



Japan Fair Trade Commission

Regulations on Single-Firm Conduct in Japan

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I . Statutory framework of regulations on single-firm conduct

Under the Antimonopoly Act (AMA), which is the basic competition law in Japan, single-firm conduct is to be regulated by two different provisions: one is for Private Monopolization and the other is for Unfair Trade Practices.

1. Private Monopolization

- (1) “Private Monopolization” is prohibited in Section 3 of the AMA and defined in Section 2 of the Act as those business activities of a firm which brings about a substantial restraint of competition in any particular field of trade by excluding or controlling the business activities of other firms.
- (2) “Exclusion” is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market. “Control” means to deprive other firms of their freedom of decision-making concerning their business activities and to force them to obey the controller’s intents.
- (3) Regarding “substantial restraint of competition”, the Tokyo High Court opined that “restraining competition substantially means bringing about a situation in which competition itself has significantly lessened and thereby a specific firm or firms can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition.”
- (4) Unlike US and EC regulations on single-firm conduct, the provision of the AMA concerning Private Monopolization does not refer to the position of a relevant firm in the market. Therefore, in our legal framework, dominant position of a firm or firm’s dominance is not a statutory prerequisite for establishing Private Monopolization, and in determining whether a specific single-firm conduct falls under Private Monopolization; that is, its specific unilateral conduct has substantially restrained competition in the market, various relevant factors should be considered in a comprehensive manner. Those factors to be taken into account would include market characteristics,

market shares, entry barriers, buyer power as well as the relevant unilateral conduct and its anticompetitive effects.

(5) Of course, it would be quite natural to presume that a firm which can control the market with some latitude of its own volition by excluding or controlling the business activities of other firms usually has a certain degree of market dominant position or substantial market power. Actually, as we will see later, that is the case for all the Private Monopolization cases the JFTC has handled so far.

(6) Regarding the remedial measures for Private Monopolization, the JFTC is to issue an order to cease the conduct of exclusion or control bringing about Private Monopolization, and to take necessary measures to restore competitive situation.

(7) In addition, by the amendments to the AMA, which became effective at the beginning of this year, administrative surcharges are now to be imposed on a firm in case of Private Monopolization caused by the control of other firms' business activities. This is because such controlling type of Private Monopolization where the powerful firm dominates the business activities of other firms in the market and thereby control the prices, volumes of supplies, customers of their relevant products or services is considered not different from cartels in terms of its economic consequences on competition in a market.

(8) Criminal sanctions such as imprisonment (up to the maximum of three years) and fines (up to the maximum of five million yen in case of natural persons and five hundred million yen in case of legal persons) are applicable to Private Monopolization like cartel cases. However, so far criminal sanctions have never been imposed on any Private Monopolization cases.

2. Unfair Trade Practices

(1) Another provision stipulating regulations on single-firm conduct in the AMA is Unfair Trade Practices, which are prohibited by Section 19 of the AMA. Unfair Trade Practices refer to several specific types of conduct designated by the JFTC in its notifications as ones tending to impede fair competition.

(2) Among various types of Unfair Trade Practices, such as

- i) unjust refusal to deal,
- ii) unjust dealings on exclusive terms,
- iii) unjust dealings on restrictive terms,
- iv) unjust low sales prices,
- v) unjustly discriminatory prices,
- vi) unjust tie-in sales, and
- vii) unjust interferences with competitor's transactions

can be considered to be used as means to create or maintain monopolies by controlling or excluding competitors, and regulations against those types of conduct are aimed at preventing Private Monopolization at an incipient level.

(3) That is, a single-firm conduct falls under the Unfair Trade Practices, thereby prohibited, if such a conduct is found to belong to any of these specified conducts designated by the JFTC and to tend to impede fair competition. "Tending to impede fair competition" is assumed not to have comparable anticompetitive effect to "substantial restraint on competition", which is necessary for violation of the prohibition of Private Monopolization.

(4) As such, the regulations on the Unfair Trade Practices are basically applicable to both "dominant" firms and "non-dominant" firms. However, regarding some types of conduct designated by the JFTC as Unfair Trade Practices, for example, unjust dealing on exclusive terms, whether a firm is "influential in the market" or not is considered.

(5) According to Guidelines Concerning Distribution Systems and Business Practices issued by the JFTC, whether a firm is "influential in a market" or not is determined by, among other things, the firm's market share or its market position. Here, in order for a firm to be found influential, either the market share of no less than 10% or the market position among the top three is prerequisite.

