History of Antitrust Law in Japan

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ABSTRACT
This article describes the process of development of Antitrust Law in Japan. The characteristic features of Japanese antitrust regulation in the historical perspective are presented. The effectiveness of the legislation and its problematic issues are analyzed. On the basis of the study, the author propose measures aimed at solving one of the problems of modern antitrust law in Japan, which is contrary to the administrative guidance.
Keywords: Japanese antitrust law, Japanese law, monopoly, history of law.

Introduction

In every modern democratic state, the operation of a market economy is proclaimed to be one of the key values. In the context of such an economic system, actors have the right to freely engage in a business activity, and various market mechanisms operate autonomously. However, practice shows that a market economy cannot function in such a way as not to infringe on the rights of one or another party. The exercise of the right to free competition being one of the key economic development factors is impeded by the process of monopolization. So, this phenomenon requires state intervention for its regulation.

Antitrust law in Japan is of particular interest when considering this issue. The Japanese society that has always considered state intervention in the economy and maintenance of monopoly forms of enterprises to be the most effective method for regulating economic relations, was forced, for historical reasons in the mid 20th century, to adopt democratic antitrust laws. Today Japan continues to amend and supplement its antitrust laws.

This essay is consequently aimed to provide a historical comparative overview of antitrust laws in Japan.

Monopoly and Competition

Prior to proceeding to the historical overview of the Japan's antitrust law formation, it is essential to define the concepts of 'monopoly' and 'competition'.

The concept of 'monopoly' has no unambiguous definition: experts interpret this notion differently. For example, K.A. Pisenko handles the concept of monopoly using two approaches: economic and legal[1]. The legal content of the concept of monopoly is defined through the list of main features in the law. In the economic sense, a monopoly is interpreted as a market condition where only one producer or vendor of a specific type of goods that have no equivalents operates, while buyers have no choice and are forced to purchase the monopolist's products only.

Other researchers of this phenomenon interpret the concept of monopoly using other approaches: microeconomic and macroeconomic[2]. In microeconomic interpretation, the key monopoly features are the ability to dictate their prices in the market and to restrict the entry to the market for other companies that produce the same or similar products.

It is noteworthy that monopoly in its microeconomic understanding is rather rare in real life and is an abstract concept[3]. The most relevant is the concept of monopoly in the macroeconomic sense. In this case, the monopoly is a market condition where the economic actor is able to influence and actually affects significant market parameters[4].

An ambiguous situation arises when trying to define the concept of 'competition'. By analogy with the concept of 'monopoly', the term 'competition' can be interpreted from the economic and legal points of view[5]. In economics, competition is understood as a market situation where an unlimited number of manufacturers or sellers carry out their economic activities without any restrictions.

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[1] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* Legal Regulation of Competition and Monopoly in the Russian Federation : a Course of Lectures. Moscow : Statute, 2011. P. 43.

[2] See: *Shishkin, M. V., Smirnov, A. V.* Antimonopoly Regulation : Textbook and Practice for Bachelor's and Master's Degrees. Moscow : Yurayt, 2019. Pp. 5–7.

[3] See: Economy : the textbook / edited by A. S. Bulatov. 3rd ed. Moscow : Ekonomist, 2004. Pp. 240–241.

[4] See: *Shishkin, M. V., Smirnov, A. V.* (see above). Pp. 10–11.

[5] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). Pp. 35–38.

The regulatory legal acts related to the regulation of competition applicable in most foreign countries do not give any specific definition of the concepts used, however, for example, the Japanese law contains an exact formulation of the concept 'competition'. Thus, Article 2 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade currently in force in Japan defines competition as a "state in which two or more enterprises, within the normal scope of their business activities and without making any material change to the facilities for, or kinds of, such business activities, engage in, or are able to engage in, supplying the same or similar goods or services to the same user; receiving supplies of the same or similar goods or services from the same supplier"[6].

Like monopoly, competition is rarely found in the market in its pure form (perfect competition). Oligopoly and monopolistic competition are much more often in the modern world. For example, an oligopoly is a market structure where a limited small number of suppliers and producers serve a large number of users.

In the ordinary mind, the monopoly always appears as a categorically negative phenomenon. In fact, monopolization can have both negative and positive aspects. One of the advantages of the monopoly is a significant reduction in costs while increasing production outputs, i.e. the so-called 'scale effect'. In addition, large monopolies make it possible to forecast the market, and are more stable in cases of bankruptcy. The stable position of a monopoly company inspires confidence among users, besides, it is easier for the state to control one enterprise than a large number of small ones. In addition, there are some industries that operate most effectively if they are managed within the framework of one large enterprise, or competition in these industries significantly infringes on public interests (state monopolies, for example, in the field of military security). In these areas, the state is forced to establish special rules that ensure the rights of stakeholders and compensate for the lack of competition.

