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Antimonopoly Law Exemption（1）

Hiroaki TANAKA

1. What is exemption?

As specified in Article 1, the Antimonopoly Law is the basic economic law that establishes and maintains the order of free competition economy to maintain and promote fair and free competition.

However, the principle of competition is not applicable to all the economic fields. There are many fields where a principle or system other than the principle of competition is applied. In these fields, even if an act restrains and interferes with competition, the Antimonopoly Law is not applicable to the act for a certain reason. This is called "Antimonopoly Law exemption."

* The existing Antimonopoly Law exemption system consists of the following:

(1) Exemptions system based on the Antimonopoly Law (based on Articles 21 to 23)

(2) Exemption system based on the special law for each industry

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（1） See Hiroaki Tanaka, "Antimonopoly Law Exemption (Dokkinhou no Tekiyoujogai)", in: The Japan Association of Economic Law (Nihon Keizaihou Gakkai), Theory of Antimonopoly Law and its Development (Dokkinhou no Riron to Tenkai) (I), Sanseido, Tokyo, 2002, at 146-166.

2. Reexamination of exemption system (2)

The exemption system was greatly revised when the Antimonopoly Law was revised in 1999 and 2000. As result, the exemption system has been decreasing due to the recent deregulation.

In 1997, the Government explained the reason for its proposal of the abolition of the exempted cartel system as follows:

"The Government will positively promote the competition policy to make the Japanese markets more competitive and open through the promotion of deregulation and fair and free competition. This will lead to the realization of international and free economic society based on the principles of self-responsibility and market mechanism. Because the system of exempting cartels and the like from the Antimonopoly Law under the special law for each industry may restrain companies' fair and free competition and give harm to consumer interests, the Government will reexamine the exempted cartel system from the viewpoint of abolishing the system in principle. (The rest is omitted.)"

This explanation of the reason for the Government's proposal indicates that the Government policy is to develop competition measures positively and secure consumer interests through competition. In addition, taking into consideration the international circumstances around Japan (that is, to break down Japan's closed view of markets), the Government thinks that the economy will become more efficient through competition in an open economy (full utilization of the principle of competition) and this will keep the Japanese industries competitive, with the result that profits will be returned to consumers. The Government seems to regard this as the best policy

(2) *Id.* at 147.

choice.

Such a reexamination of the exemption system is a great policy change. This means that the principle of competition has been further recognized as a universal and appropriate principle for application and understanding of the Law.

3. Nature of exemption provisions[3]

Exemption can be classified into "inherent exemption" and "regressive exemption" according to the nature. Inherent exemption covers acts that are inherently regarded as not violating the Antimonopoly Law. Regressive exemption covers acts that inherently violate the antimonopoly policy but are exempted for economic policy reasons. Regressive exemption requires a certain procedure. If the procedure is not carried out, the act is not exempted.

* Classification under the existing Antimonopoly Law

- Inherent exemption: ……Exercise of rights under intellectual property laws (Article 21); some acts by associations (Article 22)
- Regressive exemption: ……Resale price maintenance agreement (Article 23)

(1) Inherent exemption

The purpose of competition policy is to accomplish desirable results, such as proper allocation of resources, by maintaining competitive conditions. In an industry, however, the market mechanism may be unable to perform this function due to the peculiar circumstances of the industry.

(3) *Id.* at 148.

In this case, a policy principle other than the principle of competition will be applied, and the applicable scope of the competition policy will be limited. Examples are monopoly under the patent system or the public utility regulation and trade restraint by a cooperative association.

Although it had been thought that exemption should be applied to "acts inherent in natural monopoly" (Article 21 of the former Antimonopoly Law) because of its public utility, the revised Antimonopoly Law of 2000 introduced the principle of competition into this field. This change seems to provide an opportunity of stimulating reconsideration as to how to interpret "public interests" in relation to exemption.

When examining "inherent exemption," it seems useful to use "natural monopoly" as material. This is because "natural monopoly" is a symbol of the narrowing scope of "inherent exemption" due to the progress in deregulation.

"Natural monopoly" is defined as monopoly that is necessarily created in industries that inherently cannot become competitive due to technical or institutional reasons. The "inherently cannot become competitive" means "inevitable occurrence of a situation where it is impossible for the industry to continue to exist without monopolistic equilibrium." However, this has still not been proved economically. "Natural monopoly" also is not recognized clearly by economists.

* Recent convincing opinion[(4)]: "Natural monopoly" is based on the idea that the principle of competition is not applicable to the decreasing cost industries where huge amounts of investments in fixed and special equipment are necessary and the ratio of fixed costs to the total costs is high —that is, the industries without the limitation of

(4) Akira Negishi and Masayuki Funada, A Compendium of Antimonopoly Law (Dokusenkinshihou Gaisetsu) (3 rd ed.), Yuhikaku, Tokyo, 2006, at 373.

