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## Will Establishment of the Green Guidelines under the Antimonopoly Act Open the Way to Resolve “2024 Issue” of Transportation Industry? -From “Defensive” Compliance for Preventing Cartel to Efficiency Creating “Offensive” Business Alliance-

### 1. Expansion of Business Alliances to Resolve the “2024 Issue” of Transport Industry and the Antimonopoly Act as an Obstacle

On June 19, 2023, Japan Post Group and Yamato Group jointly announced a business alliance (“Business Alliance”) for a mail delivery business under the heading “Basic Agreement on Promotion of Sustainable Logistics Services,” whereby mails collected by Yamato Group will be delivered by post office. Looking back on the history of Yamato Group’s investment and passion for the mail delivery business, the Business Alliance seems to be a tough decision for Yamato Group.

As a background to the Yamato Group’s decision, it is reported that application of Act on the Arrangement of Related Acts to Promote Work Style Reform to the transportation industry, which had been suspended, will become effective on April 1, 2024, and the upper limit of overtime work for truck drivers of 960 hours a year will be enforced with a criminal penalty, thereby enhancing the restriction of working hours per driver. This is known as “2024 issue.” The danger of not being able to transport cargo is approaching near, and transportation industry is not in a situation in which the industry has options to provide sustainable logistics services.

However, how will the Business Alliance be evaluated under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (“Antimonopoly Act”)? Since delivery is a core part of the mail delivery business, business alliance that integrates delivery is similar to a business transfer. In the mail delivery business, Yamato Group, which provides services ranging from collection service to delivery service, seems to have been the largest and virtually sole competitor of Japan Post Group in the nationwide market of Japan and therefore, its impact on competition is not expected to be small<sup>1</sup>. I would infer that both companies certainly consulted with the Japan Fair Trade Commission (“JFTC”) in advance and/or has taken other methods to make sure that they would not violate the Antimonopoly Act. However, in light of the current practice under the Antimonopoly Act, if the Business Alliance had an effect of restricting competition, the purpose of improving the driver’s work environment would not have been a sufficient justification.

### 2. Establishment of Green Guidelines and Close-Up of View of Cooperative Logistics

Japan Post Group and Yamato Group announced that contributions to alleviate the 2024 issue (e.g., lack of truck drivers) and contributions to tackling environmental issues (e.g., carbon neutral) are the main purposes of the Business Alliance. In addition, on March 31, 2023, JFTC published the “Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act<sup>2</sup>,” which is also known as the Green Guidelines. Is the overlap of timings of these two events a coincidence? The argument that enhancement of efficiency by eliminating redundancy in delivery will contribute to greenhouse gas reductions may be difficult to demonstrate quantitatively, but there may be an argument for it qualitatively at least.

The Green Guidelines are attracting attention not only as guidelines under the Antimonopoly Act in efforts to reduce greenhouse gas, but also as the first guideline to present JFTC’s views on business alliances in general. The Green Guidelines also set forth in the “Basic Concept” that in many cases, the activities of enterprises toward the realization of green society will not pose problems under the Antimonopoly Act. Such wording can be read that JFTC actively supports companies in their efforts to reduce greenhouse gas.

The Green Guidelines also divide the acts into three categories, which are acts with no anti-competitive effect (“First Category”), acts with only anti-competitive effect (“Second Category”), and acts with both anti-competitive effect and pro-competitive effect (“Third Category”), and made overall consideration of the anti-competitive effect

<sup>1</sup> The author does not have more information than what has been published about the Business Alliance. Therefore, the author has no opinion on whether or not the Business Alliance has any impact on restricting competition.

<sup>2</sup> <https://www.jftc.go.jp/en/pressreleases/yearly-2023/March/230331.html>

and pro-competitive effect on the lawfulness of the Third Category, by taking into account the reasonableness of purposes and appropriateness of means. Furthermore, the Third Category is broadly divided into establishment of voluntary standards and business alliances, and cooperative logistics are cited as one example of business alliance. The Green Guidelines contemplate the cooperative logistics of shippers.<sup>3</sup>

Cooperative logistics by shippers have appeared a couple of times in JFTC's Consultations Case Reports<sup>4</sup>. The Green Guidelines, however, can be read that JFTC is actively promoting cooperative logistics due to the addition of the wording "Cooperative logistics are not only expected to streamline logistics, but also able to reduce greenhouse gas emissions thereby, depending on cases. In such cases, it can be considered that cooperative logistics can contribute to the realization of green society." (Part 1, Section 3(2) B (E)) as well as the examples of reduction of greenhouse gas., which refocus on cooperative logistics.

