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Panel Discussion to Closing Remarks

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### **【Part III】 Panel Discussion**

**Moderator: Dr. Kotaro Suzumura (Director, CPRC, Professor, Institute of Economic Research at Hitotsubashi University)**

**Panelists: Dr. Joseph E. Harrington, Jr. (Professor, Johns Hopkins University)**

**Dr. Massimo Motta (Professor, European University Institute)**

**Dr. Akihiko Matsui (Professor, University of Tokyo)**

**Dr. Aiko Shibata (Commissioner, JFTC)**

**Mr. Akinori Uesugi (Secretary General, JFTC)**

#### **1. The Panel Discussion**

##### **(Opening)**

##### **Moderator Suzumura**

Thank you. I am Suzumura and let's have a good discussion based on the three excellent presentations given to us so far. Well, during this morning, we heard from Professor Harrington. Maybe there are certain points we can pick up from his presentation for our discussion here.

Well, Professor Harrington's speech was very substantive and rich in content, so pardon me if I am not able to pick up everything included in the paper. On the presentation of Professor Motta, since we received it just right before the break, maybe I would just make simple points focusing on the complementarity of the presentation of Professor Harrington. So, maybe I would, first of all, give you the summary of the presentations given so far to be followed by discussion.

Now, let's look at Professor Harrington's presentation first. The major point or the important point covered by Professor Harrington was that when the competition authority detects and uncovers the collusion, to what extent leniency program can be effective and useful? In other words, what kind of leniency program would be suited to perform such functions? Behinds this question, there is the fact that the US did not success to detect and uncover the collusion prior to the introduction of leniency program in the United States very much. In the paper<sup>1</sup> referred by the professor Harrington, from 1963 to '72, there were 49 cases but only two out of 49 have been done initiated by Antitrust Division.

On this matter, Professor Matsui showed us the similar kind of number in Japan based on the JFTC annual reports in the same period. There were 1018 cases, out of which 389 cases have been begun with the initiative of the JFTC. So maybe those differences can be described by the environment differences between Japan and the United States which is followed by a

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<sup>1</sup> Hay, George and Daniel Kelly, "An Empirical Survey of Price Fixing Conspiracies," *Journal of Law and Economics*, 17(1974), 13-38 (qtd in Harrington, Joseph E. Jr. "Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion," 3. Competition Policy Research Center. Jan. 2006. Competition Policy Research Center. <<http://www.jftc.go.jp/cprc/DP/CPDP-18-E.pdf>>)

difference in the understanding and needs of the system Japan and the United States had. This might be one of the points at issue. In anyway, it is appropriate that the race amongst the collusion members might be induced as a result of a good leniency program. I think that was the point Professor Harrington put an emphasis on.

Professor Harrington also pointed out that there are some space on the part of the competition authorities that they can do something, like, issue some signal so that corporations can race against one another to be the first applicant of the leniency, using variables in hand in terms of their tactics and strategy. Some of the variables was said to be conceivable such as the timing strategy for the initiative investigation. He also suggests that structural or behavioral type approach for the screening be effective to use those signals. Those points are very important for us to consider how the newborn leniency program in Japan takes root into the soil in Japan and what kind of enforcement of the leniency program should be the powerful weapon against cartel. On these points, I think, there are so many points we can discuss together. And one more point to be noted is the relationship between a leniency program and the structural or behavioral type approach for the screening. Professor Harrington said that that point is also important. I think Professor Harrington made an important point out about the relationship between leniency program and screening method. They are essentially supplementary and complementary to each other. So, even the leniency program has been introduced, the structural or behavioral approach for screening will not be obviated. It wants to be needed in other ways. He raised several reasons and one of them is if there is a suspicion of collusion from other sources, then the leniency program would have no use. Then conversely, the screening approach can be an important exercise whereby the reasonable suspicion might be arisen or induced. Although Professor Harrington's presentation was so rich in substance and so outstanding, but I thought I want to raise those points on the issue at first.

Now, let me go on to Professor Motta's presentation we have just heard a while ago. My summary will be very brief because you still have a fresh memory of his presentation.

First point I want to mention is that the presentation of Professor Motta has been wonderfully complemented with Professor Harrington's presentation. Professor Harrington analyzed in detail about the counter measures for the collusion, leniency program as well as supplementary program, the screening. On the other hand, Professor Motta started by saying that we have to, first of all, understand the economics of the collusion in order to think about the measures against it. He analyzed in detail how it could be conducted or enforced and how it can be sustained. To put it concretely, well, during the part one of his presentation, the economics of collusion was covered. Within the short space of time, the essential features of the collusion were explained to us very well. Then during the part two, experiences in EU, particularly the leniency program, were covered mentioning the fact and its effectiveness.

From the comparison point of view, it was very useful because advantages and disadvantages of the leniency program that we each have are to be discussed from now on, so he has finished us with fertile ground for good discussion. Since Professor Harrington also explained the US leniency program, we now know the gist of leniency program of the US and of the EU respectively.

Well, then now let us go on to the main portion of the panel. Well, Japanese AMA had been amended just a while ago with the introduction of the leniency program in Japan. So, maybe I could give some time Mr. Uesugi, Secretary General in the JFTC, to summarize for us the outline of Japanese program. Please Mr. Uesugi.

### **(Leniency Program in Japan)**

#### **Uesugi**

Thank you very much, Dr. Suzumura. I would like to briefly introduce to you the leniency program of Japan. There are so many features to it. First of all, I'd like to describe to you why this system was designed in this way. We had already received presentations about the EU and US programs but maybe I could just recap them for you, trying to reintroduce them in order for you to gain deeper understanding to the Japanese program and to have more efficient use of Japanese program. My topic will be five-fold. Anyway, it's not the question of leniency program per se but the questions which come from the structure of the surcharge system in Japan. Everything has been predicated upon the current structure of surcharge system in Japan.

First, the number of applicants would be limited to three companies at most. Maybe it's rare in the world. And demarcation point will be before and after the beginning of the investigation by the JFTC and only the first applicant before the investigation would be eligible for full leniency.

So then why three? Well, all the cartel members are supposed to be ordered the payment of surcharge and that is the very principle. The number of "three" comes from the fact that we have to restrict the number of applicants just necessary to get the information which could trigger the case. So the primary purpose of the program is to get the information for the JFTC to begin the case. However, since application is possible after the beginning of the investigation too, in the end, the overall purpose is to facilitate the information collection pertaining to the violation. So it is not limitless because otherwise it would weaken the effectiveness of the cartel deterrence. And also if it is only limited to one applicant, then the company might hesitate to apply for the leniency thinking that the company might not be the very first, i.e. other companies might have gone earlier than that company. But if you give them the possibility of three, then the company would think that maybe I could be one of the three rather than one of the one. So, that was the ground why settling on the number of three. And we do not deny that we thought that we might need to gain information as much as from

three applications to furnish us with enough information for starting the investigation. That can be another reason.

I know in the United States, even after the beginning of the investigation, full leniency can be given. In case of application after the investigation, if at the time when applicants show up, the DOJ does not have enough evidence of their own to prove the case, then of course full leniency can be given if value added information can be provided by that applicant. That is one of the features in the leniency program in the US. But behind that, there is a system of plea bargaining. The plea bargaining has no limit on the number of applicants. So, the function here is almost the same as one of the leniency program. The same goes for the EU. Their characteristics are that after the investigation have begun, if the applicant shows up and by then if European Commission does not have enough evidence of their own to establish infringement under the Article 81, of course, full leniency can be given to that company. But again, it doesn't matter whether the applicant comes after or before the start of the investigation.

The second point is that, in case of Japan, with regard to the amount, there is no discretion allowed the JFTC. For the United States, the first applicant would receive a full leniency, then the rest will see the plea bargain. But in the United States, the authority has a lot of discretion for the plea bargaining. EU also has wide range of discretionary power. In case of plea bargaining both of the parties would air their views and reach compromise eventually and as a result, the level or amount and duration of the penalty would be decided. In the case of EU, even if a partial leniency is to be given, there is a range of partial leniency allowed, which has been shown to us through the presentation so far. Anyway, there is a range, reduction range being offered by European Commission. That is one feature in the EU.

So, in case of Japan, that we have fixed the surcharge rate in our leniency program such as 30% or 50% stems from the characteristics of our surcharge system, i.e. there is no discretion allowed the JFTC on the surcharge rates. So that we set the 40% of reduction even though it is originally 30%, something like that is impossible to be done in Japan. Well, in Japan, when an administrative agency gives administrative disposition in terms of monetary amount, the amount is usually fixed. No discretion there. The heavy additional tax is also the same.

How about repeat offenders like the companies which, within the 10-year period of time, committed the same offence again? If the same company had conducted the any cartel in the past 10 years, then 50% higher surcharge rate would be imposed. This is not because they are inexcusable for having committed repeated offence. If the general rate, i.e. 10%, is applied for the second time and onwards, it means that they committed the repeated offence knowing that. This means that 10% rate is not sufficient deterrence for them. So, in the second time around it will be raised to 15%. So the gist

here is to deter the future committing of the same offence by the same company.

And let me touch upon the third characteristics. In Japan we have established the system under which the JFTC applies the 20% less surcharge rate to the company which deviate from the cartel on the way. In other countries discretionary power is allowed, so this kind of factor, i.e. deviation from the cartel, can be taken into account for settling on the penalty. But in case of Japan, there is no discretion allowed for the level of the surcharge, so in these cases we decided in a law that we apply a 20% less surcharge rate.

