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Working Party No. 2 on Competition and Regulation

COMPETITION IN HOSPITAL SERVICES

-- Japan --

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The attached document is submitted to Working Party No.2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 13 February 2012.

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1. Introduction

1. Taking advantage of an opportunity to have a roundtable discussion on competition in hospital services, Japan's contribution paper explains recent issues concerning regulations of hospital services in Japan related to competition, as well as the relations between hospital services and the Antimonopoly Act.

2. Recent issues regarding regulations of hospital services

2. Concerning regulations of hospital services, in November 2002, the Japan Fair Trade Commission (hereinafter referred to as "the JFTC") made public: "The State of Regulation in the Medical Services Business and Approach from the Viewpoint of Competition Policy." Recently, discussions on government regulations and systems have been held in "the Government Revitalization Unit," established in the Cabinet Office (Subcommittee on Regulatory and System Reforms) with an aim of revamping national budgets, systems and other governmental administrations, while at the same time reviewing the allocation of roles among the national and local governments and the private sector, all from a citizen's standpoint. There are several related Cabinet decisions existing, which include discussions on the regulations of hospital services. "The New Growth Strategies" adopted by the Cabinet on June 18, 2010, state that, "the hospital, nursing and health-related industries, in which high growth and generation of employment opportunities are expected, will be positioned clearly as industries leading growth in Japan, while at the same time systems that can provide diverse user-centered services will be established by promoting entries of new private service providers while at the same time ensuring safety and improving service quality."

3. A summary of "The State of Regulation in the Medical Services Business and Approach from the Viewpoint of Competition Policy" and issues concerning the regulation of hospital services that could relate to competition will be introduced below.

2.1. Summary of "The State of Regulation in the Medical Services Business and Approach from the Viewpoint of Competition Policy" (November 2002).

4. The JFTC convened the "Study Group on Government Regulations and Competition Policy" and published a report in November 2002 titled, "The State of Regulation in the Medical Services Business and Approach from the Viewpoint of Competition Policy."

5. This report is based on the viewpoint that (i) in order to realize hospital services for patients as consumers, a system is necessary whereby patients can choose hospital institutions according to their needs and similarly, hospital institutions, as suppliers, can compete with each other. (ii) At the same time, it is essential to enhance the negotiation power of patients and insurers, and (iii) it is important to review regulations at both the supply and demand side in order to promote competition in this area and bring benefits. Based on this viewpoint, the report shows the following:

2.1.1. Promotion of competition among hospital institutions

a) Review of restrictions on opening hospital institutions and management body

6. Regulations on the entry of stock companies, etc., based on Medical Law, should be reviewed to enable current medical corporations (legally incorporated hospital institutions) to change their status to stock companies in order to diversify methods of financing, or, for stock companies to open and run hospital institutions.

b) Review of the issue of mixed treatment

7. Approving mixed treatment (i.e. mixed billing of insurance-covered treatment and non-insurance-covered treatment, to be mentioned later) should be considered by establishing a list of criteria patients need to qualify for insured treatments and defining the scope of coverage by health insurance as well as enabling patients the possibility to assume the costs themselves for uninsured services. In this case, it would be necessary to oblige hospital institutions to properly disclose information to patients because patients need to judge the rationality of mixed treatment.

2.1.2. Choice of hospital institutions by patients and the insurers (Review of regulations on advertisements)

8. In order to ensure health benefits are applicable to patients upon choosing the hospital institution, and to promote fair competition, advertising by hospital institutions should be liberalized as a general rule, by taking all the measures through which the information released or distributed is true and any inappropriate advertisements are eliminated.

2.1.3. The role of the JFTC

9. As the review of regulations in the medical services progresses, it is becoming more important to exclude anticompetitive practices of enterprises by enforcing the Antimonopoly Act, as well as by promoting more active competition among enterprises in medical services. The JFTC not only considers and coordinates regulatory reform but also needs to follow the developments of reform, as well as monitor enterprises and trade associations to identify if there is conduct (either self-initiated or through administrative guidance) that restrains competition, excludes new entries or conducts cartels in the liberalized industry. If such acts above do occur, the JFTC must take strict measures against violations to the Antimonopoly Act.

