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Monopolisation, Moat Building and Entrenchment Strategies – Note by Japan

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More documents related to this discussion can be found at www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm

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1. Introduction

1. As "moat building" and "entrenchment," this note discusses conducts by a dominant enterprise to maintain its market position and exclude competitors. The relevant legal framework in Japan is described in Section 2. below, followed by introduction of major recent cases involving such conducts in Section 3 below.

2. Legal Framework

2. In Japan, conducts by a dominant enterprise to maintain its market position and exclude competitors are primarily regulated as private monopolization (Article 3 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the "Antimonopoly Act")). The major requirement for private monopolization is to exclude or control "the business activities of other enterprises, thereby causing... a substantial restraint of competition in any particular field of trade" (Article 2, Paragraph 5 of the Antimonopoly Act). As is clear from this, there are two types of private monopolization: exclusionary and controlling[1]. As "moat building" and "entrenchment" are primarily considered to be included in exclusionary private monopolization, this note focuses on exclusionary private monopolization.

3. Among the requirements for exclusionary private monopolization, "exclusion," which is a conduct requirement, is understood to require "artificiality that deviates from the normal methods of competition."[2] This can be understood as meaning that even if competitors are deprived of deals through competition on the merits (competition by means of price, quality, etc.), the conduct requirement for exclusionary private monopolization is not satisfied.

4. As to what specific conduct constitutes "exclusion," the guidelines on exclusionary private monopolization[3] issued by the Japan Fair Trade Commission (JFTC) state that such conducts typically include, but are not limited to, predatory pricing, exclusive dealing, tying, and refusal to supply/discriminatory treatment. Multiple conducts may also constitute "exclusion" as a whole[4].

5. The effect requirement for an exclusionary private monopolization, substantial restriction of competition, means the establishment, maintenance or enhancement of market power (see 3. below).

[1] "[C]ontrol" means to bind business activities of other enterprises and subject them to the will of the actor (e.g., resale price maintenance).

[2] The NTT East case and JASRAC case (see 3. below).

[3] https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/20122501.pdf

[4] Cases where multiple conducts collectively constituted "exclusion" include the Mainami case (see 3.3. below).

3. Actual cases

6. This section discusses four major cases in recent years.

3.1. NTT East Case (Supreme Court, 2010)

This is the first case in which the Supreme Court has ruled on private monopolization.

7. NTT East (Nippon Telegraph and Telephone East Corporation) is a telecommunications carrier established in 1999 as a result of the reorganization and split-off of NTT (Nippon Telegraph and Telephone Corporation), and conducted the business in the east Japan area. The predecessor of NTT was Nippon Telegraph and Telephone Public Corporation, which was a monopoly telecommunications carrier in Japan. NTT East provided FTTH services, which were telecommunication services to users in detached houses using optical fiber facilities. NTT East was obligated under the Telecommunications Business Law to make its optical fiber facilities available to other telecommunications service providers (competitors in the user service market). NTT East owned approximately 70% or more of the optical fiber facilities used for FTTH services in the east Japan area, and there were only two other firms that owned optical fiber facilities in Japan and the areas where they had been laid were limited. NTT East was practically the only telecommunications carrier that could allow other telecommunications firms to use its optical fiber facilities, and it was difficult for telecommunications firms to install new optical fiber facilities because of the high cost and other difficulties.

8. The issue in this case was whether NTT East committed exclusionary private monopolization by the conduct of setting lower prices for users of FTTH services (downstream market) than charges for connection to optical fiber facilities for other FTTH service providers (upstream market) during the period from June 2002 to March 2004.

9. The Supreme Court ruled for the first time that the requirement of "exclusion" needs "artificiality that deviates from the scope of normal methods of competition." In this regard, with respect to the conduct in question, the Supreme Court stated that it was clear for the competitors that no matter how efficiently they operated the FTTH service business, it would inevitably incur losses if they set the prices for users at or below the same level as those of NTT East, in light of the facts that NTT East was effectively the only operator that could provide connection to competitors, that FTTH service had characteristics that favored NTT East as the market leader, and that NTT East's user fees were lower than its connection charges. On this basis, the Supreme Court pointed out that there existed a considerable gap between NTT East and competitors in terms of market position and competitive conditions, and that the period of the conduct by NTT East was of a significant length from the perspective of establishing, maintaining, or enhancing NTT East's market power. Based upon these, the Court stated that the conduct was taking advantage of NTT East's position as the sole effective supplier in the subscriber optical fiber facilities connection market to set and offer connection conditions that competitors could not accept from the viewpoint of economic rationality; and that the conduct had the aspect of "unilateral refusal to deal or discount," "artificiality that deviates from the scope of normal methods of competition," and the effect of making it significantly more difficult for competitors to enter the FTTH service market.

