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COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from Japan

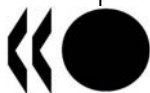
-- Session I --

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COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

--Japan--

1. Introduction

1. Today, the importance of competition policies has been widely acknowledged throughout the world and the pursuit of fair and free competition is regarded to contribute to the promotion of trade and investment, the maintenance of sustainable economic growth by enhancing economic efficiency and productivity and the further achievement of national and consumer welfare. Viewed from a historical perspective, however, a culture of competition was not widespread among the general public in Japan from the beginning, even though the Japanese economy had long been based on a market economy. This is suggested by the fact that government policies that inclined to draw a picture of a desirable industrial structure and encourage harmonious cooperation among entrepreneurs received general support even after the Antimonopoly Act (“AMA”) was enacted as a part of post-World War II economic democratisation policy.

2. This contribution paper introduces how the relationship between industrial policy and competition policy has changed through the process of increasing understanding of competition policy up to today.

2. Experience of Japanese competition law and policy

2.1. *Enactment of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act, “AMA”) (1947)*

3. In 1947, the AMA, the Japanese competition law, was enacted and the Japan Fair Trade Commission (JFTC) was established as an independent commission.

4. After World War II, as part of the democratisation of the Japanese economy, the AMA was introduced for the purpose of establishing a competitive economic system based on a market economy. It aimed to maintain a permanently competitive market through structural measures, such as the dissolution of giant conglomerates known as the Saibatsu, the elimination of the concentration of economic power and the removal of private controlling groups. The competition law and policy in Japan was introduced drastically and at the same time. While some assess that the resulting competitive market structure of the Japanese economy through this effort made a great contribution to the development of the Japanese economy overall, the concept of competition policy and economic development through competition did not take root rapidly.

2.2. *“Dark Ages of the Antimonopoly Act” (1950s)*

5. The immediate challenge for Japan after the departure of the occupying forces was to achieve economic independence. Government policy, therefore, focused on fostering and strengthening domestic industries to earn foreign exchange through exports. This led to the enactment of various laws exempting a wide range of industries from the AMA, mainly with the objective of easing cartel regulations. In addition, administrative guidance, which might harm competition and was incompatible with competition policy, was implemented in many industries during periods of recession with a view to preventing excessive competition or stabilising the market. Thus, from the viewpoint of both the legal systems and the legal institutions, competition policy was restricted and forced to step back.

2.3. *Approach to large-scale mergers and acquisitions (1960s)*

6. The deregulation of trade, foreign exchange and capital was strongly promoted in the Japanese economy during this period. At this time the Japanese economy was considered to be more closely connected with global markets through these deregulations and competition among entrepreneurs in the Japanese economy was taken as having an international scale. However, in order to strengthen the management base of enterprises, industrial policies that intensively facilitated the concentration of capital gathered more support based on the so-called “theory of excessive competition”; that is, the idea that the characteristics of Japanese entrepreneurs, which are comparatively too small in size, was thought to lead to excessive competition.

7. For example, a bill of the Law for Temporary Measures to Promote Specified Industries, which aimed to promote industrial reorganisation, was submitted to the Diet in March 1963. In this law, the government, in cooperation with the private sector, was to designate particular industries for reorganisation such as automobiles, special steels and petrochemicals, which needed to strengthen their international competitiveness, and set up policies regarding capital investments, mergers and the rationalisation of cartels of enterprises. Although the bill did not necessarily garner any positive support from political and industrial circles and was withdrawn in the Diet, an increase in large-scale mergers of enterprises followed in key industrial fields.

8. One typical large-scale merger during this period was a merger between two major steel companies, Yawata and Fuji (Consent Decision on 30 October, 1969). This merger would have greatly influenced the national economy because it was to be the largest post-war merger in Japan and steel products were significant basic materials for a variety of industries. Japan’s industrial community supported this merger as necessary for promoting industrial reorganisation under the open economy. However, it can be said that the merger was going to have a serious influence on competition because it would merge the 1st and the 2nd largest entrepreneurs in the key steel industry and the new entrepreneur’s market share would exceed 30 percent in more than 20 products. The JFTC considered that the merger would raise a lot of problems in terms of competition policy and its decision was viewed with great interest. Although the JFTC accepted the merger proposal in the end, with delivering a consent order demanding various remedies, discussions on the role of the AMA became more active, and it was made clear that approval for larger-scale mergers would not be easy to obtain. The merger of Yawata and Fuji marked a turning point, and the existence of the AMA and the JFTC were strongly recognised in Japan’s industrial community from then on.

