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CRISIS CARTELS

Contribution from Japan

-- Session III --

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CRISIS CARTELS

-- Japan --

1. Introduction

1. Implemented as part of a policy designed to democratize Japan's post-war economy, the Antimonopoly Act ("AMA") took root in Japan's economic society while the country struggled through the turmoil of the post-war economic situation. Consequently, the necessity of proactively developing competition policies is now widely recognized. In contrast, the establishment of systems allowing exemptions from the AMA should be limited to the minimum necessary because the use of such systems, coupled with a variety of subsidies and aids which are often implemented concurrently, might have the effect of protecting incumbents in the concerned industries and making new entries more difficult, thus inhibiting the rationalization of business operations due to insufficient efforts of improving management, which may end up damaging consumers' interests.

2. In Japan, a system of "Depression Cartels", etc., was approved in the past, in which an exemption, etc., from the AMA was applied to cartels under conditions of economic depressions. However, this system was repealed in 1999 because of the troubles it caused, such as protecting marginal entrepreneurs, discouraging efforts of companies to reduce prices, and as a result, entailing insufficient management efforts for the provision of good and reasonably-priced products and services through the market mechanism and harming consumer interests. As the importance of developing competitive environments, as well as promoting competition, are widely acknowledged now, even after the most recent global financial crisis, crisis cartels are not allowed in Japan. This contribution paper introduces Japan's past experiences regarding crisis cartels which were once approved under conditions of economic crisis¹.

2. Approval of cartels as countermeasures against economic crises

2.1 Introduction of the systems of "Depression Cartels", etc., under the AMA (1950s)

3. The immediate challenges for post-war Japan were to achieve economic independence, and accordingly, government policy first and foremost focused on fostering and strengthening domestic industries. In addition, facing strong criticism that the ban on shareholdings by companies was too rigorous, the original AMA was relaxed and amended in 1953 in response to the deterioration of the economic situation starting from around 1951. This amendment eased regulations against cartels as well, and systems of "Depression Cartels" and "Rationalization Cartels"² were established, by which

¹ Please refer to the presentation below at the roundtable regarding competition and financial crisis held in February 2009 for further details on this theme. Akira Goto, "Challenges and role of competition policy during the past economic slump in Japan," (2009), Competition and Financial Markets 2009, 305-310, available at <http://www.oecd.org/dataoecd/45/16/43046091.pdf>.

² When cooperation among companies is required to effectively promote rationalization that cannot be easily achieved only by the efforts of individual companies because of their limitations, or when rationalization is realized without impeding substantial competition among companies such as product standardization and

implementation of cartels were allowed with the approval of the Japan Fair Trade Commission (JFTC). The “Depression Cartels” under the then Article 24-3 of the AMA exceptionally allowed, under certain conditions after JFTC approval, the implementation of joint action by enterprises manufacturing products, etc., to restrict production volume or sales volume, limit facilities, or set prices during economic depressions.

4. Those cartels were not allowed immediately after the amendment of the AMA; however, when the economy declined due to the tightening of the monetary policy in June 1957, the JFTC approved depression cartels under the AMA in the fields of production of yeast, vinyl chloride tubes, etc.

5. In this period, other laws exempting certain cartels from the application of the AMA were established one after another in a wide range of industries. In addition, under repeated economic recessions, anti-competitive administrative measures, such as the recommendation of curtailing operations,³ were introduced in various industries in order to prevent excessive competition and stabilize the market situation. Furthermore, while the number of cartels applying for exemptions from the AMA for JFTC approval increased as part of the subsequent countermeasures against economic recessions, cartels which were illegally formed (and not permitted by the AMA or other laws) were also widespread. In the meanwhile, the market structure changed to a more oligopolistic one in Japanese industries and took on a “non-competitive” direction, which resulted in problems such as less competition, concerted increases in prices, and so on. In line with these problems, many companies tended to pass on the amount of increased cost of materials and wages, etc., to the demand side by means of cartels.

2.2 *Structural depression and temporary approval of cartels for scrapping facilities (between the latter half of the 1970s and the first half of the 1980s)*

6. Between the late 1970s and the early 1980s when the oil crisis triggered a slowing down of its economic growth, Japan faced structural depression problems such as a huge gap between supply and demand, etc. In response, the disposal of excess facilities for solving the gap between supply and demand became a policy issue to be taken up by the government. However, there were concerns that enterprises would be reluctant to dispose of their facilities if facility disposal was left to the enterprises’ own discretion because they would have to bear a large cost while it would influence other enterprises who would not participate in the disposal. Consequently, temporary legislation⁴ was enacted, including the introduction of systems which allowed cartels on facility disposal instructed by relevant ministers (instructed cartels) and exempted from the application of the AMA as a measure for industries suffering from structural depression.

7. At the same time during this period, the government also encouraged jointly scrapping facilities through the operation of the “depression cartels” system under the AMA, because the government judged that it would meet the purpose of the depression cartels system as an emergency measure to narrow the supply-demand gap through promoting the disposal of excess facilities rather than production reduction cartels, which might make enterprises more prone to cartels in industries suffering from structural depression.

restriction on product varieties, cartel implementation is approved when the case satisfies certain requirements.

³ Recommendations by which administrative agencies order all the enterprises to curtail their operations.

⁴ “The Law on Temporary Measures for Stabilization of Specified Depressed Industries” enacted in 1978, and “The Law on Temporary Measures for the Structural Improvement of Specified Industries” revised in 1983.

8. However, as instructed cartels would cause serious damage to competition, some competition policy considerations were made to treat each of the so-called Structurally Depressed Industry Laws as temporary legislation with the condition that JFTC agreement was required. Furthermore, in legislation in the late 80s, the system of instructed cartels was abolished. At the same time, with regard to the relevant minister's approval of business alliances, the consideration of competition policy resulted in the development of a coordination scheme between the relevant minister and the JFTC in order to make business alliances implemented within the framework of the AMA.

3. Review of exemption systems from the AMA such as “Depression Cartels”

3.1 Background

9. In the latter half of the 1980s, the Japanese economy steadily recovered thanks to the recovery of the entire world economy. However, the following problems gradually posed huge challenges surrounding the Japanese economy both internally and externally: the gap between the strong economic power of the national economy and people's actual feeling of quality of life internally, as well as trade-imbalances and the structural issues of the Japanese market externally.

10. Under such circumstances, it was thought all the more important to further promote fair and free competition and to make the market mechanism fully functioning in order to open the Japanese market with an economic structure in harmony with the world economy.

11. Moreover, no case of a “Depression Cartel” was approved after 1989 around the time the Japanese economy turned around thanks to the rapid economic expansion of the world economy. One of the reasons behind this seemed to be the difficulty of ensuring the effectiveness of the depression cartels with the development of a borderless economy. More specifically, at that time in Japan, the ratio of imported products rose in the manufacturing industries and Japanese companies advanced the internationalization of their activities. Consequently, it was thought that maintaining the effectiveness of cartels in this situation was impossible because cartels formed within Japan would be under competitive pressures from overseas and production abroad was out of the subject of depression cartels, etc.

3.2 Reasons for reviewing “the Depression Cartel System” and “the Rationalization Cartel System”

12. The JFTC detected illegally formed cartels one after another and imposed administrative sanctions (cease and desist orders) on them. However, there was also a concern due to the existence of the depression cartel system in certain industries that companies would be prone to take a coordinated approach by considering that the cartel would be approved by the exemption system. Furthermore, this might lead to a problem of moral hazard of the management because they might feel they could rely on cartels as a last resort even without efforts for efficiency, which would risk efficient company management based on the principle of self-responsibility.

13. On the other hand, the “Rationalization Cartel system” also faced similar problems, and since the concerned cartel enabled the restriction of production by limiting technologies and product varieties, such restrictions were thought not to be allowed.

14. As explained above, because both “Depression Cartels” and “Rationalization Cartels” lost effectiveness themselves and there were concerns about the potential harm of perpetuating the system, it was concluded to abolish them.

3.3 *Review of exemption systems from the AMA*

15. In order to review the exemption systems from the AMA including “Depression Cartels” and “Rationalization Cartels”, “The Study Group on Government Regulations and Competition Policy” compiled a report called the “Review of Exemption Systems from the AMA,” which emphasized the need to limit the implementation of the exemption system and drastically revise it. Around before and after this period, a review of the exemption system was also included in a report by the Provisional Council on Administrative and Fiscal Reform and consequently, an approach toward review was gradually taken by the entire government.

16. As a result, three legislations were enacted in 1997, 1999, and 2000 to reduce the exemption systems under the AMA, among which, in the “Bill for Reducing the Exemptions from the AMA” enacted in 1999, the system of “Depression Cartels” and “Rationalization Cartels” under the AMA were abolished. At the same time, the review of the exemption system led to the reduction in the number of exemptions from 89 systems under 30 laws in 1996, to 21 systems under 15 laws as of the end of 2010⁵. In addition, with a view to limiting the exemption systems to a minimum level, the range of exemptions was confined for the remaining exemption systems, while provisions were included to provide the JFTC with the right to be involved and to claim remedial measures for preventing abuse of the exemption systems.

4. **Conclusion**

17. After the abolishment of the so-called Structurally Depressed Industry Laws and depression cartel systems, etc., Japan underwent a series of economic crises such as the economic stagnation caused by the collapse of the bubble economy and followed by the so-called “Lost Decade,” as well as the recession triggered by the recent worldwide financial crises.

18. However, no revision to the AMA was made in a competition-restrictive direction under such economic difficulties. Instead, the enforcement of the AMA has been strengthened by the introduction of leniency systems and expansion of the scope of the types of violations subject to surcharge payment orders. Moreover, the JFTC has engaged in necessary coordination within the government so that anti-competitive policies are not allowed to approve cartels by using the recession as an excuse.

19. The fair and free competition by enterprises will promote an appropriate distribution of economic resources, contributing to not only the interests of consumers but also the entire national economy. There is no growth without competition and competition is essential for rational and effective investment, technological innovation, as well as for obtaining consumers.

20. As explained above, with the review of the exemption systems under the AMA, such as “Depression Cartels”, etc., the JFTC has been promoting fair and free competition in the Japanese market and making efforts to foster competitive environments where entrepreneurs can develop originality and ingenuity.

⁵ The application of those remaining exemptions is indifferent as to whether it is requested under a period of economic crisis or not.