Despite this, monopolies often tend to set excessively high prices and save their own funds to maximize profits. In the absence of competition, the monopolist does not seek to implement the achievements of scientific and technological progress, and reduces the quality of products. The assortment of the monopoly's products is prone to reduction, while consumers, in the absence of choice, demonstrate consumer rigidity[7].

The existence of perfect competition in the market also has positive and negative consequences. Competition promotes development of small and medium-sized businesses, and increases the quantity and quality of offered goods. The market has no shortage. In case of active non-price competition between companies, the consumer is provided with more complete information about the product and, consequently, has the opportunity to fully satisfy his needs and exercise his rights.[8] However, the forms of competition often become violent and even illegal. The stakeholders' position is unstable in perfect competition, and price changes become unpredictable.

Thus, to ensure market functioning without significant infringements of public interests and rights of individual economic actors, the market activity should be controlled by the state.

Antitrust Law

Antitrust (competition) law is one of the main methods for state regulation of monopolization and competition. This area of law regulates a specific complex branch of law.

In its most general form, antitrust law can be defined as a branch of law that regulates "economic relations in the sphere of monopoly and competition"[9], where state bodies, officials, individuals, legal entities, and their associations may participate.

It is noteworthy that many researchers equate the concepts of 'antitrust' and 'competition' law[10]. However, it is believed that these are two different areas of law[11]. This approach treats the antitrust law as a set of strictly restrictive measures, where the state has the right to demand that other economic actors conduct in a manner that does not allow restricting competition. The predominant method of antitrust legal regulation is the imperative method.

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[6] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

[7] See: *Knyazeva, I. V.* Antimonopoly Policy of the State : textbook. Novosibirsk : SibAGS, 2010. Pp. 32–33.

[8] See: *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). Pp. 40–41.

[9] *Pisenko, K. A., Tsindeliani, I. A., Badmaev, B. G.* (see above). P. 14.

[10] Ibid.

[11] See: *Totev, K. Yu.* Competitive Law (Legal Regulation of Competition) : textbook. Moscow : RDL, 2000. Pp. 73–74.

The competition law is considered to be aimed not only at controlling monopolies, but also at supporting and stimulating competition, and developing a competitive environment.

Thus, the content of antitrust law depends on various characteristics, but in general terms, including in Japan, it is the main regulator of market relations regarding two interrelated phenomena: monopoly and competition.

Stage 1 in Development of Antitrust Law in Japan (from mid 19th century to World War II)

Most social, economic and political problems aggravated in Japan by the mid 19th century, and the existing Shogunate system could not cope with those challenges. The last shogun of the Tokugawa dynasty was overthrown, and unlimited power was restored to the Emperor. In the new era of history, named after the slogan of the Emperor Meiji, important reforms were carried out in various spheres of public life, including economy.

It is important to note that at the beginning of this historical period, Japan was a backward and undeveloped country, but by the end of the period the country modernized and significantly improved its economic performance, which was due to the desire to achieve independence in the international arena and get rid of the influence of Western states.

The reforms of that time first touched the economic phenomenon of monopoly. Before the Meiji restoration, the law relating to the position of monopolies did not ever exist, moreover, the existing system of class division (shi, nō, kō, shō) perpetuated a disdainful attitude towards economic actors and determined the position of merchants and people engaged in commercial activities as the lowest stage in society[12].

The main element of Japanese modernization was the creation of a competitive industrialized economy, and in most cases it was indifferent by what means to achieve the goal. Thus, to develop the most important industries, the Japanese government considered direct government intervention to be the most effective method[13]. Throughout the entire period of the country's modernization, the Japanese government played an active role in strengthening important industries through the provision of incentives and subsidies to enterprises. Later, high customs tariffs and public procurements were added to the mercantilism policy.

Gradually, a small group of Zaibatsu conglomerates (in Japanese parlance means 'property') was formed in Japan that concentrated a large amount of economic resources in their hands. Most Zaibatsu, however, existed in the form of oligopolies, but not monopolies. One of the reasons for the predominance of such a structure was the interest of the military and government bureaucracy in maintaining some degree of competition in heavy industries. This was necessary to stimulate technological progress and restrict the influence of one enterprise on others. Later, a number of small enterprises emerged around Zaibatsu which completed orders from large businesses.

