

# Outline and Future Outlook of the Draft Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act

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On January 13, 2023, the Japan Fair Trade Commission (“JFTC”) published the Draft Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act (the “Draft Green Guidelines”)<sup>1</sup> (English version<sup>2</sup> is also available), and a call for comments was made with a deadline of February 13, 2023 (6:00 p.m.). Amidst the demand for prompt promotion of GX/DX in Japan and abroad, it is noteworthy that the Draft Green Guidelines has extensively organized the basic ideas under the Antimonopoly Act, cases that are not problematic, and examples that help narrow down the points that require close scrutiny. The ideas presented in the Draft Green Guidelines are not limited to measures to reduce greenhouse gas emissions, and are said to be applicable to all Environment, Social, and Governance (“ESG”)-related measures implemented for achieving social and/or public purposes (pp. 2–3).

## 1. Overview of Draft Green Guidelines

The Draft Green Guidelines, as shown below, outline the Antimonopoly Act’s approach to, and provide specific examples of cases of multiple businesses jointly or independently implementing initiatives with the aim of, reducing greenhouse gas emissions. Overall, the Draft Green Guidelines include examples regarding cases in which (i) efficiency improvement through the promotion of DX (e.g., data utilization) that contributes to the promotion of GX as well, and (ii) the participants in the collaboration do not necessarily need to enforce a limitation of the period for implementation of initiatives as an essential precondition, unlike the examples under the Antimonopoly Act, such as collaboration in an emergency as shown during the COVID-19 pandemic.<sup>3</sup> On the other hand, the Draft Green Guidelines also indicate that acts that are considered highly anti-competitive in normal times may be problematic under the Antimonopoly Act, even if they are ostensibly aimed at reducing greenhouse gas emissions.

### (1) Joint Efforts

With the case in which joint efforts by multiple competitors to reduce greenhouse gas emissions became problematic under the Antimonopoly Act, a cartel case involving diesel passenger car emission gas purifiers, in which a fine was imposed on July 8, 2021 for violation of the EU’s competition law (TFEU Art. 101), is fresh in

<sup>1</sup> [https://www.jftc.go.jp/houdou/pressrelease/2023/jan/230113\\_publiccomment.html](https://www.jftc.go.jp/houdou/pressrelease/2023/jan/230113_publiccomment.html) (in Japanese)

<sup>2</sup> <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html>

<sup>3</sup> [Corporate Legal Newsletter, “European Commission Publishes Competition Law Decision Framework on Response to the New Coronavirus” \(April 14, 2020\)](#) (in Japanese).

our minds,<sup>4</sup> the Draft Green Guidelines also provide a list of examples of activities that would be problematic under the Antimonopoly Act due to constituting an unfair restraint of trade, etc. (including those that are difficult to delineate in practice and require a certain internal system to be in place, such as “information exchange not covering important competitive matters such as price, etc.”). (Although some of the examples include “information exchange that does not cover matters that are important means of competition, such as price,” which is difficult to delineate in practice and requires the establishment of a certain internal system for ensuring the compliance with the Antimonopoly Act.)

Assumed Examples of Conduct Not Problematic under the Antimonopoly Act	Assumed Examples of Problematic Conduct under the Antimonopoly Act
Awareness-raising activities conducted by the industry	Joint implementation of collection of costs related to greenhouse gas reduction
Compliance with legal obligations	
Establishment of industry goals and activity guidelines	Limitations on production volume
Information transmission	
Encouragement of energy conservation at business sites	Joint disposal of jointly determined production facilities
Exchange of information that does not cover matters that are important means of competition, such as prices	
Establishment of standards for the reduction of greenhouse gas emissions and publication of facts to the extent necessary to ensure compliance with such standards	Limitations on technological development

The Draft Green Guidelines also identify a number of hypothetical examples of activities that require caution in order to avoid problems under the Antimonopoly Act, with an eye to setting voluntary standards and establishing various types of business alliances, depending on the overall consideration of the effects of restricting competition and promoting competition, which may or may not be a problem under the Antimonopoly Act. It should be noted that these examples explicitly include not only the pattern of ceasing competition by agreement among competing businesses (as in the Business Alliance Report<sup>5</sup>) but also the pattern of excluding new or existing businesses that wish to participate in a joint effort (pp. 9–30).

