Regulation on Monopolization in Japan

August 2\textsuperscript{nd} – 4\textsuperscript{th} 2005

APEC Training Course on Competition Policy
Mandarin Oriental Manila, Makati City, Metro Manila, Philippines

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The main pillars of the AMA

(1) Prohibition of Cartels

(2) Prohibition of Private Monopolization

(3) Prohibition of Unfair Trade Practices

(4) Prohibition of Mergers/Acquisitions which may substantially restrain competition in particular field of trade
Structure of Substantial Provisions of the AMA

Prohibition of Cartels

Prohibition of Private Monopolizations

Regulation of Mergers etc.

Regulation of Unfair Trade Practices

Measure to Monopolistic Situation

Regulation on Allover Concentration

Substantial Restraint Competition

Impede Fair Competition etc.
Section 2(5) of the Antimonopoly Act (AMA)

- The term “private monopolization” as used in this Act shall mean such business activities, by which any entrepreneurs, individually or by combination or conspiracy with other entrepreneurs, or by in any other manner, exclude or control the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.
In general, requirements of ill conducts of competition law will be composed by

(1) conduct requirement, and
   e.g. agreement, exclusion of competitor

(2) effect requirement
   e.g. substantial restraint of competition,
   tendency to impede fair competition
Conduct Requirement

-- exclude
or control
the business activities of other
entrepreneurs

Particular to Private Monopolization
Effect Requirement

- To cause *a substantial restraint of competition in any particular field of trade*

Same as cartels
Characteristics of Japanese Legislation

- In Japanese legislation there is no dominant position requirement,

But actually dominant positions are need to exclude or to control other entrepreneurs in most cases.
EXCLUSION OF BUSINESS ACTIVITIES OF OTHER ENTREPRENEURS
Exclusion of business activities
does not necessarily mean the actual exclusion of other entrepreneurs from a market. It could cover activities that make it difficult for other entrepreneurs to engage or continue to engage in normal business activities.

But competition can be defined as a normal process of exclusion.
If an effective company succeeded to offer a good and cheap product, other entrepreneurs could not continue to engage in normal business activities.

Regulations based on the fact that competitor can not continue to engage in normal business activities could be too strict.
In most cases, “exclusion of other entrepreneurs” could fulfill requirements of “unfair trade practices” banned in Section 19 of the AMA, but such thing is not required in Section 3 of the AMA.
The purpose of the conduct to exclude competitor

The purpose of the conduct is unclear for criterion of unlawfulness.
CRITERION OF UNLAWFUL EXCLUSION Cont.

- Criteria of unlawful exclusion conduct

- Should be based on the fact that the conduct is NOT based on effectiveness.

- In the other ward, such conduct could be called ‘artificial.’
TYPES OF ARTIFICIAL CONDUCTS

i) Raising rival costs tactics
   - corner of necessary materials
   - exclusion from distribution system etc.

ii) Predatory tactics
   - predatory pricing etc.
CONTROL OF BUSINESS ACTIVITIES OF OTHER ENTREPRENEURS
According to the 1957 Tokyo High Court decision on Noda Soy-Sauce case (25 December 1957),

“Control” is an act of taking away from other entrepreneurs their free decision in business activities, and such an act must be distinguishable from those normal means of competition in a market.
Case Study:
The Japan Medical Foods Association Case (1996)
Background
Based on the notification of the Ministry of Health and Welfare (Notification No. 237, 1994), medical foods are primarily used as a form of medical treatment for patients in the hospital. After processing, the nutritional ingredients are analyzed at an inspection organ designated by the Minister of Public Welfare, and the amounts of nutritional ingredients obtained during analysis are maintained.
The added-payment system and registration system for medical food

Based on the notification of the Ministry of Health and Welfare (Notification No. 177, 1958), in February 1978, in regard to the provision of foods by insured medical institutions, having obtained the approval of prefectural governors based on standards stipulated by the Minister of Public Welfare, a system was introduced in connection with the provision of medical foods to add a payment of a fixed amount to the food portion of medical expenses while hospitalized (hereinafter “added-payment system for medical foods”).
The added-payment system and registration system for medical food Cont.

