

Unclassified

English - Or. English

18 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

The Use of Structural Presumptions in Antitrust – Note by Japan

4 December 2024

This document reproduces a written contribution from Japan submitted for Item 2 of the 140th meeting of Working Party 3 on 4 December 2024.

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1. Introduction

1. The Japan Fair Trade Commission (JFTC) has strictly enforced the Antimonopoly Act (AMA) against anticompetitive conducts in order to encourage fair and free competition. However, the AMA itself does not provide clear and precise criteria of its violations. Therefore, the JFTC has formulated various guidelines that illustrate what kind of conduct might arise problems under the AMA, for better understanding of and promoting transparency in the application of the AMA to anticompetitive conducts.

2. While those guidelines do not have any numerical criteria for presuming illegality based on specific market structure or market share, the JFTC shows its policy to prioritize a case where a market share of a product supplied by an enterprise exceeds approximately 50% thereof when deciding whether to investigate a case in the “Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (EPM Guidelines)”, or the JFTC establishes “safe harbours” that define the scope of conducts normally considered not problematic under the AMA in some guidelines such as the “Guidelines Concerning Distribution Systems and Business Practices under the AMA (DSBP Guidelines)” and the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination (Business Combination Guidelines)”.

3. The main purpose of this contribution paper is to introduce the overview of the JFTC's enforcement policy considering market share and the safe harbours set out in these guidelines.

2. Safe harbours set out in the DSBP Guidelines

2.1. Overview of the DSBP Guidelines

4. The DSBP Guidelines are intended to contribute to preventing enterprises and trade associations from violating the AMA and to helping in the pursuit of their appropriate activities, by specifically describing, with respect to distribution systems and business practices, what types of conducts in commercial transactions may impede fair and free competition and therefore violate the AMA. Part I of the DSBP Guidelines provide guidance on principles for the assessment of restrictions on trading partners' business activities such as resale price maintenance, restrictions on dealings with competitors, restrictions on sales territories, restrictions on retailers' sales methods and so on, from the perspective of regulations under Article 19 of the AMA (“unfair trade practices”).

2.2. Criteria for judging illegality of vertical restraints

5. Any vertical restraints which tend to impede fair competition are prohibited under the AMA as unfair trade practices. The assessment of whether a particular vertical restraint “tends to impede fair competition” or not is made by considering the scope influenced by the restraint depending on factors such as objects, regions and manners of the restraint and transaction, and then comprehensively assessing factors including conditions of inter-brand competition and intra-brand competition. In this assessment, due consideration is given to not only anti-competitive effects, but also pro-competitive effects.

6. In line with this approach, the DSBP Guidelines provide more detailed assessment criteria with respect to each type of vertical restraints as follows:
- i. The respective types of non-price vertical restraints categorised as “restrictions on dealings with competitors, etc.”, “strict territorial restrictions” and “tie-in sales” are illegal when:
 - such restraints are imposed by “an influential enterprise in the market”, and
 - such restraints have “foreclosure effects” or “price maintenance effects” and therefore tend to impede fair competition.
 - ii. The respective types of vertical non-price restraints categorised as “restrictions on passive sales to outside customers”, “requirement of designated accounts” and “prohibition of sales among distributors” are illegal, even if they are imposed by enterprises other than “an influential enterprise in the market”, when such restraints have “price maintenance effects” and therefore tend to impede fair competition.
 - iii. Vertical price restraints, i.e. “resale price maintenance”, and vertical non-price restraints categorised as “prohibition of sales to price-cutting retailers” and “restrictions on advertisements, representations, etc. of prices” tend to impede fair competition in principle and are therefore illegal.

2.3. Overview of safe harbours set out in the DSBP Guidelines

7. The DSBP Guidelines stipulate whether “an influential enterprise in the market” (2.2 (i) above) or not is judged in the first instance by a market share of the enterprise, that is, whether it has a share exceeding 20% in the market or not. Thus, in cases an enterprise which has a market share of 20% or less or a new entrant commits any conduct described in 2.2 (i) above, it does not usually tend to impede fair competition and therefore is presumably not illegal. This is the so-called safe harbour. Nevertheless, even if a vertical restriction falls outside of the safe harbour, it does not necessarily mean that it is illegal under the AMA; such restriction is illegal only when it has “foreclosure effects” or “price maintenance effects”.

8. In other words, this safe harbour has been introduced in line with the purpose of the DSBP Guidelines, which is to contribute to the prevention of enterprises and trade associations from violating the AMA and making their business activities appropriate. It is designed to secure predictability for enterprises and trade associations and to avoid causing a chilling effect on business activities by the enforcement of the AMA.

9. However, there might be an exceptional case that is considered to impede fair competition, even within the scope of the safe harbor.