"economy of scale."

In the past, "natural monopoly" businesses were put under public control as public utility services, and their monopolization was approved legally. The legalground for this was the Article 22 of the former Antimonopoly Law entitled "justifiable acts under business laws." However, because "business laws" are results of legislative policy, acts that "become monopoly as a matter of course because of their nature" are not always approved.

The Antimonopoly Law was revised in 2000 because, as result of the development of technical innovation and business internationalization, there were great changes in the industrial conditions, which had been taken into consideration at the time of the legislation of the former law, and the nature of natural monopoly was diluted. In Japan, the principle of competition was introduced into the telephone service first and then the electricity and gas services.

* Was natural monopoly a product of legislative policy?
Or, did natural monopoly have a nature that enabled the introduction of the principle of competition when preparation became complete in the service industries?

(2) Regressive exemption[(5)]

The revision of the Antimonopoly Law in 1953 set back the antimonopoly policy, resulting in the introduction of a policy that approved cartels. The revision also allowed the Antimonopoly Law exemption under each business regulation law and the conclusion of reselling price maintenance contracts, which is still allowed at present. Antirecession cartels and ra-

(5) H. Tanaka, at 150-151.

tionalization cartels, which have been abolished now, were introduced at that time. They were in conflict with the antimonopoly policy.

Antirecession cartels were introduced because Japan was accustomed to controlled economy due to World War II, and the Japanese industrial world and industry-related government agencies continued to claim the deregulation of cartels in spite of the enactment of the so-called primitive Antimonopoly Law for economic democratization. Because the Japanese economy fell into serious recession in 1951 due to the end of the special procurement boom caused by the Korean War and a decline in exports due to a worldwide recession, the trend toward the deregulation of cartels was accelerated.

Concretely, at that time, the Trade Association Law was greatly relaxed and the Antimonopoly Law Exemption Law was enacted so that small and midsize companies and exporters could form cartels under some conditions.(6) This was because small and midsize companies and exporters had received the largest influence from the recession. To overcome the serious recession, the revised Antimonopoly Law was approved in 1953 and the antirecession cartel system was introduced. From the viewpoint of national economy, the antirecession cartel system was regarded as an exceptional and limited measure allowable in an emergency case where it was difficult for most of the companies in an industry to continue their business activities. Antirecession cartels were recognized as the so-called "necessary evil."

Anyhow, it seems that the prime reason was the Japanese industries' cartel-like nature.

As for rationalization cartels, the rationalization of companies should be

(6) See Yoshio Kanazawa, Economic Law (Keizaihou) (new ed.), Yuhikaku, Tokyo, 1980, at 228.

essentially accomplished through free competition among companies. However, if the rationalization is promoted cooperatively among the companies in the same industry, this may be expected to bring about great results. Because of this, the existence of rationalization cartels was approved. In addition, it can be pointed out that there was also the aim to secure international competitiveness.

Generally, it was interpreted that a rationalization cartel had a small effect of restraining competition and was useful for the promotion of effectiveness, the purpose of competition. Therefore, a rationalization cartel was regarded as useful for the activation of competition units (companies' activities). That is, this exemption was based on the idea that rationalization cartels did not so much conflict with the competition policy. In reality, however, it was doubtful whether cartels were useful and necessary for rationalization.(7)

To be sure, because, as in the case of the establishment of standards, a problem can be solved earlier by making a decision through discussions among the whole industry, it can be said that rationalization cartels are useful for the improvement of efficiency. However, the means to improve efficiency most is none other than free competition itself. Therefore, although rationalization cartels seem to have a positive and desirable purpose of rationalization, it is actually a denial of competition. In addition, while the above-described antirecession cartel is a temporary measure against worsening economic conditions, rationalization cartels frequently have permanent effects and therefore have the great effect of restraining competition.

After all, the essence of rationalization cartels was the restraint of com-

(7) Kenji Sanekata, Antimonopoly Law (Dokusenkinshihou) (3 rd ed.), Yuhikaku, Tokyo, 1995, at 411.

petition.

(3) Abolition of antirecession cartels and rationalization cartels[8]

Because the revision of the Antimonopoly Law in 1953 was a revision in response to Japan's economic situation at that time, the system for applying exemption to cartels should have been based on the premise that the system would change according to economic and social changes. Therefore, it is natural that economic and social changes in Japan have now required the permeation of the principle of competition throughout a wide range of economic fields. The historical role of antirecession cartels as "necessary evil" has ended.