2.4. *Greater awareness of competition policy through elimination measures against anti-competitive activities that affect the whole national economy (1970s)*

9. During this period, the international monetary crisis and the oil crisis shocked the Japanese economy. Unusual inflation psychology followed the oil crisis in 1973, leading to skyrocketing prices. Many suppliers such as manufacturers rushed to form illegal cartels in order to raise prices in advance before their costs rose. The JFTC uncovered the illegal cartels one by one and rendered cease-and-desist orders. On 15 February 1974, the JFTC filed with the Public Prosecutor General criminal accusations against 11 oil wholesalers and their executives, who were involved in the price cartel case of oil products, based on the provision of Article 73, Paragraph 1 of the AMA, which was the first case of criminal accusation in a cartel after the AMA was enacted.

10. In addition, because administrative guidance was involved in this cartel case¹, the relationship between administrative guidance and cartels became an issue for debate. Concern about the relationship

¹ In this case, the administrative guidance from the Ministry of International Trade and Industry (MITI) sought to “control prices of oil products and stabilise livelihoods by requiring oil wholesalers to consult with the ministry in

between administrative guidance and cartels had been discussed for many years, and the JFTC had consistently taken the position that cartels, even those concluded under administrative guidance, were violations of the AMA. The prosecution in this case and a guilty verdict at the Supreme Court marked a turning point of changing past practices to restrain competition by administrative guidance².

11. During the structural depression after the oil crises, the so-called Structurally Depressed Industry laws, that is, the Law on Temporary Measures for Stabilisation of Specified Depressed Industries (1978), the Law on Temporary Measures for the Structural Improvement of Specified Industries (1983) and the Law on Temporary Measures to Facilitate Industrial Structural Adjustment (1987) were drafted. In the process of the legislation of these acts, there was, at first, a strong tendency of requiring government intervention from the viewpoint of industrial policy, such as considering or implementing instructed cartels by the government and exemptions to the AMA. However, because of the JFTC's actions and the influence of so-called "Positive Adjustment Policy" approved by the OECD, these laws ended up substantially taking into consideration competition policy, which is shown by the fact that the JFTC's agreement was required even if cartels instructed by the relevant Ministers were allowed. In addition, in the later legislation of the above laws, in order to implement business alliances within the framework of the AMA, consideration of competition policy resulted in the development of a coordination scheme between the relevant minister and the JFTC regarding the relevant minister's approval of the alliances; furthermore, cartels instructed by the relevant ministers were not allowed in the 1987 law.

2.5. Expansion of the scope of application of the competition law through deregulation and reduction in exemptions (1980-90s)

12. In the latter half of the 1980s, deregulation was promoted to open the Japanese market and boost imports in order to mitigate trade friction caused by Japan's enormous trade surplus. Further in the 1990s, the yen's appreciation led to calls for structural reform of the Japanese economy, as it revealed the price differential within and outside the country as well as concern for the hollowing-out of industry and employment uncertainty as it encouraged enterprises to shift overseas. In order to construct an economic society based on the principle of self-responsibility and market principles, the importance of strengthening competition policy as well as deregulating Japan's economic and social systems was emphasised. Thus, the active development of competition policy proceeded in this period.

