

Revised Japan Fair
Trade Commission
antitrust guidelines on
environmental
sustainability

Comments and suggestions



Introduction

The International Chamber of Commerce (ICC) and its national committee in Japan (ICC Japan) wish to thank the Japan Fair Trade Commission (JFTC) for the opportunity to contribute comments and suggestions on the JFTC's revised Guidelines Concerning the Activities of Enterprises, etc. Towards the Realization of a Green Society Under the Antimonopoly Act (Guidelines). The submission is made by ICC and ICC Japan as a response to the JFTC public consultation launched in February 2024.

In ICC's view, the Guidelines are commendable for their efforts to promote environmental sustainability while ensuring that competition is not adversely impacted. By encouraging companies to pursue green initiatives, such as reducing greenhouse gas emissions and promoting renewable energy, the Guidelines demonstrate the JFTC's commitment to addressing pressing environmental challenges.

The proposed amendments to the JFTC's Guidelines are intended to provide further clarity on the agency's position in relation to situations where two principles, *i.e.* competition and environmental protection, may appear to clash. As such, they help companies navigate the pressure to address emerging environmental challenges and evolving market dynamics without fear of violating competition laws.

ICC's contribution focuses exclusively on the amendments proposed by the JFTC. ICC's comments are explained in the following section.

Comments

Introduction, Section 2 - Basic concept

The following language was added: *"The JFTC may exceptionally find such acts do not violate the act in consideration of various additional factors which include elimination of the anti-competitive effects by measures such as measures to block information exchange and market trends including the international competitive situation such as increased import pressure from overseas if an enterprises, etc. provides an explanation regarding additional factors and the elimination of the anti-competitive effects, etc. are recognized as facts."*

ICC welcomes the inclusion of further clarifications as to what elements might be considered by the JFTC as exceptional circumstances, which allow for cooperation among competitors to be considered lawful. However, ICC believes that the word "exceptionally" may impose an unjustifiably high burden of proof and holds the view that it would not be necessary nor appropriate to maintain it, considering the factors listed should be assessed objectively, on a case-by-case basis.

Additionally, the reference to "international competitive situation such as increased import pressure" provides however little clarity about how the increased import pressure may justify acts that otherwise would be considered a violation of the Antimonopoly Act. The Guidelines could certainly benefit from a more detailed explanation on this point. We recommend to add "*the*

internalization of externalities (such as climate change-related costs and risks that would otherwise be imposed on society), the correction of market failures and collective action problems, and implementation of the “polluter pays” principle.”

These are well recognised economic principles that deserve to be recognised and give guidance to parties as to the kind of explanations that are appropriate to show that effective competition is consistent with sustainability goals. Additional clarity regarding the criteria for measures to eliminate anti-competitive effects, as well as the consideration of market trends, would be beneficial.

Moreover, the same comment holds true as regards “measures to block information”, which are further detailed in footnote 10 *“Measures to block targeted information from those directly engaged in the manufacture or sale (depending on the contents of the information) of products related to the information”*. We assume that this applies to information exchange between competitors (in manufacturing or sale of any particular product) and that such measures include information barriers to prevent the unnecessary exchange of competitively sensitive information between them. More clarity on this point would be much appreciated, as well as the incorporation of established antitrust terminology, such as “competitively sensitive information”, that could facilitate better understanding among practitioners.

Introduction, Section 4 – Future actions

The following language was added: *“Also, in order to realize a green society, enterprises, etc. need to respond to changes in the assumptions of the international competitive environment such as regulations and systems, market structures, and technological trends, over the short, medium and long term. For this reason, when an enterprise, etc. seeks preliminary consultation, etc. with the JFTC on its activity, if enterprises, etc. claim the basis that their initiatives are aimed at realization of a green society, the effects of decarbonization¹⁴ as a competition promotion effect of the initiatives, changes in regulations and systems, etc., in addition to explanations from enterprises, etc., the JFTC will make decisions taking information provided by related ministries into consideration. In particular, regarding the effects of decarbonization, the JFTC will rely on information provided by related ministries when making decisions.”*

The fact that the JFTC will test and confirm sustainability arguments posed by the parties is part of the due diligence process that an agency is required to perform in its antitrust assessment. Ideally, such “reality checks” should not only be made against information provided by other public agencies (“related ministries”) but also on academic research and other independent sources such as the Intergovernmental Panel on Climate Change (IPCC) and Non-Governmental Organisations (NGOs).

Part I, Section 1 - Acts that do not pose problems under the Antimonopoly Act

The following language was included: *“In addition, when enterprises, etc. consider joint activities, it may be necessary to mutually exchange information regarding business activities, etc.¹⁹ In this case, if there is no exchange of information regarding matters that are important means of competition including prices, there is usually no problem under the Antimonopoly Act. Furthermore, even the exchange of information regarding matters that are important means of competition*

including prices, does not normally pose a problem under the Antimonopoly Act if measures to block information are taken.”

The same comment made to Section 2 (Basic concept) applies here, in particular to “measures to block information”. We assume that such measures include information barriers to prevent the unnecessary exchange of *competitively sensitive* information between competitors.

