

## **The Electric Power Industry and Competition Law in Japan**

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## I Introduction

This essay describes the basic framework and perspectives on competition law for the electric power industry in Japan.

The application of competition law to the electric power industry did not become a serious issue in Japan until 1999. In that year, an amendment of the Electricity Business Act (EBA)<sup>1</sup> was passed to liberalize partially the retail supply. The amendment took effect in March 2000. Liberalized customers were originally those who obtained power supply of at least up to 2,000 kW (so-called “special high-voltage customers”). Later, the threshold was lowered gradually from 2,000 kW to 500 kW in April 2004 and to 50 kW (so-called “high-voltage customers”) in April 2005.<sup>2</sup> Liberalized customers comprise 63% of the total demand for electricity in Japan.<sup>3</sup>

Liberalized customers, or customers with “Specified-Scale Demand,”<sup>4</sup> can choose among the electric power company that exist in their service area (hereinafter “native incumbent”),<sup>5</sup>

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<sup>1</sup> A quasi-official English translation of the EBA as of 2005 is available at: <<http://www.japaneselawtranslation.go.jp/law/detail/?id=51&vm=04&re=01>>. All the URLs were re-accessed on January 7, 2012.

<sup>2</sup> The METI Rule of Implementing the EBA, Art. 2-2 (1). The EBA Art. 2 (1) (vii), which defines “Specified-Scale Electricity Business,” that is, liberalized zone for retail competition, allows the METI to make an METI rule to proscribe detailed definition.

<sup>3</sup> METI (Agency for Natural Resources and Energy, Electricity and Gas Industry Department, Electricity Market Division), “On Liberalization of Electricity Retail Market” (November 2011)(only in Japanese), p. 6, available at: <<http://www.enecho.meti.go.jp/denkihp/genjo/seido.pdf>>. Liberalized customers do not necessarily choose new entrants. The market shares are much lower than 63%, as shown later.

<sup>4</sup> The EBA Art. 2 (1) (vii).

<sup>5</sup> An electric power company, or a native incumbent, is statutorily called as “General Electricity Utility” (The EBA Art. 2 (1) (ii)).

electric power companies in other service areas, and “Specified-Scale Electricity Utilit(ies).”<sup>6</sup> Specified-Scale Electricity Utility is commonly known as PPS, which stands for power producer and supplier.

However, the market shares of PPSs in 2010 were 4.17% for the market of special high-voltage customers, 2.95% for the market of high-voltage customers, and 3.47% for the combined market.<sup>7</sup>

The Japanese electric power industry has been divided into ten regions dominated by the same number of native incumbents.<sup>8</sup> It may be logically valid to say that the concept of “service area” is meaningless now that utilities from other areas can enter the retail market. However, impediments to effective competition still exist, and they include the following: (i) a predominant installed base on the side of customers in each service area made by the conventional 100% retail market share of each native incumbent; (ii) the likelihood of coordinated behavior among native incumbents; (iii) a transmission monopoly in each service area by each native incumbent; and (iv) the predominant abundance of power generation of each native incumbent to follow loading patterns of customers.<sup>9</sup> These impediments are the reason that it is still meaningful to adhere to the concept of “service area” even when addressing liberalized retail competition in Japan.

## II Framework

Two national agencies have been involved in the competition law for the electric power industry: the Ministry of Economy, Trade and Industry (METI) and the Japan Fair Trade Commission (JFTC). The METI is in charge of the EBA whereas the JFTC is in charge of the Antimonopoly Act (AMA).<sup>10</sup>

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<sup>6</sup> The EBA Art. 2 (1) (viii).

<sup>7</sup> METI, *supra* note 3, p. 10. Among the ten regions, those for Tokyo Electric Power (including Tokyo) and Kansai Electric Power (including Osaka) have relatively high market shares by PPSs, which, however, are under 9% (p. 11).

<sup>8</sup> Hokkaido Electric Power, Tohoku Electric Power, Tokyo Electric Power, Chubu Electric Power, Hokuriku Electric Power, Kansai Electric Power, Chugoku Electric Power, Shikoku Electric Power, Kyushu Electric Power, and Okinawa Electric Power.