Moreover, because the permeation of the principle competition has been required in various economic fields, rationalization cartels, which are essentially incompatible with the promotion of competition, have completed its historical mission.

If looking at this from another angle, it also can be said that both antirecession cartels and rationalization cartels were born during the process toward the high-growth era of the Japanese economy. These types of cartels may have been results of the demands of the times, which may be the reason why they are treated as unnecessary things in today's mature economic society.

The revision of the Antimonopoly Law in 1999 was also because of changes in the Japan's economic situation and perception of times, which brought about "return to starting point" of the primitive Antimonopoly Law, which was based on the idea that competition is the best means for effectiveness.

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(8) H. Tanaka, at 151-153.

Over 60 years after the enactment of the Antimonopoly Law, at last Japan has begun to return to the idea of the (primitive) Antimonopoly Law, a basic economic law.

4. Antimonopoly Law exemption under special laws each industry

Some companies or trade associations can be granted Antimonopoly Law exemption under special laws other than the Antimonopoly Law. As of the end FY2006, there were 14 special laws for each industry, such the Insurance Business Law. Under the industrial laws, cartels can be formed with the consent of the competent minister or the Fair Trade Commission or after consultation with or notification to the competent minister or the Fair Trade Commission.(9)

For example, in the case of an insurance cartel under the Insurance Business Law, if concerted acts are carried out concerning aerial insurance business, atomic energy insurance business, automobile liability insurance business under the Automobile Liability Insurance Law, or necessary to obtain approval from the Commissioner of the Financial Service Agency, who must obtain the Fair Trade Commission's consent to the approval.

The Antimonopoly Law exemption is applicable to insurance business because insurance business needs to average and divide risks as much as possible. Regarding non-life insurance business in particular, concerted acts, such as coinsurance, are essential for underwriting a huge amount of insurance.

Because the cost of an insurance product is not determined at the stage of scale, there are some countries where insurance companies went into in-

(9) Cf. Masahito Kubo and Hiroaki Tanaka, Lecture on Antimonopoly Law (Dokusenkinshihou-Kougi), Chuo-Keizaisha, Tokyo, 2008, at 18.

solvency when insurance business was submitted to competition. The bankruptcy of an insurance company influences not only the subscribers to the company but also the whole insurance industry. Also to maintain subscribers' trust in the insurance industry, it is necessary to exempt insurance rate cartels from the Antimonopoly Law.

Other cartels exempted from the Antimonopoly Law include transportation cartels under the Road Transportation Law, marine transportation cartels under the Marine Transportation Law, and aerial cartels under the Aviation Law (these are under the jurisdiction of the Ministry of Land, Infrastructure and Transport).

All of them belong to the fields into which it is not necessarily appropriate to introduce the principle of competition as it is. Other main countries that have an antimonopoly law also are in the same situation.

5. Conclusion(10)

As described above, Japan's antimonopoly policy aims to permeate the principle of competition into as many fields as possible. Therefore, the number of fields exempted from the Antimonopoly Law is decreasing gradually.

In addition to this downward trend, it is also important to clarify the scope of the application of the Antimonopoly Law in the exempted fields. This is because the application of the Antimonopoly Law to the exempted fields and the introduction of the principle of competition into them are realistic improvement measures.

Because an exempted company (or trade association) obtains a special position, if it uses the position to restrain other companies' business activities through production, sale and other acts, the acts are not covered by the

(10) Cf. H. Tanaka, at 164-166, especially, at 165.

exemption. This case is treated as a problem concerning the prohibition of private monopoly or the prohibition of unfair trade practices.

Anyhow, exemption is an exceptional measure in light of the purpose of the Antimonopoly Law. Therefore, competition-restrictive acts allowed as exemptions are required to place first priority on the protection of consumer interests and maximize them. It can be said that the ideal antimonopoly policy is to satisfy this requirement.

〈追記〉

「法律学を学ぶ者にとって，法制史を学ぶことは，極めて重要であると思う」とは，経済法学の泰斗，故金澤良雄先生の言である（「経済法の史的考察」はしがき）。小稿を通じて独占禁止法の変遷の一端を垣間見たつもりであるが，果たしてどこまでそれが成功したか心許ないところである。もとより小稿は，法制史の研究を意図したものでもない。あくまで自分の守備範囲でのものである。砂川先生とは，二年前，夏の宴の後での会話が最後となってしまった。先生のご専門に少しでも近づこうと小稿を試みた次第である。もはや先生からのご指摘・批判を受けられないことが残念である。ただただ，先生のご冥福を祈るばかりである。