On this system, there is an argument if it is good way that companies can apply for the leniency and the reduced rate at the same time. The reason why we made the system like this is that we thought that those people who are willing to apply for the reduction would go all the way to become applicant for the leniency rather than asking for 20% reduction and, that there might be some companies which would hesitate in becoming the applicant for the leniency program but live with the idea of asking for 20% reduction instead by deviating from the cartel half way through. So, I think it will be effective for the weakening the cartel and eventually crushing the cartel. But this is a kind of prediction which has to do with the design system, so maybe we can talk about this later from the viewpoint of academics.

Now, let me go on to my fourth point. For the applicant side whether they were eligible for getting the leniency or not is given in a very transparent manner and predictability is very high as viewed from the applicant companies. I cannot go into details though, there are formats the JFTC has designated in the JFTC Rule<sup>2</sup>; number one format, number two format and number three format. Based on those formats, companies are required to furnish reporting and the materials. As long as the companies adhere to the formats and submission is made accordingly, regardless of whether that information is giving value added to the JFTC or not, the status of leniency will be given to the companies.

And also, there is a marker system under which the status of priority can be ensured for the applicant who submits the number one format. So, you can always secure your priority front-end. Then the company will be allowed some time to come up with the reporting and materials in the format. So, our predictability is very high.

And after the onsite inspection, the amount of the leniency is small. After the investigation, if applicant comes with a low value added information then he will not be eligible for getting the partial leniency. This means that high value added information should be brought after the investigation. But anyway even after the onsite inspection, the companies would quickly

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<sup>2</sup> "Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges" (Fair Trade Commission Rule No.7 of 2005), <<http://www.jftc.go.jp/e-page/legislation/ama/immunity.pdf>>

complete their internal investigation, and based on the number three format, make a submission, secure their status about priority and continue to gather all the materials necessary by the deadline, 20 days after the investigation starts. Then it's highly likely that high value added information would be finished to the JFTC, so the JFTC would think about giving them the partial leniency.

This was already mentioned by Commissioner Shibata but I would just recap this once again because it's important. The demarcation is made before and after the onsite inspection. Why is that? Because the onsite inspection is very observable from outside. People will not know from outside whether the JFTC has information or not, but they will know when the onsite inspection is. Hence the critical point will be the onsite inspection day under the Japanese system.

The important thing here is that the time which is after the investigation in EU and US can actually be prior to the beginning of the investigation here in Japan. So, it does make a difference how much incentive is at work under our system because in case of Japan, after gaining the information that could lead to the start of the official investigation, the preliminary investigation will be done, which may take a few months before the actual start of the investigation. So during this period, of course, applicant can come in and make application for the full leniency because that is before the onsite investigation. So, predictability is very high as viewed from the applicant, which is advantageous to the applicant.

However, there are some concerns on the part of the authority. Because we set the hurdle for the leniency relatively low, we have risk not to get the information enough for us to start the investigation and to establish the infringement. I have heard that the EU has the same kind of concern. I am a little afraid that we also have such a problem.

And the fifth point is as follows. We have both criminal penalty as well as surcharge here in Japan. So, the leniency on the surcharge may not function fully if the applicant with the full leniency is prosecuted. Since the JFTC is an administrative organization, we can make an action on surcharge but we cannot make decision on the criminal penalty because that is exclusive right belonging to the public prosecutor. Since the EU and the US don't have both of them, we can look to the case of Canada and Australia instead. If the competition authority in Canada would like to make it into a criminal case, they proceed based on the leniency program. Then the competition authority can make recommendation to the prosecutor saying that prosecutor should not make an indictment of that particular applicant. This is recommendation only. That is, they have established the system in non-restricted way, just a recommendation from the competition authority to public prosecutor.

In case of Australia, they have changed their system recently too. They initially started with the fine system for cartel only, but it has been proven

that fines only are not enough to deter the companies from forming cartels so that it was found useful to have a criminal penalty too to deter the cartel for the companies. So they also have got those two systems at the same time. The criminal fine is variable up to the three times of the illicit gains and the surcharge can be also as high as fines. So, there is no difference between them because the ceiling amount of them is the same. Hence, they can choose the way, just a fine or criminal fines.

Why is it possible for the company with full leniency not to be accused in Japan? Because the JFTC in Japan has an exclusive authority to file an accusation. So, the JFTC would exclusively decide whether the companies involved would be accused or not. Since we are the exclusive organization for the competition policy and if the JFTC makes a decision that that company will not be indicted or accused, then the prosecutor would respect our decision. That is how our mechanism works. But in terms of Japanese legal system, even if the JFTC do not accuse, if someone in the cartel is prosecuted, other members belonging to the same cartel also can be prosecuted, which is the legal principle in Japan. So it can be happened that the JFTC does not know that the company is wing leader or instigator of the cartel but it turns out to be those after the investigation by the public prosecutor. In that case it is highly likely that the leniency cannot be given to the company.

So, I have thus summarized the leniency program in Japan, just highlighting on the differences that we have with the counterpart in the EU and the US.

#### **Moderator Suzumura**

Thank you very much. Well, the general outline was given by Secretary General about Japanese Leniency System. Now I would like to invite Professor Harrington and Professor Motta, our invited speakers, to comment on anything that you would like to say about the comments you received during this morning as well as Japanese Leniency Program which was explained by Mr. Uesugi right now. Or maybe you can have some additional points that you would like to cover anything you would do. So at first Mr. Harrington please.

#### **Harrington**

Let me just make a couple of comments or maybe I'll just make one and then we can go back and forth. I think it's a very nice feature, the lack of discretion in terms of fines. And let me give you a little anecdote to make this point. In the Vitamins price fixing case, which was certainly one of the largest, if not the largest in recent years, that the Department of Justice was involved in as well as many other countries. The well defined U.S. sentencing guidelines said that Hoffmann-La Roche should receive a penalty of between \$1.2 billion and \$2.4 billion. They ultimately were assessed a penalty of \$500 million; now that is the largest penalty that's ever been levied in the US for price fixing, but it's on the order of 40% of the lower bound given by sentencing guidelines. I questioned why the Department of



Justice would settle for such a low amount for a case with very solid evidence, i.e. Rhone-Poulenc SA entered the leniency program. And I think it would have been better for the deterrence of cartels in the future, if they had been committed to, let's say, levy a fine in between those bounds. So, I think it is actually a very desirable feature to have a lack of discretion.

There could be some short run costs because let's suppose the Department of Justice could not have compromised. Well, Hoffmann-La Roche would have probably pursued all sorts of judicial proceedings, and it would have taken a few years, lots of government resources. Then, probably, the government would have to put its resources in the order of few millions or tens of millions of dollars in exchange for which they probably would have had a fine of \$1 billion in stead of \$0.5 billion.

So, let me just first make that remark, which I think is a very desirable feature to the Japanese program.

**Moderator Suzumura**

Thank you very much. In the same vein, Professor Motta, would you like to make a comment? And you can also make comment each other too, if you like. Please.

**Motta<sup>3</sup>**

Well, I would like to make a few comments on some points which are perhaps more debatable about the leniency program in Japan. I think we all agree that this has been a very welcome development and I think the program has been designed very carefully and so we are really talking about some small details here. But as the European Union experience shows, there is no perfect program because each country or group of countries has different legal environment and different society environments, so what might be good for the US is not good for the Europe and what is good for Europe might not be good for Japan and so on. But once said so, let me speak of some points which might be discussed, because again as the European Union experience teaches, you will discover perhaps that your leniency program is not perfect after having put it in practice.

As I said before, in Europe the European Commission introduced the leniency program in 1996 and already after five years they were starting having some feedback and seeing there were some delicate points and so after six years they introduced a new leniency program. So, I hope that yours is the perfect leniency program but perhaps you should assess it after a few years. Actually I'm surprised that in the US now, for so many years they have not even reconsidered their program. They might say that it is the perfect program but I think it's worth starting reassessing it.

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<sup>3</sup> All of Dr. Motta's parts in this transcript are as the recording is. The CPRC has got his permission to put the transcript on the website as it is.

So, let me pick up on a few issues regarding the Japanese leniency program. First of all on lack of discretion. As I said, lack of discretion is such a good thing when it comes to the leniency programs and naturally one reason why the first program in the EU didn't work was that the European Commission had too much discretion. In at least one case, there was one firm whose CEO changed, and the new CEO got to know that the firm was involved in a cartel and he decided that he didn't want to continue with the cartel. So without the European Commission suspecting anything he decided to apply for leniency and to reveal to the European Commission this cartel they didn't know about.

Now, one would argue that in cases like that the firm should have got full immunity, but actually it was not the case because the European Commission wanted to keep discretion and in this particular case, once decision and a formal decision was made, the CEO of the company discovered that they were giving not 100% but 75% reduction on the fines. And this is because the European Commission judged that there was not full cooperation; that is, that the firm had not revealed everything that they knew. Without adding any particular verifiable information about that, so the firm said "No, we said everything", but the Commission said "No, we are sure that you didn't mention all the evidence". But after all, you know, they had the power, completely discretionary power and they decided not to give complete immunity to the firm. Of course, all other firms realized what happened and not surprisingly they were thinking twice about coming forward with a leniency application.

