



IBA ANTITRUST SECTION COMMENTS ON THE JAPAN FAIR TRADE COMMISSION'S "DRAFT GUIDELINES CONCERNING THE ACTIVITIES OF ENTERPRISES, ETC. TOWARD THE REALIZATION OF A GREEN SOCIETY UNDER THE ANTIMONOPOLY ACT"

1. Introduction

- 1.1 The International Bar Association ("IBA") is the world's leading international organization of legal practitioners, bar associations and law societies.
- 1.2 As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at <http://ibanet.org>.
- 1.3 These comments have been prepared by the Sustainability Working Group of the IBA's Antitrust Section and draw on that combined experience. The Working Group has made submissions to various agencies addressing similar issues related to the interface between competition laws and environmental sustainability.¹

2. Scope of response

- 2.1 The Working Group commends the Japan Fair Trade Commission ("JFTC") for developing guidelines related to competition law policy to support the realization of a "Green Society". These guidelines have the potential to help unlock the benefits of sustainability collaboration for society and consumers.
- 2.2 The Working Group is grateful for the opportunity to participate in the consultation. This submission focuses on four areas which have proven to be important for competitors when they embark on sustainability projects together, and in respect of which increased legal certainty is important:
 - Guidance on joint activities which do not raise competition issues
 - Mandatory standards
 - Joint purchasing

¹ Further information about the Sustainability Working Group is available at <https://www.ibanet.org/antitrust-working-groups-and-submissions>

- Joint boycotts

2.3 The Working Group would also like to underline that companies' sustainability transformations continue to evolve. Therefore, the Working Group is keen to encourage the JFTC to keep an 'open door' to having companies approach them regarding collaborations that the JFTC may not have considered in these guidelines.

3. Joint activities which do not raise competition issues

No material impact on costs overall

- 3.1 The example on page 14, line 29 explains that although sustainability cooperation might increase the cost of an input to a certain extent, there will be no restriction of competition provided the "ratio of the cost" of the input to the cost of provision of the downstream service is "extremely small".
- 3.2 The Working Group considers this to be a very useful approach – especially since it is common for sustainability arrangements to focus on greener inputs/intermediate products. The guidance could be even clearer by quantifying what kind of "ratio" would be regarded as de minimis – perhaps in percentage terms.
- 3.3 Ideally, this point ('no significant impact on costs') would also be reflected on page 8, line 8 where the guidelines list factors which imply there is no impact on competition.

Voluntary standards falling outside competition law

- 3.5 Standards are covered in a number of places in the guidelines (e.g., on page 10 as examples of joint acts which do not raise issues; on page 12 where they are described as acts that "require attention in order not to pose a problem" under competition law; and on page 22 as regards technological standardization).
- 3.6 The Working Group respectfully submits that section 1 on page 8 would be an appropriate place to explain that voluntary standards for sustainability (whether purchasing or manufacturing) are highly unlikely to raise competition issues provided those standards are genuinely voluntary² and have been developed in a manner with appropriate safeguards to prevent anti-competitive conduct.
- 3.7 The Working Group notes that page 13, line 13 lists the sorts of problems that standards could create, e.g., discrimination; restricting the use of other standards etc.. However, it would be useful to consider a new section on page 8 that would more clearly describe (in positive terms) when a voluntary standard would likely be compliant with competition law (e.g., non-discriminatory; capable of being exceeded; developed transparently following open consultation, etc.). Indeed, a number of these factors are already listed in relation to technological standardization (on page 22, line 26) and it would be logical and helpful to combine these sections on standards (or at least cross-reference between them).

Trade association activities which do not raise competition issues

- 3.8 Page 10, line 9 contains a useful example covering a number of activities which companies commonly pursue via a trade association. It is helpful to explain that a non-binding goal set by trade association will be permissible. The example could go further by explaining that the individual companies will each individually publish their pledges to achieve these targets on their websites.

