition policy, whether such measures distort competition among business operators.

4.2. Fact-finding Survey

18. The JFTC has been conducting surveys on sectors where competitive concerns are occurring and has been providing proposals from the viewpoint of competition neutrality on existing regulations and subsidies as well as the viewpoint of preventing violations on the AMA⁸.

⁸ The industrial sectors in which the JFTC has conducted fact-finding survey and has provided proposals include the sectors in which the liberalization was carried out in the past (electricity, gas, telecommunication, etc.). In addition, in 2006, when the laws on the privatization of the postal services were enacted, from the viewpoint of ensuring equal footing for enterprises engaged in similar services, the JFTC analyzed issues on competition policy and published the report, etc. such as "Issues Concerning the Postal Services and Competition Policy Coinciding with the Enactment of the Laws on the Privatization of the Postal Services" (July 21, 2006) and http://www.jftc.go.jp/en/pressreleases/yearly_2006/jul/2006_july_21.html

19. The following is an explanation of the summary of the report "Survey on Cashless Payments with QR Code and barcode" published by the JFTC on April 21, 2020⁹. First, we will describe the flow of transactions concerning code payments and then explain the JFTC's proposals regarding competition neutrality.

20. In Japan, code payments in which users pay for purchases by reading a QR code or barcode using a smartphone-based payment app are rapidly spreading. A business operator providing a code payment service (code payment provider) provides its service to users through a payment app that it created. And a user opens his or her own account through such a payment app on his or her own smartphone to use a code payment service. There are banks and nonbanks as code payment providers.

21. When a user purchases a product or service from a member merchant through a payment app, the payment process is typically undertaken as follows: the code payment provider deducts the amount corresponding to the price of the product from the user's account, and the code payment provider makes a payment to the member merchant on behalf of the user. Therefore, in principle, user's account needs to be charged before the code payment service is used.

22. The following is how users charge their accounts. Since banks provide deposit services to users, users can charge their code payment accounts from their own bank accounts when using a code payment service provided by banks. On the other hand, when users use a code payment service provided by nonbanks, the users need to charge their code payment account from their bank account or by using a credit card or cash¹⁰. When nonbank code payment providers provide the method of charging from the bank account of users, it is necessary that the nonbank code payment providers make the contract with banks which enables the charging from the bank accounts by the users.

23. Next, the flow of disbursement to the member merchants is as follows: A code payment provider disburses merchant's sales proceeds amassed through the use of the code payment services from the member merchant's code payment account into the member merchant's bank account based on the agreement on a disbursement frequency made in advance between the code payment provider and each member merchant. In disbursing sales proceeds into the member merchant's bank account, a nonbank code payment provider submits a request for a deposit transfer to an intermediate bank and pays it the deposit transfer fee. If the member merchant has an account within the intermediate bank, the disbursement of sales proceeds can be completed through the interbank deposit transfer. However, if the member merchant has an account in a bank that is different from the intermediate bank, the transfer of funds (interbank deposit transfer) between the intermediate bank and the bank where the member merchant has an account is required. For most interbank deposit transfers, the Domestic Funds Transfer System operated by the Japanese Bank's Payment Clearing Network (Zengin-Net) is utilized as the fund payment system because of efficiency generated by economies of scale, etc. In addition, The National Bank Data Communications System (Zengin System) operated by Zengin-Net is

"JFTC's opinion on AMA concerning Postal Savings Service and Postal Life Insurance Service etc. with the Postal Service Privatization" (October 18, 2006) (Japanese)

<http://www.yuseimineika.go.jp/iinkai/dai11/sirou2.pdf>

⁹ <https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200421.html>

¹⁰ The report introduces some of the nonbank code payment providers' view, stating that charging by using credit cards or cash is inferior to charging from bank accounts in terms of cost and convenience, and therefore, charging from bank accounts is a very important method of charging for nonbank code payment providers.

utilized as an interbank network for operating the aforementioned fund payment system¹¹. The fees which a nonbank code payment provider pays to the intermediate bank for the interbank deposit transfer is decided by the intermediate bank based on the interbank service fees paid by the intermediate bank to the receiving bank¹² and Zengin System expenses as well as the costs incurred in the intermediate bank.