During the reign of Emperor Yoshihito (1912-1926), i.e. during the years of the so-called 'Taishō democracy', economic growth in Japan continued, but in the 1920s to 1930s, development after a rapid recovery slowed down sharply, primarily due to the global economic crisis. Over that period, about 25% of all industrial enterprises in Japan operated for export, and the decline in prices for Japanese goods in the world market led to an increase in industrial reserves and a large-scale reduction in production.[14]

Back in the 1920s, the Japanese government took a number of measures to overcome the recession. In this period, the Japanese parliament, in pursuit of limiting competition and stabilizing trade, passed a law aimed at stimulating exports for small and medium-sized enterprises. This law allowed small businesses to create cartels to control the prices of exported goods.

Some time later, in the Shōwa period (1926-1989), a certain list of legislative acts was adopted, which established a limited number of enterprises able to do business in a specific area. Among them are the Banking Act of 1927 and the Iron and Steel Industry Act of 1933.[15] The most important law regulating competition in Japan was the Principal Industries Control Act of 1931. Under its provisions, the creation of cartels was officially allowed in cases where their activities were reasonably necessary

[12] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 483.

[13] *Seita A., Tamura J.* The Historical Background of Japan's Antimonopoly Law // University of Illinois Law Review, 1994. No. 1. P. 128.

[14] History of Japan / Ed. A. E. Zhukov. M. : Institute of Oriental studies of the Russian Academy of Sciences, 1998. Vol. 2. 1868–1998. P. 321.

[15] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 527.

for development of the national economy. All agreements hereunder became binding for cartel members. In 1933, an important amendment was made to the Act, which prescribed that all cartels were required to obtain approval for their actions from the government and be accountable to the latter. The Act became the background for modern antitrust regulation, which features the approval of enterprises by state authorities.

Japan's competition law was notably influenced by its participation in international agreements after World War I. The Hague Conference of 1925 decided that all states-members of the Paris Convention, including Japan, should take measures to combat unfair competition before the next conference in London. In 1926, a draft law appeared, but it did not find approval and was not adopted. As the conference in London approached, the Japanese government had to fulfill its obligations. In 1934, shortly before the conference, the parliament passed the Unfair Competition Act. Its scope of application was overly limited; it was rarely applied and did not much affect the economic situation. For example, the Act provided for a purely formal provision prohibiting damaging the reputation of goods of another manufacturer.

Thus, before World War II, a system was formed in Japan, where all economic power was concentrated in the dominant industries Zaibatsu. Zaibatsu were somewhat hybrid in nature, as they incorporated both private and public resources. All the major Zaibatsu were a network that included a holding company with the majority of shares owned by members of the same family, and many subsidiaries. Employees of subordinate companies often associated themselves with the holding company, but not with a subsidiary, their real employer. They were ready to work for the good of the conglomerate, felt a sense of respect and obedience to their elders. This became a characteristic feature of Japanese business conduct and has survived to this day. The rest of the industries (production of cotton and silk fabrics, shoes, porcelain, etc.) in the Japanese economy of that period were represented by small and medium-sized enterprises, often transformed into cartels.

Stage 2 in Development (From the End of World War II to the Early 21st Century)

Antitrust law in its standard sense emerged in Japan only after World War II, in the course of the occupation forces' activities to democratize and demilitarize the Japanese state. Until that time, Japan, on the other hand, had some rules that encouraged monopolization and cartelization.

Paragraphs 10–11 of the Potsdam Declaration, which was signed by some countries of the antifascist bloc on the Japanese issue, contained provisions obliging the Japanese government to carry out democratic reforms, reorganize industry, and liquidate military oriented companies.[16] To implement these measures, an occupation government was created in Japan, which was supposed to consist of several countries, but in fact, only the United States was involved in the entire occupation policy.

The occupation government began to democratize industry through deconcentration of economic power and dissolution of Zaibatsu. Zaibatsu were perceived by the new authorities as one of the perpetrators of war crimes. The personal assets of family members of the largest Zaibatsu were frozen, and they were prohibited to hold managerial positions in other companies. Some Zaibatsu were split into several small companies, while others were replaced by new replacement enterprises.

The most important step in the development of a democratic Japanese economy was the adoption of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, the temporary transitional Deconcentration Law in 1947 and the revision of the Commercial Code. Thus, Japan became the first Asian country to borrow and adopt the law on monopoly and competition. The antitrust law contained many provisions from American antitrust laws, but was much more detailed and stringent, as the United States feared that against the background of traditional Japanese thinking, American antitrust laws would be misinterpreted.

