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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION COMPETITION

Contribution from Japan

-- Session II --

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Introduction

1. According to an opinion survey conducted by a government agency in February 2001, more than 70 percent of respondents had a “positive” image toward competition. As to the activities concerning the elimination of cartels and bid riggings on the other hand, approximately 60 percent of respondents replied “insufficient”. These figures clearly show that the general public, throughout the prolonged recession in Japan, supports the principle of competition and looks forward to active actions by the competition authority.

2. Viewed from a historical perspective however, competition culture is not widespread among the general public, even though the Japanese economy has long been based on a market economy. One conceivable reason is that administrative policy, which inclined to build up industries and encourage harmonious cooperation among entrepreneurs, had received general support even after the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act) was enacted as part of post-World War II economic democratisation policy.

3. Various ground-breaking events followed that led to the above survey results showing greater understanding by the general public toward competition law and policy. On the occasion of the sudden rise in prices caused by the oil crisis and other opportunities for example, the Japan Fair Trade Commission (JFTC) revealed the damages caused by anticompetitive conduct through investigating cases which had serious impacts on the national economy, and brought clarification of the standard on the application of competition law. One characteristic of the JFTC’s activities was against not only cartels, which took advantage of a general rise in prices and large-scale mergers in key industries, but also misleading representations on daily goods. Action toward consumer problems in terms of competition policy may also have boosted public understanding of the JFTC’s work.

4. This paper describes how understanding of competition policy has spread throughout Japan. It introduces typical experiences of the JFTC, which is the competition authority in Japan, since the competition law was enacted in 1947 and the general public was not familiar with competition.

1. Enactment of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act) (1947)

5. In 1947 the Antimonopoly Act, Japanese competition law, was enacted and the Japan Fair Trade Commission was established as an independent commission.

6. As is well known, the modernisation of almost all aspects of Japan started at the time of the Meiji restoration, which took place 130 years ago. Japan's economic system since the Meiji era had been basically market-oriented; however, there were no laws regulating cartel, trust and market concentration before the end of World War II. Further, a small number of families gained control over a lot of companies in various industries under a holding company owned by each family. Such groups of companies were called “*zaibatsu*”, and from the Great Depression in the early 1930s until the end of World War II, the Japanese government resorted to extensive control over the economy, through mainly trade associations, in order to mobilize all national resources for military purposes.

7. After World War II and under the occupation by allied powers, drastic democratisation measures were introduced in all spheres of Japanese life. Industrial democratisation policy which was a part of economic democratisation policy consisted of one-time cease-and-desist measures of the former

anticompetitive system such as dissolution of the Zaibatsu, elimination of the concentration of economic power and removal of private controlling groups and permanent measures concerning the means of future competition policy such as the enactment of the Antimonopoly Act. These measures had the same objectives of establishing a competitive economic system based on a market economy.

8. As described above, competition law and policy in Japan were introduced quickly and drastically. However, the concept of competition policy and economic development through competition did not take root rapidly, and did not turn the controlled economic policy of Japan into competition policy at that time.

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

9. The immediate issue for Japan after the occupying forces had left was to achieve economic independence. Government policy therefore focused on fostering and strengthening domestic industries to earn foreign exchange. This led to the enactment of various laws exempting a wide range of industries from the Antimonopoly Act, mainly with the objective of easing cartel regulations, which was a major legislative step backward in competition policy.

10. In the field of administration, anticompetitive administrative measures, which were incompatible with antimonopoly policy, have been implemented in many industries during recessions in order to prevent excessive competition or stabilize the market, thus restricting the application of the Antimonopoly Act by the JFTC.

11. Against such moves toward easing of antimonopoly policy, the JFTC firmly supported the principle of the Antimonopoly Act, and strictly acted against unfair trade practices mainly related to medium and small sized enterprises, which are often disadvantaged by competition and trade, such as the regulation against delays in paying subcontractors, regulation against abuse of dominant bargaining position by department stores, etc. These efforts to act against unfair trade practices even during tough times promoted public understanding and support toward antimonopoly policy.

3. Approach to consumer policy from the standpoint of competition policy and addressing large-scale mergers (1960s)

3.1 Approach to large-scale mergers and acquisitions

12. The deregulation of trade, foreign exchange and capital led to the fundamental framework of the Japanese economy during this period. At this time the Japanese economy became internationalised through such measures and more closely connected with world markets both in the import of raw materials and export of manufactured products. Through these events the Japanese economy came to be considered forming a link in the chain of the international economy and competition among entrepreneurs was to be taken hold on an international scale.