² Several of the examples of joint arrangements which would not raise competition issues on page 10 appear to attach significance to the fact that the joint acts are of a voluntary nature. For example, the guidelines refer to a non-binding goal in line 11; a voluntary commitment in line 21; and a recommendation in line 31.

- 3.9 The example on page 10, line 36 is also helpful because it shows that the sharing of best practices (which do not amount to competitively sensitive information) is permitted. The guidelines could contrast this with the sharing of confidential R&D status, which is problematic in the example on page 12, line 11.
- 3.10 However, the Working Group respectfully submits that the example on page 10, line 2 could be made clearer. The example risks obscuring the fact that it should not be problematic for a trade association to set a target (higher than that required by statute) provided that the manufacturers decide independently whether to achieve or exceed the target, as well as how to achieve it. Many trade associations will want to develop joint methodologies and Key Performance Indicators for members so that they can communicate effectively to stakeholders (including consumers and financial markets). The companies may want to publish this information themselves and via their trade association for maximum coverage. Consistent with this point, the (permitted) example at line 20 appears to involve a trade association sharing information about its members' sustainability activities even though there is no underlying statutory obligation.

4. Mandatory standards

- 4.1 The example of page 14, line 3 could be a very useful illustration of companies phasing out environmentally harmful products. That is especially the case because the example allows the balancing of quality improvements against cost increases.
- 4.2 However, there are many factors at play in the example and it is therefore unclear which aspects of the joint arrangement are in themselves problematic. For example, if the standard were voluntary (and had been established in a compliant way), then there may be no need to investigate quality improvements or the potential exclusion of other substitutes. That is because the companies would remain free to manufacture outside of the standard and consumers would remain free to purchase those other products, possibly made by the same companies. Even if the cost of the replacement raw material were higher, the next example explains that cost increases are not necessarily problematic in the first place.
- 4.3 The scenario in line 29 involves a joint arrangement which would lead to lower emissions with no mention of product improvement. That is useful because many joint sustainability projects are focused on eliminating negative externalities but will not actually involve a physically different end product. However, this example is explicitly stated to involve a voluntary standard and therefore the assessment of costs etc. does not seem necessary in the first place (assuming the standard has been developed in a compliant manner).
- 4.4 Overall, the Working Group respectfully submits that the first two examples on page 14 could perhaps be better framed as an example of a mandatory standard where the companies agree to phase out non-sustainable products. That would not require any companies that did not wish to participate in the standard to comply with it. However, for those companies wanting to be part of the binding arrangement, the mandatory standard would enable the companies to avoid free-riding on the investments required to promote the sustainable product and to educate consumers (the so-called "first mover disadvantages").
- 4.5 The guidelines could then explain that, in this scenario, the assessment would involve whether there was an appreciable impact on downstream costs/price. This could in other words provide an opportunity for the JFTC to develop a 'soft safe harbour' similar to that proposed in paragraph 572 of the draft EU Horizontal Guidelines which sets out a number of safety features so as to ensure no exclusion or anti-competitive price increases.³

³ https://competition-policy.ec.europa.eu/document/download/c3388b84-153b-4848-a920-31ed69e74c0a_en?filename=draft_revised_horizontal_guidelines_2022_all_languages.zip See also by analogy the safe

- 4.6 The guidelines could also describe the analysis to be undertaken if there were an appreciable impact on cost/price. The guidelines could mention the expected benefits of the joint act (with both product developments and avoided emissions being eligible) and how it would be determined whether the restrictive effects are offset. This would also be a helpful place to set out what kinds of benefits, including environmental, would be relevant for such an assessment and how parties might quantify/and provide evidence to support them (noting that such an assessment should not imply a strict ‘mathematical’ exercise). The Working Group respectfully points out that this a key concern for businesses. Indeed, the JFTC might develop tools which would allow companies to quantify tangible sustainability gains.⁴