So, this is something that the European Commission understood and it decided to make automatic immunity if some conditions were fulfilled. So it is important to keep some conditions and the same is actually true of the Japanese system. One point that I have already made, and I don't know if the other speakers want to comment on it, is that I'm a bit surprised by the condition of the coercion: as I said before in my speech, it might happen that a new manager comes to the firm and, it was the old manager which coerced other firms but then the new manager doesn't want to continue with the cartel. So, why do they deprive the possibility of the new manager coming up with a leniency application which might receive immunity?

Another issue which was repeatedly raised today was the distinction between before and after the investigation. If I have understood how it works in Japan, the law foresees that full leniency can apply only provided that reporting happens before the investigation. But I think it's perhaps less of a problem than in Europe and in the US because you interpret investigation as a long process and actually the starting date is the raid, and presumably after the raid you should have already some information. But, from the experience of the EU it turns out that even after the raid you might not have all the information and so you might also want to consider this possibility. And actually we'd seen that four out of roughly 49 cases were about leniency applications which were received after the raid was made. It so happened

that the Commission had not been able, during the raid, to receive enough documental evidence, so they didn't have enough material to prove the infringement. And they decided to give full immunity because even if they come up after the raid they still gave some important information. So, I think, this is another aspect which is important and which I raise for a discussion. However, still with respect to the difference between after and before the investigation, I am puzzled by the fact that in the Japanese system there is no distinction between the leniency reductions, that is, all of the firms which come up after the investigation, can get 30%. And I wonder whether it would not be better to still differentiate between the first and the later applicants in order to give more incentive to come up with information. This is a point actually which has been raised also by Professor Harrington in his paper<sup>4</sup>, and which I think is very important.

The other issue is about why only three applicants? I understand that there are trade-offs and I also understand that you don't want to give a reward to firms which come up without giving any additional evidence. But imagine that the first three applicants have not given enough evidence (and also that the Japanese system is such that you might receive immunity and leniency even if you don't come up with enough evidence to prove the infringement). So, it might happen that you have three firms which come up even before the investigation with evidence, but this evidence is not enough to prove the infringement. Then suddenly you have a fourth firm which might come up with new information and that information would be very valuable to prove the infringement, perhaps not of all the cartel participants but of some of them. So, the question is why stop to three and why not try the rule which says well, let's leave it open and in case there is substantial new evidence which is provided by other applicants, let's give a reward to the others well. Thank you.

**Moderator Suzumura**

Well, thank you very much. I know other panelist have opinions to air too but with regard to the point maybe you can respond, Mr. Uesugi?

**Uesugi**

Well, on the available number of the applicants for the leniency program, since it is the number, there are, of course, other possibilities such as two, three, four, five and so on. But we are here talking about the leniency program, which is a program to be introduced for the very first time in Japan. So we thought that we should start in a minimum logical way, i.e. three initially for the time being. Of course, it is attractive to have a system which places emphasis on the quality of the information but that gives the discretion to the authority and it might be disincentive for being applicants for the leniency program. So, this time we decided that maybe three will be appropriate.

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<sup>4</sup> Harrington, Joseph E. Jr. "Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion," 3. Competition Policy Research Center, Jan. 2006. Competition Policy Research Center. <<http://www.jftc.go.jp/cprc/DP/CPDP-18-E.pdf>>

But, I really understand that thought i.e. if three might be inadequate, why don't we open it up to four. Thank you.

**Moderator Suzumura**

Now in the order of the previous speech, maybe I could give the floor to Professor Matsui to make comments to other speakers as we will also hear your views please.

**Matsui**

Thank you very much. I would like to make two points. The first point is the issue related to discretion. In the end, I think, it depends on how far the companies or the society puts trust in the party who gives discretion. I mean, in the society where people think that the competitive state is the required and the cartel formation is per se illegal, it may be natural that the trust is given to the authority and leave the discretion of the authority and take this as the trustworthy. And I think that kind of understanding in a society is possible. I'm not talking anything about distrust towards the JFTC here, but the competitive norm has not been fully established in Japan compared to, for instance, the US. That is why, in a country like Japan, the transparent rule is very important to begin with. Otherwise, I think the norm putting root into the soil in Japan will collapse. And, of course, if the Japanese society comes to acquire the norm about competition, I think at that point we are able to be ready to change the system with more discretion, perhaps. That's the first point I would like to make. Then the second point, it is related to the first point though, is about the leniency after the onsite inspection i.e. 30% reduction of the surcharge across the board, and so, in order to remove the discretion and increase the transparency, as for the timing i.e. before and after the inspection. That is a very clear distinction and I think that was the right way to do. And, there is just up to three applicants with 30% and there is no race to be the first applicant in the race. Hence the incentive to race may be lost. But simultaneously, if the cartel or the companies form subgroup, or subcartel, and in Japan very important to move hand in hand, which is often said that it is the culture prevails in Japan, there is a chance to apply for leniency with group. So, there may be the higher incentive emerging to apply for the leniency. But, I must say that since only one month has passed since amendment of the new Antimonopoly Act takes effect, we have to wait and see what is likely to happen. But theoretically, I also don't know which systems is better. I think both systems can be happen in the future.

**Moderator Suzumura**

Thank you. So let's have observation from everyone. So next is Commissioner Shibata, would you like to make comments about the two invited speeches and others as well, please?

**Shibata**

Thank you very much. Professor Motta discussed about collusion. He defined the collusion very clearly. Professor Harrington talked about leniency program and screening approaches. He suggested such systems in order to battle collusive conduct. In the presentations and with additional comments, some details have been clarified, and I am enjoying this rich contents of the panel discussion. Mr. Uesugi has just mentioned the absence of discretion. And Professor Matsui said that we have introduced leniency for the very first time, so we need the very transparent system for the beginning. I totally agree with those opinions. In the Japanese legal framework, the concept of leniency is very new and it's an epoch-making change to introduce it. On top of that, if discretionary rights are given to authorities, that would sound very advanced or extreme. So, as Professor Harrington mentioned that excessive discretionary powers could cause problem, and therefore I believe the current new Japanese system is quite good for at least now. Thank you.

**Moderator Suzumura**

Thank you very much. Well, Professor Harrington, we come back to you. You gave a short comment before. Now you can talk for a little longer. Would you like to?

**Harrington**

Let's see. First I have a few follow-up comments to what Professor Motta said. First thing is, my sense is that the United States is probably too content and happy with its leniency program. There is no doubt there has been a number of successes, but there has been very little discussion about modifying the program. I find it important to maintain that attitude. As Professor Motta said that there is no perfect policy and there is probably always going to be a better policy. So, I think, it's important to stay in the mode of always looking for ways to improve. I think we've somewhat gotten out of that in the US.

Furthermore, related to that, it's important to keep in mind as to what we're trying to accomplish here. We're trying to reduce the rate of cartels in the economy. That's a hard thing to measure. The fact the leniency program is being used is certainly encouraging, and we can certainly point to certain cases where the use of the program was instrumental in a successful prosecution. So, I have no doubt that there have been a number of successes with the program.

But, we could certainly go too far. We could offer full leniency to every firm, and usage will be very high. But I think we'd all agree that what we've just done is to create a very good deal for price fixers. So, we want to look at the usage, we want to look at prosecutorial success, but we shouldn't be too blinded by those numbers to think that we have the best policy.

Secondly, Professor Motta mentioned about the issue of coercion. If a firm was engaged in coercion, that they would not be eligible, and he brought up a legitimate instance in which that would be counterproductive. But I think

you want to keep in mind that there are some good reasons to treat those firms, as well as firms who initiate a cartel, which are often the ones that engage in coercion. To treat them differently, and to treat them harsher, because just imagine here that we are going to treat them differently, and so now we have an industry, they want to collude, but each firm wants the other one to take the first move to initiate it, or to take the actions to coerce. Because they know that if they engage in that, they are not going to be eligible for as much leniency, that's going to make it a little bit more difficult to form a cartel, and so there is some ex-ante benefits for treating more harshly those who coerce and those who initiate a cartel. So, that's on the other side of the scales.

A third point is related to it having been mentioned that there is a lot of success with prosecution after the raid of company offices in Japan. And I can think of some global cartels involving US firms, Japanese firms, Korean firms, where there was some documented evidence and it did not tend to be with the US firms. And in some cases I can think about, it was representatives of the Japanese companies who kept some details from the meetings.

Now, there are obviously, real advantages to writing things down, keeping track of the agreement, that's important. But, of course, you provide potential evidence for prosecution. That's something which was of much greater concern to the US companies because of the fact that the penalties are so much more severe. If, indeed with these harsher penalties and leniency programs that it becomes more costly to be caught price fixing in Japan, you might imagine they are going to keep less physical, written evidence. And if that's the case, then these dawn raids aren't going to be as successful. So that's something to keep in mind. It is an undesirable byproduct of having a more aggressive and successful policy. It's going to be harder to find concrete evidence.

Oh, let's see, I want to just make a couple of other comments in response to some of the points made by Professor Matsui and Dr. Shibata. On the issue of discretion, I guess my concern with discretion is if I think about the Department of Justice, which I've always been very impressed with the people in the antitrust division, but there can be a tendency to settle a case, I think, too early. And it could be motivated by resource constraints, that they want to settle it and move on to the next case, and if they get guilty pleas, that's a success. And it may not be that much more success if they get guilty pleas with a billion dollars of fines than if they get a guilty plea with half a billion. But in terms of deterring cartel formation, it makes a big difference whether the fine is a billion dollars or half a billion. So, I think there is going to be a tendency for the members of an antitrust agency to want to settle to some degree. Which, given the resource constraints, may be the best thing, but, probably, the better thing is that they are given less discretion and this really forces the government to provide more resources. Because I think it is so essential not to just get a guilty plea, but to get

severe penalties. We've seen it so many times with cartels that reform, and they are reforming because the penalties just aren't severe enough.