24. With regard to the transaction structure, etc. mentioned above, there is a certain difference between banks and nonbank code payment providers in the competitive conditions on the flow of disbursement to member merchants, because banks basically do not incur additional expenses for disbursement to member merchants. Some nonbank code payment providers expressed the view that the burden of transfer fees for disbursement to member merchants is increasing.

25. Against this backdrop, the JFTC made the following recommendations from the viewpoint of competition policy:

- Each bank should make efforts to rectify the current situation under which interbank service fees have been maintained at levels greatly exceeding the actual administrative costs incurred, by verifying whether or not interbank service fees truly are necessary and fulfilling suitable accountability requirements with regard to the levels at which they are set and the grounds thereof.
- It would be desirable for the Zengin-net to develop and enhance a governance structure capable of fully reflecting the needs of end users of the system, and to secure transparency of cost of transactions using the system.
- It would be desirable for the Zengin-net to consider developing standards of connection to the Zengin system and opening up access for fund transfer service providers that satisfy these standards¹³.

26. In addition to the above, the JFTC suggested to consider, in light of competition policy, lifting a ban on payment of wages to fund transfer service providers¹⁴. If nonbank code payment providers registered as fund transfer service providers were able to receive users' wages or other source of income directly to their own accounts, then they would be able to provide users with code payment services without connecting to bank accounts. The JFTC stated that permitting payment of wages to fund transfer service providers' accounts would have a desirable effect on securing an equal footing in competition conditions between banks and nonbank code payment providers.

¹¹ The JFTC pointed out that the Domestic Funds Transfer System has natural monopoly because it has network externalities (an increase in the number of the member banks improves convenience) and economies of scale (the higher the transaction volume gets, the lower the average cost per transaction gets because of the use of equipment that requires a large initial investment).

¹² The interbank service fees are to be determined through bilateral negotiations between the sending bank (i.e. the intermediate bank) and the receiving bank.

¹³ Since many nonbank code payment providers provide, in addition to code payment services, services for refunds to deposit accounts or cash from account balances that are exchange transactions, there are many cases in which a nonbank code payment provider or a subsidiary thereof is registered as a fund transfer service provider. However, fund transfer service providers including nonbank code payment providers are not authorized to become members of the Domestic Fund Transfer System.

¹⁴ At present, wages may not be transferred to non-bank accounts.

27. After the release of the report, the Japanese government decided "Action Plan of the Growth Strategy", which included a review of interbank service fees. In response to the request for reviewing interbank service fees, the Zengin-net decided to reduce the fees to about half of the current level, which was followed by the leading banks' announcements about the reduction of their own transfer fees.

28. The positive effects on competition neutrality have been generated through the fact-finding survey, which makes it possible to accurately understand the competition issues in markets, and an appropriate advocacy based on the results of the survey.

5. Guidelines for Public Support for Revitalization in view of Competition Policy¹⁵

29. In Japan, various forms of public support for revitalization are provided based on a variety of policy objectives¹⁶. Public support for revitalization is intended to revitalize enterprises that would otherwise have exited the market as a result of competition. It may interfere with the market mechanism, in which, as a result of market competition, inefficient enterprises exit and efficient enterprises survive in the market, and thus may adversely affect market competition by giving inefficient enterprises a competitive advantage over efficient enterprises, etc. Therefore, it is important to minimize the impact on competition when providing public support for revitalization.

30. Based on this awareness of the problem regarding public support for revitalization, the "Study Group on Competition Policy and Public Support for Revitalization", organized in accordance with the decision of the Minister of State for Special Missions, Cabinet Office, which consisted of experts, was held 8 times from August to December 2014 to discuss how the public support for revitalization should be from the viewpoint of competition policy. The report of the discussions in the study group was published in December, 2014. The report stated that it would be appropriate for the JFTC to develop and release cross-industrial guidelines incorporating some factors which supporting organizations should be aware of from the viewpoint of competition policy, when providing public support for revitalization.

