

- The court in *Kikkoman*⁸¹ clearly made the structuralist assumption that only powerful enterprises could act anti-competitively.⁸²

At the same time, however, the court did note the importance of relationships in Japanese business by allowing that **control** could occur even without direct contact between enterprises, if a strong effect was felt. Finally, the courts also prefaced every area of the control of unfair business practices with a requirement of dominance.⁸³

● The focus on dominance

With the focus of the Fair Trade Commission of Japan (JFTC) and courts confined to dominance and structural restraint,⁸⁴ less emphasis was placed on trust-busting itself. The inevitable result was a regrouping throughout the 1950s and 1960s. For example, in 1968 two huge mergers were proposed: one involving the three largest paper companies; and the other the two largest steel

⁸¹*Noda Soy Sauce Company v. FTC*, Tokyo High Court, 15 December, 1957, Kosai Minshu, 10/10, 1957, p. 743.

⁸²Mitsuo Matsushita, 1993, *op.cit.*, p. 117:

One question is whether or not it is necessary that the enterprise which is engaged in a private monopolization has a certain degree of economic power... There is no wording in the Anti-Monopoly Law which clarifies this question. However, by the very nature of private monopolization, it is impossible for a small and weak enterprise to exclude or control the business activity of other enterprises and eliminate competition in a market. Therefore, naturally, it is a large enterprise in terms of market share or otherwise which is capable of committing a private monopolization.

⁸³Prohibited refusals to deal had to be practiced by a company with a high degree of market share [*Osaka Burashi Kogyo Kumiai*, FTC decision, 20 September, 1955, Shinketsushu, 7 (1956), p.20; Mitsuo Matsushita, *op.cit.*, pp. 150-1: "It seems that a high degree of market share is required in order to hold that an individual refusal to deal is unlawful."]. Price discrimination enforcement would only focus on large leading manufacturers [*Toyo Linoleum*, FTC decision, 7 February, 1980, Shinketsushu, 26 (1980) 85]. Tying is only prohibited if practiced by sellers with "sufficient economic power" [*Textbooks*, FTC Decision, 11 February, 1964, Shinketsushu, 12 (1965), 100; *Farmers' Cooperatives*, FTC Decision, 12, December 1963, Shinketsushu, 39; Mitsuo Matsushita, *op.cit.*, pp. 154-5]: a tie-in contract is held unlawful if it is used by the seller of a commodity with sufficient economic power with regard to the tying commodity. Exclusive dealing is only a concern if it is practised by "an enterprise with strong market power" [*Muto Kogyo*, FTC Decision, 22 November 1974, Shinketsushu, 21 (1975), 148; Matsushita at 155]. Vertical territorial restrictions require that the imposer be a powerful enterprise...." [Mitsuo Matsushita, *op.cit.*, p. 158; see also 1991 JFTC Guidelines].

⁸⁴See I. Prakash Sharma, "The Abuse of Dominance: A Comparison of National Competition and Trade Regimes", *Policy Staff Paper* No. 96/01, Ottawa: Foreign Affairs and International Trade, (forthcoming 1996).