10. The court concluded that the act caused a "substantial restriction of competition," and thus found that exclusionary private monopolization had been established, in light of the facts including that the existing competitors did not work as sufficient competitive constraint on NTT East and that new entrants to the market occurred after NTT East stopped the conduct.

3.2. JASRAC Case (Supreme Court, 2015)

11. The Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) is a management business operator that engages in the management business of copyrights of music works (hereinafter referred to as the "management business"). In general, a management business operator is entrusted with the management of music copyrights by authors, etc. based on a contract, licenses the use of the managed music works, collects royalties from the users for such use, deducts the management fee, and distributes the royalties to the authors, etc.

12. The relevant market in this case is the service market where management business operators license broadcasters to use the managed music works, collect royalties from broadcasters, and distribute them to the authors, etc.

13. Until September 2001, the management business was conducted under a permission system and JASRAC was virtually the only management business operator in Japan. After October of the same year, when the Act on Copyright Management Service came into force and the Act shifted the permission system to the registration system, four other companies in addition to JASRAC started their management business. Nevertheless, JASRAC has been entrusted with the management of the most of music copyrights.

14. In general, there are two ways to collect royalties from broadcasters for broadcasting etc.: "blanket collection[5]" and "individual collection[6]," and the both blanket and individual collection options are offered by JASRAC. However, in the blanket collection conducted by JASRAC (hereinafter, referred to as the "Blanket Collection"), the royalty is fixed regardless of the usage ratio of the managed music works. Therefore, if a broadcaster concluding a conduct with JASRAC for the Blanket Collection concludes with another management business operator in addition to JASRAC and pays broadcasting royalties, the total amount of broadcasting royalties for the broadcaster increases by the additional payment. Also, according to the terms and conditions of the contracts with JASRAC, if a broadcaster chooses individual collection, the amount of royalty paid to JASRAC become significantly higher than in the case of the Blanket Collection, and almost all broadcasters therefore have concluded contracts for the Blanket Collection.

15. The Supreme Court addressed the issue of whether there is an exclusionary effect in the JASRAC's conduct of concluding contract with almost all broadcasters for the Blanket Collection and collecting broadcast royalties. The Court firstly stated that it was very difficult for a broadcaster to conclude an agreement only with other management business operators without concluding a contract for the Blanket Collection with JASRAC, which manages most music copyrights, in light of the following circumstances:

- JASRAC already had a monopoly position when the management business became able to be operated based on registration instead of permission,
- entry of other enterprises into the music copyright management business would be accompanied by considerable difficulties due to the barriers such as generally large amount of costs required for the management business,

[5] A method in which the use of entire managed work is licensed comprehensively, and the fees for broadcasting, etc. are comprehensively determined and collected (e.g., as annual fixed fee).

[6] A method in which fees for broadcasting, etc. are calculated and collected on a per-use per-performance basis for each managed work.

- even after the shift from the permission system to the registration system, JASRAC continued to be entrusted with the management of the most of music copyrights, and
- for broadcasting, vast number of music works are used on a daily basis.

16. Under these circumstances, the JASRAC's conduct, combined with the basically substitutive nature of the broadcast use of music, restrained the use by almost all broadcasters of music managed by other management business operators, and lasted for a considerable period (more than seven years). Because of these factors, the Supreme Court found the exclusionary effect of the JASRAC's conduct.

17. With regard to the existence of "artificiality that deviates from the scope of normal methods of competition," in light of the content of the provisions on broadcasting royalties and their collection methods, the fact that the choice of collection methods by broadcasters is effectively restricted by these provisions, and the nature of the system that causes restraint of use, the court concluded that the JASRAC's conduct has "artificiality that deviates from the scope of normal methods of competition," unless the circumstances are exceptional.

3.3. Mainami Case (Tokyo High Court, 2023)

18. Mainami Aviation Services (Mainami) engages in the relevant business, in which Minami sells aviation fuel to the users and delivers it by refueling the tank of users' aircrafts at 11 airports in Japan. Mainami used to be the sole supplier in the relevant business field at Yao Airport, which is the relevant market. Although SGC Saga Aviation (Saga Aviation) entered into the relevant market in 2016, Mainami had kept a market share of over 80% until January 2019.

19. With respect to the relevant business, Mainami engaged in the following conducts.

1. Mainami notified its client users that it would not continue to fuel their aircrafts if they are fueled by Saga Aviation.
2. As a condition for fueling users which received the service of Saga Aviation, Mainami required the pilots and other employees of users to sign a document describing that they shall not seek Mainami's liability for aircraft-related accidents caused by mixing the aviation fuel of Mainami with that of Saga Aviation, and, if they don't accept the requirement, required removing the fuel supplied by Minami from their aircrafts.

