

**ANNUAL REPORT ON COMPETITION POLICY IN JAPAN**  
**(January-December 2008)**

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## **I Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislation**

### **1 Efforts toward the amendment of the Antimonopoly Act**

#### 1) Background to the approval of the bill to amend the Antimonopoly Act (“AMA”)

The bill to amend the Antimonopoly Act and Premiums and Representations Act was submitted to the 169th ordinary session of the Diet on March 11, 2008. The bill was carried over to the 170th extraordinary session, but was abandoned thereafter. With the necessary revisions made for implementing it as soon as possible, the bill to amend the Antimonopoly Act was resubmitted to the 171st ordinary session of the Diet on February 27, 2009. The bill passed the House of Representatives on April 27, 2009, and the House of Councilors on June 3, 2009, and was approved on the same day. The amendatory act was promulgated on June 10, 2009.

#### 2) Major points of the amendment to the Antimonopoly Act

The following are the major points of the amendment:

##### A) Review of the surcharge system

- a) A surcharge system will be introduced against the exclusionary type of private monopolization. The amount of surcharge shall be the amount obtained by multiplying the sales of the goods or services concerned by six hundredths (two hundredths for retailers and one hundredth for wholesalers).
- b) An entrepreneur that repeatedly commits violations in the form of concerted refusal to trade, discriminatory pricing, unjust low price sales, or resale price restriction shall be subject to the surcharge system. The amount of surcharge shall be the amount obtained by multiplying the sales of the goods or services resulting from the pertinent violation by three hundredths (two hundredths for retailers and one hundredth for wholesalers).
- c) An entrepreneur that continues to abuse its superior bargaining position shall be subject to the surcharge system. The amount of surcharge shall be the amount obtained by multiplying the amount of the pertinent violating transaction with its counterparty by one hundredth.

##### B) Review of the surcharge rate for unreasonable restraint of trade

A system will be introduced whereby an entrepreneur that plays a leading role in a violation shall be subject to an increased surcharge rate of fifteen hundredths of the pertinent sales (4.5 hundredths for retailers and three hundredths for wholesalers).

##### C) Review of the Leniency Program

To encourage violators to provide further information for the JFTC’s fact-finding investigations on violations, the number of leniency applicants will be expanded to a maximum of five for each violation.

##### D) Extension of the Statute of Limitations for Administrative Orders

The statute of limitations applicable to cease and desist orders and surcharge payment orders will be extended from the current 3 years to 5 years.

##### E) Revision of the Notification and Reporting System stipulated in Chapter 4 of the AMA

- a) Introduction of a Prior Notification System for Share Acquisitions.
  - b) Revision of the scope of Notification Thresholds for Acquiring Corporations, etc.
  - c) Revision of the scope of Notification Thresholds for Foreign Corporations.
  - d) Revision of the scope of Notification Thresholds for Mergers, Demergers or Acquisitions of Businesses.
  - e) Expansion of the scope of the exemption from notification of Mergers, Demergers or Acquisitions of Businesses.
  - f) Introduction of Substantive provisions and Notification provisions for joint share transfers.
- F) Special provisions concerning Document Production Order  
 Special provisions concerning Document Production Order will be introduced to facilitate remedies in litigation relating to suspension or prevention of infringement by means of unfair trade practices.
- G) Review of the Penal Provision  
 The maximum jail term for unreasonable restraint of trade, etc. will be increased from the current 3 years to 5 years.

## **2 Bilateral cooperation agreements**

### **1) Signing of “Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations”**

The Government of Japan and Member States of the Association of Southeast Asian Nations signed the Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations in April 2008. It has a chapter dedicated to Fields of Economic Cooperation, which stipulates that the Parties shall explore and undertake economic cooperation activities on competition policy.

### **2) Signing of “Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership”**

Both the Government of Japan and the Government of the Socialist Republic of Viet Nam signed the Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership in December 2008. It has a chapter dedicated to competition, which stipulates that each country shall cooperate in the field of controlling anti-competitive activities.

### **3) Other moves toward agreements**

The Japanese government is continuing discussions on competition policies with Australia, Peru, etc. in negotiations for economic partnership agreements (EPAs).

## **II Enforcement of competition laws and policies**

### **1 Measures against violations**

#### **1) Measures taken in 2008**

Under the AMA, the JFTC conducts necessary investigations based on Article 47. If it finds any violation, the JFTC notifies the person who is to be the addressee of the cease and desist order of such matters as the expected content of the order (Paragraph 5 of Article 49) and gives the person an opportunity to express an opinion and to submit evidence (Paragraph 3 of Article 49) before

issuing the cease and desist order in consideration of the opinion and evidence. Even if the JFTC does not have enough evidence to take legal measures, when it identifies any suspicions of violations of the AMA, it issues warnings and instructs the parties concerned to take measures. In addition, the JFTC issues cautions as a means of preventing such violations when it does not have enough evidence to specifically identify a violation of the AMA, but is only able to recognize certain conduct that could lead to violations.

Out of 32 examinations concluded by the JFTC in 2008, it took legal measures in 21 cases (cease and desist orders in 20 cases and a surcharge payment order without a cease and desist order in one case). The JFTC also issued warnings in 3 cases in which it identified suspicions of violations of the AMA, issued cautions in 5 cases, and terminated examinations in 3 cases in which it was unable to uncover evidence of illegal conduct.

#### **A) Legal measures**

The JFTC has been especially engaged in continuous efforts to eliminate bid rigging. In 2008, 9 of the JFTC's legal measures were carried out against bid rigging.

- |   |   |
|---|---|
| • Bid rigging                                 | 9 |
| • Price cartels, etc. (excluding bid rigging) | 8 |
| • Unfair trade practices                      | 4 |

#### **B) Surcharge payment orders**

The AMA states that when enterprises or trade associations form cartels, a surcharge will be levied in the following cases:

- a) Cases pertaining to the prices of goods or services; and
- b) Cases that affect the prices of goods or services by effectively restricting the volume of supply.