5. Joint purchasing

- 5.1 The joint purchasing section on page 23 helpfully acknowledges that, in the environmental context, joint purchasing can be employed to “stabilise” developing markets. However, the methodology set out on page 24, line 2 is largely conventional and so it is not immediately clear how this particular objective would be taken into consideration by the JFTC.
- 5.2 The example, given in line 21, is a positive attempt to provide guidance to major competitors that are trying to develop a supply chain when there may be insufficient supply/demand. The example refers to competitors with an extremely large market coverage as regards the downstream service.
- 5.3 The guidelines focus on commonality of cost (referring to the proportion of cost for the provision of the downstream service). The Working Group respectfully points out that this may not be of much assistance to companies seeking to develop a market for environmental reasons. In those circumstances, the parties might seek to buy together precisely because costs are high, and they want to share those costs. Indeed, the starting point might be a high commonality of cost which might subsequently decline as the market develops (e.g., due to increased supply and economies of scale).
- 5.4 As such the Working Group respectfully submits that some further room for collaboration is warranted for competitors seeking to develop a market – e.g., it would be helpful for the guidelines to state that where the joint buying is designed to develop a market that would not otherwise be viable then the JFTC will tolerate a higher commonality of cost than would otherwise be the case (for at least an appropriate developmental period).

6. Joint boycotts

- 6.1 Section 2 on page 41 provides guidance in relation to boycotts – described as conduct which makes it difficult for enterprises to enter the market, or which excludes existing enterprises from the market.
- 6.2 The Working Group considers that it would be useful to have guidance on collective boycotts in the environmental context, because companies may be concerned that arrangements which are designed to eliminate unsustainable inputs from the supply chain could be characterised as anti-competitive collective boycotts.
- 6.3 The examples on page 42 do not cover this kind of situation. It would be useful to have an example whereby companies agree to no longer purchase products from certain suppliers on the basis that they are unsustainable. The guidelines could explain that in view of its content and objectives, such an agreement would not in principle be regarded as an unlawful cartel – i.e., it would not be regarded as one which is

harbour for ‘recognition schemes’ in the ACM Guidelines regarding arrangements between competitors (acm.nl) (para 42)

⁴ See for example paragraph 56 of the draft ACM Guidance which acknowledges that the weighing can be done satisfactorily where “based on a rough estimate, the benefits are larger than the harm to competition ”

<https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law>

designed to exclude suppliers that are producing unsustainable products from the market. Instead, the guidelines could explain that the exclusionary effects of such a joint purchasing arrangement would need to be assessed in the normal way, taking into account the nature of the products, the market position of the purchasers and the market position of the supplier(s). It would be relevant to consider whether the suppliers that are affected by the agreement would have customers other than those that are part of the joint purchasing agreement, and/or if they could easily start producing sustainable products too.

- 6.4 On a related point, the guidelines could also cover when companies may agree to restrict illicit competition. See for example the recent case in the Netherlands, where the competition authority allowed garden centres to curtail the use of illegal pesticides (by agreeing not to buy from growers who are using illegal pesticides)⁵. In the circumstances, this was not seen as an illegal collective boycott; it was considered to be a legitimate attempt to avoid illicit competition from illegally grown products. The Dutch competition authority underlined that these types of arrangements need to be open and transparent, and an adequate due process needs to be in place and followed before any supplier is excluded.
- 6.5 The Working Group respectfully suggests that the example at line 5 on page 40 could be modified to explore legitimate agreements to curtail illicit competition similar to the Netherlands case. In the existing example, the companies are seeking to prevent illicit competition from a company that seeks to use a label, even though it is ineligible.

- 6.6 The Working Group reiterates that it applauds the JFTC for giving organisations such as the IBA the opportunity to comment on the draft guidelines. We hope that the comments in this short submission are helpful and we would be happy to discuss our remarks with the JFTC if this were considered useful.

⁵ <https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides>