Anti-Monopoly Act Exemptions in Japan

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Why are there exemptions under the Anti-Monopoly Act?

(1) Japan’s Anti-Monopoly Act and Exemptions

Japan’s 1947 Anti-Monopoly Act stipulates that the provision of Section 3 of the Act (Prohibition of private monopolization and unreasonable restraint of trade) shall not apply to Conduct characteristic of natural monopolies (public utilities) (Section 21), Legitimate acts under special laws and orders (Section 22), Acts under intellectual property rights (Section 23), and Acts of cooperatives (Section 24). The Anti-Monopoly Act was revised in 1953, and new exemptions were added in the form of Resale price maintenance contracts (Section 24-2), Depression cartels (Section 24-3), and Rationalization cartels (Section 24-4). Moreover, through the 1950s and 60s, depression cartels, rationalization cartels and cartels to prevent excessive competition were authorized under several statutes independent of the Anti-Monopoly Act.

Under revisions to the Anti-Monopoly Act in 1999-2000, exemptions for Legitimate acts under special laws and orders and public utilities, depression cartels and rationalization cartels were scrapped. Therefore today only three exemptions remain in the Anti-Monopoly Act, namely Acts under intellectual property rights (Section 21 in the current act), Acts of cooperatives (Section 22 in the current act) and
Resale price maintenance contracts (Section 23 in the current act). Systems such as depression cartels, rationalization cartels, and cartels to prevent excessive competition recognized under separate legislation in the 1950s and 60s have been gradually phased out with fewer such systems remaining today.

(2) Basis for exemptions

For what reasons are Anti-Monopoly Act exemptions like those above permitted? Broadly speaking, there are two reasons. One reason relates to Acts under intellectual property and Acts of cooperatives, in which the exemptions are consistent with the competitive order that the Anti-Monopoly Act tries to achieve. (These types of exemptions are sometimes referred to as “original exemptions,” but here these types of exemptions shall be referred to as “type 1 exemptions.”) The second reason relates to depression cartels, rationalization cartels, cartels to prevent excessive competition, and resale price maintenance contracts, in which the exemptions are sanctioned in order to achieve the objectives of industrial policies. (Here these types of exemptions shall be refereed to as “type 2 exemptions.”). Type 2 exemptions permit anti-competitive actions by cartels and the like that are strictly prohibited under the Anti-Monopoly Act, and thereby narrow the Anti-Monopoly Act’s domain of applicability. As such, there has been great debate over many years regarding whether such exemptions are consistent with the Anti-Monopoly Act. This paper will examine the basis for both type 1 and type 2 exemptions.

(1) Type 1 exemptions

The basis of type 1 exemptions is as follows.

(i) Acts under intellectual property rights.

Section 21 of the Anti-Monopoly Act stipulates that “The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act,
the Patent Act, the Utility Model Act, the Design Act or the Trademark Act.” This section merely states the obvious fact that the Anti-Monopoly Act shall not apply to such acts recognizable as the exercise of intellectual property rights.

(ii) Acts of cooperatives

Section 22 of the Anti-Monopoly Act establishes the following in regard to the Acts of cooperatives. “The provision of this Act shall not apply to such acts of a cooperative (including a federation of cooperatives) which conforms to the requirements stipulated in each of the following paragraphs and which has been formed in accordance with the provisions of a separate law: Provided, That the foregoing shall not apply to such cases where unfair trade practices are employed, or where competition in any particular field of trade is substantially restrained, resulting in unjust rise of prices:

(i) Its purpose shall be mutual aid among small scale entrepreneurs or consumers;
(ii) It shall be voluntarily formed; and the participation in and withdrawal from the cooperative shall be voluntary;
(iii) Each member shall possess equal voting right; and
(iv) If distribution of profits among members is contemplated, the limits shall be stipulated in a law or a Cabinet Ordinance, or in the articles of an association.”

Joint activities through cooperatives made up of small-scale entrepreneurs are thought to enhance the trading status and the competitive status of these entrepreneurs, thereby promoting the formation of a fair and free competitive order. This idea constitutes the basis for such exemptions.

(iii) Resale price maintenance contracts

Resale price maintenance actions are prohibited under Section 19 of the Anti-Monopoly Act as restrictive trade practices, but Section 23 of the Act establishes the following exemptions for the resale of certain commodities and copyrighted works.