2.4. Criteria of “an influential enterprise in the market” and reasons behind

10. The safe harbour criterion of “a market share of 20% or less” is based on the JFTC's enforcement experience: there are some JFTC's decisions and courts' judgements where vertical non-price restraints by enterprises with market share of less than 30% were found to be in violation of the AMA as the restraints had price maintenance effects. Additionally, the JFTC also took into account that the “Guidelines for the Use of Intellectual Property under the Antimonopoly Act”, which also indicate JFTC's assessment approaches from the viewpoint of applying Article 19 of the AMA (“unfair trade practices”), set 20% or less market share as a safe harbour criterion (cases where the anti-competitive effect is minor).

11. Before its amendment, the DSBP Guidelines defined the safe harbour as “the enterprise has a market share of less than 10% and its position is not within the top three in the market”. However, the criterion of the position in the market was abolished, because the market structures were different among industries and then the market share distribution of the top three enterprises in each market was also varied.

2.5. Types of conduct not subject to application of safe harbours

12. As described in 2.2 (iii) above, resale price maintenance, as well as non-price vertical restraints categorised as “prohibition of sales to price-cutting retailers” and “restrictions on advertisements, representations, etc. of prices” are not subject to application of the safe harbour, as they are illegal in principle.

13. Also, as described in 2.2 (ii) above, any vertical non-price restraints which may raise huge price competition concerns, i.e. “restrictions on passive sales to outside customers”, “requirement of designated accounts” and “prohibition of sales among distributors”, are not subject to application of the safe harbour, that is, even if an enterprise has a market share of less than 20%, the above mentioned conducts by the enterprise are illegal when they have price maintenance effects.

3. Safe harbours set out in the Business Combination Guidelines

3.1. Overview of the Business Combination Guidelines

14. The AMA prohibits a business combinations such as shareholdings, mergers, joint incorporation-type splits, absorption-type splits, joint share transfers, and acceptance of assignments of business (hereinafter collectively referred to as “business combination”) if they substantially restrain competition in any relevant market. These plans for business combinations are subject to the prior notification system based on the AMA. The JFTC reviews whether or not plans for business combination would substantially restrain competition in any relevant market (hereinafter referred to as “review”) in accordance with procedures provided in the AMA.

15. With the aim of securing transparency and predictability of reviews, the JFTC provides the Business Combination Guidelines.

3.2. Overview of the safe harbours set out in the Business Combination Guidelines

16. With the view of securing transparency and predictability of reviews, the JFTC provides the scope of business combination which would not substantially restrains competition in the Business Combination Guidelines; this is the safe harbour.

17. The JFTC normally clears any business combination falling within the safe harbour unless there are special circumstances, because it can cause a change in the market structure only to a small extent and have a minor effect on competition.

18. Even if a business combination meets the safe harbour criteria due to small market shares of the merging parties in a relevant market, an examination concerning substantial restraints of competition might be necessary in exceptional cases where, for example, the parties concerned possess high potential competitiveness which is not reflected to their market shares, such as possession of important data or intellectual property rights.

19. If a business combination does not meet the safe harbour criteria, that fact alone does not automatically mean it is problematic under the AMA. The JFTC reviews the business combination in accordance with the factors indicated in the Business Combination Guidelines.

3.3. Criteria of safe harbours using the HHI and market share

3.3.1. Criteria applicable to horizontal business combinations

20. When a horizontal business combination falls under either of the following standards below, it is normally considered that the effect of the business combination would not substantially restrain competition in the relevant market.

- The Herfindahl- Hirschman Index (hereinafter referred to as the “HHI”) after the business combination is not more than 1,500.
- The HHI after the business combination is more than 1,500 but not more than 2,500 while the increment of the HHI is not more than 250.
- The HHI after the business combination is more than 2,500 while the increment of the HHI is not more than 150.

3.3.2. Criteria applicable to vertical and conglomerate business combinations

21. When a vertical and conglomerate business combination falls under either of the following standards below, it is normally considered that the effect of the business combination would not substantially restrain competition in the relevant market.

- The market share of the parties concerned after the business combination is not more than 10% in all of the relevant markets.
- The HHI is not more than 2,500 and the market share of the parties concerned after the business combination is not more than 25% in all of the relevant markets.

3.4. Reasons behind the safe harbour in the Business Combination Guidelines

3.4.1. Grounds for the HHI standards

22. The current safe harbour criteria in the Business Combination Guidelines were adopted in 2007. The JFTC set out the current safe harbour criteria based on its experience in past reviews; It extracted past cases which were cleared without any condition, cases which went to a detailed review and cases in which the JFTC pointed out competition concerns, checked the HHI and the HHI increment in each of these cases, and then determined the appropriate levels of the HHI and the HHI increment for the safe harbour.

