

The Treatment of Agricultural Cooperatives in the Antimonopoly Act in Japan

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INTRODUCTION

The Japanese government provides various forms of legal support for agricultural cooperatives. One of the most substantial considerations is the special treatment in the anti-monopoly policy, whereby agricultural cooperatives are allowed to escape from certain regulations of the Antimonopoly Act. Recently, strong criticism regarding this treatment has been growing. The purpose of this paper is not to argue any particular opinion on the matter; rather, this investigation aims to describe details of the current relationship between the activities of agricultural cooperatives and relevant regulations of the Antimonopoly Act.

Protection of small-scale producers in the Antimonopoly Act

Article 1 of the Antimonopoly Act stipulates that “the purpose of this Act is to promote fair and free competition, stimulate the creative initiative of enterprises, encourage business activity, heighten the level of employment and actual national income, thereby promoting the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc., and all other unjust restrictions on business activity through combinations, agreements, etc.”

“Enterprise” in the Antimonopoly Act is defined as “a person who operates a commercial, industrial, financial or other business” (“person” here includes “legal person” in addition to “natural person”). Farmers and agricultural cooperatives are also deemed to be enterprises.

It should be noted that a *laissez faire* regime does not guarantee fair and free competition. Generally, small-scale enterprises are in a weak position in confrontations with large-scale companies. Without any protection from the government, small-scale enterprises will be forced to exit the market and large-scale companies will obtain a monopolistic position in the market. In such situations, it is difficult to maintain fair and free competition. Thus, many governments in capitalist countries have provided various means of legal protection for cooperative movements among small-scale producers. In this sense, Japan is not exceptional.

Article 22 of the Antimonopoly Act stipulates special treatment for cooperatives of small-scale enterprises as follows:

“The provisions of this Act do not apply to acts by a partnership (including a federation of partnerships) which conforms to the requirements listed in each of the following items and which has been formed pursuant to the provisions of the Act; provided, however, that this does not apply if unfair trade practices are employed, or if competition in any particular field of trade is substantially restrained, resulting in unjust price increases:

- i. The purpose of the partnership is to provide mutual support to small-scale enterprises or consumers
- ii. The partnership is voluntarily formed, and the partners may voluntarily participate in and withdraw from it
- iii. Each partner possesses equal voting rights

- iv. If a distribution of profits among partners is contemplated, the limits of the distributions are prescribed by laws and regulations or in the articles of partnership.”

“Partnership” here is defined as “any contractual combination of two or more enterprises.” In fact, Article 9 of the Agricultural Cooperative Act stipulates that all cooperatives established based on the Agricultural Cooperative Act (including their federations) are deemed as being partnerships that satisfy the four conditions of Article 22 of the Antimonopoly Act. Thus, agricultural cooperatives are qualified to receive exemption from applying the regulations of the Antimonopoly Act, unless they have committed unfair trade practices or have restrained competition in any particular field of trade¹. For example, even if all the members in an agricultural cooperative make an agreement to sell agricultural products to traders at the same price, it will not be deemed as a cartel prohibited by the Antimonopoly Act.

The structure and business of Japanese agricultural cooperatives

Before discussing further the relationship between the Antimonopoly Act and the Agricultural Cooperative Act, it may be useful to have a quick overview of the system of Japanese agricultural cooperatives².

There are two types of agricultural cooperatives. One is unit cooperatives, which consist of farmers and non-farmers. The other is federations of agricultural cooperatives, which consist of unit cooperatives.

Unit cooperatives provide not only agricultural services, but also almost every other service required in daily life, such as banking and arrangement of family ceremonies. Each unit cooperative has its own jurisdiction; these do not overlap. All the farmers in each jurisdiction belong to the unit cooperative as regular members. Non-farmers who have paid dues are allowed to use all the cooperatives’ services as associate members³. Both regular and associate members have equal rights to use services provided by unit cooperatives. Only regular membership holders, however, have the right to vote at general meetings, where unit cooperatives make the most important decisions about their activities.

