

JFTC publishes guidelines for exclusionary private monopolization under Antimonopoly Act

On October 28, 2009, the Japan Fair Trade Commission (JFTC) published the Guidelines for Exclusionary Private Monopolization under the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act). The private monopolization is prohibited under Article 3 of the Antimonopoly Act, which provision plays the same role as in Article 2 of the US Sherman Act and Article 82 of the EC Treaty. There have not been so many cases in which the JFTC took enforcement actions against the exclusionary private monopolization in Japan. The JFTC formulated the Guidelines to ensure further transparency of law enforcement and improve predictability for entrepreneurs by clarifying, to the extent possible, the requirements for the exclusionary private monopolization.

The main contents of the guidelines are the following:

- the general matters that the JFTC is to consider when determining whether to give priority to investigating a particular case as the exclusionary private monopolization;
- the types of major conduct that tends to be deemed problematic as the exclusionary conduct, and the framework for deliberations and factors applied for assessing whether or not it falls under the exclusionary conduct for each type; and
- the factors to be considered for defining a particular field of trade and determining the presence or absence of a substantial restraint of competition in a particular field of trade when assessment is made over whether the exclusionary conduct has substantially restrained competition in the field of trade.

Background

The JFTC may issue a cease and desist order against any private monopolization under the Antimonopoly Act. In addition, the JFTC may issue a surcharge payment order against any private monopolization by control. Due to the amendment to the Antimonopoly Act that will come into effect on January 1, 2010, the exclusionary private monopolization will become subject to the surcharge payment order. It is very difficult to distinguish the exclusionary private monopolization from exclusions of other entrepreneurs resulting from normal business activities. Thus, the JFTC is concerned that the introduction of surcharge payment order may cause a chilling effect on fair and

free business activities.

Key features of the guidelines

The scope of the guidelines is limited to the exclusionary private monopolization, but covers not only the conduct committed by a single entrepreneur but also the conduct committed by multiple entrepreneurs.

The general framework to analyze the exclusionary private monopolization starts by assessing whether or not the conduct in question falls under the exclusionary conduct. The next step is to assess whether or not the exclusionary conduct has substantially restrained competition in a particular field of trade.

The exclusionary conduct refers to various conduct that make it difficult for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities, thereby likely causing a substantial restraint of competition in a particular field of trade. The guidelines clarify typical exclusionary conduct, mainly those that have been covered in the past, into the following four categories:

- below-cost (costs which would not be generated unless the products were supplied) pricing – the JFTC will only intervene where pricing causes difficulty to the business activities of an equally or more efficient competition;
- exclusive dealing (including exclusive rebate-giving);
- tying; and
- refusal to supply and discriminatory treatment beyond reasonable degree, concerning a product necessary for trading customers to carry out business activities in the market (downstream market).

In each case, the JFTC will comprehensively consider conditions of the entire market of the product, positions of the entrepreneur concerned and the competitors in the market, period of the conduct, conditions of the conduct, etc. Non-typical conduct may also fall under the exclusionary conduct.

A court held that the requirement of substantial restraint of competition in any particular field of trade is interpreted to mean establishing, maintaining and

strengthening a situation in which competition itself has decreased, and a certain entrepreneur or a certain group of entrepreneurs can control the market by to some extent manipulating price, quality, quantity and other various conditions (NTT East Case [Tokyo High Court Judgment May 29, 2009]). The JFTC will comprehensively consider position of the entrepreneur concerned and conditions of the competitors, potential competitive pressure, users' countervailing bargaining power, efficiency and exceptional circumstances to assure consumer interests.

The JFTC will take into account the efficiency improvements when (i) it is deemed that efficiency improves as effects specific to the conduct and it cannot be achieved by other means that are less restrictive on competition, and (ii) it is deemed that the results of a decline in the prices of products, an improvement of quality, a supply of new products, etc. are passed on to users due to the said improvement of efficiency, and the welfare of users is improved. However, when the exclusionary conduct achieves a monopolistic situation or an almost monopolistic situation, the JFTC will normally conclude that competition is substantially restrained, even if the circumstances set forth in (i) and (ii) above subsist.

The JFTC will give priority to the investigation of cases where the share of the product that the entrepreneur concerned supplied exceeds around 50% after the commencement of the conduct in question and the conduct is deemed to have a serious impact on the lives of national citizenry. Even if a case does not meet these criteria, however, it may be subject to investigation depending on the type of conduct, market conditions, positions of competitors, etc. Thus, the JFTC does not intend to create a safe harbor.

Comment

Although the guidelines clarify the general framework and factors to be considered, they do not provide detailed guidance on the exclusionary private monopolization. No safe harbor is created by the JFTC. As such, continuous review of the guidelines is imperative for the JFTC to ensure further transparency of law enforcement and improve predictability for entrepreneurs.

If you would like to know more details, please contact Miyake & Yamazaki.

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