<sup>9</sup> The Electricity Guidelines, *infra* note 12, mentions all of the four factors to show the necessity of issuing the guidelines (Part 1, 1 (2)).

<sup>10</sup> “Anti-monopoly Act” or “AMA” is a popular and unauthorized shortcut for the “Act on Prohibition of Private Monopolization and Maintenance of Fair Trade.” There is no official reason to stick to the popular name,

These two agencies seemed to have been in conflict with each other. The Ministry of International Trade and Industry (MITI), the predecessor of the METI before 2001, had been perceived to be eager to restrict competition. However, at least in the context of electricity liberalization, the two agencies have been cooperating since 1999, the METI having changed its “clothes” to become a competition promotion agency, at least in the era of liberalizing the electricity industry.

The METI, however, has monopolized the position of framing hard designs in the legal system, designing the extent of liberalization as well as the regulatory structure of controlling transmission, in addition to organizing the structure of controlling wholesale supply to retailers.

Open now for the JFTC is soft design surrounding the surface of hard design, that is, regulation of conduct under the framework of liberalized regulation. Soft design is targeted mainly at the exclusionary conduct of native incumbents.

Soft design, however, has not been monopolized by the JFTC but has been shared with the METI. The EBA, METI’s statute, has some vehicles for regulating exclusionary conduct if they are related to its transmission regulation.<sup>11</sup> The remaining field has been allocated to the JFTC, which is in charge of the AMA, although the AMA could be statutorily applied to conduct covered by the EBA. The Electricity Guidelines follow this allocation of power.<sup>12</sup>

The fact of allocation may be evidence of the weak position of the JFTC, but one could construe it as evidence of their cooperation. The METI and the JFTC have always been at the same round table in revising the Electricity Guidelines in order to adapt to the changes in hard design.<sup>13</sup> In contrast, with respect to telecommunication regulation, where one could observe much less cooperation between the JFTC and the Ministry of Internal Affairs and

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but it has in fact prevailed. A quasi-official English translation of the Act as of 2009 is available at: <[http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/amended\\_ama09.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/amended_ama09.pdf)>

<sup>11</sup> The EBA Art. 24-6 (1) covers (i) misappropriation of a retail rival’s sensitive information, acquired as the transmission monopolist, for its own retail business, and (ii) discriminatory treatment in providing transmission to retail rivals. Art. 24-6 (2) authorizes the METI to issue cease and desist orders.

<sup>12</sup> JFTC & METI, “Guidelines for Proper Electric Power Trade” (originally finalized on December 20, 1999 and lastly revised on September 5, 2011)(hereinafter “The Electricity Guidelines”). Only the 2002 version is available in English on the web: <[http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/electric.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/electric.pdf)>

<sup>13</sup> The Director of the Coordination Division of the JFTC has usually joined meetings of the Proper Trade Working Group of the Advisory Committee for Natural Resources and Energy, attached to the METI.

Communications (MIC), the “co-authored” guidelines are clearly divided into two parts: the JFTC part and the MIC part.<sup>14</sup> The guidelines often cover the same topics twice: by the MIC from its perspective of the Telecommunications Business Act and by the JFTC from its perspective of the AMA.

One of the remarkable features of the Electricity Guidelines document is that it shows not only potential illegal conduct but also “desired conduct” for the promotion of competition. Disobedience to “desired conduct” itself could not be a violation of the EBA or the AMA, but those descriptions are a form of administrative guidance in the promotion of effective competition.