The amount of the surcharge is calculated by multiplying the amount of sales of the concerned goods or services during the period of the cartel by a certain percentage. In the case of trade associations, the surcharge payment is levied on the enterprises constituting the association. In 2008, the JFTC issued surcharge payment orders to 63 enterprises totaling 9,638.84 million yen.

#### **C) Criminal accusations**

The JFTC has adopted an active policy to apply criminal penalties to violations that a) substantially restrain competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid rigging and boycotts, which constitute serious cases that are likely to have a widespread influence on the national economy; or b) involve firms or industries that are repeat offenders or which do not take appropriate measures to eliminate a violation, and for which the administrative measures of the JFTC are not considered sufficient to meet the aims of the AMA.

In 2008, the JFTC filed an accusation regarding one case as follows:

- The JFTC filed accusations with the Prosecutor-General against the companies and their officials conducting the business of manufacturing and selling hot-dip 55% aluminium-zinc alloy-coated steel sheets and strips for an unspecified number of customers, which had agreed to raise the selling prices of the products at issue that were shipped after July 1, 2006 (the

accusations were filed on November 11 and December 8, 2008).

#### **D) Hearing procedures**

The JFTC initiated hearing procedures on 24 cases in 2008. As of the end of December 2008, the JFTC was conducting ongoing hearing procedures for 57 cases, of which 13 concerned allegations of violations of the AMA, 40 concerned surcharge payment orders and 4 concerned allegations of violations of the Premiums and Representations Act.

The JFTC issued decisions on 59 cases in 2008 following hearing procedures, including the case of Trading on Restrictive Terms Relating to Windows OEM Sales Agreements by Microsoft Corporation.

### **2) Summary of main cases**

#### **A) Case against Manufacturers and Sellers of Marine Hose**

The JFTC found that the manufacturers and sellers of marine hose had jointly determined the prospective recipient (called “Champion”) of the orders that were placed after consumers of marine hose had asked multiple manufacturers and sellers for estimated prices, and had cooperated to ensure that the Champion would receive the orders. Therefore, the JFTC issued cease and desist orders and a surcharge payment order on February 20, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

#### **B) Case against Manufacturers and Sellers of Flexible Gas Pipes and Fittings**

The JFTC found that the manufacturers and sellers of flexible gas pipes and fittings had agreed to raise the base price of flexible gas pipes from the current levels, and thereby raise the selling prices for consumers or sellers of the product from the current levels, and therefore issued cease and desist orders and surcharge payment orders on March 24, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

#### **C) Case against Manufacturers and Sellers of Polypropylene Shrink Film**

The JFTC found that the manufacturers and sellers of polypropylene shrink film decided to raise the selling price of polypropylene shrink film from the current levels, and therefore issued cease and desist orders and surcharge payment orders on March 28, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

#### **D) Case against Manufacturers and Sellers of Steel Pipe Piles and Steel Sheet Piles**

The JFTC found that the manufacturers and sellers of steel pipe piles and steel sheet piles had agreed to raise the selling prices to constructors of the products used by them when contracted to perform construction works by the national and local government, etc., from the current levels, and therefore issued cease and desist orders and surcharge payment orders on June 4, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

#### **E) Case against a Seller of Yarn for Hand-Knitting or Handicraft, etc.**

The JFTC found that the seller determined the lower limit of the discounted price

(hereinafter referred to as “discount limit price”) for its product of yarn for hand-knitting, etc., requested that retailers sell the product at such discount limit price or higher along with having the wholesalers request the retailers to which they sold yarn to sell the product at the discount limit price or higher, and stopped shipment of the product to such retailers that did not agree with the request or the wholesalers distributing the product to such retailers, and therefore issued a cease and desist order on June 23, 2008, because such an act is in violation of Article 19 of the AMA (Item 1 and 2, Paragraph 12 [Resale Price Restriction] of “Designation of Unfair Trade Practices”).

F) Case against a Retailer of Home Electric Appliances

a) The retailer had coerced the suppliers of home electric appliances to dispatch employees in order to have such dispatched employees display and restock the goods and attend to customers, etc. at its newly opened or remodeled shops regardless of whether or not goods were delivered by such suppliers.

b) The retailer had coerced the suppliers of home electric appliances to dispatch employees in order to have such dispatched employees initialize the settings of the goods used for display at the shops or returned from customers among those purchased from such suppliers so that it could sell them as “Discount goods used for display.”

Given the above findings of fact, the JFTC issued a cease and desist order on June 30, 2008, because the above acts are in violation of Article 19 of the AMA (Paragraph 7 [Unjust assignment of work to employees of suppliers, etc.] of “Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers”).

G) Case against Participants in the Bidding for Electric Equipment Construction in Relation to Sewage Disposal Facilities Ordered by the City of Sapporo

The JFTC found that the entrepreneurs had designated predetermined successful bidders for the planned electrical equipment construction ordered by the City of Sapporo in line with the intention of employees of the City of Sapporo appointing the designated contractors before the bids began to ensure that such designated contractors would receive the orders, and therefore issued cease and desist orders and surcharge payment orders on October 29, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

In addition, as involvement in the bid rigging by employees of the City of Sapporo was discovered in relation to the above violations, the JFTC issued a demand to the Mayor of Sapporo for improvement measures in accordance with the provisions of the Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc.