- The Association was designated by the Minister of Public Welfare on February 22, 1978 as the only inspection organ of its kind for medicinal food products.
The added-payment system and registration system for medical food Cont.

- At the same time, a registration system was established, and medical foods which pass the inspection analysis of the amounts of nutritional ingredients and so forth conducted by the Association, and which obtain approval from the Ministry of Health and Welfare, are registered as medical foods, and the Ministry of Health and Welfare notifies the prefecture of medical foods registered with the Association that are subject to the added-payment system for medical foods.
The added-payment system and registration system for medical food

Cont.

- As of the end of February of 1996, a total of 272 medicinal food items are registered with the Association.
Dealers of medical foods etc.

- Nisshin and Knox are the only two primary dealers of medical foods (parties which lay in stock from manufacturers for sale either to secondary dealers or medical institutions). The majority of 24 companies which are secondary dealers (parties which lay in stock from primary dealers for sale to medical institutions) are affiliated with Nisshin or Knox.
The total amount of sales of medical foods to medical institutions by Nisshin and secondary dealers affiliated with Nisshin accounts for almost the entire amount of sales of medical foods to medical institutions in Japan.
Manufacturers of medical foods

- There are 65 manufacturers of medical foods, and almost all of them are affiliated with Nisshin or Knox.
Conducts of This Case
Since about December 1972, the Association has carried out the permit system for manufacturing plants of medical foods and the permit system for dealers, and the Association has allowed the manufacturing and sale of medical foods only by authorized manufacturers and dealers.
1977 Decision of the board of directors

- At the meeting of the board of directors for the Association held on May 27, 1977, in order to promote price maintenance for medical foods and to secure fees for official approval, it resolved henceforth to have Nisshin serve in principle as the primary dealer of medical foods to medical institutions.
Registration policies concerning medical foods

With the aim of establishing Nissin’s monopolistic supply system of medical foods, the Association carried out the registration system for medical foods based on registration policies (hereinafter “registration policies”) including:
(a) do not register foods that are similar to medical foods already registered;

(b) set a goal of about 280 registered medical foods, and do not register more than this number;

(c) in regard to the acceptance of application for registration from businesses attempting to manufacture medical foods, have them consult beforehand with primary dealers; and

(d) have primary dealers participate in registration reviews.
- Exclusion of rivals from medical foods market
- Raising rival cost tactics
Agreement dated October 30, 1986

In 1986, following a rise in public criticism with respect to the monopolistic supply system of Nisshin in the medicinal food industry, in order to substantially maintain the monopolistic supply system, and in order to ensure the receipt of fees by the Association for official approvals, on October 30, 1986, the Association and Nisshin drafted an agreement between the Association, Nisshin, and Knox, and had Knox execute said Agreement, which included the primary items below (hereinafter “1986 Agreement”):
With respect to the entry by Knox into new territories, Knox shall enter only into 21 prefectures primarily where the diffusion rate of medical foods is low;

Affiliated dealer groups for medical foods shall include the two groups represented by Nisshin and Knox, and Nisshin and Knox shall cooperate in an effort to impede entry by dealers which are not affiliated with one of their groups;
Agreement dated October 30, 1986

Cont.

(c) Nisshin and Knox shall have new secondary dealers become affiliated with either Nisshin or Knox, and will not sell to secondary dealers outside of their own affiliated groups;

(d) Nisshin and Knox shall not conduct any sales activities with respect to medical institutions which are already purchasing medical foods from other dealers and shall have secondary dealers follow accordingly;
(e) Nisshin and Knox, shall henceforth continue to have manufacturers of Nisshin sell mainly to Nisshin and to have manufacturers of Knox sell mainly to Knox;

(f) Nisshin and Knox, shall sell to medical institutions at the sales price for medical institutions stipulated by Nisshin or Knox (hereinafter “fixed price”), and shall have secondary dealers sell at the fixed price;
Agreement dated October 30, 1986

Cont.