Assumed Examples of Conduct Not Problematic under the Antimonopoly Act	Assumed Examples of Problematic Conduct under the Antimonopoly Act
Establishment of general activity guidelines for business activities to reduce greenhouse gas emissions	Price and other restrictive acts in connection with the establishment of voluntary standards
Establishment of standards, etc. for goods and services using specific raw materials (in the absence of other available raw materials) to reduce greenhouse gas emissions	Strict application of voluntary standards that may affect competition among operators
Establishment of uniform calculation standards for greenhouse gas emissions	Establishment of standards for goods and services that include discriminatory treatment against some businesses
Joint research and development on greenhouse gas reduction technologies that are difficult to research and develop independently	Restrictions on the use of facilities, etc. due to the establishment of greenhouse gas reduction targets

<sup>4</sup> [European Newsletter, “Enforcing Competition Law Against Joint Action in the Environmental Sector” \(July 20, 2021\).](#)

<sup>5</sup> [Competition Policy Research Center, Japan Fair Trade Commission, “Report of the Study Group on Business Alliances” \(July 10, 2018\).](#)

Cross-licensing for technologies essential for the manufacture of products to reduce greenhouse gas emissions, etc.	Joint research and development to eliminate alternative technologies
Establishment of standards for parts and other components for efficient use of resources	Joint research and development with price and other restrictions
Joint purchasing to reduce greenhouse gas emissions	Formation of patent pools with price and other restrictions
Joint logistics to reduce greenhouse gas emissions by improving delivery efficiency, etc.	Standardization activities with price and other restrictions
Joint production, etc. for greenhouse gas reduction in cases where a company does not have production technology, etc.	Standardization activities that eliminate alternatives
Joint production, etc. to reduce greenhouse gas emissions in cases where a company (at its own discretion) suspends its own production facilities, etc.	Joint purchases that restrict competition in the market for the manufacture and sale of goods using the procured raw materials
Joint implementation of sales promotion activities related to products and services that contribute to the reduction of greenhouse gas emissions	Joint logistics with information exchange and sharing of prices and other information
Joint facility use for commodity services that contribute to greenhouse gas reduction	Joint production, etc. with operating restrictions on production facilities, etc.
Joint collection and use of (anonymized and abstracted) data necessary for efforts to reduce greenhouse gas emissions	Joint implementation of sales promotion activities with price and other restrictions, etc.
	Joint collection and use of data necessary for efforts to reduce greenhouse gas emissions with price and other sharing

## (2) Efforts to Deal with Counterparties

The Draft Green Guidelines also provide examples of conduct toward the counterparty to a transaction that is problematic under the Antimonopoly Act (e.g., transactions with restrictive conditions, abuse of a superior bargaining position, etc.) and examples of conduct that is not problematic under the Antimonopoly Act. For example, the JFTC recently announced that unilaterally rejecting a request from a business partner to pass on to the transaction price an increase<sup>6</sup> in the price of raw materials, etc. or the cost burden<sup>7</sup> of ensuring cyber security and setting significantly lower consideration could constitute abuse of a superior bargaining position. In connection to this, the Draft Green Guidelines explain that there is no problem under the Antimonopoly Act if the transaction price is set in such a way that the increase in procurement costs due to the requirement to use environmentally-friendly materials is passed on to the transaction price (pp. 31–50).

The Draft Green Guidelines point out that imposing restrictions on business activities of business partners or selecting business partners (selective distribution, termination of transactions, etc.) as part of efforts to realize a green society is often not a problem under the Antimonopoly Act. However, the relationship with abuse of a superior bargaining position is not explicitly mentioned, and this seems to be an explanation of ideas and

<sup>6</sup> [Japan Fair Trade Commission, “Frequently Asked Questions \(Antimonopoly Act\)” Q20.](#)

<sup>7</sup> [Ministry of Economy, Trade and Industry & Japan Fair Trade Commission, “Toward Building Partnerships with Suppliers to Improve Cyber Security throughout the Supply Chain” \(October 28, 2022\).](#)

cases based on the assumption that, as usual, careful consideration must be given as to whether there is a possibility that the conduct constitutes abuse of a superior bargaining position.

Assumed Examples of Conduct Not Problematic under the Antimonopoly Act	Assumed Examples of Problematic Conduct under the Antimonopoly Act
Mandatory ongoing purchases, etc. as a condition of supplying goods requiring capital investment	Prohibiting retailers from handling competitive products
Allocation of sales territories for the purpose of promoting capital investment, etc. necessary for the provision of products	Strict regional restrictions
Supply of products only to distributors that meet certain criteria for greenhouse gas reduction	Selective distribution for the purpose of prohibiting sales to discount dealers
Obligation to provide facilities necessary for the use of products, etc.	Establishment of standards that do not apply equivalent restrictions to all trading partner businesses
Termination of transactions with business partners that do not meet certain standards related to greenhouse gas reduction	Termination of transactions with distributors as a means of ensuring the effectiveness of transactions with exclusive conditions
Denial of certification for products that do not meet the voluntary standards set by trade associations (until those standards are met)	Termination of transactions with operators as a means of eliminating competitors
Request for purchase of raw materials, etc. as specified in specifications	Denial of access by competitors to data essential to their business activities
Request for sponsorship money from the counterparty to a transaction (at the time of consortium participation)	Joint boycotts of operators as a means of eliminating competitors
Data sharing that directly benefits the counterparty to a transaction (excluding trade secrets, etc.)	Joint boycotts of operators as a means of obstructing entry by new operators
Set compensation suppliers that reflect increased costs	Requests to purchase goods that are not necessary for the counterparty to a transaction
Joint implementation of sales promotion activities related to products and services that contribute to the reduction of greenhouse gas emissions	Requests for financial contribution under the guise of greenhouse gas reduction, etc.
Joint facility use for commodity services that contribute to greenhouse gas reduction	Requests for services such as waste collection that are not included in the contents of an order
Joint collection and use of (anonymized and abstracted) data necessary for efforts to reduce greenhouse gas emissions	Unilateral attribution (without proper compensation) of data collected from the counterparty to a transaction to oneself
/	Unilateral determination of compensation for orders based on specifications that reduce greenhouse gas emissions compared to conventional products
	Cancellation of orders after ordering the installation of machinery and equipment to reduce greenhouse gas emissions