(1) The provision of this Act shall not apply to legitimate acts performed by entrepreneur who produces or sells a commodity, the uniform quality of which is easily
identifiable and which is designated by the Fair Trade Commission, with another entrepreneur who buys such commodity, in order to fix and maintain the resale price thereof (this term means hereinafter the price at which the latter entrepreneur or a third entrepreneur who purchases from him sells such commodity): Provided, That the foregoing shall not apply if the said act tends to be grossly injurious to the interest of consumers in general, or if it is done against the will of the entrepreneur who produces the said commodity by an entrepreneur whose business is to sell the said commodity.

(2) The Fair Trade Commission shall not designate a commodity under the provisions of the preceding subsection unless it comes under each of the following paragraphs: (i) The commodity shall be for the daily use by the consumers in general; and (ii) Free competition shall exist with respect to the commodity.

(3) The designation of a commodity under the provisions of subsection (1) above shall be made by a notification.

(4) Legitimate acts performed by an entrepreneur whose business is to publish copyrighted works or by an entrepreneur whose business is to sell such published works, in order to fix and maintain with another entrepreneur who buys such works the resale price thereof, shall be exempted from the application of the provisions of Act.

(5) The organization formed in accordance with the provisions of any one of the following Acts shall not be included in the term of "another entrepreneur" who buys commodities or copyrighted works as provided for in subsection (1) or the preceding subsection: Provided, That the foregoing provisions shall, in the case of the organizations formed under the provisions of any one of the Acts mentioned in paragraphs (viii) and (viii-ii) hereunder, only apply to cases where a business cooperative, a minor business cooperative, a federation of cooperatives, a commercial and industrial association or a federation of commercial and industrial associations purchases such commodity as provided for in subsection (2) above or copyrighted works as provided for in subsection (4) above, for the consumption of persons directly or indirectly constituting the said business cooperative, a federation of cooperatives, commercial and industrial associations or a federation of commercial and industrial associations:

(i) National Public Service Act; (ii) Agricultural Cooperatives Act; (iii) National Public Service, etc., Mutual Aid Association Act; (iii-ii) Local Public Service, etc., Mutual Aid Association Act; (iv) Consumer Cooperatives Act; (v) Fisheries Cooperatives Act; (vi) Public Corporation, etc. Labor Relations Act; (vii) Labor Unions Act; (viii) Small and Medium Sized Enterprise, etc., Cooperatives Act; (viii-
ii) Small and Medium Sized Enterprises Organization Act; (ix) Local Public Service Act; (x) Forestry Cooperatives Act; (xi) Local Public Enterprise Labor Relations Act.

(6) When an entrepreneur as stipulated in subsection (1) above has fixed the resale price under the said subsection and has entered into contract for the purpose of maintaining it, he shall, in accordance with provisions of the Rules of the Fair Trade Commission, file a report thereon with the Commission within thirty days from the date of the conclusion of the said contract: Provided, That the foregoing shall not apply if the Fair Trade Commission stipulates otherwise in its Rules.

In this section, actions to fix or maintain the resale price of copyrighted works is exempted (Section 23-4). In terms of copyrighted works, and books in particular, the publication of diverse range of books, including those by novices or that do not have many readers, is preferable to raise the cultural standard in any given country. Therefore the basis for resale price maintenance on copyrighted works lies in the practice of taking the profit from popular books and using it to encourage publishers to publish those books that are not as popular (an internal cross-subsidization system). Such exemptions can be thought of as underpinning cultural promotion policies.

(2) Type 2 exemptions

The following exemptions constitute type 2 exemptions. (Exempted systems under separate legislation)

(i) Liquor retail industry – Rationalization cartels

The Law concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax (overseen by the Ministry of Finance) stipulates that liquor business association’s regulations on facilities for the sale of liquor, regulations on liquor containers, and other regulations pertaining to the sale of liquor that are designed to reduce costs, promote efficiency, facilitate smooth liquor business transactions, protect
consumers and otherwise rationalize the management of the liquor manufacturing and sales industries, are exempt from the provisions of the Anti-Monopoly Act (Section 42).

Liquor business associations must obtain permission from the Minister of Finance to establish the agreements between businesses members required to enforce these regulations (Section 43). In granting this permission, the Minister for Finance must consult with the Fair Trade Commission (Section 94).

(ii) Small and medium-sized businesses – Cartels to prevent excessive competition.