### **III Perspectives**

#### **1 Overview**

In electricity competition law, retail markets have almost always been the main targets of investigation and compliance efforts. In most cases, exclusion of PPSs by native incumbents has been discussed in the context of competition law for the electricity industry.<sup>15</sup>

Potential anticompetitive conduct is usually related to three of the four impediments for competition described in Part I of this essay. These three impediments include transmission monopoly, predominant power generation, and predominant installed base.<sup>16</sup>

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<sup>14</sup> JFTC & MIC, “Guidelines for Promotion of Competition in the Telecommunications Business Field” (originally finalized on November 30, 2001 and lastly revised on August 29, 2008). Only the 2002 version is available in English on the web: <[http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/telecom.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/telecom.pdf)>

<sup>15</sup> An exception is competition between a native incumbent and gas companies to sell a heating source to households. Those customers are not usually liberalized in the context of the retail competition of electricity. Heating source competition is discussed at the Electricity Guidelines, *supra* note 12, Part 2, IV 2 (2). The JFTC gave a caution to Kansai Electric Power for its allegedly discriminatory treatment of apartment buildings in providing electricity depending upon whether an all-electricity heating system was adopted or not. JFTC press release on April 21, 2005, available at: <<http://www.jftc.go.jp/pressrelease/05.april/05042102.html>> (only in Japanese). Even households that purchase gas for heating need electricity for lighting.

<sup>16</sup> Coordinated behavior among native incumbents ((ii)) could be punished if the JFTC get evidence, if any, of horizontal agreements—for example, promising no entry to other service areas.

## 2 Transmission Monopoly

Because of full regional monopolies, the EBA requires each native electric company to submit its Wheeling Service Provisions, which are the quasi-official translation for transmission tariff, to the METI. Such tariffs are subject to revision orders by the METI.<sup>17</sup> This regulation aims to keep transmission prices and conditions reasonable and non-discriminatory to maintain effective retail competition. Native incumbents are required to keep transmission accounts independent to prevent prices from being affected by costs that are not related to the reasonable management of transmission.<sup>18</sup>

The EBA also prohibits native incumbents from discriminating against PPSs in transmission.<sup>19</sup> Because transmission is regulated by the EBA, the Electricity Guidelines allow little room for the AMA, that is, the JFTC.<sup>20</sup>

## 3 Predominant Power Generation

The predominance of native incumbents in power generation could be a bottleneck for the PPSs entering retail markets. Most PPSs are still too small to follow satisfactorily the loading patterns of their own customers, making it essential for not a few PPSs to purchase full-time backup support from native incumbents or ask their own customers to purchase partially from native incumbents.<sup>21</sup> Because such support by the native electric company is a bottleneck, the refusal to supply and other discriminatory conduct concerning such support could violate the AMA. The Electricity Guidelines emphasize such issues.<sup>22</sup> Subsequently, the JFTC unveiled a terminal investigation of Chubu Electric Power for its allegedly exclusionary conduct concerning partial supply.<sup>23</sup>

By the same token, the Electricity Guidelines mention the possible disturbance of customers'

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<sup>17</sup> The EBA Art. 24-3.

<sup>18</sup> The EBA Art. 24-5.

<sup>19</sup> Supra note 11.

<sup>20</sup> The Electricity Guidelines, supra note 12, Part 2, II.

<sup>21</sup> The difference between full-time backup support and partial supply depends on whether the native incumbent makes contract with the PPS or the customer.

<sup>22</sup> The Electricity Guidelines, supra note 12, Part 2, I 2 (1)(partial supply), III 2 (2)(full-time backup support).

<sup>23</sup> JFTC press release on November 16, 2001, available at: <<http://www.jftc.go.jp/kyoso/press/01111601.pdf>> (only in Japanese).

own private power plants.<sup>24</sup> Native incumbents could suppress those private facilities by refusing to supply the rest of the needed electricity at the customers' offices or factories. Those private plants could become wholesale sources for PPSs.

In 2005, the METI promoted the establishment of the Japan Electric Power Exchange (JEPX) to facilitate the PPSs' collection of power. To raise the ability and capacity of the JEPX, the Electricity Guidelines urge native incumbents to wholesale actively at JEPX when they have excessive supply. However, this conduct is just "desired," and disobedience of it could not be a violation of the AMA.<sup>25</sup>

In August 2011, the Renewable Energy Source Electricity Act was enacted. This Act is scheduled to take effect in July 2012. Under the framework of the Act, native incumbents will be obliged to purchase renewable energy source electricity at fixed prices ("Feed-in Tariff"). The PPSs could also purchase such electricity. These trades could be a target for discussions about competition law in the near future.<sup>26</sup>

The disaster in March 2011 has ignited efforts to enter the field of power generation, whether renewable or not.