Even in some of these recent cases, like the vitamins case, I know some economists, who are intimately involved with that case, that believe that even after the fact that collusion was still profitable, in spite of the billions of dollars of penalties between fines and customer damages. So, I think we're still short of having penalties to effectively deter cartel formation. So, anything that commits us to pursuing harsher penalties is the right strategy, particularly in light of our leniency program, since that's allowing us to really have wonderful evidence, in order to successfully prosecute a case. I think I'll stop there.

### **Moderator Suzumura**

Thank you very much. Well, before moving on, let me just straighten out the discussion.

We are continuing the discussion, and at least I would like to cover two points with you. And within the limited time, I would like to allow some time for questions and answers with the floor, because we have received many questions to invited speeches. So, we'd like to save time for that too.

So, there are two points I would like to discuss with you before going to the floor. First point is as follows. We've been talking about the leniency program. Well, come to think of it, all we have discussed about is the matter for the system designers. What kind of performance this design can have? It all depends on the company's side. So, let us talk about the applicant side next. Otherwise, we won't be able to assess the system entirely.

And the second point is that, of course, competition goes beyond borders. It goes across border. Each country has their own national competition law. But, they are not harmonized yet. We have our own competition law which are revised and new regulations are introduced. But within the global context, problems might arise because of the inconsistencies with the rest of the world system. So, maybe we could talk about the harmonization of the competition laws here. So those are the two points I wanted to bring up with you. After discussing those two points, we would like to go on to the open floor discussion.

So, let's talk about the users' side of the system. First of all, if anyone has points to discuss on the leniency program designed, we can discuss now. So anyone who would like to make a point about the leniency program? And of course, you are free to make comments to the remarks of other people on the panel too. So rather than myself designating the person, maybe if you like to take the floor, please raise your hand, so that I could recognize you. Anyone?

### **Motta**

I will try to make a comment on what Professor Harrington has said, and which is related to the question of the applicant side, although I'm not sure about it. You know in some cases there are very large fines, which are given to firms, and this is the issue that I wanted to raise. Partly the amendment of the Antimonopoly Act has been the enactment of the leniency program. And partly it has been also to strengthen the penalties which are being given to the firm, and we have not talked so much about it.

And I think this is a crucial aspect, because it is true that in several cases (and the Vitamins case was certainly one of the most important), the fines are enormous, but still it is widely thought that the cartel was profitable even if it had been discovered and fined. So, here I might talk only about the European Union experience (as I don't know how it works in Japan so well in practice), but it might be that even the fact that you have raised the fines may not be enough. And, I think, this is the only way in which we can actually make sure that the firms are deterred from entering cartels. That is, firms will consider the benefits of the cartel versus the costs, the expected costs of the cartel, which means the expected fines, but also the probability that they are going to be discovered. So, to work with higher fines is actually very important to assure deterrence.

And also, increasing the fines might also have an additional benefit because sometimes, at least in Europe, what happens is that the antitrust authorities and the national authorities appear in newspaper pages, in front pages, only when they are giving record fines. And this actually has had an interesting publicity impact because so many firms had not realized that the fines could be so big. And once they see in the newspaper about such large fines being paid, then they start to realize. And even more important, the public starts to realize that competition law exists, that the antimonopoly act exists, that large fines can be given. And the public starts to give support to the competition authority that previously the competition authority didn't have. So, we were hearing something today by several speakers and in particular from Mr. Takeshima, the Chairman of the JFTC, that there is a lack of culture of competition in Japan. But actually giving stronger fines might promote a structural change in the way in which competition is perceived. And given that competition is so important, as Mr. Takeshima was saying for innovation and for growth, it might be a very important change. And I want to link this point with the point about the firms' perspective, which is perhaps what Professor Suzumura wanted us to talk about. I think, we have to understand much better how things work inside the firm, and in particular what happens once a cartel is uncovered. And because we do not know exactly which sort of implicit contract exists between the managers or the employees of the firm in general, and their shareholders. And what would be very important and in part you are trying to do that with the compliance program, is that we should try to make sure that firms have a code of conduct. We should try to make sure that firms know that employees should not be rewarded, if they have discovered cartelizing, but they should be punished and that there should pay the consequences of having taken part in a cartel.



And I come to my last point on this series of comments, which is that we do not know enough what happens in practice after a fine is given. Because we do not know, for instance, enough about the stock market reaction of publicly traded firms, and some preliminary research shows that in general the share price of the firms barely moves after a fine has been given, which means that a firm has probably not been punished enough. And on the other hand, we know that there is a research, like a recent research for instance by Professor Connor<sup>5</sup>, which has studied a huge number of cartel cases to look at what have been the profits that firms have made in cartels. And it turns out, that the profits that the firms are making from cartels are huge. On average, Professor Connor estimates that the overcharge that firms belonging to a cartel are making, is between 25% and 30%, which means that the price is 25% to 30% higher on average, of course, than it would have been without a cartel.

Now all this is very difficult to estimate because the counterfactual hypothesis is always very difficult – it's difficult to understand how the price could have evolved over time absent the cartel -, but we should try to promote understanding of what happens after the fines have been given. And, this comes back to the point I was making before. We do not know what happens to the managers. Because at least in Europe anecdotal evidence shows that after a firm has been found infringing the law, perhaps it has even been a repeated offender, and the managers of the firm are still there, which means that something doesn't work. The managers should be punished. If the managers who are responsible for the cartel are not punished, it means that something doesn't work. So, I do not know if it's exactly sort of comments that Professor Suzumura wanted us to add, but I do think we have to understand a little bit better how the incentive structure works within the firm with respect to cartels, and what can competition authority do in order to intervene about that.

**Moderator Suzumura**

Well, thank you so much. Anything? Yes, Professor Matsui, please.

**Matsui**

When we assess a leniency program, very often we try to take up the leniency independently and to try to assess whether this is effective or not. I don't think that it is the right way to assess the program. That sort of argument is likely to happen, though. However, in my view, rather than taking up leniency as it is alone, we will have to look at with other factors. A Leniency is just one piece of the competition policies. And the leniency is only effective in combination with other policies. And in Japan, the bid rigging is quite prevailing, and therefore, in order to eliminate the bid rigging practice, it is also necessary to carry out reform of the bid rigging system itself. And even prior to the introduction of the leniency program, for

<sup>5</sup> John Connor, Professor, the Department of Agricultural Economics, Purdue University

example in Nagano prefecture, it has dropped the difference between bid price and planned price from 90% to 70% actually by changing the bid system. And based on that calculation, if in each prefecture and the government procurement that kind of policy is taken, there is a benefit from the two to five trillion yens saving, or economic impact of this magnitude. This is just a quite tentative calculation, but this means that leniency program must be assessed by being combined with other programs. It is important that we use the program as one of the competition policy.

**Moderator Suzumura**

With regard to the implications for the surcharge system, we have started to deepen the discussion. And Professor Motta mentioned about the compliance program. So, may be we can think about the significance of the amended AMA on the compliance program. I would like to give the floor to Mr. Uesugi now to be followed by the discussion with the rest of the panel. Secretary General Uesugi, please.

**(Implication of the new AMA)**

**Uesugi**

Well, let me talk about what kind of impact the raise of the surcharge rates and the introduction of the leniency program would give on the corporate behavior, especially the impact on the compliance program of the companies. As Professor Matsui has just mentioned, a leniency program alone will not be the key. It will work in combination with other systems as well. There is a company law there and also other legislations which should be concerned at the same time. It should be looked at from the whole context. What is important here is that we do have harsher surcharge rates for the repeat offenders. Within the 10-year period of time, if the company committed the same kind of offences, then the surcharge rate to that company will be raised. It was 6% before, but it will be raised to 15%, i.e. 2.5 times as high as before. And it will be applied on the companies as a whole. That is, if one minor section within the company committed the cartel under the situation where other section in the company had committed any kind of cartel before, it will be applied 15% of surcharge rate. So for diversified companies, it will be a very heavy burden, so company as a whole has to have a good compliance program, otherwise they might overlook the cartel being formed. And if the JFTC gives an order of surcharge payment, then the manager of that company are bound to be criticized by the shareholders, because the shareholders expect the manager have a good compliance program, and shareholders would like to make it sure that the companies would take good measure so that no repeat offence would be committed. Otherwise, 50% higher surcharge rate will be placed on.

So, managers have to be held responsibility for the corporate conduct, and beginning from 1st of April this year, Whistleblowers Protection Act will be enforced. Of course, it is not directly related to the leniency program, but all the whistleblowers are now being ensured that they will not be applied with adversities by the company. But it does have deep implications upon

the leniency program too. Ever since April, if within a company, some hotlines have been established, and if information comes in from one of the employees within the company through the hotline, then company has to have internal investigation first on their own. If it is left unattended without conducting an internal investigation, then that informant might go outside and share that information with outsiders in exchange for the protection. Then, as a result of the internal investigation, it was so decided that there is indeed suspicion about the cartel formation or bid rigging, then the company managers would feel like using the leniency program and go straight away to be the applicant for the leniency, or at least seek for that possibility. Otherwise that manager would be in a big trouble for the responsibility. Because if other fellow members of the same cartel apply for the leniency and the company is ordered to pay the surcharge, again, if it is found out that the manager has indeed received the information of the cartel beforehand, it is unavoidable for the manager to be criticized. Because if the manager took the right action, the company would have been able to avoid the payment of the surcharge. Managers have to understand this seriously.

So, managers cannot be excused if such a thing had occurred. And ever since the investigation is started by us, then the partial leniency becomes available. So if the onsite inspection is given, then companies should start an internal investigation immediately. So at least, they can be still entitled to receive 30% leniency, partial leniency.

But that is not all. Because we suspect that a cartel regarding one particular product implies that there, possibly, might be other cartels regarding other products. Because, for example, if we look into some suspicious cases developed in Tokyo prefecture, then we might suspect that why not in Kanagawa or Chiba or Saitama prefectures. So, if an internal investigation is called for, then may be that would be as good as being entitled to receive full leniency for other area. So, anyway, I would like to emphasize the importance of internal investigations to be done by the companies themselves. And compliance program for each of the companies are very important in that respect. It's not our official position though, I would say that the company should have a corporate leniency program within the company. That is to say, the employee would like to really tell the truth, but in return for telling the truth that person might get fired by the company, and that will be a big hurdle to tell the truth. I have a lawyer as my friend, and he would like to ask some questions to the employee, but the employee will not say anything because employee is afraid of being punished inside the company, and the people in the legal department will not have enforcing power, compulsory power upon his fellow workers within the company. But, partial leniency is available for the company, so I hope that a company would be lenient on the employee who is willing to speak out. If it is too lenient, there would be the problem Professor Motta mentioned, but I think a leniency policy within the company, which would encourage employee to speak out, at least, should be useful. The leniency program is not to be monopolized by competition authority only. It can be made available inside

the company too by way of private corporate leniency program. And Professor Matsui talked about the norm. We are talking about the carrot and stick this time. And we wanted to deter the cartel formation. But at the opposite end, we also have reformed to do on the awareness. We have to instill in the minds of the people that it's bad to have a cartel, and competition is good for the growth, and economy and so forth. So, we need to also provide support to the compliance program formation, as we heard from our Chairman about the survey on the compliance program. But apart from that with regard to the listed companies, if the JFTC has imposed a surcharge or investigation, we have to find out to what extent they are being reported to the shareholders meeting. We have to make it sure that the company managers also are responding in a proper way and we would like to make a fact finding about that.

Companies may have a compliance program, but they may also commit offences anywhere. We have seen those cases. In those cases, we are aggressively ordering the companies to come up with appropriate compliance program in the cease-and-desist order. We have had the cease-and-desist order issued for the case of steel-bridges-bid-rigging case. And we ordered the company to transfer the managers who were involved directly in that steel bridge bid rigging case to other sections within the same company for five-year period or so. We also ordered not to get the staff involved with steel bridge business if the company accepts the staff who retired the Japan Highway public corporation. That kind of concrete order had been issued by the JFTC. So, there are so many ways we can work. And by providing both carrot and stick appropriately, we hope that we can be successful in eradicating the cartel.

And let me just talk at last about international cartel case. Since Japan did not have a leniency program, the information about cartels did not come to the JFTC and the companies might tend to keep the information in Japan. However the things have been changed. Now we have a leniency program. So if there is a application for the leniency in the US, we expect that the authority in the US would mention about the leniency program in Japan and vice versa. This has made it much easier for us to deal with an international cartel.

As the Chairman Takeshima mentioned, there are already concrete cooperation systems among the US, EU and Japan. Now Canada has come in the system. Based on the system, we are taking an aggressive action in uncovering and discovering the international cartel cases.

At last, the rule of the game has been changed, and we are now about to play that game under a new rule. We expect that under the new rule, the players in the game take appropriate responses and compliance program need to be thoroughly implemented, and so forth. We are also trying to keep on supporting that. Thank you very much.

**Moderator Suzumura**

We heard the view from the person responsible for designing the amended AMA and message was also issued to the companies too. Now, maybe, we've been broadening the coverage of our discussion, but please feel free to say anything at this time. You can uncover of course new points too, if you like. But, any comment will do. Anyone? Yes.

**Harrington**

I have a question for the remainder of the panel, since the US is different on this point from Japan and the EU. So it seems that Japan and EU are similar in that the fine will be based upon the total company revenue or turnover, how you like to measure it. And, I do find that a little bit unusual in the following sense. On the one hand it can serve to lead to a higher fine, but of course there are many ways to do that. More to the point is we're thinking about trying to affect the incentives of these parties regarding whether to collude or not. And there it seems logical to tie the punishment in some way to the gains involved. The US with private customer damages gets closest to this. Even there, it's not really tied to the gains. It's tied more to an approximation of the damage inflicted on consumers. And I can understand why one might want to look at revenue involved instead of trying to estimate the gain in profits, because estimating the gain in profits is a very difficult exercise, while measuring revenue is a fairly straightforward exercise. But there still is the issue of why not tie it to the revenue involved with the division of the company that's engaged in collusion because that would seem to most directly speak to the incentives of whether to collude or not. Okay, so we collude, we're going to gain some profits that's related to revenue, and the penalty will similarly be related to revenue. So, I guess I throw that out as a question towards having a better appreciation of the advantages to that type of scheme.

**Motta**

In the EU, it's not that the fines are proportional to the total turnover. The regulation just establishes that there is a maximum fine, which is 10% of total turnover. So, this gives us the ceiling that the fine can reach. And when I made a point that this is the total turnover of the group, and it's a world turnover, I just wanted to emphasize that the fine could be extremely high, could be extremely large, and in some cases it has been extremely large.

Now, one problem of the way in which the European Commission has imposed fines is that nobody actually knows what is behind its calculation of the fines. In a sense that they have provided some guidelines which are based on gravity of the infringement, duration of the infringement, some mitigating factors, some aggravating factor, but all these are added or subtracted from a base fine. So, the way in which it works is that first the Commission says, okay, this is the base fine, say 100. Then we have aggravating factors because of for instance, the gravity of the infringement, and so this is multiplied by three. When it has lasted four or five years, this

number is then multiplied by five, and so on. But, you know, everything starts from the base fine. And actually on the base fine, the Commission has a lot of discretion, which means that it's very difficult to predict the way in which they are going to give fines, which is a problem. And it is a problem, because as I said before, the formal procedure of investigation and manner of litigation is extremely long in Europe. And because of the fact that there is no transparency in the way in which the European Commission is giving fines, what happens is that the firms are always appealing to the courts. And, sometimes they are trying to have the Commission decision annulled on formal grounds or on substantial grounds, but very often the appeal is just made to make sure that there is the possibility to reduce the fine. Since there is no clear rule, what the firms do is that they try to reduce the fine, and this means that the Commission has to devote a lot of resource just to follow up all these judgments, and the procedure of the appeals. So it would be much better if there wasn't such discretion.

Furthermore, the amount of fines relative to turnover is something which cannot be verified, because when a Commission decision is published, all sensitive information, which is considered as business secret by the firm is taken out. And the firms consider the turnover in the relevant market as sensitive information and so this is not published. Hence any observer or any researcher cannot actually check whether the fine was given as a percentage to the turnover of the relevant market or not.

**Moderator Suzumura**

With regard to the issue of discretion, anyone else who would like to make a comment on discretion at this time, anyone?

**Uesugi**

Well, with regard to Professor Harrington's remarks, he talked about Omnibus Question, which is not so familiar concept in Japanese people or Japanese society. I would like to explain the following to you. The Omnibus Question is a system under which we ask the applicants for the leniency program if they involved in other cartels or not. We don't have such a system in Japan. There isn't any leniency plus program either. If applicant divulged the information about other cartels that applicant will not be given higher premium leniency on top of what is being available and it goes for vice versa. Even if he does not admit to the information knowledge of other cartels, that conduct itself will not be a ground for receiving severe punishment. That is the situation in Japan. But as I said to you before, when the informant comes in, we might ask just casually if they have knowledge about other cartels. But, we don't have a practice like the United States where omnibus question is being asked always.

**Shibata**

We spoke about international harmonization. In this anti-trust legal framework, if you compare with the tax areas which I have taught before, there is more rapid harmonization in this area of competition. For example,

if you look at leniency program in the US and the EU, it has prevailed very quickly within several years. Already it has landed in Japan. So, in the last decade there was very quick harmonization in leniency programs. But when it comes to tax system, for example corporate income taxes, 20 years have been required to change one country's system and never be harmonized as quickly as a leniency program. This might come from the difference in natures, i.e. the natures in tax and surcharge. A tax is levied on a tax payer and a surcharge or a fine is levied on a violator of laws

In Japan, we have low level of culture on competition. I believe that companies' compliance program only is not enough. If there would be academicians here in the audience, then please do teach your students well about the importance of competition.

As I speak with members of the industry, there is such a question, "What's wrong with bid rigging. Because it is important that there is a continuous inflow of businesses and for that we need to coordinate with our competitors, otherwise the subcontractors will lose business. Employees of the subcontractors would be unemployed. You talk about competition only but you can't just wait until your next good chance of business comes, so bid rigging is important". But, competition issue is a separate issue from social security. As Chairman Takeshima mentioned, the healthy growth of the economy cannot be expected without competition. Therefore the spirit of the antitrust framework has to be explained at all levels of the people in the society.

**Moderator Suzumura**

Thank you very much. Professor Matsui, please.

**Matsui**

So, when we look at users of the leniency program, namely, the companies, since we do have corporate representatives in this room, I think they are much more knowledgeable about the situation than myself. But up until the few months ago, I was involved in the internal administration of the university, and so there was the university position. Since there is a corporatization of the national university, the rule of the game surrounding the universities has changed significantly. And as a result of that, the answer to the question of whether people's awareness or consciousness has changed equally would be no. People still stick to the traditional thinking. But what actually changes? The kind of opinion which is acceptable is changed. Some people say that a university professor is like somebody in the outside food stall. Each professor has their own opinion. They are not interested in administration itself but once their opinion is asked, they deliver different opinions. Hence, once a rule is decided on and opinion about that rule is about trying to improve the university under that rule. That kind of opinion is expressed by university professors. And our President or our Vice-President has begun to listen to the constructive opinions. I think any organization, including the company of course, is not monolithic in thinking.

And so, by allowing people to freely express opinions, the best opinions can be heard and gradually that leads to the change in norm of the society or norm of the organization. So, in that sense, leniency program of course in itself is important but the significance of leniency program in a symbolic sense is equally important in my view. Therefore, within the company, I hope that this program should be discussed actively in order to change the position or attitude of the companies. And not overnight but gradually, the norm about competition will become healthier within the corporate setting. Thank you.

**Moderator Suzumura**

Well, thank you so much. It was said that the change in the rule of the game does not necessarily bring the change in people's mindset with the example of a university. I think that there is an unwritten culture which exists behind. The rule may be changed soon but there are certain shared culture hardly changed, which is prevalent in any organization, unwritten culture. We are going to receive questions later but it's the common question posed to all of the panelists at the same time. Well, coming back to the leniency program issue, maybe I could pose to every one of you the question from the floor. The question is as follows. "The leniency system is something to betray the rest of the members and become applicant getting out of that collusion or the partnership, if you will. And that kind of approach is not so amiable within the Japanese cultural setting." That's what the people often ask in Japan, so how should I react to or how should we react to such a question is something we need to discuss. So, anyone can answer this question, please indicate to me if you would like to take the floor. Anyone?

**Matsui**

What I am going to say may be related with what I have just said. I think the organization is not monolithic in the opinions. And therefore for the consorted conducts, there is a person who joins the scheme and, of course, there are other people who may believe that this is something people never should do. So, the organization consists of the people with different positions and different opinions. And if the organization is really monolithic in thinking and once agreement is reached, leniency application, that is a betrayal of once agreed, would bring about the conflict and likely to destroy the traditional Japanese culture. If this is the case for real, I think I understand that point and that is quite convincing argument. However, if there is applicant for the leniency or if there are other people who wish to apply for the leniency, they themselves are not conspirators but those are the ones who wish to aim at the fair competition within the organization. So, if there is a majority of people with that opinion, the company will opt for application for the leniency and that is a desirable course. But of course some people might say that betrayal is betrayal. I think there is a strong opinion of this sort. I am very interested in hearing the rebuttal from other people with my opinion.

**Moderator Suzumura**



Thank you so much. Now Dr. Harrington, please.

**Harrington**

Is it for real that in Japan companies are so cooperative amongst themselves? Let me make two points related to that. One is just in terms of global cartels, so this is not a domestic cartel within Japan but a global cartel involving Japanese companies and American companies and the like. In many of these global cartels, there was cheating; these things do not work perfectly; firms were setting lower prices than they agreed to. In market sharing schemes where they are supposed to report their sales to the cartel so it could be monitored, whether their actual sales were at the specified quota or not, there are episodes that there was misreporting of those sales. They produced more than they actually reported, so they cheated and they tried to get away with it. So, certainly those instances make me think that these firms do have a common element to raising price but they are still competing for market share, so competition is there.

Similarly, if one looks outside of the price dimension, a lot of these cartels entail collusion on some of the dimensions and they compete aggressively on other dimensions. As a case in point, I was just talking to someone who was doing some research dealing with the development of VCR technology and was talking about that we had, I believe, it was Matsushita with the VHS technology, Sony with Beta. They had an opportunity to cooperate at some point when these were competing standards but they chose not to and instead compete aggressively.

Though there might be cooperation in terms of price, what we do have with recent global cartels are episodes of cheating; so they are trying not to cooperate in terms of market share. We have episodes where they are competing aggressively on non-price dimensions. So, I have a mixed opinion in my head about how deep is the culture of cooperation and is it just limited to some dimensions and not to other ones and if it is not limited to all dimensions then maybe it won't be as hard to change as we think.

**Moderator Suzumura**

Thank you so much. Well, Commissioner Shibata, would you like to take the floor?

**Shibata**

The most important principle on the competition law is whether it increases the social welfare. In order to increase it, competition is a necessity. That's the spirit. Then, taking bid rigging as one example, the often heard rule of bid rigging is at the construction sites, the company who is closest to the construction site would be allowed to win the bid or the contractors who have also experienced a construction before on the same site, they would be given the opportunity. Then, companies would be able to do the construction at a very low cost. So, if everybody follows that kind of practice, within the cartel members those who can do the construction at the lowest cost would also be

able to win the contract. It sounds so reasonable amongst the cartel members.

If that gain is going to be distributed among the consumers, that sounds fine. But on the contrary if there is any gain, it is only enjoyed by the cartel members because the contract price does not go down anyway. This means that this kind of cartel harms the social welfare by excluding the competitors who want to win with the cheaper price. This means that competition is undermined. This kind of cartel practices after all reduces the social welfare and therefore we have to stop those anticompetitive activities even utilizing the leniency programs.

#### **Moderator Suzumura**

Well, about this issue, each country has their own indigenous moral, if you will, the sense of moral which is different from one country to another. But the concept of competition goes beyond borders. So in that sense this kind of debatable point always exists, and how to react to this question depends on your degree or moral I would say. So, let's refrain from having a general discussion on this point. Now, let us come back to our table setting, if you will.

Two points so far. One is about the estimation of the system taking the players' responses against the change of the rule into consideration. Another point is, as I said, the competition is not bound by national boundaries and it does have a wider logic to it. Each country has its own unique characteristics against the collusion. When those characteristics appeared in the leniency program, what kind of problems could be raised? So, regarding those two points, if there are additional opinions, we can take those opinions and then we can go on to the next stage. Anyone? Then let me go on.

Well, we had received actually a lot of questions from the floor. So maybe I could read them out and ask for your responses. Some of the questions are addressed to specific persons and some of the questions are addressed to all of panelists and so forth. But, before that I would like to ask the all of panelists for the comments looking back what we had today. I would also like to ask two invited speakers to make any advice with regard to the future of Japanese competition policy and systems. But anyone can speak at this time so I wouldn't designate anyone. So, Mr. Uesugi, do you have anything to say?

#### **(Looking back the symposium)**

##### **Uesugi**

I don't know if I am responding to your question or not, but with regard to the leniency program, well, uncovering and detecting the cartel has been the motivation for introducing leniency program in many different countries. But information obtained through the leniency program needs to be protected very highly. In Japan all the information which comes through the leniency program will not be shared with outside, i.e. a high degree of protection will

be given to that information. I believe it is the same for other countries too. This could be an obstacle for having international cooperation in uncovering international cartel case. So, we might need to make some kind of convention or international treaty which allows each country to get involved in the cooperation for uncovering the international cartel case, what is called "the second generation cooperation". Maybe I could ask views from our overseas guests.

**Moderator Suzumura**

Then Professor Harrington, please.

**Harrington**

I would like to reiterate something you said Professor Suzumura. And I may come back if I have some thoughts about what was just stated; which is, I think, you have exactly the right perspective that it is a dynamic process in instituting a program. Some features of the program are going to be good, some are bad; you don't know which right now and so you just have to keep that in mind as one see how the program develops and expect that it will need to be changed. So, I think as long as one has the right attitude with regards to that, one is sure to lead to policy improvements and ultimately to an effective policy.

**Moderator Suzumura**

Thank you. And Professor Motta, please.

**Motta**

Let me mention one issue about the sharing of information among competition authorities. It might appear at first sight as a very powerful way to go forward towards cartels. But actually it might create some problems and it might not be easy as a route to go, precisely because there are different jurisdictions in different systems. Now, for instance, in Europe, there is an issue which is that at the EU level, that is at the supra-national level, there are no criminal penalties. But at the level of member countries, some countries do have criminal penalties. So, if the firms know that the competition authorities will share information, they might be extremely careful because it might be, for instance, that it goes well with the European Union in the sense of avoiding fines, but especially if a country doesn't have a leniency program, it might be that after the European Union level, the cartel could be prosecuted by the national competition authorities. The national competition authority may not have a leniency program and then, you know, some of the managers might end up in prison. So, it is right that potentially it's a very good device but it might backfire because of the differences between the different systems.

**Moderator Suzumura**

Well, Professor Matsui, please.

**Matsui**

I'd like to make three points briefly. The first point is with regard to leniency program. This is not the program to be used after the cartel. It should be the program to be used before the formation of cartel. Because this matter should be considered to prevent cartel from being formed. That must be the aim of the program and therefore the culture, where when the people in charge discuss to stop the cartel because of the leniency program, is really necessary. And the second point is that this is perhaps the request to Japanese government or JFTC in particular. In a competition policy, I think, a competition should be introduced into competition policy itself. I think I touched upon this point in the morning and also Professor Motta talked about it. In the case of the EU, the competition authorities are not only the European Commission but also national competition authorities. There is sometimes a coordination but also there is certain tension among those institutions in order to improve the competition policy. And in the United States there for instance they have DOJ and FTC at federal level and other competition authorities at state level. So multiple authorities have got involved to improve the competition policy. So, in a good sense, there is a competition among those authorities and so in Japan, I think, we should move in the same direction. Although I do not know whether the authority is given to the government authority or local government, there should be the system which is equivalent to the JFTC at the local level and so in a public policy I think the factor of competition should be introduced.

And the third point is social damage of bid rigging. In reality, if there is bid rigging, perhaps 2 to 5 trillion of the waste is produced from the tax. Now even though there is a argument over the increase of the consumption tax, we should think about it considering the fact above. If in each local and national government, the competition policy is promoted and the spirit of competition is fully understood, there is no need of discussion for the tax increase anymore and therefore it should be very comprehensive in policy formulation including competition policy.

**Moderator Suzumura**

Well, Commissioner Shibata, please.

**Shibata**

At the beginning it was discussed that Japanese system does not have any discretion given to the authority. Yes, certainly but we have introduced a leniency program where are actually many uncertainties. Confronting uncertainties the companies would have to decide to apply for leniency or to continue the cartel. That is the question the program asks to the companies. From the company's perspective, before investigation what might be the probability that the cartel would be detected? Or if the investigation has been started, what is the probability of being convicted? Or if you apply for leniency and what is the probability that you will be able to enjoy the surcharge reduction. All of those are uncertain but companies have to make the judgment despite that.

Now, the cartel members, they never trust 100% of the cartel colleagues anyway. Somewhere they are always suspicious of potential cheating amongst the cartel members. On the other hand, if at least one party applies for leniency, that cartel will dissolve easily so that is the instability of some of the cartels. The EU and the United States, they have gone through improvements and amendments and finally they are seeing more success in leniency system. That is, the very sensitive fine tuning is required constantly. So, the JFTC also will have to continue studying its leniency program and going forward. Thank you.

## 2 Floor Discussion

### **Moderator Suzumura**

Thank you very much. Well, then prior to entertaining questions from the floor, since I have been remaining silent for whole day more or less, maybe I could be given the floor myself and speak, but it will be very short. There are certain things I wanted to comment. Well, Professor Motta, he mentioned that no system can be perfect. It is a very important point I would say because if you look at it from backward side, we used to have our traditional AMA where we had accumulated our problems over time. For example, take surcharge system as an example, this time around we enhanced our surcharge system very much with the amendment, but when it was born originally, it was characterized as a seizure of ill-gotten gain from the cartel and so forth, so it was not administrative by penalty or disposition, that was the notion applied. And so that it was made compatible the criminal system in the AMA by affording the JFTC's exclusive right to prosecute with the double jeopardy in the Constitution, but in order to have effectiveness of the surcharge over time, surcharge weight have been raised.

So, it started as a notion of seizing the ill-gotten gain, so over time it became inconsistent because over time surcharge rate have been raised anyway. So, some of the jurists used to say that surcharge had dubious nature to it. Maybe that might be a valid point. Of course, exclusive authority to file prosecution had been rested with JFTC but when it came to information collection, we had a limit. However, there was oil secret price cartel case which was uncovered and made a criminal accusation. We really used our authority to file the prosecution and we did it with that case. But we were not able to communicate properly with the public prosecutor side at that time, as I read that in a book. With this case as a trigger, between the JFTC and prosecutor, the joint study group on the accusation was formed. An agreement was reached and both of the institutions have to agree first before making an indictment and prosecution.

So, JFTC has administrative purposes to fulfill by collecting information but it can trigger the criminal accusation which constitutes a kind of contradiction. I am not trying to find fault with our older system, but anyway I wanted to make the point that some of the systems did have a strain or stress in the past, developed over time. And recognizing those stresses, efforts have been made to correct that and to make the system consistent and compatible and be responsive to the goals. An adjustment and correction is needed from time to time.

It is not that we are always starting from scratch which means that we have to work incessantly trying to modify what we have in the hope that a better system can be formed. And as I said to you at the opening remarks today, this amendment of AMA was an epoch-making event for us. However, I am not saying that our system is perfect. Rather we should not think that way. Because there are still so many outstanding issues. So, environment will

change, our experiences would change and evolve and more importantly, the system is only rules of the game and we have to think about the players who will be using that rule of the game. So, there are so many self-reflections that we are also required to do. We must not forget that we always have to think of a way to improve what we have.

So, in implementing competition policy, there are so many preferences and advices that we can use. So, we hope that we can always work in favor of improving welfare for overall people in Japan. And many research themes are pointed out. We take them as the research subject of the CPRC Thank you very much.

So having said that, as I said to you before, maybe it is good time to receive questions from the floor as much as time allows. Maybe we can entertain the questions from the floor.

Well, first question. Well, Professor Harrington, in your talk, you talked about government procurement contract. Well, we have a government led bid rigging<sup>6</sup> case in Japan which has been a big problem in Japan for some time now and it's not being solved yet. In the United States and Europe, do you have many cases of government led bid rigging like we do here or although the case might be smaller than here in Japan, do you have some of them in your country too? Can I ask you to answer this point first please?

### **Harrington<sup>7</sup>**

Let's see. I am less familiar with cases at the federal level, though I am sure there are cases there. I know at the state level that, for example, the road construction industry as there has been many, many price fixing – that is, bid rigging cases more specifically, with regards to road construction. I am sure there are some other ones that are just escaping me right now but I would say it's something which is thought to be quite widespread within the US for a lot of state contracts. You have really the perfect conditions for collusion. You have a limited number of providers, in this case construction companies, who are bidding on a regular basis, they have lots of opportunities to punish each other, there is repetition and so there has been number of cases across many, many different states. So, that's very much an ever-present problem which is yet to be solved because those cases very much continue. So, those are much lower profile cases than vitamins or lysine or graphite electrodes, which are global and rather large. But when you aggregate these, particularly across states within the United States, I suspect that the total amount is really quite substantial.

### **Moderator Suzumura**

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<sup>6</sup> *Kansei Dango*. Some people translate it as "government-initiated collusive bidding".

<sup>7</sup> Professor Harrington takes "government led bid rigging" as "the bid rigging case concerning the procurement or projects ordered by the government".

There is a follow-up question to that about this governmental public sector bid rigging. So, what is the penalty imposed upon the public sector side in case of the US and what is the situation in Europe?

### **Harrington<sup>8</sup>**

At the federal level, to my knowledge, there is no difference between bid rigging and other forms of price fixing, so they would be liable for private customer damages, the usual triple damages. Now, I should say on that point President Motta mentioned some work of John Connor<sup>9</sup>. He has also looked overcharges and private customer damage calculations and I think there is an important qualifying note here. Certainly, what is true legally in the United States is that if firms are found guilty in a court case or it reaches the point of a judicial decision, then they will determine what the damages have been to customers and they'll have to pay an amount triple the size of that. In practice, of course, a very high fraction of these cases are settled out of court and, on average, about single damages are paid. I think Professor John Connor in his study found that damages paid was about 115% of the actual damages<sup>10</sup>. So, we're well short of triple damages. So, that's what – that would apply to price fixing, bid rigging. So, that's at the federal level.

Every state has some different rules regarding price fixing and bid rigging and I don't know whether bid rigging is treated more harshly or not.

### **Moderator Suzumura**

I have a totally different question coming different questioner. About the international cartel, when the several numbers of countries are concerned and those countries can offer competitive leniency program, what would happen. So, there is an international cartel and domestic cartel, but do you think we should make a difference between the international case and the domestic case of cartel when we are thinking about the utility of the leniency program. Do you think there is a redundancy in the utility that one can expect from the different leniency program offered by several number of countries? Because several countries offer the leniency programs at the same time and when the international cartel is involved, how would the leniency programs be coordinated and adjusted, if you will, or used? Please, would you like to answer?

### **Harrington**

That's a very big question. Let's see. If I started thinking about distinctions between domestic and international cartels, only one of them is at the international cartel, it's going to be in a variety of countries, some of which will have an active antitrust authority, some of which will not, some of which will have really no meaningful antitrust laws. I mean we've been talking here

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<sup>8</sup> See the footnote 7 above.

<sup>9</sup> See the footnote 5 above.

<sup>10</sup> Connor, John M., "Effectiveness of Antitrust Sanctions on Modern International Cartels," Purdue University, working paper, 2004.



about Japan and the US and the EU but there are a lot of countries out there that have very little in terms of antitrust protection. In those, it is very important for the stability of colluding in the countries that I just mentioned, it is very important that there is collusion as well in these other countries. It's just not additional profit. If they don't collude there, there is a way in which they can cheat in those countries and that supply can filter back through resellers to the markets – to the bigger markets they are trying to collude in. There was an important recent case in the United States that was settled at the Supreme Court, the vitamins case. The plaintiffs for that case sought to sue for damages in US Court, inflicted by the cartel in countries where you cannot collect damages. So the idea here is there is damages created all over the world and some of them you can collect those damages or there are other forms of penalties. Then there are some countries for which there will be no penalty and they are trying to basically have those penalties shifted over to the US and have their say in US court. The Supreme Court decided against that, so you cannot sue for customer damages created, let's say, in a country in Africa within a US court. Now, what that means, of course, is that there are still these other gains from collusion, which the firms are able to protect. Then that's going to be a distinction between the international or a global cartel and the domestic cartel. And yeah, in terms of the multiple leniency programs, I must admit I hadn't really thought that through. That sounds like an important but yet complex question. Here I've been thinking about the incentives of someone to report under a leniency program, but I have to admit I've been thinking of that very much in isolation. You know, here is one country with the leniency program, what are the incentives to report, although now if in the context of multiple countries where applying for leniency and receiving in one country could well influence the case elsewhere. Even if that evidence can't be directly used, nevertheless, the other countries perhaps have an increased level of confidence that there is evidence to be had and maybe more aggressively pursue this case.

Professor Motta mentioned as well on this point the differences in penalties across countries within the EU. So, it's a similar one. I guess I am not really answering that question because it is a difficult question but I would say that's one that's really worthy of people sitting down and trying to think through.

**Moderator Suzumura**

Thank you very much. There are some more questions addressed to Professor Harrington, but maybe we can move on to Professor Motta and ask him to respond to some of the questions. Two questions for you. First question is about the criminal penalty. It is written in English, so let me read them out.

"Some member countries, e.g. the UK and Ireland, adopted criminal penalty to executives engaged in cartels. Has this difference in criminal penalty affected behavior of executives or firms in different member countries? In

case such data does not exist, how do you consider that difference affect behavior of executives or firms in different member countries?" That's the question.

### **Motta**

This is a very interesting question and it touches upon a very important point which has been very much under discussion in Europe for the last few years. So, the first short answer is that there is no data. This is for two reasons, one is that in any case the UK, for instance, has introduced the criminal penalties just last year so it would be too soon to have any evaluation of it. But the other thing is that actually I wonder to which extent we could actually have an empirical evaluation of whether criminal penalty is more effective than an administrative penalty, simply because we do not know how many cartels are out there. So, it is very difficult to evaluate and say well, you know, we discover fewer cartels say in Italy than in the UK, then it must be that in the UK the system works better. Because maybe the situation is completely different in Italy, and maybe in one country the competition authorities are working better than another. But more to the roots of the problem what happens is that this would require some sort of assessment with respect to what is the total population of cartels which exist in an economy. And that we cannot know, so it's very difficult to evaluate the enforcement which is provided by criminal penalty versus administrative penalty.

So, although there is no econometric answer, I do think that criminal penalties are extremely important and I think actually they are crucial and for one reason. The reason is that in Europe at least at the supra-national level, what happens is that it is the managers or executives who take decisions about whether or not to engage in a cartel, but it is the firm and not the manager which is punished. So, you see again, as we have said repeatedly, it would be important to devise a system which provides the right incentives not to engage in a cartel. And the system which punishes a different agent than the one that actually takes the action, I do not think it is an efficient system. So, it would be much better to punish those who actually take the decisions, the managers. And that is why I think it is very important that even in systems where it is not possible to introduce criminal penalties for various reasons. It is important to persuade or oblige the firms to adopt some code of conduct to make sure that the executives which are caught infringing the law will actually be punished and not rewarded in terms of their career.

### **Harrington**

Yes, if I could just make a follow-up remark to what was just said by Professor Motta. One thought I had regarding how to measure whether criminal penalties make a difference, would be to look at global cartels and to see if in any cases they chose not to collude in the US. So there is a country which has criminal penalties, many other countries where these global cartels can possibly collude, they don't have the criminal penalties. Now, the cases I

am familiar with are necessarily global cartels where they did operate in the US just because I am more familiar with the US cases. But it's only that would be one strategy and to see that whether or not that seems to make a difference. There is always the issue which is whether or not you think about many firms, many industries' firms can collude, they differ in terms of their prior assessment of getting caught. It's always possible that the firms that end up colluding are the ones that are just excessively optimistic about not getting caught. And if that's the case then there may not be a difference between colluding in the US or elsewhere. The US may have more severe penalties and imprisonment, but if firms assign such a low probability to it they might not see a difference across countries. But, you know, I think that's changing. Given the leniency program, I suspect they are significantly increasing their assessment of the probability of getting caught. So, it will be interesting to see whether or not for some of these global cartels they choose in some instances to avoid countries which do have criminal penalties.

**Moderator Suzumura**

One more question is addressed to Professor Motta. The question, looking at the aviation industry, airline industry in the US and EU. "If you look at the airlines, they have alliances and code sharing operation, there are so many partnerships. What about the market dominance power and the price controlling power by those airlines. What about the aspect of raising the convenience for the passengers, how do you strike a balance there, any view on this?" Professor Motta, please.

**Motta**

That is another very interesting question. Well, first of all, I am not an expert on the airline market but it is clear that the person who raised the question put the finger on a very important point, which is, what is the right balance between cooperation and competition because there are some forms of cooperation which are accepted by many antitrust authorities. The case of the alliances and code sharing agreements are cases in point. There are also other cases in point like for instance one topic on which Professor Suzumura also has worked, which is cooperation in research and development. That is another case in which some forms of cooperation among competitors are actually accepted and to some extent even promoted. So, I think, there is no answer in general to that. I can refer to particular cases. So, for instance, I know the case of SAS and Lufthansa. SAS is Scandinavian Airlines, a firm which has a dominant position for flights into and out of Scandinavian countries such as Denmark, Sweden and Norway. And they had an agreement with Lufthansa which is the dominant company in airline transportation for flights in and out of Germany.

And, they allowed these two firms to enter a very close agreement which involved code sharing and the fact that they would have the same frequent flier program, which is also another important consideration which is taken into account by consumers. Well, there was a lot of discussion at the time when the European Commission was submitted this proposal, and in the end,

the Commission decided to allow SAS and Lufthansa to get into this agreement. I am not familiar enough to have my own views about this case, but my gut feelings and the feelings of most of the scholars with whom I have talked, is that in this case, for instance, given that there were two companies which were so strong in each of the market was a bad decision. That is, the balance between cooperation and competition might have gone in this case too much on one side, on the side of privileging cooperation.

But of course then, you know, it really depends from case to case and then there is also the fact that many of the European firms have engaged into this code sharing and other sort of agreements. There are few only which have been left out, so now to prevent those firms which have been left out of the agreements, not to enter into other agreements, it would clearly render the competition in the field very, very asymmetrically in favor of those who had already entered the agreement. So I think it is a bit too late to intervene on that.

**Moderator Suzumura**

Thank you. Well, my question is addressed to Commissioner Shibata. You made a comment that before and after the investigation, there is a difference in the leniency. You made a comparison. In case of the United States, criminal penalty is there but in case of Japan and EC, only surcharge exists as well as fine in the form of administrative penalty. So, do you think those differences need to be taken into account while making the comparison of the leniency program?

**Shibata**

When I discussed that point, the surcharge and the fine was compared because in Europe it is fines, in USA it is criminal fines, and the size of that amount is different. I was explaining about the concept in comparing the different systems. So about the actual probability or the expected amount they would have to pay must be recalculated with care once again.

**Moderator Suzumura**

Thank you very much. Amongst the question sheets, there are other outstanding questions, for example, some people would like to know the reference material that they can look at if you have any suggestion. So, I could give the questionnaire later to the panelists, but anyway maybe we can finish the discussion with the floor because we only have a few minutes left for our panel. So maybe we could close the panel discussion at this time. But before doing that, this is the last opportunity for you I am afraid, so if there is anything that you would like to say before you conclude and leave this panel, please let me know? Anyone of you, please be forthcoming in asking for the floor, anyone? Nothing in particular; no more comments?

Well, then I see that we have exhausted all of the time allocated for the panel discussion. So, once again, ladies and gentlemen, we started with a keynote speech by chairman Takeshima today and we spent a long day with

you, but it was very substantive and very worthwhile. We enjoyed the keynote speeches and many other presentations given today. So, as a sponsor, we are very happy. I hope you are feeling the same. I hope you have enjoyed the session as much as we had and I hope that we have motivated you to think further about the policy implications and further. So with this, we would like to conclude the panel discussion. I thank you very much for your cooperation.

### **【 Closing Remarks 】**

**Dr. Kotaro Suzumura (Director, CPRC, Professor, Institute of Economic Research at Hitotsubashi University)**

As I said to you already, the symposium like this is such a precious opportunity for us because we are now standing at the turning point for our competition policy. Our AMA was amended and it has given us a good opportunity to think about the future of our competition policy now that new AMA is put into force.

So, we always wanted to hold a symposium like this for some time and we are very happy that our idea came true today. I thank you for most substantive day, thanks to your cooperation and that is solely indebted to invited speakers who have come afar to be with us today, namely our two foreign guests as well as people from the center and people from academia and the support from JFTC and NIKKEI and so forth. We are very grateful for your cooperation. Allow me to spend one or two minutes explaining about our center. As Chairman Takeshima mentioned at the very outset today, our center is very young; we only have a short history. The JFTC itself was born in 1947, so it's not that old either. But in case of our center, our center was established 44 years after the establishment of the JFTC. Based on the economics and law, we are to look into the cases of Japan, looking at its history and the theoretical point of view to think further about the competition policy and we hope that we can contribute to the policymaking of the competition from offering the database and provide, if you will, a strong framework for our thinking.

That had motivated the foundation of the center and the center's efforts was reflected in today's symposium but we hope that we can continue to make whatever humble contribution to the foundation of competition policy in Japan. We hope that we can be a link between the academia and the people working at the forefront of our competition policy and we would like to become a good interface between the two. Well, both Professor Harrington and Professor Motta, we are looking forward to having a continued good working relationship with you way into the future. We always welcome your advice and academic support. Thank you.