2.2. Points on issues in hospital services that could relate to competition

2.2.1. Mixed treatment

10. When both "insurance-covered" medical treatment (to which public health insurance is applicable) and "private" medical treatment (to which public health insurance is not applicable) exist in a series of medical practices, such medical treatment is referred to as a "mixed treatment." Pursuant to the current Health Insurance Act, except in certain cases, patients do not qualify for health insurance benefits for mixed treatments (Article 86, Health Insurance Act). As a result, patients are required to assume all treatment costs. (There is no competition in medical fees paid for "insurance-covered" medical treatments to which public health insurance is applicable because the fee is calculated based on officially allocated points for each medical practice.)

11. With regard to this "mixed treatment," it has been pointed out that options for patients are limited financially when they wish to choose advanced medical care or treatments suited to their individual situation. It has also been pointed out that patients cannot be eligible for insurance benefits as a compensation for the insurance premium which is forcibly collected when the patients used both "insurance-covered" medical treatment and "private" medical treatment at the same time. This problem has been mentioned as a matter to be discussed with regard to regulatory reform.

12. Recently, "The Policy on Measures Related to Regulatory and System Reforms" adopted by the Cabinet on June 18, 2010, mentions an "expansion of the scope of the Special or Specified Medical Care Coverage System in which 'private' medical treatments can be received with 'insurance-covered' medical treatments," as a matter to be discussed in regulatory reforms.

13. In the dispute on the legality of prohibiting mixed treatments as a general rule, the Supreme Court decided on October 25, 2011 that the prohibition was legal, stating that, "the Special or Specified Medical Care Coverage System" exists to ensure the safety and effectiveness of insurance-covered medical treatments and prevention of unreasonable burden on the patients, and the prohibition of mixed treatments is a prerequisite for this system. The interpretation that the patient should assume all medical costs in the case of mixed treatment is justifiable in view of consistency for the entire Health Insurance Act."

2.2.2. Participation in the hospital market by stock companies

14. The Medical Care Act prohibits establishment of hospital institutions that pursue commercial gain (Article 7 paragraph 5 and Article 54 of the Medical Care Act). Therefore, stock companies may not establish hospital institutions since they pursue commercial gain.

15. In "the Policy on Regulatory and System Reforms" adopted by the Cabinet in 2011 (April 8), the "Review of the Regulations Regarding Support for Rehabilitation and Merger of Medical Corporations" was included in the matters to be discussed in the regulatory and system reforms.

16. In addition, the "Act on Special Districts for Structural Reform" that was amended in May 2004 exceptionally allows stock companies that satisfy certain standards to establish hospital institutions that offer advanced hospital care in the area of private medical treatment to which public health insurance is not applied. "The Three-Year Plan for Promoting Regulatory Reforms" (re-revised third edition), (adopted by the Cabinet on March 31, 2009) also mentions "lifting the ban on hospital institutions operated by stock companies" as a matter related to regulatory reforms, and the decision was made to "monitor the situation of hospital institutions operated by stock companies in special districts for structural reform, and study their nationwide dissemination further."

2.2.3. Restrictions on advertising

17. The Medical Care Act has adopted a system that allows only matters that are objective and verifiable to be advertised (positive list method). The amendment to the Medical Care Act of 2007 adopted a "Comprehensive Provision Method" that made the restriction method an inclusive one, significantly enlarging the scope of contents that can be advertised.

18. "The Subcommittee on Regulatory and System Reforms" established in "the Government Revitalization Unit" has mentioned mitigation of advertising restrictions as a matter to be discussed for regulatory reform. In December 2010, the "Life Innovation Working Group" (in its second term) established under the subcommittee, a draft reform measure to "liberalize, as a general rule, advertising launched by hospital institutions, by revising the positive list method."

3. The Health Services and the Antimonopoly Act

3.1. Introduction

19. To secure fair and free competition, the Antimonopoly Act stipulates a number of provisions concerning the activities of enterprises and trade associations.