13. With these deregulations as a turning point, discussions on industrial reorganisation through mergers and integration of enterprises, and concentration of production and grouping of companies have proceeded, led mainly by industrial policy authorities, as the small scale of Japanese entrepreneurs was thought to lead to excessive competition. As a result, an increase in large-scale mergers of enterprises followed in key industrial fields. The so-called “theory of excessive competition” proposed that too many small enterprises in Japan compared to international standards were engaged in excessive competition through small-lot production of many kinds, leading to unsound financial conditions like insufficient stockholders’ equity accumulation.

14. One typical large-scale merger during this period was a merger between two major steel companies, Yawata and Fuji, the largest post-war merger in Japan at that time and also a merger of the 1st

and 2nd largest entrepreneurs in the key steel industry. It can be said that the merger had a serious influence on the national economy as the new entrepreneur's market share would exceed 30 percent in more than 20 products, causing problems in terms of competition policy. Some supported the merger as necessary for promoting industrial reorganisation under the deregulated economic system, but others believed it would strongly affect the national economy. Hence, JFTC's decision was viewed with great interest, and intense discussions ensued among academics and the mass media. The JFTC had initiated a hearing procedure to investigate the case, and eventually approved it while demanding various remedies.

15. Although the Antimonopoly Act did not necessarily function satisfactorily during this period of concentration of economic power through mergers among entrepreneurs, this merger of Yawata and Fuji marked a turning point, and discussions on the role of the Antimonopoly Act became more active. It was also made clear that approval for large-scale mergers would not be easy to obtain.

3.2 Approach to consumer policy from the standpoint of competition policy

16. Another distinctive event during this period was the appearance of a new attitude toward protecting consumers' interest in conjunction with an increase in salaried workers brought about by the mass production system resulting from technological innovation, coupled with changing economic conditions and the rise in income (called the "income revolution"). Whereas consumer problems also arose, such as false and exaggerated advertising due to stiff competition, defective products accompanying new product development, and existence of toxic substances in foodstuffs and other dangerous products, etc.

17. Under these circumstances, in 1960 the "false canned beef case" occurred, when it was found that canned beef mostly consisted of whale meat or horsemeat despite the label picturing cattle. This incident fuelled a consumer movement that called for the control of such deceptive trade practices. However, no suitable regulatory laws existed to address such problems; therefore, the JFTC issued a cease-and-desist order against this deceptive trade practice as deceptive customer inducement under the Antimonopoly Act. The linkage between deceptive representations and competition policy started with this "false canned beef case", and with this as a turning point, the role of the JFTC as one of the main agencies for consumer protection was recognised.

18. In 1962, the Act Against Unjustifiable Premiums and Misleading Representations (Premiums and Representations Act) to control unfair representations and premiums from the standpoint of competition policy was enacted to supplement the Antimonopoly Act. The enactment and enforcement of this act raised public awareness of the JFTC.

4. Greater awareness of competition policy through cease-and-desist measures against anti-competition activities that affect the whole national economy (1970s)

19. During this period, the international monetary crisis and oil crisis shocked the Japanese economy. It was feared that the economy, which was already in recession at the time, would deteriorate further by the decline in exports engineered by the so-called "Nixon Shock" in 1971. A series of applications for recession cartels, which are exempted from application of the Antimonopoly Act, were filed.

20. As the economy recovered, there was an unusual rise in prices. The JFTC, concluding that "me-too" price rises were being made taking advantage of the rapid rise in general prices, acted firmly. Speculative trade practices by trading companies was a major problem during this process of unusual inflation, so the JFTC clarified the problems under competition policy by surveying such practices of trading companies twice.

21. 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 costs rose, as price increases of raw materials could not be determined. The JFTC uncovered illegal cartels one by one and rendered cease-and-desist orders. In February 1974 the JFTC finally accused those concerned in various cartel companies engaged in the wholesaling of oil, restricting the disposal volume of crude oil for oil products, to the Public Prosecutor General based on the Antimonopoly Act. This was the first time that the JFTC had accused somebody in a cartel, and criminal sanctions became an effective and strict measure for eliminating cartels.