H) Case against Manufacturers and Sellers of Automatic Ambient Air Monitors

The JFTC found that the manufacturers and sellers of automatic ambient air monitors had designated predetermined successful bidders for the special automatic ambient air monitors procured by governmental organizations or local governments through competitive bidding or quotation collection to ensure such predetermined successful bidders would receive the orders, and therefore issued cease and desist orders and surcharge payment orders on November 12, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

I) Case against Manufacturers and Sellers of TFT Liquid Crystal Display Modules for “Nintendo DS”

The JFTC found that the manufacturers and sellers of TFT Liquid Crystal Display Modules formed a common intent that the price for the product used for display screens of hand-held gaming devices called “Nintendo DS” manufactured and sold by Nintendo Co., Ltd. whose orders were placed during the period between the price revision date closest to but later than around October 6, 2005, and March 31, 2006, would need to be prevented from dropping below the existing price by more than 100 yen, and therefore issued surcharge payment orders on December 18, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

J) Case against Manufacturers and Sellers of TFT Liquid Crystal Display Modules for “Nintendo DS Lite”

The JFTC found that the manufacturers and sellers of TFT Liquid Crystal Display Modules formed a common intent to regard a certain price as the target price for the product used for display screens of hand-held gaming devices called “Nintendo DS Lite” manufactured and sold by Nintendo Co., Ltd. whose orders were placed during the period from January 2007 to March 2007, and therefore issued cease and desist orders on December 18, 2008, because such an act is in violation of Article 3 of the AMA (“Prohibition of unreasonable restraint of trade”).

### **3) Litigation**

#### **A) Lawsuits seeking to overturn a JFTC decision**

Regarding lawsuits seeking to overturn JFTC decisions, 12 court decisions were made in 2008. Meanwhile, 8 new lawsuits were filed. As of the end of December 2008, there were 15 pending lawsuits.

#### **B) Lawsuits seeking injunction based on Article 24 of the Antimonopoly Act**

Throughout 2008, 7 new lawsuits were filed based on Article 24 of the AMA. As of the end of December 2008, there were 9 pending lawsuits.

#### **C) Lawsuits seeking compensation for damages based on Article 25 of the Antimonopoly Act**

Throughout 2008, 36 new lawsuits were filed based on Article 25 of the AMA. As of the end of December 2008, there were 38 pending lawsuits.

## **2 Mergers and acquisitions**

### **1) Efforts to make progress on the transparency and predictability of mergers and acquisitions regulations**

The JFTC is taking action to further enhance the transparency and predictability of the review, such as publishing details of the review on some cases among those in which notification has been accepted or prior consultation has been made and which are thought to be helpful as a reference to entrepreneurs planning business combinations.

### **2) Statistics relating to mergers and acquisitions**

Based on the provisions of Article 15, Article 15-2 and Article 16 of the AMA, mergers, demergers and business acquisitions of a certain size in Japan must be notified to the JFTC prior to the transactions and based on Article 10 of the AMA, stockholdings of a certain size must be reported after the transactions. The JFTC conducts reviews of notified or reported cases, and when it determines that a transaction may be to substantially restrain competition in a particular field of trade, the JFTC has the power to take measures, including the prohibition of the said transaction. Throughout 2008, 65 company mergers were notified based on the provisions of Article 15, 22 demergers were notified based on the provisions of Article 15-2, 104 cases of business acquisitions were notified based on the provisions of Article 16 and 927 stockholdings were reported to the JFTC based on the provisions of Article 10 of the AMA. None of the stockholding, merger, demerger or business acquisition cases notified and reported in 2008 were cases in which the JFTC took any legal measures.

Number of reports concerning stockholdings, company mergers, demergers and business acquisitions

|                       | 2006  | 2007  | 2008  |
|-----------------------|-------|-------|-------|
| Stockholdings         | 917   | 1,055 | 927   |
| Mergers               | 79    | 70    | 65    |
| Demergers             | 18    | 31    | 22    |
| Business acquisitions | 146   | 105   | 104   |
| Total                 | 1,160 | 1,261 | 1,118 |

### 3) Main mergers and acquisitions cases

#### - Capital Alliance of Kirin Group and Kyowa Hakko Group

##### A) Overview

This is a case where, as part of a capital alliance between the two company groups mainly consisting of a merger of Kirin Pharma Co., Ltd. which operates the business of pharmaceuticals (hereinafter referred to as “Kirin Pharma”) and Kyowa Hakko Kogyo Co., Ltd. operating the same business (hereinafter referred to as “Kyowa Hakko”) (the merger was consummated on October 1, 2008, when Kyowa Hakko changed its trade name to Kyowa Hakko Kirin Co., Ltd. (hereinafter referred to as “Kyowa Hakko Kirin”)), Kirin Holdings Co., Ltd (hereinafter referred to as “Kirin HD”) had step-by-step acquired shares of Kyowa Hakko up to an amount in excess of 50%.

Since these groups are engaged in many common businesses in addition to the pharmaceutical business, they are planning to gradually promote consolidation and alliance of each of their businesses in the future.

##### B) Viewpoint on the Case under the Antimonopoly Act

###### a) Particular field of trade mainly examined

In this case, the company groups concerned have many competing products between them. The JFTC examined in detail the following six products, of which the alliance is considered to greatly influence the competition.

###### (1) Gene-recombination type human granulocyte colony stimulating factor product

Gene-recombination type human granulocyte colony stimulating factor product (hereinafter referred to as “G-CSF”) is a medicine for medical treatment with an effect to promote the development and multiplication of neutrophils, a kind of white blood cell and



used for treating neutropenia resulting from cancer chemotherapy (cancer treatment with dosing anticancer drugs) and for promoting the increase of neutrophils upon hematopoietic stem cell transplantation.

The market size in FY 2007 was approximately 37.2 billion yen.

(2) Alcohol for liquor material

Alcohol for liquor material refers to “Alcohol for material” under the Liquor Tax Law. It is defined as a distilled substance containing alcohol with an alcohol content over 45%. It is manufactured by those having licenses to manufacture alcohol for material under the Liquor Tax Law and is used as a material for alcoholic beverages, such as sake or continuously distilled shochu (Group A shochu).

This is the same substance as the industrial fermented alcohol used for food or chemical application, but the industrial fermented alcohol is regulated under the Alcohol Business Law, while alcohol for liquor material is regulated under the Liquor Tax Law. Each law requires different manufacturing licenses, storage procedures, etc.