The history of Japan's main antitrust law dates back to 1946, when the Japanese Ministry of Industry and Commerce issued a proposal to prohibit the excessive concentration of economic power, except when it is beneficial and necessary. The occupation government considered it unacceptable and began to independently develop a law that would completely ban monopolies, unfair trade practices and excessive economic concentration of power. These ideas were enshrined in Article 1 of the antitrust law.[17]

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[16] Declaration of Governments of USA, Great Britain and China [Electronic source] dated 26 July 1945 // Embassy of Japan in Russia. URL: https://www.ru.emb–japan.go.jp/itpr_ru/1941.html#7 (date of application: 12 February 2020).

[17] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

The law additionally provided for creation of a special Japanese Fair Trade Commission, by analogy with the American Federal Trade Commission. Its main responsibility was to monitor compliance with the rules of the antitrust law.[18] Article 28 prescribed that the Commission should exercise its powers independently of the government.[19] Thus, the Commission actually monopolized the area of law enforcement in this industry. The occupation authorities believed that such a concentration of law enforcement in one independent body would be most effective in enforcing the law. It will later become clear that in Japan such a system makes the Commission more vulnerable to political pressure, and law enforcement may become ineffective.

Article 9 of the law prohibited creation of holding companies. No company, including a foreign one, could obtain an excessive concentration of economic power by acquiring or owning shares in other companies.[20] This provision on prohibition of holding companies was canceled only in 1997. A special aspect of the new law was Article 8, which did not have any equivalents in US antitrust laws. This article prohibited businesses from restricting competition and preventing other companies from doing business in a particular industry.[21]

Many businesses, mostly large companies and their backing conservative parties, found the law overly harsh and impeding Japan's economic growth. It was perceived not as a means to democratize the economy, but as punishment for a country that had lost the war. From the outset, the ideas of the antitrust law were foreign to the character and historical experience of the Japanese, which resulted in amendments to the antitrust law that first were made in 1949.

The most significant change was that amendments lifted a ban on the company's ownership of shares in another company, as long as the acquisition of shares did not harm the existence of free competition. The amendments canceled the restrictions on company directors to hold leadership positions in no more than four companies. This was now only prohibited if these companies were competing in the same industry.

In 1950, the Korean War broke out and Japan became an important supplier of military goods to the United States. This provided a precondition for revitalization of the Japanese economy and the subsequent "economic miracle" in the country. Despite this, many companies could not resist free competition and went bankrupt, enterprises began to demand additional amendments to the law. In connection with the situation, the Japanese parliament passed the so-called Stabilization Act, which allowed small and medium-sized enterprises to create cartels in case of a steady decline in demand for their products.

In 1953, new amendments were introduced into the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. Those amendments mainly resulted in authorization of cartelization if approved by the ministry in charge of the relevant economy sector where the enterprise was created. Gradually, the number of cartels freed from the anti-monopoly law increased.

At all stages of development, the basic principles of the antitrust law were specified in the Fair Trade Commission's acts. In the 1950s, the Commission's enforcement activities focused on unfair trade practices and were often carried out informally. The focus on this problem and the evasion of official action was explained by the fact that the Commission tried not to interfere in the controversial issues of economic policy, which were decided by the Ministry of Trade and Industry.

In the 1970s, a major oil crisis began. In 1974, T. Takahashi, the Chairman of the Fair Trade Commission, proposed a program of reforms in the antitrust law to solve economic problems. Among the measures proposed were tougher penalties for violators of the antitrust law, partial alienation of assets from oligopolistic companies, and introduction of restrictions on the number of shares that financial companies may have. However, the Ministry of International Trade and Industry entered into confrontation with the Commission, and no significant changes were made to the law.[22] To rid the Japanese economy of severe price increases, the Ministry allowed oil importers to set up cartels to increase the cost of gasoline and fuel oil purchased by consumers. The Fair Trade Commission made the case public. In 1984, the Supreme Court ruled that the Ministry's actions were illegal, and fourteen top managers of oil companies were sentenced to prison. This situation allowed the Commission to influence parliament and tighten some provisions of the antitrust law.

The general trend of the 1980s in the area of antitrust regulation was an informal activity of the Fair Trade Commission through recommendations and warnings for companies. Antitrust laws increasingly

[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] *Suzuki K.* Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network. London, New York : Routledge, 2002. P. 23.

came into conflict with the interests of individual enterprises. In such areas, appropriate mitigating changes have been made to the legislation on monopolies. The relevant evidences can be found in the Fair Trade Commission report dated 1989 which demonstrated that nearly half of Japan's economic output continues to be in industries with a strong concentration of economic power.[23]

In the 1990s and 2000s, many provisions of antitrust laws have been rethought. Initially, the changes were caused by external pressure, mainly from the United States. They sought to amend the antitrust law in order to maximize the benefits for US companies in the Japanese market. Later, during a slowdown in economic growth, changes became part of domestic economic policy, which increasingly viewed the law as a way to create a sustainable and developing economy. For example, in 1992, an amendment was made to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, which quadrupled the size of the fine for violating the antitrust law. Since the second half of the 1990s, the number of cartels excluded from the antitrust law was significantly reduced.