The Law Concerning Coordination and Improvement of Hygienically Related Businesses (overseen by the Ministry of Health, Labour and Welfare) permits entrepreneurs involved in health- and sanitation-related businesses, who for the most part are small- to medium-sized businesses, to form hygiene-related business associations in their various industries, and permits acts that place restrictions on charges or sales methods in cases where excessive competition in any given industry may prevent business association members from enforcing appropriate sanitation measures (Article 8). Permission from the relevant minister is required to implement these sorts of price and sales method regulations, and it is mandatory for the relevant minister to consult with the Fair Trade Commission (Article 13). Permission from the relevant minister is only provided on the condition that the regulations are the minimum required level, do not discriminate against particular business association members, and will not unjustifiably impede the interests of users or consumers (Article 9).

(iii) Trade – Export cartels

The Export and Import Trading Law (overseen by the Ministry of Economy, Trade and Industry) aims to prevent unfair import transactions (export of products in breach of intellectual property rights, export of products bearing false identification of origin, etc.), to establish the order for export transaction and import transactions, and to promote the healthy development of foreign trade. This Law sanctions the formation of
agreements between exporters concerning price, quantity, quality, design, or any other matter related to export transactions (Section 5 and Section 11).

(iii) Transportation – Transport cartels

The Road Transport Law (overseen by the Ministry of Land, Infrastructure and Transport) identifies agreements relating to the joint operation by bus operators of routes that are less viable due to falling demand (Section 18 “Transport cartels”) as being exempt from the provisions of the Anti-Monopoly Act. Likewise, the Marine Transportation Law (overseen by the Ministry of Land, Infrastructure and Transport) exempts domestic marine transport cartels (Section 28-1-3) and external marine transport cartels (Section 28-4), the Port Transportation Business Law (overseen by the Ministry of Land, Infrastructure and Transport) exempts domestic marine transport cartels (Section 8-1 No. 1-6) and joint marine transport operations (Section 8-1 No. 7-13), while the Civil Aeronautics Law (overseen by the Ministry of Land, Infrastructure and Transport) exempts domestic aviation cartels (Section 110-1) and international aviation cartels (Section 110-2).

(v) Insurance – Damage insurance

Insurance Business Law (overseen by the Financial Services Agency) exempts insurance cartels (Section 101-1 No. 1,2) from the provisions of the Anti-Monopoly Act, just as the Law concerning Non-Life Insurance Rating Organisations (overseen by the Financial Services Agency) exempts the calculation of compulsory automobile liability insurance and earthquake insurance base ratings by rating organisations (Section 7-2-2).

II Are there boundaries for these exemptions?

As detailed above, Acts under intellectual property rights (Section 21 of the current law), Acts of cooperatives (Section 22 of the current law), Resale price maintenance contracts (Section 23 of the current law) constitute exemptions under the
Anti-Monopoly Act. Yet due care needs to be taken to ensure that these “exemptions” do not sanction any and all anti-competitive actions.

For example, under the exemption for Acts of cooperatives, the Anti-Monopoly Act stipulates, “Provided that the foregoing shall not apply to such cases where unfair trade practices are employed, or where competition in any particular field of trade is substantially restrained, resulting in unjust rise of prices.” Here unfair trade practices (prohibited under Section 19 of the Anti-Monopoly Act) are in no way exempted. Also, Resale price maintenance contracts for copyrighted works constitute an exemption, but in the following case the provisions of this section of the Anti-Monopoly Act will apply. “Provided that the foregoing shall not apply if the said act tends to be grossly injurious to the interest of consumers in general, or if it is done against the will of the entrepreneur who produces the said commodity by an entrepreneur whose business is to sell the said commodity.”

In this way, these exemptions do have boundaries. Section 3 and Section 19 of the Anti-Monopoly Act also apply to acts recognized as exceeding the scope of actions endorsable under intellectual property rights.

III. Conclusion

This paper has demonstrated that the scope of Anti-Monopoly Act exemptions has been shrinking in recent years, and that exemptions are only sanctioned up to a certain point, beyond which the relevant section of the Anti-Monopoly Act shall apply.

Cartels exempted under separate legislation are thought to have a range of objectives such as (1) to rationalise, foster and strengthen industry to enhance international competitiveness, (2) to protect small- to medium-sized business, (3) to counteract depressions, and (4) to prevent unfair export trading. However, today, there is a growing awareness of the effectiveness of competition on economic growth and revitalisation, and of the adverse effects of exempted cartels that restrict competition and
therefore limit the operation of market mechanisms. Therefore, exempted cartels need to be abolished to the greatest extent possible and competition needs to be adopted.

Moreover, other exemptions besides exempted cartels, such as direct government regulations on market entry and prices, etc., should be relaxed as much as possible or removed entirely, and a commitment should be made to competitive policies and legislation.