Some alcohol for liquor material is used by the liquor material alcohol manufacturer to manufacture liquors. The remaining alcohol is sold to other liquor manufacturers.

The market size in FY 2006 was approximately 7.7 billion yen.

(3) Sake-type or mirin (sweet sake) -type fermented seasonings (for restaurants and for processing)

Fermented seasonings are produced by fermenting and maturing rice, starch or saccharides. Although they contain alcohol, they are not treated as liquors because of adding salt as “a measure to prevent drinking” under the Liquor Tax Law. Fermented seasonings can be largely classified into “sake-type,” “mirin-type” and “wine-type.”

Sake, pure mirin and wine can be used as substitutes for sake-type fermented seasonings, mirin-type fermented seasonings and wine-type fermented seasonings, respectively.

The market size in FY 2006 was approximately 10 billion yen.

(4) Wine-type fermented seasonings (for restaurants and for processing)

Refer to the above description for the outline of the product.

The market size in FY 2006 was approximately 1 billion yen.

(5) Monosodium glutamate

Monosodium glutamate (hereinafter referred to as “MSG”) is the chemical compound of glutamic acid, which is an amino acid. It is a white powder seasoning with the “*umami*” content extracted from kelp.

The market size in FY 2006 was approximately 12.5 billion yen.

(6) Complex *umami* seasonings (for restaurants and for processing)

Complex *umami* seasonings (for restaurants and for processing) are complex seasonings obtained by mixing MSG and nucleic-acid-based seasonings (\*). By mixing, *umami* is remarkably enhanced.

The market size in FY 2006 was approximately 5.4 billion yen.

(\*) The mixture consisting of the same amount of “Sodium inosinate,” which is the *umami* content of *niboshi* (small dried sardines), dried bonito or the like, and “sodium guanylate,” which is the *umami* content of shiitake mushrooms is called “Sodium ribonucleotide.” Such mixtures are generally referred to as nucleic-acid-based seasonings.

**b) Evaluation under the Antimonopoly Act**

(1) G-CSF

A. Substantial restraint of competition by unilateral conduct

- (a) After this business combination, the company group concerned will be ranked at the top with a market share of approximately 60% in the G-CSF market and there will be only two manufacturers in this market. In addition, considering potential competition with “KRN125” (sustainable G-CSF), which is being developed by Kirin Pharma, there is a possibility that the market share of the company group concerned in the market will further become higher in the future.
- (b) “Neu-up,” which has been manufactured and sold by Kyowa Hakko was introduced to the G-CSF market two and a half year after “Gran” manufactured and sold by Kirin Pharma and “α” manufactured and sold by a competitor “A,” and has increased its market share since then. After this business combination, there is a concern that the competitive effect promoted by Neu-up before the combination would be lost and the actual prices of these products delivered to medical institutions would be affected.
- (c) G-CSF is a medicine developed by application of biotechnology (hereinafter referred to as “bio-medicine”). Unlike generic pharmaceuticals of general chemically synthesized pharmaceuticals, much time and money are needed to develop the equivalent to generic pharmaceuticals in the area of bio-medicine, which makes new entry in this market not easy.
- (d) While antibiotics are used to treat and prevent infectious diseases, which are material side effects of cancer chemotherapy, G-CSF and antibiotics are used not alternatively, but complementarily. This means that sufficient competitive pressure from related markets is not expected.
- (e) Because of the nature of the pharmaceutical market for medical treatment, competitive pressures from patients and doctors as customers on the pharmaceutical company are difficult to work.

Considering the abovementioned factors, there is a concern that the effect of the business combination may be to substantially restrain competition in the particular field of trade through unilateral conduct by the company group.

B. Substantial restraint of competition by coordinated conduct

Considering that (a) this business combination reduces the number of manufacturers in the G-CSF market from three to two, (b) new entry to the market is not expected for a while because of the situations described in (c) and (d) in A above, and (c) competitive pressures from related markets or customers hardly work, competitive restraints on coordinated conduct by the company group concerned and its competitor would not work sufficiently.

Therefore, there is a concern that the effect of the business combination may be to substantially restrain competition in the particular field of trade through coordinated conduct by the company group concerned and its competitor.

(2) Alcohol for liquor material

A. Substantial restraint of competition by unilateral conduct

As a result of this business combination, the market share of the company group concerned in the market of liquor material alcohol reaches approximately 65%. Because the majority of customers consist of small and medium-sized sake manufacturers and they tend to place priority on long-term trade relationships with alcohol suppliers, bargaining power in price negotiations by the customers would not be strong.

However, (a) there are several major competitors with market shares of over 10%, and (b) those competitors are found to have certain excess supply capacities that are expected to become larger. In addition, (c) there is a possibility that the fermented alcohol for industrial use will be more widely used for manufacturing liquors in the future, and (d) the import of alcohol products will possibly increase by lowering tariffs in the future. Considering these factors, the effect of the business combination may not be to substantially restrain competition in the particular field of trade through unilateral conduct by the company group.

B. Substantial restraint of competition by coordinated conduct

This business combination results in the concentration of market shares to a few major competitors. While the majority of customers consist of small and medium-sized sake manufacturers without effective bargaining power in price negotiations, in addition to the factors listed above in paragraph A, there is a competitor that is planning to construct a new plant and an industrial-use fermented alcohol company that has a large excess supply capacity, which suggests that the competitors in this field of trade do not have a common interest and there are less incentives for them to coordinate their conduct. Therefore, it is considered that the effect of the business combination may not be to substantially restrain competition in the particular field of trade through coordinated conduct by the company group concerned and its competitors.

(3) Sake-type and mirin (sweet sake) -type fermented seasonings and wine-type fermented seasonings

A. Substantial restraint of competition by unilateral conduct

As the result of this business combination, the market shares of the company group concerned amount to approximately 45% (ranked top) in the market of sake-type and mirin-type fermented seasonings and approximately 55% (ranked top) in the market of wine-type fermented seasonings.

However, (a) there is a major competitor with a market share of over 10% in these markets; (b) there is a possibility of imports for sake-type fermented seasonings; (c) it would be relatively easy for sake or vinegar manufacturers in the case of sake-type or mirin-type fermented seasonings and for wine manufacturers in the case of wine-type fermented seasonings to enter the market, taking advantage of their existing manufacturing facilities and know-how; (d) there are related markets such as sake, sake compound, pure mirin and mirin-like seasonings for sake-type and mirin-type fermented seasonings and low-price wines for wine-type fermented seasonings and these products could serve as competitive constraints on the increase in prices for sake-type and mirin-type fermented seasonings as well as wine-type seasonings; and (e) the users of the products are food-processing companies and food-service companies with effective bargaining powers in price negotiations. Considering these factors, the effect of the business combination may not be to substantially restrain competition in the particular

field of trade through unilateral conduct by the company group concerned.

B. Substantial restraint of competition by coordinated conduct

As a result of this business combination, the market gets more concentrated, with the cumulative market shares of the top three companies including the company group becoming approximately 60% in the markets for sake-type and mirin-type fermented seasonings and approximately 90% for wine-type fermented seasonings. However, in addition to the factors described above in paragraph A, each company in fermented seasonings markets is manufacturing various products and even custom-made products, which indicates that the products manufactured by each company are not homogeneous and there are less incentives for coordinated conduct. Furthermore, prices for food-service and food-processing companies are negotiated on a one-to-one business basis and it is not easy to obtain information about terms of trade between competitors and their customers. Considering these factors, the effect of the business combination may not be to substantially restrain competition in the particular field of trade by coordinated conduct by the company group concerned and its competitors.

(4) MSG

A. Substantial restraint of competition by unilateral conduct

As a result of this business combination, the market share of the company group concerned amounts to approximately 35% (ranked top) in the MSG market. However, considering that (a) several major competitors have market shares of over 10%, (b) direct imports of products from overseas manufacturers are increasing and can easily grow depending on product price trends in the Japanese market in the future, and (c) food-processing manufacturers as the users have effective bargaining powers in price negotiation, the effect of the business combination may not be to substantially restrain competition in the particular field of trade through unilateral conduct by the company group concerned.

B. Substantial restraint of competition by coordinated conduct

Considering the situation described above in paragraph A, after this business combination, the effect of the business combination may not be to substantially restrain competition in the particular field of trade through coordinated conduct by the company group concerned and its competitors.

(5) Complex *umami* seasonings

A. Substantial restraint of competition by unilateral conduct

As a result of this business combination, the market share of the company group concerned amounts to approximately 30% (ranked second) in the market of complex *umami* seasonings. However, considering that (a) there are major competitors with market shares of over 10%, (b) if the prices of complex *umami* seasonings rise, customers would procure the combination of simple MSG and nucleic-acid-based seasonings instead of complex *umami* seasonings, and these products would exert a certain competitive pressure from related markets, (c) food-service companies as users have effective bargaining powers in price negotiations, the effect of the business combination may not be to substantially restrain competition in the particular field of trade through unilateral conduct by the company group concerned.

B. Substantial restraint of competition by coordinated conduct

Considering the situation described above in paragraph A, the effect of this business combination may not be to substantially restrain competition in the particular field of trade through coordinated conduct by the company group concerned and its competitors.

Note: The JFTC also examined the cases of MSG and complex *umami* seasonings from the viewpoint of vertical business combination and judged that the effect may not be to substantially restrain competition.

**c) Remedies Proposed by the Company Group Concerned and Evaluation of the Remedies**

(1) Remedies proposed by the company group concerned

In the course of its investigation, the JFTC pointed out its concerns about competition in the field of trade for G-CSF. The company group concerned then proposed the remedies below.

Kyowa Hakko Kirin will either assign or grant a license or the like thereof, the rights related to the research and development peculiar to Neu-up, which is manufactured and sold by Kyowa Hakko Kirin, and those related to the manufacture and sale of Neu-up (including the status of the entity obtaining approval for manufacture and sale under the Pharmaceutical Affairs Law), to a third party pharmaceutical company as immediately as possible (hereinafter referred to as “the Assignment”). (Agreement on the Assignment will be executed by the end of September 2009 and the Assignment will be put into practice by the end of March 2010.)

(2) Evaluation under the Antimonopoly Act considering the above remedies

The remedies proposed by the company group concerned assures that the status of the entity obtaining approval for manufacture and sale under the Pharmaceutical Affairs Law will be succeeded to a third party pharmaceutical company (hereinafter referred to as “the Assignee”) and the Assignee will be the only one that is able to manufacture and sell Neu-up. While the Assignee may select whether to manufacture Neu-up by itself or to entrust the manufacturing to other companies, these remedies would enable that the company group concerned may be entrusted to manufacture the Neu-up if the Assignee so desires. Therefore, with the proposed remedies, the Assignee will be able to independently manufacture and sell Neu-up as a new competitor. Thus, it is considered that the competitive situation before the business combination can be substantially recovered.

**C) Conclusion**

From the situation described above, the JFTC judged that, if the remedies proposed by the company group concerned are most surely implemented, this business combination may not be to substantially restrain competition in any particular field of trade.

**III The role of the competition authority in the formulation and implementation of other policies**

**1 Coordination between the Antimonopoly Act and other economic laws and ordinances**

When administrative bodies propose to enact or amend an economic law or ordinance from the standpoint of a specific policy requirement, the JFTC acts in consultation with these bodies to ensure

coordination among the proposed provisions, the AMA and competition policy. In 2008, as in previous years, the JFTC acted in consultation with other administrative agencies and submitted the JFTC's opinions.

## **2 Survey report on the current situation of transactions in the city gas business area (published in June 2008)**

In the past, entry and prices were strictly regulated in the city gas business. However, reform of the regulatory system has been carried out since 1995 with the primary focus on liberalizing the retail area for large-volume customers. The JFTC conducted a survey directed to gas suppliers in order to grasp the changes in the situation of the city gas business as a result of the progress of reform of the regulatory system. During the study process, starting January 2008, the JFTC held the "Study Group on Regulation and Competition Policy", where the JFTC reported survey findings and gathered opinions of members on the current status of the issues raised, such as the high-cost structure of the city gas business and the future improvement measures. And after obtaining the approval of the Study Group and putting together the research findings, the JFTC released the "Survey report on the current situation of transactions in the city gas business area" on June 10, 2008.

The points of the report are as follows:

- (1) Business area for large-volume customers (already liberalized business area) - further promotion of new entries

- a) Review of the balancing rule

Under the current transportation service framework, operators requesting a transportation service (i.e. new entrants) are required to supply a gas quantity with the deviation rate of within 10% per hour fluctuation range from the quantity used by customers (balancing rule). Therefore, they monitor the amount used by the customers on a real time basis in many cases. In this regard, in light of the current situation where general gas utility suppliers do not always similarly monitor their supply quantity, it is reasonable to consider the expansion of the extent for applying the scheduled balancing rule (by which it is regarded sufficient if the scheduled supply quantity based on the expected consumption of the customers and the actual supply quantity are within the abovementioned fluctuation range) and review of the current standards on the abovementioned fluctuation range.

- b) Allocation of vaporization and pressurization costs to transportation service rate

There are some doubts about the rationality of allocating the entire costs for vaporization and pressurization to the costs required for network pressure control, as has been done, in spite of their other aspect as the costs for gas production of the transportation service providers themselves. Therefore, it is expected that rules on rational cost allocation be defined and arguments on the cost allocation be resolved via transparent procedures. In addition, when reviewing this situation, it is advisable to verify whether there are excess profits in the transportation services of general gas utility suppliers and proceed with the review in a way to achieve an appropriate level of transportation service rates.

- c) Regulations regarding installment of new gas pipelines

Since the current regulations regarding installment of new pipelines is implemented mainly based on outward requirements, namely the installment conditions of general gas utility suppliers' pipelines, there are some doubts that the installment may become subject to change or suspension even when there is nothing detrimental to customers as a whole. Therefore, revising the basis of decisions in a way that comprehensively considers the

increased cost with the installment of new pipelines and benefits to customers is thought to be necessary and, when making decisions on individual cases, it is thought effective for the regulatory authority to let both parties make prima-facie presentations and to make decisions from a neutral standpoint.

(2) Regulated area – expansion of liberalized parts

Issues such as the high-cost structure and entrenched supply areas as virtually vested interests in regulated areas have not been fundamentally resolved, even after reform of the regulatory system. Therefore, it is also advisable to liberalize regulated areas starting from the retail area for customers that use relatively large quantities.

(3) Competition between energies

Since competition among city gas suppliers may not be sufficiently secured even after the abovementioned measures are taken, it is desirable to develop an environment for full liberalization of the city gas business by promoting competition with other energy sources.

#### IV Japan Fair Trade Commission resources (FY 2008)

##### 1 Budget (unit: ¥ billion and %)

The budget of the Fair Trade Commission is as follows (unit: billion yen, %).

| Fiscal Year  | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|--|------|------|------|------|------|------|------|------|------|
| Budget amount (¥ billion)                                  | 5.9  | 6.04 | 6.16 | 7.85 | 7.82 | 8.13 | 8.34 | 8.42 | 8.68 |
| Change over previous year (%)                              | 2.1  | 2.3  | 2.0  | 2.2  | 0.4  | 4.0  | 2.5  | 0.9  | 3.2  |
| General Expenditures Budget: change over previous year (%) | 2.6  | 1.2  | 2.3  | 0.1  | 0.1  | 0.7  | 1.9  | 1.3  | 0.7  |

(Notes)

- The General Expenditures Budget refers to the total budget of the Japanese government and is the amount of General Account Budget Expenditures less National Debt Service and Local Allocation Tax Grants.
- The rate of increase for the JFTC budget of FY 2003 is compared to the post-reclassification budget (7.69 billion yen) in order to avoid the effects of an increase in personnel expenses, which required an independent calculation, in line with the JFTC's transfer to the Cabinet Office.

##### 2 Number of officials

The number of officials in the General Secretariat of the JFTC is as follows (unit: persons).

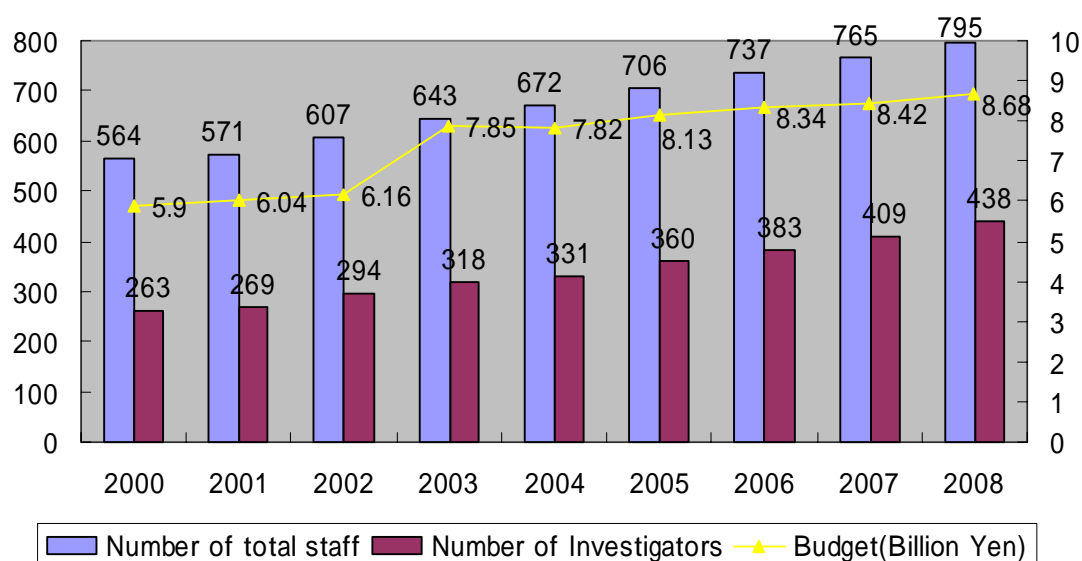
Out of 795 officials in 2008, there are 37 economists, 50 lawyers, 647 other professionals, and 61 support staff.

| Fiscal Year                                    | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|--|------|------|------|------|------|------|------|------|------|
| Number of officials                            | 564  | 571  | 607  | 643  | 672  | 706  | 737  | 765  | 795  |
| Enforcement against anti-competitive practices | 263  | 269  | 294  | 318  | 331  | 360  | 383  | 409  | 438  |
| Merger review enforcement                      | 22   | 22   | 28   | 30   | 32   | 32   | 35   | 36   | 36   |
| Advocacy efforts                               | 22   | 22   | 25   | 30   | 30   | 37   | 36   | 34   | 35   |

(Notes)

- The number of officials engaged in enforcement against anticompetitive practices refers to the Investigation Bureau and Investigation Divisions of local offices.
- The number of officials engaged in merger review enforcement refers to the Mergers and Acquisitions Division.
- The number of officials devoted to advocacy efforts refers to the General Affairs Division of the Economic Affairs Bureau and the Coordination Division.

#### *Staff and budget (FY 2000-2008)*



### 3 Activities of the Competition Policy Research Center

The Competition Policy Research Center (hereinafter referred to as the “CPRC”) enhances research activities as a result of collaboration between the JFTC staff and visiting researchers (16 persons at the end of December 2008) who are specialists in the area of economics or law in order to strengthen the theoretical and empirical basis for the implementation of the AMA and the planning of competition policies.

In 2008, the CPRC published 6 joint research reports and 6 discussion papers. It organized 15 workshops, 3 open seminars and one international symposium and offered specialized training in economics, with the aim of improving the staff’s economic analysis skills.

#### 1) Joint research reports

- A) Fact-finding Survey and Economic Analysis on Cartels ( 2008/3 )
- B) Empirical Rules Used in Hearing and Investigation Procedures under the Antimonopoly Act ( 2008/3 )
- C) Theoretical Review on Unfair Trade Practices and Private Monopolizations which Exclude Competitors (2008/6)
- D) Local Market Competition in Retail and Service Industries -Case Studies of the Japanese Movie Industry- (2008/11)
- E) Analysis of Consumer Behavior on Representations -Decision Making in Choosing the Price Plans of Mobile Phones- (2008/11)
- F) The Enactment Process of the Original Antimonopoly Act and its Implications to the Current Act - JFTC's Organization, Judicial System, Compensation for Damages and Criminal System (2008/11)

#### 2) Discussion papers

- A) "The Role of Competition Policy in the Promotion of Economic Growth in Thailand" (2008/5)  
Nipon Poapongsakorn (Professor, Thammasat University)
- B) "The Role of Competition Policy in the Promotion of Economic Growth" (2008/5)



- Lawrence J. White (Professor, University of New York)
- C ) "The Role of Competition Policy and Regulatory Reform in the Promotion of Economic Growth" (2008/5)  
 Naohiro Yashiro (Professor, International Christian University and Council on Economic and Fiscal Policy)
- D ) "The Effectiveness of Competition Policy: in Theory and Practice" (2008/5)  
 Marc Ivaldi (Professor, Toulouse School of Economics)
- E ) "Coverage Area Expansion, Customer Switching, and Household Profiles in the Japanese Broadband Access Market" (2008/5)  
 Mitsuru Sunada (CPRC Researcher)  
 Masato Noguchi (InfoCom Research, Inc.)  
 Hiroshi Ohashi (Associate Professor, Faculty of Economics, University of Tokyo, CPRC Visiting Researcher)  
 Yosuke Okada (Professor, Graduate School of Economics, Hitotsubashi University, and CPRC Chief Researcher)
- F ) "Product Development Strategies and Price Dynamics: The Japanese Compact Digital Still Camera Industry, 1997-2005" (2008/6)  
 Eiji Satoh (Graduate School of Economics, Hitotsubashi University and CPRC Student Fellow)  
 Kenji Matsuo (Mitsubishi Heavy Industries, LTD.)  
 Patricia A. Nelson (University of Edinburgh)  
 Yosuke Okada (Professor, Graduate School of Economics, Hitotsubashi University and CPRC Chief Researcher)

### **3) Hosting Open Seminars**

The CPRC hosts open seminars to introduce the results of its joint research reports, etc. These open seminars are also used as a venue for speeches by senior officers of the competition authorities and by academics abroad when visiting Japan.

In May 2008, Hiroyuki Odagiri (Professor of Economics, Hitotsubashi University and Director of the CPRC) was invited to speak at an open seminar on the theme of "Use of Economics in Competition Policy".

In October 2008, Fujio Kawashima (Associate Professor, Graduate School of International Development, Nagoya University) was invited to speak and Jiang Shan (Lawyer, Beijing Weiming Law Firm) and Masanori Fukamachi (Senior Planning Officer, International Affairs Division, General Secretariat, Secretariat, JFTC) were invited to serve as commentators at an open seminar on the theme of "Enforcement System and Situation of the Chinese Competition Law".

In October 2008, Motokazu Kikuchi (Lawyer, Yanagida & Nomura Law Firm) and Shuya Hayashi (Associate Professor, Graduate School of Law, Nagoya University and Chief Researcher, CPRC) were invited to speak at an open seminar on the theme of "1977 Amendment of the Antimonopoly Act".

### **4) Hosting an international symposium**

To act as a center of international exchange on competition policies, the CPRC hosts international symposiums joined by officials of overseas competition authorities and academic specialists.

In March 2008, an international symposium called "The Role of Competition Policy in the

Promotion of Economic Growth” was held in close collaboration with the 21st Century COE/RES Program of Hitotsubashi University and Nihon Keizai Shimbun, Inc., etc. Invited participants included Lawrence J. White (Professor, Stern School of Business, New York University), Marc Ivaldi (Professor, Université des Sciences Sociales de Toulouse) and Dr. Naohiro Yashiro (Professor, International Christian University).

#### **5) Implementation of Specialized Training in Economics**

The CPRC gives training in economics to enhance the economic analysis skills of the JFTC’s staff. In June and November 2008, academic experts and CPRC visiting researchers were invited as lecturers to provide training in industrial organization, game theory and econometrics, etc.

### **V Main surveys related to competition policy**

#### **1 Report concerning the Study Meetings on the Measures and Promotion of Reform in Public Procurement (published in May 2008)**

The JFTC has conducted questionnaire surveys concerning such issues as reforms of the bid tendering system and the status of measures taken to enhance compliance at procurement agencies, compiled survey results and expressed its views on the desirable direction of the public procurement system for the competition policy. The JFTC therefore decided to hold meetings referred to as “Study Meetings on the Measures and Promotion of Reform in Public Procurement” (hereinafter referred to as “the Study Meetings”) to exchange information concerning the status of efforts made by procurement agencies for enhanced compliance and reforms of bid tendering systems, by inviting officials in charge at national and prefectural governments, etc. and to further promote effective measures by studying the issues and problems that the procurement agencies faced in the course of implementing their reform measures, through discussions including outside experts. The JFTC compiled the results of the meetings into a report and published it in May 2008.

The points of the report are as follows:

- (1) It is important for procurement agencies to enhance compliance by promoting measures linking those to prevent illegal activities, such as collusive bidding initiated by government officials, and those that enable procurement agencies to deal with illegal activities as quickly as possible when they occur. When implementing measures to enhance compliance, it is not only important to establish systems that enhance compliance but also to effectively utilize such systems as well as promote measures to increase the procurement officials’ awareness of compliance.
- (2) It is important to ensure fairness and transparency concerning examination and appraisal in the comprehensive evaluation method. In introducing such a method, it is desirable that procurement agencies are prepared to appropriately evaluate quality elements other than the price as well as to implement the method for objective evaluation so that participating bidders do not have any suspicions that the evaluation is arbitrarily conducted or suchlike.
- (3) The JFTC has expressed its views that regional requirements need to be managed to ensure that the bidders that participate in the bids are not predetermined and that a sufficient number of bidders participate in the bids, by imposing such requirements only when more than a certain number of bidders are expected to participate in the bid, for example. The examples presented by the procurement agencies at the Study Meetings all adopted mechanisms that ensure competition in setting regional requirements, so that it is expected that these efforts will continue.

(4) Concerning the issue of participation by only one bidder or failure of bids to materialize, it is still possible to regard that there is potential competition even when there was only one or no participant at all in the bids. However, procurement agencies are expected to take measures to realize actual competition and make bidding more competitive by analyzing the circumstances surrounding each project in more detail and determining the conditions of tenders that suit the circumstance of each project.

## **2 Survey of current status of efforts made to enhance compliance in foreign companies and corporate compliance from attorneys' viewpoint - focusing on compliance with the Antimonopoly Act - (published in May 2008)**

As a measure to assist improving compliance with the AMA, the JFTC conducted a questionnaire survey directed toward foreign companies undertaking business in Japan and analyzed the current status of the compliance with the AMA in foreign companies in Japan by paying attention to their differences with those of domestic companies. The JFTC published the results of the survey in May 2008. In addition, the JFTC conducted a questionnaire survey directed to attorneys regarding their understanding of corporate compliance with the AMA as well as the current conditions of corporate compliance as seen from the attorneys' viewpoint in light of the enforcement of the revised AMA in 2005.

The points of the report are as follows:

### **(1) Survey of current status of efforts made for promoting compliance in foreign companies**

While some differences were found in the size of capital and the industry category in comparing foreign and domestic companies, efforts made to enhance compliance with the AMA in foreign companies as a whole could not be considered sufficient to the extent judged from the results of the questionnaire. However, given that many foreign companies perceive that even if their compliance systems with the AMA appear inadequate as a matter of their form, they are functioning in practice to prevent violations of the AMA, it is possible that they are focusing on the function rather than the form of their compliance systems.

The JFTC also conducted a survey targeting small- to medium-sized foreign enterprises and found that the smaller the size of the company, the less the progress the company tends to make in developing its compliance system. While it is thought that there is more burden on small- to medium-sized enterprises in developing compliance systems than on larger companies, which makes it harder to make progress in their development, starting with measures that put relatively little burden on them may be possible, such as establishing compliance manuals and assigning people in charge of compliance.

### **(2) Survey of corporate compliance from attorneys' viewpoint**

When compared with companies' recognition shown by the responses to similar questions, many attorneys have harsh views regarding overall activities of companies for compliance with the AMA, as many of them say that they are "sufficient in form but not working very well in a practical sense" or "insufficient both in form and in practical function".

Regarding their evaluation of leniency programs, asked whether the leniency program should be used when violation against the AMA is found by internal auditing etc., a high percentage (81%) of attorneys replied that "it should be used" and a high percentage (85%) also replied that the leniency program "helps" improve corporate compliance. Therefore, the leniency program seems to be receiving a high level of appraisal from attorneys.