3.4.2. Reason for the type-based criteria of the safe harbour

23. The HHI is the sum of the squared market share of each enterprise in the relevant market; it indicates the degree of oligopoly in the market. In a review, the JFTC focuses on how significantly the business combination has altered the market structure, so by looking at not only the HHI, but also the HHI increment, it can identify the alteration of the market structure after the business combination.

24. The Business Combination Guidelines adopt different safe harbour criteria depending on the types of business combinations: it uses the HHI and the HHI increment for horizontal business combinations, and uses both the market share and the HHI for

vertical and conglomerate business combinations. In the case of horizontal business combinations among companies in the same market, the market shares of the companies will be combined and then the HHI will increase after the business combination, so the safe harbour criteria are composed of the HHI and the HHI increment. On the other hand, in the case of vertical and conglomerate business combinations among companies in different markets, the HHI does not increase after the business combinations, so the safe harbour criteria are composed of the HHI and the market share of the parties concerned.

4. The JFTC's enforcement policy considering market share in the EPM Guidelines

4.1. Overview of the EPM Guidelines

25. Exclusionary private monopolization refers to excluding the business activities of other enterprises (hereinafter referred to as “Exclusionary Conduct”), thereby causing, contrary to the public interest, a substantial restraint of competition in any relevant market of trade. On the other hand, it could naturally happen in every competition process that as a result of business activities of an enterprise, a product or a service of the other enterprise is driven out of the market. Therefore, there is a difficulty in distinguishing Exclusionary Conduct from normal business activities leading to exclude the business activities of other enterprises.

26. In light of these circumstances, the JFTC has formulated the EPM Guidelines with the purpose of ensuring further transparency of law enforcement and improving predictability for enterprises by clarifying, to the extent possible, the requirements for exclusionary private monopolization. The EPM guidelines describe the JFTC’s investigation policies about cases concerning Exclusionary Private Monopolization and what conduct may fall under “Exclusionary Conduct” and “substantial restraint of competition in any relevant market of trade” as the requirements for exclusionary private monopolization.

4.2. Enforcement policy for exclusionary private monopolization

27. Whether or not an Exclusionary Conduct falls under the exclusionary private monopolization is assessed from the viewpoint of the influence that the alleged conduct has on the competition in a relevant market of trade. There is a wide variety of conduct deemed as Exclusionary Conduct, so it is difficult to characterize all of them. However, from the viewpoint of ensuring transparency of law enforcement and improving predictability of enterprises, the EPM guidelines describe 4 typical types of Exclusionary Conducts in reference to past cases, and for each type of conduct, consideration factors for assessing whether the alleged conduct falls under Exclusionary Conduct.

28. In addition to that, the EPM Guidelines describe that a relevant market of trade means the scope where the Exclusionary Conduct causes a substantial restraint of competition, and the scope is relatively decided depending on factors such as the objects, regions, and conditions of the conduct and trade. And then the EPM Guidelines describe that the JFTC will not rely on certain specific criteria but comprehensively consider factors such as market share and its ranking of the said enterprise, conditions of the competitors and potential competitive pressure, on a case-by-case basis to assess whether or not competition is substantially restrained.

29. Additionally, the EPM guidelines provide that the JFTC, when deciding whether to investigate a case as the exclusionary private monopolization, will prioritize the case where the share of the product that the said enterprise supplies exceeds approximately 50% after

the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry, comprehensively considering the relevant factors such as market size, scope of business activities of the said enterprise, and characteristics of the product. This enforcement policy is based on following situations. In most of the past cases concerning exclusionary private monopolization, enterprises who were subject to the JFTC's investigation had a large share of the markets for the product related to Exclusionary Conduct. Thus, in most cases where an enterprise's conduct can be effective in excluding business activities of the other enterprises and foreclosing the market, the share of the product that the said enterprise supplies is to some extent large. Moreover, the larger the share of the product that the said enterprise supplies is, the more likely it is that the alleged Exclusionary Conduct becomes highly effective in causing a substantial restraint of competition in a relevant market of trade.

5. Conclusion

30. As explained above, the JFTC has set out the safe harbours in the DSBP Guidelines and Business Combination Guidelines to indicate the range of market structures and market shares that are normally not considered problematic under the AMA, with the aim of enhancing predictability for enterprises. Also the JFTC has indicated a policy to prioritize a case where the share of the product that an enterprise supplies exceeds approximately 50% thereof when deciding whether to investigate an exclusionary private monopolization case, in the EPM guidelines. On the other hand, the JFTC does not have any numerical criteria for presuming illegality based on specific market structure or market share.

31. Establishing safe harbours and using market share as a factor in determining priority of enforcement activities is beneficial from the perspective of ensuring transparency and predictability in law enforcement. However, it is necessary to consider various factors comprehensively on a case-by-case basis, such as a state of competition and potential competitive pressure, rather than relying uniformly on specific criteria, when determining whether it may arise problems under the AMA.