31. Against this backdrop, the JFTC published the "Guidelines for Public Support for Revitalization in view of Competition Policy" in March, 2015.

32. The guidelines pointed out that in order to minimize the negative impact caused by public support for revitalization on competition, public support for revitalization should be implemented based on the "principle of subsidiarity"¹⁷, "principle of minimum necessity"¹⁸,

¹⁵ <https://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160331.html>

¹⁶ Public support for revitalization refers to support for business revitalization, which corporations incorporated under a special law and with capital financing from the Japanese government (including corporations in which the national government has capital equity) with a view to achieving various policy objectives provide, in order to enable enterprises experiencing business management difficulties as a result of market competition, in spite of still having effective business management resources, to recover their capacity and continue business operations.

¹⁷ A principle that public support for revitalization should be provided only in cases where the business cannot be revitalized smoothly through the efforts of the private sector and, accordingly, public support for business revitalization has to be provided by supporting organizations as a complement of the functions of private sectors.

¹⁸ A principle that, when public support for revitalization is necessary to achieve various policy objectives, it should be provided with a minimum necessity in terms of its scale and method.

and "principle of transparency"¹⁹. Based on these principles, the guidelines also indicate specific elements that should be considered by supporting organizations for public support for revitalization.

33. For example, the guidelines indicate the following considerations to be made for archiving the requirement of minimum necessity:

- It is within the minimum requirement to provide the scale of support that is sufficient to cope with incidental risks, etc. However, it is not within the minimum requirement to overestimate such risks and, accordingly, to add to the scale of support.
- In light of the fact that public support for revitalization has pump-priming effects, it is appropriate to request beneficiaries beforehand to procure by themselves, as much as possible, loans and capital increases from private sector financial institutions, etc.
- It is necessary for supporting organizations to request beneficiaries' creditors that they would agree to give sufficient debt waiver when beneficiaries have excessive debts. However, in terms of letting shareholders, among others, fulfill their responsibilities primarily, it is advisable to request them to carry a burden of the beneficiaries' losses in the form of a capital reduction, etc.

34. In addition, the guidelines indicate the following considerations to be made regarding the period and frequency of support:

- The period of support should be as short as possible and, as a matter of principle, such support should not be extended.
- Public support for revitalization should be provided, as a matter of principle, on a once-only basis, and should not be repeated each time beneficiaries face financial difficulties.

35. Unlike many of the other guidelines developed by the JFTC, these guidelines do not provide an interpretation of the AMA. The JFTC developed the guidelines beyond the framework of the AMA to indicate the matters to be considered in order to minimize the effect of public support for revitalization on competition from the viewpoint of competition policy. Organizations providing public support for revitalization are not legally obligated to comply with the guidelines, but it is expected that public support for revitalization will be provided in line with the guidelines with consideration for the impact on competition, so that beneficiaries will not have a significant competitive advantage by leveraging public support for revitalization.

¹⁹ A principle that information on individual cases should be disclosed as much as possible with consideration for prompt disclosure and easy access to information, so that the possible impacts of public support for revitalization on the market mechanism can be identified, and that competitors of beneficiaries are able to submit their opinions regarding the matter.

6. Conclusion

36. The JFTC has been applying the AMA to enterprises regardless of their form of ownership, and has been reviewing the scope of the exemption systems in accordance with changes in the economic structure. Government policies, such as regulations and subsidies, are not subject to legal measures based on the AMA, but the JFTC has been conducting advocacy activities persuasively by analyzing the effects of government policies on competition, taking into account the viewpoint of competition neutrality, or by grasping the facts in detail and clarifying how adverse effects on competition could occur in fact-finding surveys. Such tools will continue to be useful in ensuring competitive neutrality.