#### **4 Predominant Installed Base**

The native incumbents' predominant installed base or predominant current market share could be another bottleneck for PPSs. If a native incumbent enters into long-time contracts with a number of customers, thus foreclosing PPSs, such conduct could be a violation of the AMA. The JFTC issued a caution to Hokkaido Electric Power, blaming it for such long-time contracts. According to the JFTC, the native incumbent obliged long-time customers to pay too large an amount of monetary penalty when terminating a contract and switching to a PPS.<sup>27</sup> Native incumbents are allowed to collect an already discounted amount, but an

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<sup>24</sup> The Electricity Guidelines, supra note 12, Part 2, IV 2 (1).

<sup>25</sup> The Electricity Guidelines, supra note 12, Part 2, III 2 (3).

<sup>26</sup> Apart from exclusionary practices, abuse of a superior bargaining position (ASBP) by a native incumbent to an independent power generator would constitute a violation causing administrative surcharge (the AMA Art. 2 (9) (v) and Art. 20-6).

<sup>27</sup> JFTC press release on June 28, 2002 (no longer found on the web).

excessive penalty would not justify the exclusion of PPSs.<sup>28</sup>

A predominance of native incumbents could enable them to commit price discrimination when they exclude PPSs by offering a lower price only to PPSs' target customers. The Electricity Guidelines suggest that such price discrimination could violate the AMA if the lower price is below cost.<sup>29</sup>

## IV AMA

Exclusionary conducts are proscribed twice in the AMA: Both "Private Monopolization (PM)"<sup>30</sup> and "Unfair Trade Practices (UTP)"<sup>31</sup> could be tools for making an exclusionary conduct illegal.

Private Monopolization has two variations: Private Monopolization caused by control of other firms and Private Monopolization caused by excluding other firms. The latter (hereinafter "Exclusionary PM") is more relevant to the context of electricity competition law.

Unfair Trade Practices has many variations. Some of its provisions are related to exclusionary conducts (hereinafter "Exclusionary UTP"). The difference between legal requirements showing violation is whether market power, in the context of the ability to raise prices in a relevant market, is needed (Exclusionary PM) or not (Exclusionary UTP). In other words, it is enough for an Exclusionary UTP to be equipped with the fact of excluding a PPS even when other competitors still exist.

The difference between enforcement measures is an administrative surcharge (a kind of administrative fine). An exclusionary conduct evaluated as an Exclusionary PM would usually result in an administrative surcharge of six percent, which is deducted from the amount of sales in the relevant market.<sup>32</sup>

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<sup>28</sup> The Electricity Guidelines, supra note 12, Part 2, I 2 (1).

<sup>29</sup> The Electricity Guidelines, supra note 12, Part 2, I 2 (1).

<sup>30</sup> The AMA Art. 2 (5).

<sup>31</sup> The AMA Art. 2 (9).

<sup>32</sup> The AMA Art. 7-2 (4).

However, since the introduction of administrative surcharge to Exclusionary PM in January 2010, the JFTC has not been reported to have made even a “dawn raid” concerning an Exclusionary PM, probably because of its serious impact of large amounts and difficulty of calculation. This episode provides a good lesson for balancing illegality and enforcement.

## **V Conclusion**

Competition law is usually a sufficient tool for promoting competition. However, it sometimes fails in some solidly monopolized markets because it cannot oblige monopolistic incumbents to take affirmative action.

The atmosphere of the electricity industry in Japan may have changed in 2011. It is difficult to foresee the future or even the current status of the Japanese electric power industry and its competitive circumstances. This essay is aimed only at analyzing the situation in Japan up to the disaster of March 2011.