13. In 1995, the Cabinet adopted "The Deregulation Action Plan", which included the active development of regulatory reform and competition policy. There have been several Cabinet Decisions concerning regulatory reform since then.

advance for approval of any oil price hike, not leaving price changes to their industry's sole discretion, or by indicating price changes in the ministry's basic policy to be reflected in their price hike plan, always on condition that any price hike should stay within the maximum price established in 1971 per type of oil in order to cope with the emergency caused by the extraordinary oil price hike resulting from successive substantial increases in oil price put into effect by OPEC and OAPEC since the autumn of 1970." The meaning of Administrative Guidance is currently stipulated in Article 2, Paragraph 6 of the Administrative Procedure Act (Act No.88 of 1993): "recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions".

² On the occasion of the Tokyo High Court's ruling in the cartel case of Petroleum Products, the JFTC published the "Interpretations Concerning the Relation between the Antimonopoly Act and Administrative Guidance" (the former Administrative Guidance Guidelines) in March 1981, which organised its view, centred on administrative guidance concerning prices and quantities. The JFTC sent the guidelines to the relevant ministries and agencies and requested them to consider them in their administrative management.

14. In order to clarify the guidelines under the AMA about ensuring the transparency of distribution and business practices, which was discussed in the Structural Impediments Initiative (SII) talks between Japan and the United States starting in 1989, the JFTC published “Guidelines Concerning Distribution Systems and Business Practices” (1991). In addition, the JFTC formulated and published “Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids” (1994) and “Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act” (1995), which were intended to contribute to preventing firms and trade associations from violating the AMA and to help them in their pursuit of appropriate actions. Furthermore, the JFTC reviewed the former Administrative Guidance Guidelines in June 1994, and then formulated and published new “Guidelines Concerning Administrative Guidance under the Antimonopoly Act” (1994) that show the agency’s views on administrative guidance regarding the entry of firms and provide concrete examples indicating each category of administrative guidance that may pose a problem under the AMA.

15. The need for exemptions has changed significantly since the inception of the exemption system in accordance with the improvement of the economic environment as Japan gained global economic power and the financial conditions of Japanese companies strengthened. Therefore, reflecting several Cabinet Decisions since “the Revised Deregulation Action Plan” (in March 1996), the JFTC has reviewed exemptions to the AMA significantly. The number of exemptions was reduced from 89 systems under 30 laws, as of the end of FY 1995, to 21 systems under 15 laws as of the end of 2008.

2.6. *Efforts for strengthening the enforcement power of the AMA (ongoing)*

16. As is shown in the processes mentioned above, it may be no exaggeration to say that the importance of competition law and policy has become widely perceived to a considerable degree in Japan and competition law and policy has become firmly established in the Japanese economy. As a result, when considering a policy or measure applicable to any individual industry for example, the government now carefully considers how it will serve to improve competitive environments or promote competition in the relevant market. Also firmly established is the realisation that for the further development of our economy, it is indispensable for entrepreneurs in many industries not only to improve technology and productivity in the face of stiff international competition but also to compete actively in domestic markets.

17. On the other hand, in the face of Japan’s ever-changing economic realities, the JFTC is continuously reviewing the AMA and competition policy in order to make them more effective for maintaining and promoting fair and free competition in consideration of whether the legal system of the AMA is designed to function sufficiently or is comparable to that of the level of international standards.

a) Enhancement of law enforcement functions through the amendment of the AMA

In order to strengthen the measures against antimonopoly violations, a comprehensive amendment of the AMA, which was the largest since 1977, including (a) an increase of the surcharge rate, (b) introduction of a leniency program, (c) introduction of criminal investigative power and (d) revision of the hearing procedures, was approved by the Diet in April 2005 and came into effect in January 2006.

In compliance with the provisions contained in Article 13 in the Supplementary Provisions of the amended AMA of 2005, the Act’s amendment bill, including (a) the introduction of a surcharge system imposed on those entrepreneurs engaging in exclusionary type private monopolisation, unfair trade practices, etc., (b) the review of the surcharge rate imposed on entrepreneurs that have been playing a leading role in cartel, bid-riggings, etc., (c) the introduction of a joint application system for the leniency program by those entrepreneurs affiliated with each other and implicated in the same infringement and (d) the revision of the notification system regarding

business combinations, was approved at the Cabinet meeting held on March 11, 2008, and was submitted to the 169th ordinary session of the Diet on the same day³.

b) Efforts for regulatory reforms

To realise sustained economic growth led by private-sector demand, it is a pressing task to push ahead with the structural reform of our economy through regulatory reform. By means of structural reform, we are expected to build a socioeconomic system that is open to the world and permits the private sector to fully utilise its initiative and vitality acting on the principles of self-responsibility and the market mechanism.