Unit cooperatives procure production inputs (e.g., fertilizers, pesticides, feeds, and agricultural machines) and sell them to farmers (regular members). The prices of agricultural inputs from a unit cooperative to farmers are higher than the unit cooperative’s procurement prices, because the unit cooperative charges commissions. This activity is called “joint purchase.” Joint purchase of agricultural inputs is one of the major businesses of unit cooperatives. Another major business is “joint shipment”: i.e., unit cooperatives collect agricultural products from farmers and sell them to traders. In similar fashion to joint purchase, unit cooperatives charge farmers commissions for joint shipment. Commissions for joint purchase and joint shipment are major sources of revenue in unit cooperatives.

Unit cooperatives compete with ordinary private companies in selling agricultural inputs to farmers and collect agricultural products from farmers. However, the assets and human resources available to any one unit cooperative are insufficient to enable it to compete with ordinary private companies. To conquer this weakness, unit cooperatives form federations at the prefectural and national levels. These federations are referred to as *Keizairen* and *Zen-noh*, respectively. *Zen-noh* comprises one and only one federation at the national level and has a nationwide market channel for procuring agricultural inputs and distributing agricultural products. Among 47 prefectures in Japan, 13 prefectures have their own *Keizairen*. These *Keizairen* are subordinates of *Zen-noh*. Unit cooperatives in these 13 prefectures use *Zen-noh*’s market channel via *Keizairen*. In the remaining 34 prefectures, unit cooperatives

directly access *Zen-noh's* market channel. *Keizairen* and *Zen-noh* buy and sell agricultural and non-agricultural commodities, acting as unit cooperatives' agents. Since unit cooperatives also have the freedom to procure agricultural inputs directly from and sell agricultural products directly to ordinary private companies without using *Zen-noh's* market channel, there exists market competition between ordinary private companies and federations of agricultural cooperatives.

Requirements for agricultural cooperatives to receive favorable treatment under the Antimonopoly Act

It should be noted that the favorable treatment for agricultural cooperatives stipulated by Article 22 of the Antimonopoly Act is not unconditional. As mentioned above, Article 22 says "this does not apply if unfair trade practices are employed, or if competition in any particular field of trade is substantially restrained, resulting in unjust price increases." However, there have been occasional criticisms that the interpretations of "unfair" and "substantially restrained" are not clear. In response to these criticisms, in 2007, the Fair Trade Commission of Japan, which is responsible for enactment of the Antimonopoly Act, presented *The Guidelines for Application of the Antimonopoly Act to Agricultural Cooperatives* (abbreviated as the *Guidelines* hereafter).

The *Guidelines* provide examples of problematic conduct, whereby agricultural cooperatives cannot receive the Antimonopoly Act's favorable treatment, in three situations: from a unit cooperative to a farmer; from a federation of agricultural cooperatives to a unit cooperative; and from a federation of agricultural cooperatives or a unit cooperative to an ordinary private company.

Problematic conduct from a unit cooperative to a farmer

The Antimonopoly Act does not deter unit cooperatives from urging farmers to sell agricultural products and purchase agricultural inputs through them, by distributing information on their services, developing new market channels, and raising farmers' awareness of the importance of cooperative movements. However, if a unit cooperative undertakes at least one of the following three forms of conduct, the favorable treatment of Article 22 of the Antimonopoly Act is withdrawn from it:

- i. A unit cooperative requires farmers not to use ordinary private companies in so far as they want to sell any agricultural products and/or purchase agricultural inputs through the unit cooperative.
- ii. A unit cooperative allows farmers access to its joint-use of agricultural facilities under the condition that these users sell their agricultural products and/or purchase agricultural inputs through the unit cooperative.
- iii. A unit cooperative makes an agricultural loan to farmers under the condition that the borrowers sell their agricultural products and/or purchase agricultural inputs through the unit cooperative.

Problematic conduct from a federation of agricultural cooperatives to a unit cooperative

Of the unit cooperatives' total sales of agricultural inputs (or total collection of agricultural products), the proportion that the unit cooperative procures (or sells) through *Keizairen* or *Zen-noh* is defined as "percentage utilization of cooperative channels," abbreviated as PU hereafter. *Keizairen* and *Zen-noh* use PU as a central feature of management. Generally, a

higher PU makes it easier for *Keizairen* and *Zen-noh* to obtain more profits by strengthening their bargaining power in the agricultural input and product markets. However, unit cooperatives' freedom to use ordinary private companies instead of *Keizairen* and *Zen-noh* should be assured in order to promote market competition between ordinary private companies and *Keizairen* or *Zen-noh*. Thus, the *Guidelines* prohibit *Keizairen* or *Zen-noh* from purchasing agricultural products from or selling agricultural inputs to a unit cooperative in combination with another agricultural product or agricultural input that the unit cooperative wants to sell or purchase through ordinary private companies. In addition, the *Guidelines* warn that rebates from *Keizairen* or *Zen-noh* to a unit cooperative should not be linked with the PU of the unit cooperative.