### **3. Factors to be Considered in Determining the Lawfulness of Cooperative Logistics by Shippers in the Green Guidelines**

The factors to consider under the Antimonopoly Act concerning cooperative logistics listed in the Green Guidelines are as follows (Part 1, Section 3(2)B(E)), which are not anything new:

- It is only incidental to the main business of purchasers of the logistics service (shippers), and it has little impact on price of product. Therefore, competition is unlikely to be substantially restrained compared with joint production or joint sales.
- However, when the total share of purchasers of the logistics service (shippers) participating in cooperative logistics in the procurement market for logistics services is high, competition in the procurement market may be substantially restricted.
- In addition, a high proportion of cost of products sold by shippers may encourage coordinated conducts among shippers and substantially restrict competition for the product.
- Agreement on price or quantity of product substantially restrains competition. Therefore, in the case that prices and quantities of products sold are shared among competitors through cooperative logistics and the competitors agree on price increases, it will be regarded as a cartel.

The lawful case (Example 30) is a joint delivery of three retailers, but it is obviously a lawful case with factors which are as follows: (a) the three retailers take necessary measures to block the transfer of information on price, quantity, etc. of the goods; (b) the ratio of cooperative logistics cost to the selling cost of the goods is extremely small; and (c) there are various enterprises in the procurement market for the delivery service, and the total market share of the three retailers is about 10%. On the other hand, unlawful case (Example 31) is a mere case of price cartel. Neither of these cases are helpful. In particular, (c) above means that there are numerous other shippers and therefore, (c) is often satisfied.

Many cooperative logistics cases that improve efficiency appear to be somewhere between clearly lawful and clearly unlawful. In such cases, the interpretation of issues that cannot be fully understood from the Green Guidelines and the Consultation Case Reports as explained below becomes an issue.

### **4. Issues that Cannot be Fully Understood from the Green Guidelines and the Consultation Case Reports**

(1) Is it possible to stop competition in terms of quality of logistics services?

One of the reasons why joint delivery between competing enterprises did not necessarily progress is that delivery was one of the services in competition. If shippers compete for delivery, joint delivery will reduce costs, but will halt competition for some of the services. If delivery bases and routes are consolidated thereby, some service outages may become irrecoverable. Furthermore, reduced costs may not pass on to the shippers, who are the customers, and solely be used to improve the driver's work environment.

Thus, if there is a deterioration in the quality of services due to reduction in costs, then there will be Third Category

<sup>3</sup> Therefore, the Business Alliance mentioned above between Japan Post Group and Yamato Group is not directly related to the items of cooperative logistics provided in the Green Guidelines. Case No. 8 of the FY2018 Consultation Case Report discusses cooperative transportation among competing carriers in the main transportation routes and provides improvement of drivers' work conditions as a reason for cooperative transportation. However, the size of joint business provided in Case No. 8 is small.

<sup>4</sup> For example, in Case No. 6 of the FY2020 Consultation Case Report published on June 9, 2021, there was a case where "15 manufacturers of office equipment set up delivery bases in various places and jointly deliver office equipment from the delivery bases to the designated delivery locations of the customers."

issue in which it is determined that there are both anti-competitive effect and pro-competitive effect on competition. However, it is not necessarily clear how JFTC thinks about this issue.

There might be many cases in which excessive competition in delivery services returns to an appropriate level. However, the Antimonopoly Act does not necessarily justify an agreement between competitors to restore excessive competition to an appropriate level. According to the description in the Green Guidelines, JFTC is perhaps only looking at the impact on product prices.

(2) Are measures to block the transfer of information at minimum necessary level?

Joint delivery by shippers may become more efficient if it is made between competitors (i.e., delivery of same type of goods to a common customer), and since the aggregation of goods among a few number of same type of certain shippers will be carried out repeatedly, there is a potential to significantly improve efficiency through AI which will learn the delivery statuses.

However, in many cases, information on to which customers products are sold, when the products are sold, and what products are sold is important sales information. If joint delivery is made, there is a possibility that such sales information will leak among shippers making joint delivery. Moreover, the response to rivals' actions will vary from shipper to shipper and may facilitate competition by making it easier for shipper to sell goods to rivals' customers. However, this may also lead to a coordinated actions among shippers in which natural segregation of areas will occur, in which each of the shippers decides not (i) to get involved in area of business which multiple shippers are good at and focus on or (ii) to deal with rivals' customers. That is why the measures to block the transfer of information were expected in cooperative logistics among shippers up to now<sup>5</sup>.

However, the measures to block the transfer of information, which had been proposed as a matter of course in the past may hinder the analysis of optimal delivery patterns, etc., and may hinder the improvement of efficiency. In addition, the measures to block the transfer of information within a company group can become a major problem in personnel allocation, and this in and of itself can become a reason for companies to hesitate to form a business alliance. For example, if it becomes necessary to take actions, such as making it impossible for employees, who engage in work involving other companies' information, to return to their original departments, it will become difficult to internally allocate personnel. However, if such work is completely conducted by someone outside the company, corporate governance will no longer work.