### (3) Business Combinations

The Draft Green Guidelines also identify cases in which antitrust concerns arise in business combinations and cases in which they do not. In cases that do not pose antitrust concerns, it is explained that it is difficult for

there to be a competition-restricting effect due to the existence of other dominant competitors, etc. Therefore, even in green-related business combinations, whether clearance can be obtained promptly may, as usual, depend largely on the market environment.

However, it is noteworthy that the Draft Green Guidelines explain that whether business combinations pose antitrust concerns will be examined taking into account innovations in new technologies that contribute to the reduction of greenhouse gas emissions.

In other words, if, after a business combination, the efficiency of the group of companies concerned is expected to increase due to economies of scale, integration of production facilities, specialization of plants, reduction of transportation costs, and improvement of the efficiency of R&D systems, etc., and the group of companies concerned is expected to adopt competitive behavior, the impact on competition will also be taken into account. In other words, the impact on competition is to be judged by taking into account the impact on each company's business activities. In other words, if a business combination for the realization of a green society is expected to have a competition-promoting effect by causing innovation in new technologies, etc. that contribute to the reduction of greenhouse gases, or by creating a market for new products that contribute to the reduction of greenhouse gases, the "efficiency" aspect of the aforementioned judgment factors is also evaluated (pp. 51–64).

## 2. Future Outlook

It is anticipated that the era requiring rule-based management strategies concerning the environment and other issues will continue for some time to come.<sup>8</sup> Therefore, it is expected that businesses will be required to develop business management based on both ESG and the promotion of competition, referring as appropriate to the finalized version of the Draft Green Guidelines that will be released after the public comment period. In terms of specific trends, we are first awaiting the release of the finalized version of the Draft Green Guidelines. After that, it will be necessary to check whether the JFTC's consultation casebook to be released around June (as in past years) contains any cases that would be helpful to your company's products and services examined based on the finalized Green Guidelines, and check the status of activities by the JFTC to disseminate the Green Guidelines both in Japan and overseas. In the mid to long term, the JFTC will likely keep a close eye on revisions of the Green Guidelines and the progress of cooperation between the JFTC and overseas competition authorities in this area. Of course, the development of a competitive environment for ESG-related measures will involve various investment-related rules, as well as the Act against Unjustifiable Premiums and Misleading Representations in the case of environmentally-friendly labeling, etc. In that sense, the Draft Green Guidelines are a good starting point for legal consideration under the Japanese laws.

On the other hand, due to the nature of the "guidelines," they do not provide detailed explanations of the points at which the need for coordination and restriction outweighs the accompanying reduction or easing of competition in all specific cases. Therefore, the delicate balance between the pursuit of partial optimization for the environment and the promotion of competition, while ensuring that the pursuit of partial optimization for the environment and the promotion of competition do not significantly undermine each other or impair overall optimization, will continue to be a challenge for any company.

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<sup>8</sup> [Thought Leadership, "How Companies Should Face the New Wave of Trade Rules: Human Rights, the Environment, and Economic Security" \(January 12, 2023\).](#)

In addition, ESG-related issues, in particular, are often difficult to resolve in Japan alone, and the connection with the international plane will continue to be an issue; for example, whether cooperation and business restrictions complying with stricter environmental regulations in other countries can be justified under the Japanese Antimonopoly Act as benefiting Japan (in the medium to long term). Another vexing issue is how environmental benefits associated with non-green-related measures will be evaluated under the Antimonopoly Act, such as how environmental issues such as rising energy consumption associated with DX promotion will be incorporated and evaluated under the Antimonopoly Act in relation to restrictions on DX-related cooperation and transactions.<sup>9</sup> It is expected that the thinking of each competition authority on these areas will be clarified in the future.

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<sup>9</sup> See [European Commission, “Green Cloud and Green Data Centers”](#).