In such circumstances, the Japanese government places the revitalisation of the economy based on regulatory reform as the top priority, and has been promoting regulatory reform since the mid-1990s. Most recently, reform has been promoted in accordance with the Three-Year Plan for the Promotion of Regulatory Reform (Cabinet Decision of June 2007, revised in March 2008).

The JFTC actively participates in formulating programs designed to promote such regulatory reform, makes necessary recommendations for improving individual government regulations and makes efforts for a clearer application of competition laws through the formulation of guidelines. As part of such efforts, since 2000 the JFTC has conducted studies, presented recommendations and formulated guidelines on some 35 regulatory reforms in total.

c) Improvement of corporate compliance

There are increasing movements toward requiring improved corporate compliance, such as through the amendment of the AMA, the creation of a system of whistleblower protection and rulemaking for internal control under the Companies Act and the Financial Instruments and Exchange Act. Because improvement of corporate compliance is important for advancing fair competition in the economy and trade, the JFTC promotes support for improvement of compliance as a key policy designed to enhance compliance under the AMA, and conducts a questionnaire survey on corporate compliance and publishes reports. In 2007, for instance, the JFTC developed a questionnaire survey for foreign-owned companies operating in Japan and summarised the data and situation of their compliance in Japan. At the same time, the JFTC developed a similar survey among domestic companies and examined how foreign-owned companies differ from domestic companies in their compliance. The JFTC also surveyed lawyers, asking how companies changed in their awareness of compliance in response to the required improvement of corporate compliance following enforcement of the amended AMA. The JFTC analysed the results obtained in all these surveys and published “Compliance by foreign-owned companies and compliance by foreign-owned and domestic companies as viewed by lawyers - with a focus on the Antimonopoly Act.” (Published in May 2008)

3. Conclusion

18. Implemented as part of the policy designed to democratise Japan’s post-war economy, the AMA has since made steady progress, struggling through war-derived devastation and turmoil, rapid economic growth, oil crises, collapse of the bubble economy, etc. At times, the process was a rocky road as the AMA was subjected to relaxed revisions on some occasions and insufficient recognition among the general public on others. Little by little the AMA has struck root in our economic society and is now widely recognised.

³ The bill was withdrawn at the end of the 170th Diet in December 2008.

19. One of the reasons why it took such a long time to gain understanding of competition law and policy is that there was a recognition that government policy that had been inclined to protect and foster domestic industries had contributed to the high growth of the Japanese economy, which is now the second-largest in the world. However, during the period of Japan's rapid economic recovery and growth following World War II, fierce competition continued in many industries among entrepreneurs with many new market entries. Therefore, the policy of growing so-called National Champions has never functioned as the core of industrial policy in Japan. We should also take note of the fact that the AMA as a comprehensive competition law has consistently existed and the JFTC has continued enforcing the AMA since 1947 until today. While regulations to protect specific industries or entrepreneurs through industrial policy may temporarily bring about a certain level of growth and contribute to maintaining the economy, it is recognised that on a long-term basis, as the creative initiatives of entrepreneurs do not function sufficiently and diverse resources are not utilised efficiently, economic structural reform does not occur smoothly and autonomously, and continuous economic growth can be hindered.

20. From around the 1970s, a competition policy perspective began to be considered in implementing industrial policy oriented government intervention. In and after the 1980s, the government worked more actively on implementing competition policies in accordance with deregulations amid the growing recognition of the necessity for structural reform. Today, the importance of improving competitive environments and promoting competition in the market is widely recognised. As a result, for instance, the JFTC and relevant ministries are in close contact and coordinate with each other in such a manner that policies to be determined under relevant business laws of specific industries are drawn up and implemented in a manner consistent with the policies worked out under the AMA.