22. This oil cartel case presented two other issues. First, despite the application of cease-and-desist orders by the JFTC and criminal sanctions, it was thought that the tendency believing cartels were better than doing nothing was still difficult to eliminate in this situation. The second issue was that administrative guidance was involved in this cartel. The issue of administrative guidance and cartels had been discussed for many years, and the JFTC had consistently adopted the position that cartels, even those concluded under administrative guidance, were violations of the Antimonopoly Act. The prosecution in this case and a guilty verdict in the Supreme Court marked a turning point of past practices to restrict competition by administrative guidance.

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

23. One of the distinctive features of competition policy through this period was regulatory reform. In the latter half of the 1980s, deregulation was enacted to open the Japanese economy and boost imports in order to mitigate trade friction caused by Japan's enormous trade surplus. In the 1990s, the yen's appreciation led to calls for structural reform, as it exposed the price differential within and outside the country. Further, the appreciation encouraged enterprises to shift overseas and caused the hollowing-out of industry and employment instability.

24. The JFTC, based on the recommendations of the OECD in 1979 etc., has addressed structural reforms in conjunction with the agency concerned since the early 1980s. During this period deregulation was not accepted by society as a whole, but in the 1990s, the clear price differential between Japan and other countries showed the importance of deregulation. The focus on deregulation in the 1990s shifted from reducing the burden on the public, simplification and rationalisation of administrative procedures and utilisation of private resources, to an emphasis on improving quality of life, reducing the price difference within and outside the country, improving access to markets, international harmonisation of systems and frameworks, revamping the industrial structure, encouraging new entry, etc., and these were compatible with the competition policy.

25. Furthermore, in the 1990s, the system of exemptions from the Antimonopoly Act was overhauled. Many of the stipulations concerning such exemptions were rooted in various industries in the late 1940s to 1950s in order to stabilize and rationalize enterprise management for the purpose of strengthening industry and improving international competitiveness.

26. However, the need for such exemptions changed in the same way as the need for government regulation, as the economic environment improved, Japan became a world economic power, companies' financial conditions strengthened and lifestyles diversified. The exemption system, which was likely to protect industry incumbents and weaken management, which in turn may impair the interest of consumers, was therefore reviewed.

6. Strengthening the enforcement power of the Antimonopoly Act (ongoing)

27. As described above, public awareness of competition policy has permeated in Japan. Viewing the Japanese economy today, entrepreneurs in many industries that face stiff international competition are making efforts to improve industrial technology and productivity, and are competing actively in the domestic market as well. However, the Antimonopoly Act was enacted over 50 years ago and strengthened 25 years ago and the Japanese economy has changed a lot during these years. As a result, it is necessary to examine whether the Antimonopoly Act is working satisfactorily, and whether the antimonopoly legal system is adequate from an international standard for example, as a satisfactory deterrent against violation of the law and anti-monopoly/oligopoly regulations.

7. Conclusion

28. When Japan's Antimonopoly Act was enacted in 1947, our society believed in harmonious cooperation among businesses over competition. There was also a period in which economic policy was inclined to consider industrial policy. And both systems and the implementation of competition policy were confronted with considerable constraints. There was also a time of what is popularly referred to as the "Dark Ages of the Antimonopoly Act." But after the passage of long years, competition policy has now taken a premier position.

29. One of the reasons why it took such a long time to gain understanding of competition law and policy is that government policy was inclined to foster industries and encourage harmonious cooperation among entrepreneurs even after the introduction of competition law and policy, in order to build the Japanese economy quickly, which is now the second-largest in the world. Regulations to protect specific industries or entrepreneurs through industrial policy temporarily bring about a certain level of growth and maintenance of the economy. However, on a long-term basis, as the creative initiatives of entrepreneurs do not function sufficiently, diverse resources are not utilised efficiently. Therefore, autonomous economic structural transition does not occur smoothly and results in hindering continuous economic growth. The Japanese public's understanding of competition law and policy has deepened through the Japanese economic system itself shifting toward greater competition in the process of gradual development and the experience of deregulation of trade and capital. Therefore, in Japan today, there is broad support and awareness of the need to implement structural changes and to reinforce competition policy as a key component in the overall program for structural change. Thus, in recent years, the market mechanism has come to occupy a far more important role in Japan than in the past.