(g) The sales price of Nisshin and Knox to secondary dealers shall request mediation from the Association.

Control of Knox’s business activities
In order to ensure the effectiveness to the 1986 Agreement, the Association and Nisshin has Knox execute a memorandum on April 19, 1989 (hereinafter “1989 Memorandum”) pledging to observe the Agreement.
Conditions of implementation

(a) Pursuant to the 1986 Agreement, based on the permit system for dealers of medical foods, the Association and Nisshin failed to issue permits to primary dealers not associated with Nisshin and Knox or to secondary dealers which had not obtained the recommendation of Nisshin or Knox, restricted the activities of businesses attempting to sell medical foods.
and restricted the activities of Knox and secondary dealers in sales territories outside of authorized sales territories.

Exclusion of Knox and their secondary dealers from certain territories
Pursuant to the 1986 Agreement and registration policies, and based on the registration system for medical foods and the permit system for manufacturing plants, the Association and Nisshin restricted the activities of businesses attempting to manufacture medical foods, including the restriction of registration and so forth.
Pursuant to the 1986 Agreement, and based on the permit system for manufacturing plants of medical foods and the permit system for dealers, the Association and Nisshin restricted the sales customers of manufactures of medical food in addition to the suppliers, sales customers, sales prices, sales territories, and sales activities of Knox and dealers of medical foods.
Furthermore, acting through Knox, the Association and Nisshin restricted the sales customers of manufacturers of medical foods, in addition to the suppliers, sales customers, sales prices, sales territories, and sales activities of dealers of medical foods.

Control of business activities of manufactures through Knox
Application of the law

Section 3 of the Antimonopoly Act
/private monopoly/
Relevant Market

Product market
--- Medical food

Geographical area
--- Allover Japan
Cease and desist measure
To the Association

(1) The Association shall make the following items thoroughly known to manufacturers and dealers of medical foods, in addition to users of medical foods. The methods for making these items thoroughly known shall be approved beforehand by the JFTC.

(a) With respect to the conduct of registration of medical foods, the fact that the previously-enforce registration policies were withdrawn;

(b) The fact that the permit system for manufacturing plants of medical foods and the permit system for dealers were abolished
To the Association and Nissin

(2) The Association and Nisshin shall make the following items thoroughly known to manufacturers and dealers of medical foods, in addition to users of medical foods. The method for making these items thoroughly known shall be approved beforehand by the JFTC.

(a) The fact that the 1986 Agreement and the 1989 Memorandum were annulled.
(b) The fact the restrictions imposed on the sales customers of manufacturers of medical foods, in addition to restrictions imposed on the suppliers, sales customers, sales prices, sales territories, and sales activities of dealers pursuant to the 1986 Agreement were withdrawn.
(c) The fact that henceforth the Association and Nisshin will not exclude the activities of businesses attempting to manufacture or sell medical foods, and that the suppliers, sales customers, sales prices, sales territories, and sales activities of dealers of medical foods will not be restricted.
Request to inform regard the measure to the JFTC

- The Association shall promptly inform the JFTC with regard to measures taken under (1) and (2) above, and Nisshin shall promptly inform the JFTC with regard to measures taken under (2) above.
Warning to Knox

Suspicions were recognized that as a primary dealer of medical foods, Knox restricted the sales customers of manufacturers of medical foods, in addition to the suppliers, sales territories, and so forth of dealers. In light of the risk of violating the provisions of Section 19 of the Antimonopoly Act, the JFTC issued a stern warning to said company to henceforth not engage in these types of acts.
In light of the recognition that the registration system, the permit system for manufacturing plants, and the permit system for dealers of medical foods carried out by the Association violated the Antimonopoly Act, in order that henceforth acts similar to those in this case are not repeated, the JFTC requested that the Ministry of Health and Welfare conduct thorough guidance with respect to the Association, and that guidance be issued so that similar acts are not committed by public-service corporations and the like under the jurisdiction of the Ministry of Health and Welfare.