The inclusion of new examples of acts that will not be considered as a violation of the Antimonopoly Act as Supposed Cases 5 and 8 is extremely helpful and appreciated. The recommendations in Supposed Case 8 related to information barriers and very practical and clear.

Part I, Section 2 - Acts that Pose Problems under the Antimonopoly Act

The clarifications included in Supposed Case 12 allow for a clear understanding of the JFTC’s position in relation to the agreement between competitors on the timing of the disposal of production facilities. Here, JFTC provides clear guidelines in relation to the exceptional circumstances in which such agreements will not infringe the Antimonopoly Act.

In the same section, the inclusion of Supposed Case 14 is very welcome, as it also provides clear guidance in relation to what JFTC will deem as an appropriate exchange of information between competitors for procurement purposes (aiming at sustainable goals) and what will be treated as a naked violation.

Supposed Case 14 unfolds into a broader explanation of the limits of joint activities between competitors. The following piece is extracted from that explanation: *“Here, whether or not it is recognized that the effect of restricting competition on the market is limited and does not result in “substantial restraint of competition in a particular field of trade” is determined on a case-by-case basis, mainly by considering the following factors comprehensively. All of these factors do not need to be recognized, and even if only one factor is recognized, it may be determined that it does not result in a “substantial restraint of competition in a particular field of trade.” However, in reality, it is often necessary to consider multiple factors comprehensively, so when planning an activity to restrict matters that are important means of competition as a joint activity for decarbonization, it is desirable to consult with the JFTC especially [if]*

(i) The market share of businesses conducting joint activities is small and there are influential competitors.

(ii) Competitive pressure from imports from overseas is recognized, taking into account the following circumstances: overseas enterprises have concrete plans for exporting to Japan, leading overseas enterprises are increasing their production capacity and the possibility of starting or increasing exports to Japan is increasing, etc.

(iii) Competitive pressure due to entry is recognized, taking into account the following circumstances: it is easy to enter the market, and if an enterprise that engages in joint activities raises the price of a product, there is a high possibility that an entrant will appear who will try to increase profits by selling the product at a lower price, etc.

(iv) Competitive pressure from adjacent markets is recognized, taking into account the following circumstances: active competition in the market for products with similar efficacy to the products targeted for joint activities, etc.

At first, JFTC's position on the influence of competitive pressure from imports, entry and adjacent markets is not entirely clear, in particular if such competitive pressure will be considered as a positive or negative factor when assessing joint activities between competitors with sustainability goals. However, Supposed Cases 15 and 16 suggest that such competitive pressures will be considered as positive factors when assessing the joint activities of competitors. The Guidelines could benefit from a clearer position taken by JFTC in relation to the influence of such competitive pressures in its decisions.

In this sense, the Guidelines could benefit from a clearer definition of "adjacent market". It appears that adjacent products are identified as those with similar efficacy or potential for substitution. It would be particularly helpful if the Guidelines could define "adjacent products" in order to distinguish them from "complementary products", refining the definition of "adjacent markets".

Part I, Section 3 (2) – Business Alliances

The clarifications included in Supposed Cases 34, 36, 39 and 45 as to why such conducts would be considered problematic under the Antimonopoly Act and what circumstances could be considered as not problematic are very welcome. The same applies to the corrections made in (E) Joint Logistics.

Part III, Abuse of a Superior Bargaining Position

The addition of Supposed Cases 70 and 72 in Part III Abuse of a Superior Bargaining Position as an example of a situation where no abuse of a Superior Bargaining Position will be found (in the first case) and a situation where an abuse will be found (in the latter) is very welcome.

Part IV, Section 2 (A) (2) (C) (A) Substantial restraint of competition by Horizontal Business Combination

Finally, in this section, we think that the addition of Supposed Case 78 provides a good guidance as to a situation where JFTC will find no problem in a horizontal "business combination" due to the competition posed by adjacent markets. This is extremely welcome, as the role of adjacent markets is acknowledged by the agency as a strong factor to prevent the substantial restriction of competition. The further clarification on the commentaries added to Supposed Case 79 is also very clear, providing examples of circumstances where a horizontal combination with sustainable goals will not substantially restrict competition.

Conclusion

We believe that the additions and clarifications set forth in the revised Guidelines help to improve clarity and to provide certainty to companies navigating the sustainability and competition law

landscape. However, ICC wishes to emphasise that the effectiveness of such guidelines depends ultimately on their enforcement and implementation by JFTC, which must monitor compliance closely and take swift action when needed. This includes conducting ongoing evaluation and refinement of the Guidelines.

In this sense, ICC would like to emphasise the importance of guidance and approvals in relation to specific cases. We commend that JFTC has received, according to its head of consultation and guidance unit, “at least a dozen” cases of companies seeking approval of green initiatives and published its approval of a sustainability cooperation in the petrochemical sector. In addition, ICC would like to emphasise that: (i) the guidance and approvals should be structured with no more demands on the companies than is strictly necessary; (ii) they should be prioritized and dealt with as quickly as possible; and (iii) information about the approvals should be published wherever possible, while respecting legitimate commercial confidentiality. These practices are already being adopted by the publications of the Netherlands Authority for Consumers and Markets and the UK Competition and Markets Authority, for example.

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