(6) Such an approach is based on the reasoning that, in the case of a firm ranked low in the market position or newly entered on the market, its conduct would not usually result in reducing the competitors' business opportunities or making it difficult for them to find alternative trading partners.

(7) Regarding remedies for Unfair Trade Practices, as in the case of Private Monopolization, a cease-and-desist order, or order of taking elimination measures is to be issued, though unlike Private Monopolization, neither of

administrative surcharges nor criminal sanctions are to be imposed.

II. Enforcement of regulations on single-firm conduct by the JFTC

1. Private Monopolization

- (1) Since the enactment of the AMA in 1947, the JFTC has found illegal on a total of 15 cases of Private Monopolization, and for the last ten years, we have dealt with 9 cases. Most of the recent cases are excluding type of Private Monopolization. (On the other hand, for the last ten years, we have handled a total of more than two hundred cartel cases.)
- (2) As already mentioned, whether some specific single-firm conduct is found to fall under Private Monopolization is to be determined by taking into consideration various relevant factors comprehensively on a case-by-case basis. However, in actual enforcements, we have taken legal measures only for those cases where substantial restraints of competition in the market have been quite obvious. Let me take up two examples.
- (3) The first one is the case against Paramount Bed Co., Ltd. (Paramount Bed), where the decision was issued on March 31, 1998.

The relevant market of this case was the one on the hospital bed ordered by Tokyo Metropolitan Government's Finance Department, and Paramount Bed held approximately 90% share in this market and other two manufacturers held the rest. Seeing the whole Japanese market of the hospital bed, the market situation was not so different, and Paramount Bed manufactured and sold the majority of hospital beds ordered by the government or by local municipalities.

Under the market condition above, Paramount Bed committed the following violations:

- ① Paramount Bed approached the procurement officials to create tender specifications that would only apply to products manufactured by Paramount Bed. By means of this conduct, Paramount Bed was able to exclude the business activities of other hospital bed manufacturers.
- ② In the situation that manufacturers were not allowed to participate in

bids, Paramount Bed controlled the business activities of bid participants by choosing a successful bidder among the participants who sell its beds, and by indicating respective bidding prices to successful bidders as well as other bidding participants. Moreover, Paramount Bed provided funds to bid participants in order to ensure that those participants would obey the instruction issued by Paramount Bed.

The JFTC found that the conduct by Paramount Bed fell under Private Monopolization, as it excluded the business activities of other hospital bed manufacturers and controlled the business activities of its supplier and therefore substantially restricted competition in the market by exercising the monopoly power (dominance). Therefore, the JFTC ordered elimination measures to Paramount Bed.

- (4) The second case is the one against Hokkaido Shimbun Press, where the consent decision was issued on February 28, 2000.

The relevant market of this case is the newspaper market in the Hakodate area, which is a part of Hokkaido. Hokkaido Shimbun published a general daily newspaper that accounted for a majority of general daily newspaper publications in the Hakodate area.

Under the market circumstances, when Hakodate Shimbun was entering the evening newspaper market in the Hakodate area, Hokkaido Shimbun obstructed the entry of Hakodate Shimbun and carried out the following actions to hinder their business:

- ① Hokkaido Shimbun applied for trademark registration to the Patent Agency regarding nine mastheads, including "Hakodate Shimbun," that would be used when publishing newspapers in the Hakodate area, although they had no specific plans to use those mastheads.
- ② The main newspaper publishers in Hokkaido received articles through Jiji Press and Kyodo News Service. Based on a priority policy with precedent contractors where Jiji Press would not deliver articles against the will of the present contractors, Hokkaido Shimbun implicitly solicited Jiji Press not to deliver articles to Hakodate Shimbun so that Jiji Press and Hakodate Shimbun could not conclude a delivery agreement.
- ③ To make it difficult for Hakodate Shimbun to acquire and assemble

advertisements, even in the situation that damage to Hokkaido Shimbun itself was expected, Hokkaido Shimbun split the price of inserting basic advertisements in local newspapers in half for small-and-medium-sized companies, who would be the advertising targets for Hakodate Shimbun.

- ④ Hokkaido Shimbun solicited Television Hokkaido Broadcasting not to respond to requests for broadcasting Hakodate Shimbun commercials so that Hakodate Shimbun could not broadcast any television commercials.

The JFTC found that the conduct by Hokkaido Shimbun fell under excluding type of Private Monopolization, as it excluded the business activities of Hakodate Shimbun and substantially restricted competition in general daily newspaper operations in the Hakodate area. Hokkaido Shimbun appealed for a hearing procedure against the recommendation but finally accepted to take measures issued by the JFTC.