Modern Stage

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade as amended and numerous Fair Trade Commission's recommendations currently remain the main sources of antitrust law. However, economic conditions have changed significantly as compared to the end of the 20th century.

One of the phenomena characteristic of the Japanese economy today is keiretsu (in Japanese parlance means 'set', 'system'), which are often called the successors of Zaibatsu. Having united in keiretsu, the companies jointly create a diversified concern. Their position has some common features with the monopoly. Firms have a large percentage of each other's shares, and relations between firms are long-term. In addition, each of them has a close relationship with a common large bank.

Although many provisions of the main antitrust law have remained intact since 1947, Article 9 of the antitrust law was amended in 2002. The concept of 'holding company' was abolished, and the Article began to cover companies with an excessive concentration of economic power in general.

The next amendment to the antitrust law in 2005 established a stricter penalty for its violation. In 2009, the list of actions was expanded, including various types of unfair competition, for which companies are held liable. The last significant change to the antitrust law was made in 2013. Individuals acquired the ability to appeal any Commission's decision to the Tokyo District Court.

Today, Articles 1 and 2 of the modern antitrust law support free competition, promote democratic development of the national economy, and protect interests of the general population by prohibiting private monopolization, restricting trade and unfair trade policies.[24]

The Fair Trade Commission, which continues to have a long mandate, currently retains its active role in overseeing and modifying the law in line with economic realities. The clarifications issued by the Commission in the field of antitrust regulation adjust the provisions of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade in accordance with the requirements of the time. For example, in 2019, the guidance was issued regarding the abuse of best position in negotiations between digital platform operators and consumers who provide personal information.

One of the problems in implementation of antitrust law at this stage is its contradictions with the explanations within the administrative guidance given by the Ministry of International Trade and Industry. The administrative leadership consists in the fact that the Ministry, in the sphere of its permanent competences, gives recommendations to companies or makes proposals. It can be expressed in writing, but it usually exists orally. The law does not establish any penalties for non-compliance. The main problem with such clarifications is the Ministry's assistance to development of cartels or cartel agreements in order to overcome depression or rationalize industry. The Fair Trade Commission often opposes the Ministry, arguing that such anticompetitive governance is illegal, or at least undesirable, as it allows cartels to be created bypassing antitrust laws.

According to the author, this problem could be settled by introducing a system where any explanation of the Ministry would be published in writing and, before being sent directly to the company, would have to be checked by the Commission. If the Commission rejects the text of the clarification on the grounds of its contradiction with the antitrust law provisions, the Ministry could, for example, appeal it to another instance or revise the clarification. Such a scheme would avoid non-compliances and conflicts,

[23] History of Law in Japan since 1868 / edited by W. Rohl. Leiden : Brill Academic Publishers, 2005. P. 534.

[24] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Electronic source] // Japan Fair Trade Comission. URL: https://www.jftc. go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html (date of application: 10 February 2020).

and would not limit the Ministry's powers, since the Commission would have purely control functions. In any case, the administrative guidance is only a voluntary recommendation, and not an act binding the company.

Thus, modern Japanese antitrust law is an essential part of its legal system. It, like any other industry, is being constantly adjusted, and the bodies responsible for implementation of rules strive to ensure their most effective functioning and eliminate existing deficiencies.

Conclusion

To summarize, it is noteworthy to say that pre-war Japan was characterized by government support for monopoly and oligopoly forms of enterprises, meanwhile over the period after World War II, it faced the reverse process of borrowing strict US antitrust laws and attempting to modify the latter. Today, the Japanese antitrust law is a substantially amended and supplemented law that seeks to conform to the realities of a developed post-industrial society. The Fair Trade Commission remains the main body implementing these rules.

The main problem of the antitrust law that Japan has faced since the end of the 20th century up to now is the conflict between the antitrust law and unalterable Japanese opinion, according to which monopolistic forms of enterprises are the most effective. Evidence of such a problem is the confrontation between the Fair Trade Commission and the administrative leadership of the Ministry of International Trade and Industry. According to the author, this conflict can be resolved, for example, by introducing a system of checks by the Commission of the Ministry's proposals.

Thus, Japan's antitrust law is a unique element of Japanese law, whose essence, problems and contradictions can be understood only if considering it from a historical perspective.

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