When a unit cooperative procures a commodity through *Keizairen* or *Zen-noh*, the *Keizairen* or *Zen-noh* is allowed to present a standard price for the unit cooperative's retail price for farmers. However, the standard price should be used only for reference. The *Guidelines* prohibit *Keizairen* or *Zen-noh* from forcing a unit cooperative to use the standard price as the actual retail price to farmers.

Problematic conduct from an agricultural cooperative to ordinary private companies

Keizairen, *Zen-noh*, and unit cooperatives have various transactions with ordinary private companies. In dealings between them, abuse of a superior bargaining position is prohibited⁴.

Exclusive deal between a unit cooperative and a farmer

In addition to Article 9, Article 19 of the Agricultural Cooperative Act provides favorable treatment for agricultural cooperatives. In particular, Article 19 allows agricultural cooperatives to have a special type of contract, called an "exclusive contract," with farmers⁵. By entering into an exclusive contract with a farmer, a unit cooperative deters a farmer from using any enterprises other than the agricultural cooperative. For example, using this contract, a unit cooperative can prevent farmers from selling their agricultural products to any dealers other than the unit cooperative. The purpose of Article 19 of the Agricultural Cooperative Act is not to support member farmers' income, but to stabilize the management of unit cooperatives by making it easier to maintain a minimum volume of their business operations⁶. There is a possibility that a transaction under an exclusive contract contradicts the principle of free trade, which the Antimonopoly Act aims to promote. Thus, in making an exclusive contract with a farmer, a unit cooperative should be careful not to restrict the freedom of the farmer. Indeed, Article 19 requires the following three conditions for making exclusive contracts with farmers: first, the contract period should not exceed one year in length; second, activities with exclusive contracts should be limited to minor components of the unit cooperatives; and third, a unit cooperative should not give any unfavorable treatment to farmers who refuse to make an exclusive contract.

Criticisms of the Antimonopoly Act's favorable treatment for agricultural cooperatives

Recently, strong criticism of agricultural cooperatives has been growing. For example, since 2002, the Council for Regulatory Reform (CRR), an advisory board for the Japanese Prime Minister, has repeatedly suggested the removal of the Antimonopoly Act's favorable treatment for agricultural cooperatives. Some influential commentators in academic, political, and business communities have sided with the CRR. Their criticisms are summarized in the following four points.

First, there is a skeptical view as to whether the current agricultural cooperatives are indeed working for mutual support to small-scale enterprises, i.e., farmers. For example, in 2010, Kohei Otsuka, then Senior Vice Minister for Financial Services, asserted that today's agricultural cooperatives more concerned with protecting their own profits rather than in member farmers' income⁷. A working group for reviewing agricultural policy in the Ministry of Agriculture, Forestry and Fisheries presented a similar view to that of Otsuka⁸.

Second, it is questionable as to whether federations of agricultural cooperatives are allowed to be exempted from applying the Antimonopoly Act, because some of them have strong marketing powers. For example, *Zen-noh* has a sufficiently dominant position in distributing fertilizers to enjoy strong bargaining powers. Some mercantile law experts assert that the Antimonopoly Act should be applied to *Zen-noh* under the same conditions as ordinary private companies⁹.

Third, there are two types of memberships in agricultural cooperatives: regular membership for farmers and associate membership for non-farmers. Unlike regular members, associate members do not have voting rights in the general meetings of members. In that sense, it is unclear whether agricultural cooperatives satisfy condition (iii) in Article 29 of the Antimonopoly Act.

Fourth, even large-scale private companies are also allowed to join agricultural cooperatives as associate members. Thus, there is a possibility that large-scale companies use agricultural cooperatives as a loophole to escape regulations of the Antimonopoly Act¹⁰.