20. For example, if a doctor simply works as a researcher or an employee, the doctor is not classified as an "enterprise" under the Antimonopoly Act. However, if the doctor engages in the hospital services as a business, the doctor is classified as an "enterprise." Whether a doctor conducts medical activities as a business or not is based on whether the doctor engages in medical activities repeatedly and continuously as an operating body. Under the Antimonopoly Act, "Trade Associations" means associations that unite or combine two or more enterprises, mainly aiming to increase their common profits by engaging in

businesses. If an association of hospital institutions satisfies this requirement, the said association of hospital institutions comes under the definition of "Trade Association" which is subject to the Antimonopoly Act.

21. We introduce "Guidelines Concerning the Activities of Medical Associations Based on the Antimonopoly Act" and the cases where the Antimonopoly Act was applied in the hospital service market below.

3.2. "Guidelines Concerning the Activities of Medical Associations Based on the Antimonopoly Act" (August 7, 1981)

22. A "doctor" is one type of business associated with health professions. As already noted, if a doctor satisfies certain requirements, the Antimonopoly Act is applied to the doctor as an enterprise. Medical associations, which exist as a professional body of doctors, do not necessarily fall under the definition of trade associations based on the Antimonopoly Act. However, if a medical association satisfies certain requirements, the Antimonopoly Act is applied to the association as a trade association. If a medical association as a trade association commits an act to restrain competition, for example by limiting the number of present or future hospital institutions in a certain business area on the pretext of "proper placement," or if a medical association commits an act to unjustly restrict the function and activities of doctors who are members of the association, then such acts shall be regarded as violations to the Antimonopoly Act. Therefore, the JFTC published the "Guidelines Concerning the Activities of Medical Associations Based on the Antimonopoly Act" in 1981, based on the results of a survey concerning the activities of medical associations and cases in which the activities of medical associations were deemed to be in violation of the Antimonopoly Act.

23. With respect to whether the Antimonopoly Act is applied to a medical association, the Guidelines stipulate that if a medical association is purely an academic association, the medical association is not regarded as a trade association based on the Antimonopoly Act. However, if a medical association is an association for the purpose of increasing common profits by engaging in businesses, the medical association is regarded as a trade association based on the Antimonopoly Act and the Act is in turn applied. The following acts, conducted by medical associations, which are deemed to be trade associations, such as (i) acts that restrict the opening of a new hospital institution, (ii) acts that unjustly disrupt business activities, (iii) acts in which hospitals fix fee tables for private medical treatment, etc., or (iv) acts concerning hospital care hours and advertisements, can be classified in three categories: "acts in violation of the Antimonopoly Act in principle," "acts that may be in violation of the Antimonopoly Act" or "acts not in violation of the Antimonopoly Act in principle."

24. Concretely, if a medical association, through its code, limits the number of hospital institutions in a specified area or the distance between two hospital institutions, or decides on private medical treatment fees or document fees of its members, then the association will be acting against the Antimonopoly Act in principle because these acts will unjustly restrain the business activities of the association's members, or may substantially restrain competition of hospital profession in the area. In contrast, if a medical association provides reasonable advice in response to an approach by a party wishing to establish a hospital institution, encourages members to show its fee table, or unifies the form of fee tables, it will not be acting against the Antimonopoly Act in principle.

3.3. Cases where the Antimonopoly Act was applied in the hospital service market

3.3.1. (Hearing Decision) No.1 of 1997: Case of Mitoyo District Medical Association of Kan-onji City

25. Mitoyo district Medical Association has:

a) Restrained the number of current and future medical practitioners in the Kan-onji Mitoyo district by restricting the establishment of hospital institutions.

b) Unreasonably restrained the functions and activities of existing medical practitioners by restricting the addition of areas of medical care practiced by members, increase in the number of beds, expansion or renovation of hospital institutions and the establishment of health care facilities for the elderly.

3.3.2. (Recommendation) No. 18 of 2004: The case against Yokkaichi City Medical Association

26. Yokkaichi City Medical Association has:

a) At a meeting of its board of directors held on or around 15 October, 2002, the medical association decided to set the fee for a flu vaccination administered by its members to persons under the age of 65 at a minimum of 3,800 Japanese yen per vaccination effective as of October 2002; this act substantially restrained competition in the field of trade of flu vaccinations within the area of Yokkaichi City.

b) Based on an internal code of the consultation committee, unreasonably restrained the functions and activities of its members by restricting the addition of areas of medical care, increase in the number of beds and establishment of health care facilities practiced by members.