20. In this case, the issue was whether the Mainami's conduct constituted exclusionary private monopolization. Mainami alleged that the conduct did not constitute exclusionary private monopolization because it had no exclusionary effect and was justified by the rationality of avoiding the risks of its own liability in the event of an aircraft accident caused by Saga Aviation's fuel.

21. The Tokyo High Court addressed issues including whether the Mainami's conduct had "artificiality that deviates from the scope of normal methods of competition." The court held that the requirement of "artificiality that deviates from the scope of normal methods of competition" was satisfied for reasons including the followings.

- Given that Mainami has more than 80% share of the relevant market and is an irreplaceable supplier for users, the conduct forces them to deal solely with Mainami, depriving them of the freedom of choice.

- The conduct was committed for the purpose of excluding Saga Aviation[7].

3.4. Google[8] Case (approval of the commitment plan, April 2024)

22. In this case, the JFTC issued a notice of commitment procedure, stating that Google was suspected to violate the Antimonopoly Act by ceasing to provide Yahoo with technologies for search engines and search advertising. In response to the notification, Google submitted a commitment plan to the JFTC for approval, and the JFTC approved it and made a public announcement[9] on April 22, 2024[10].

23. Yahoo does not have the technologies for search engines and search advertising. Yahoo had been provided the technologies from Yahoo Inc. until around 2010. However, as Yahoo Inc. decided to cease its development of the technologies in 2009, Yahoo had to newly select another provider of the technologies and decided to select Google.

24. In advance of the conclusion of an agreement on provision of the technologies, Google and Yahoo consulted the JFTC as to whether the agreement would cause any problem under the Antimonopoly Act. In July 2010, the JFTC responded that the provision of the technologies would not violate the Antimonopoly Act; in light of their explanation that Google and Yahoo would independently operate their own online search services and online search advertising and would maintain complete separation of the information including names of advertisers and their bidding prices, so that Google and Yahoo would maintain the competitive relationship between them after commencement of the provision of the technologies. Google concluded the contract with Yahoo in July 2010, and started providing Yahoo with the technologies.

25. However, Google amended the contract in 2014 and ceased providing Yahoo with the technologies necessary for mobile syndication transactions[11], thereby making it difficult for Yahoo to carry on mobile syndication transactions from September 2015 at the latest through October 2022 (hereinafter referred to as the "suspected conduct").

26. Yahoo was able to compete with Google in the field of mobile syndication transactions by receiving the technologies from Google. However, by ceasing providing the technologies, Google made it difficult for Yahoo to find a supplier of the technologies and to continue carrying on mobile syndication transactions. The suspected conduct could violate the Antimonopoly Act as private monopolization or unfair trade practices (refusal to deal or interference with competitor's transactions).

27. Google's commitment plan approved in this case includes the following. (i) The highest decision-making body of Google will confirm that the suspected conduct has already been ceased. (ii) For the next three years, Google will not withhold the technologies

[7] As mentioned above, Mainami alleged that the conduct was aimed at avoiding risks and justified, but the court decided that avoiding risks was an ostensible reason to conceal the intention to exclude Saga Aviation, based on evidences including Mainami's internal documents.

[8] In this note, Google LLC, which was Google Inc. before the reorganization on September 30, 2007, is referred to as Google.

[9] https://www.jftc.go.jp/en/pressreleases/yearly-2024/April/240422.html

[10] The approval of the Commitment Plan does not mean that Google's conduct violated the Antimonopoly Act.

[11] Transactions in which a business entity distributes search advertising to the advertising spaces provided from, and shares a portion of the revenue generated by the search advertising with, Website Operators, etc.

necessary for mobile syndication transactions from Yahoo, except in cases where the JFTC finds a reasonable justification and approves the withholding in advance. (iii) Google will take the necessary measures for being supervised periodically based on the oversight by external expert for compliance with the Antimonopoly Act regarding the provision of the technologies necessary for mobile syndication transactions.

4. Conclusion

28. As described above, in Japan, conducts known as moat building and entrenchment are basically considered to be exclusionary private monopolization, and important cases, including Supreme Court decisions, on exclusionary private monopolization have been dealt with in recent years.

29. Finally, in relation to moat and entrenchment, it should be added that the Cabinet has approved a new draft law to improve the competitive environment for certain software[12] used in smartphones. This is in response to the situation where it is difficult to restore fair and free competition by case investigation based on the Antimonopoly Act because it takes a significantly long time, while the market for the provision of the software is oligopolized by a specific few leading enterprises. The new law is to designate as regulated entities those who operate businesses above a certain scale for each type of the software and to prescribe prohibited conducts and compliance requirements, as well as measures to be taken in the event of violation. The draft law is to be discussed in the Parliament.

[12] Mobile OS, app store, browser and search engine.