Counterarguments against criticisms

For years, there have been rigid supporters of agricultural cooperatives in academic and political circles. If the Antimonopoly Act's favorable treatment were removed, agricultural cooperatives would run into serious difficulties in continuing their current business¹¹. Thus, those who support agricultural cooperatives make energetic counterarguments against the above-mentioned criticisms. They praise agricultural cooperatives for their honest efforts in promoting Japanese agriculture.

Currently, those for and those against agricultural cooperatives vie with each other in academic and political debate. So far, the Antimonopoly Act's favorable treatment for agricultural cooperatives has been maintained. Considering the growing criticism of this as described above, however, it is not clear as to whether this will continue unchanged into the future.

Footnotes

1. *Entities that are not established on the basis of the Agricultural Cooperative Act are prohibited from calling themselves agricultural cooperatives. It is obligatory for all cooperatives (including their federations) established under the Agricultural Cooperative Act to include the term "agricultural cooperative" in their names.*
2. *Agricultural cooperatives that have credit services in addition to their agribusinesses are called Sogo Nokyo (the literal translation is "general agricultural cooperatives"). They form a nationwide network known as the JA group. While there are agricultural cooperatives that do not belong to the JA group, an overwhelming majority of Japanese agricultural cooperatives are within it. In fact, Japanese mass media use the JA group as the general term for the system of agricultural cooperatives. This paper's description also predominantly applies to agricultural cooperatives within the JA group.*
3. *Associate membership status is a system that is almost unique to Japanese agricultural cooperatives, rarely being found in Europe and North America. More discussion of*

associate membership is available at Godo, Yoshihisa, "The Significance of Non-farmers in Japanese Agricultural Cooperatives," FFTC Agricultural Policy Platform, 2014 (downloadable at http://ap.ffc.agnet.org/ap_db.php?id=264).

4. *The Fair Trade Commission of Japan presented The Guidelines Concerning Abuse of a Superior Bargaining Position Under the Antimonopoly Act (the original version was stipulated in 1998; it was revised in 2004, 2010, and 2011). These guidelines prohibit business entities from engaging in any of the conduct specified, in a way that is unjust in light of normal business practices, by making use of a superior bargaining position over the counterparty: (a) causing the counterparty to an ongoing transaction (including a new counterparty with whom there is intended to be an ongoing transaction; the same applies in (b) below) to purchase goods or services other than those that are concerned in the relevant transaction; (b) causing the counterparty to an ongoing transaction to provide oneself with money, services, or other economic benefits; and (c) refusing to receive the goods concerned in a transaction from the counterparty, causing the counterparty to take back the goods concerned in a transaction after receiving those goods from the counterparty, delaying payment of the consideration for a transaction to the counterparty, or reducing the amount of that payment, or otherwise establishing or changing trade terms or executing transactions in a way that is disadvantageous to the counterparty.*
5. *The idea of an exclusive contract for Japanese agricultural cooperatives was introduced in conformity with a similar system in the cooperative laws in the United States (Akeda, Tsukuru, "Nogyo Kyodo Kumiai Ho (Agricultural Cooperative Laws)," Keizai Horei Kenkyu-kai, 2010).*
6. *Judgment of the Supreme Court of Japan, September 17, 1964, 388 Hanrei Jiho 29.*
7. *Otsuka, Kohei "Kisei Seido Kaikaku niwa Odan-teki na Taisei ya Soshiki ga Hitsuyo (Cross-sectional Systems and Organizations should be Established for Promoting Regulation Reform)," Ekonomisuto, Vol. 86, No. 44, 2010.*
8. *Ministry of Agriculture, Forestry and Fisheries, "Nokyo Kaikaku no Kihon Hoko (Principle for Reforming Policies on Agricultural Cooperatives)," 2003.*
9. *Murakami, Masahiro, "Nokyo to Dokukinho Ronten Meikaku ni (The Main Points in Dispute about the Antimonopoly Act's Treatments for Agricultural Cooperatives)," morning edition of Nikkei Newspaper, October 29, 2002.*
10. *Godo, "The Significance of Non-farmers in Japanese Agricultural Cooperatives," FFTC Agricultural Policy Platform, 2014 http://ap.ffc.agnet.org/ap_db.php?id=264*
11. *Tashiro, Yoichi, Sengo Rejimu karano Dakkyaku Nosei (New Agricultural Policy Emerging from the Postwar Regime), Tsukuba Shobo, 2014.*

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