As explained above, with respect to business alliances to achieve a fundamental pro-competitive effect, it is not necessarily clear how JFTC thinks about the necessity and degree of strength of measures to block the transfer of information if it is unavoidable for business alliances to include acts that are considered to have an anti-competitive effect including exchange of business information. The measures to block the transfer of information that are not at minimum necessary level may also make the business alliance meaningless.

In Case No. 2 of Consultation Case Reports of the FY2022 released by JFTC on June 30, 2023, Carrier X has a real-time tracking service system for packages and a shipper asked Carrier X to track packages of Carrier X's competitors with this system and therefore, Carrier X requested its major competitors to participate in the joint tracking service. The points of this case are that (a) operation of joint tracking service is entrusted to Company P, which has no capital ties with Carrier X, (b) Carrier X and each carrier cannot check information other than their own transportation status, (c) each shipper cannot check information other than the transportation status of package requested by such shipper, and (d) information such as fares is not entered into the system, in order to prevent the backflow of sensitive information. JFTC concluded that there is no problem under the Antimonopoly Act. This case can be deemed as a case in which the measures to block the transfer of information was taken at a minimum necessary level. This case shows that the measure, in which shipper's or carrier's proposal of innovations to improve efficiency, outsourcing of their operation to a third party with no capital ties, and aggregation of information at such third party, is one of the measures to block the transfer of information.

## **5. Is JFTC trying to change the way law enforcement should be?**

Joint delivery by shippers could have been useful means to solve the 2024 issue, but as mentioned in 4 above, there were still factors that caused the shippers to hesitate. JFTC's past published cases were also obvious lawful cases in which the shared costs were low and information sharing was blocked. It could therefore be understood from

<sup>5</sup> In addition to the case mentioned Footnote No.4 above, there are Case No. 4 in 2004, Case No. 6 in 2015, Case No. 7 in 2016 and Case No. 4 in 2021 of Consultation Case Reports.

these published cases that it was necessary to pile up the elements of legality which might be deemed as excessive, in order to avoid violating the Antimonopoly Act and therefore, cooperative logistics must be considered in the context of “defensive” compliance.

However, returning to the case of the Business Alliance between Japan Post Group and Yamato Group, the Business Alliance was a substantial integration in the delivery market (in which one of them withdrew), and the impact on competition was not considered to be small. Is it possible to explain the lawfulness of the Business Alliance under the existing concepts of the Antimonopoly Act?

JFTC explained that the Green Guidelines were compiled by collecting and organizing the guidelines and case studies published to date, and not by establishing new standards. On the other hand, there is an impression that JFTC may take a more tolerant stance toward the realization of green society.<sup>6</sup> JFTC has clearly indicated its willingness to actively provide consultations to business enterprises on individual cases.

In addition to reducing greenhouse gas, the Green Guidelines also state that “It is highly possible that the analysis framework and other matters indicated in the Guidelines can also be applied to the activities of enterprises, etc. toward the achievement of the Sustainable Development Goals (“SDGs”) implemented similarly for socially and publicly desirable objectives, considering the characteristics of acts conducted as such activities.” (Introduction-2). The heading of the Business Alliance between Japan Post Group and Yamato Group was “Basic Agreement on Promotion of Sustainable Logistics Services,” and the resolution of 2024 issue was precisely a head-on challenge to the sustainability of transportation industry.

For this reason, the Antimonopoly Act to date was only “defensive” compliance in preventing the exchange of information and business alliances among competitors from falling under cartel, and now it seems to be an opportunity for JFTC to turn “offensive” in which enterprises can actively propose and consult with JFTC on an audacious business alliance that has not existed before. In particular, although there was a hesitation up to now to discuss the minimum necessary level of measures to block the transfer of information, it might now become possible to have a head-on discussion on the need to have a certain amount of information exchange for reduction of greenhouse gas and to have sustainable logistics. This could be a significant turning point in transportation industry which is facing the 2024 issue.

## **6. Remaining theoretical issue – time lag in efficiency**

Improving the competition in transport industry benefits all shippers, carriers, drivers and consignees and therefore, agreements, including those among competitors and business counterparties, which cover up to rectification of certain excessive competition, may be beneficial in the long term, including shippers and consignees, even if they are temporarily anti-competitive. In particular, avoiding the fatal situation in which the cargo cannot be transported due to the 2024 issue will greatly benefit both shippers and consignees.

According to the conventional theory of the Antimonopoly Act, it was considered that a wide range of benefit of efficiency, which will occur later, would not justify the substantial restraint of competition. However, the reduction of greenhouse gas will inevitably result in the spread of benefits to non-participants of transportation industry, and there will be a time lag in the occurrence of benefits. Therefore, the Green Guidelines may be deemed as having opened the door to study theoretical questions about acts which cause a wide range of efficiency after going through a time lag such as the time lag mentioned above.

End

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<sup>6</sup> Yusuke Takamiya “Some Considerations from the Characteristics and Practical Perspectives of the Green Guidelines” (Fair Trade, No. 872 (2023), p. 22)