2. Unfair Trade Practices

- (1) For the last ten years, the JFTC has taken legal measures against around 50 cases of Unfair Trade Practices, including 10 cases of dealing on exclusive or restrictive terms, and 9 cases of interference with transaction.
- (2) In determining whether any specific single-firm conduct falls under Unfair Trade Practices, that is, whether it tends to impede fair competition, basically speaking, as in the case of Private Monopolization, various relevant factors should be taken into account on a case-by-case basis. For example, in a case concerning discriminatory pricing, the Tokyo High Court opined that various factors including the structure and development of the relevant market, the differences of supply costs, market position of the concerned retailer (market share), and subjective intentions for setting price differentials would need to be taken into account in a comprehensive way. (April 27, 2005)
- (3) However, regarding Unfair Trade Practices, the JFTC has designated, in its series of notifications, those types of single-firm conduct which are likely to tend to impede fair competition, and has clarified more specifically what kinds of conduct violate our AMA as Unfair Trade Practices in various guidelines including Guidelines Concerning Distribution Systems and Business Practices which was issued in 1991 (to address the Final Report of

US-Japan Structural Impediments Initiative in 1990). Therefore, we believe that there has been a certain level of clarity, predictability and transparency secured in the determination of Unfair Trade Practices.

- (4) Let me take up one example of the case of Unfair Trade Practices, which involved a market dominant company in Japan, Microsoft KK (MSKK), a subsidiary of Microsoft Corporation, and the recommendation decision was issued on December 14, 1998.

According to the decision, the market situation of the case was as follows. First, MS "Excel" had been popular among consumers since 1993 and had acquired the top market share for spreadsheet software. On the other hand, MS "Word" was originally an English word processor and it was said that the function for Japanese language did not work very well, and thus, "Tchitaro" produced by the Japanese software company had the top share for word processor software in Japan in 1994.

In the market situation, MSKK decided to take a policy to make PC manufacturers preinstall both MS "Excel" and MS "Word" in their PCs in 1995. On the other hand, many PC manufacturers including major ones asked MSKK to license only MS "Excel" because they preferred to preinstall "Tchitaro" rather than MS "Word". However, MSKK rejected this proposal and finally made these PC manufacturers accept the license agreement where PC manufacturers should preinstall not only MS "Excel" but also MS "Word" in their PCs.

In addition, MSKK decided to take a position that it made PC manufacturers preinstall not only MS "Excel" and MS "Word" but also MS "Outlook", schedule management software, in their PCs in 1996. Since there was another type of schedule management software, which held the top market share and was called "Organizer" produced by Lotus Corporation, a part of PC manufacturers asked MSKK to license only MS "Excel" and MS "Word" in order to preinstall Lotus "Organizer" in stead of MS 'Outlook'. However, MSKK again rejected the proposal and finally made all manufacturers accept installing MS "Outlook" as well as both MS "Excel" and MS "Word" in their PCs.

The JFTC found that MSKK unjustly made PC manufacturers buy its word processor software by tying it with its popular spreadsheet software. In addition, MSKK unjustly made PC manufacturers buy its schedule

management software by tying it with its spreadsheet software and word processor software. These conducts fell under the category of illegal tie-in sales.

III. Future prospects for single-firm conduct regulations in Japan

- (1) As I have mentioned, it is one of the major characteristics of our AMA that single-firm conduct can be regulated by either Private Monopolization or Unfair Trade Practices, where a case-by-case basis approach is to be taken in determining whether concerned conduct is unlawful or not, by considering all relevant factors comprehensively.
- (2) On the other hand, some notable discussions related to regulations against single-firm conduct have been developed in the Antimonopoly Act Study Group established in Cabinet Office as a private discussion body under the Chief Cabinet Secretary. There is an argument that surcharge payment should be imposed on not only controlling type of Private Monopolization but also excluding type of Private Monopolization (i.e. the current legislation imposes surcharge payment only on the former type of Private Monopolization.). Also some argue that some types of Unfair Trade Practices should be subject to surcharge payment. As an official of the JFTC, since these discussions would affect the future regulation system against single-firm conduct, I would like to carefully study various views of relevant parties and continue to monitor future discussion in this study group.
- (3) In addition, it is undoubtedly sure that referring to the discussion in the United States and EU is helpful for us to make our discussion deeper and more valuable on single-firm conduct regulations. Therefore, I would like to continue to pay careful attention to various discussions on Section 2 of the Sherman Act and Section 82 of the EC treaty.

Thank you very much for your kind attention.