Keynote Speech at JFTC/CPRC International Symposium (Draft)

Japanese Competition Policy in a New Era:

Encouraging Free and Fair Competition

Introduction

Good morning, ladies and gentlemen. First, I would like thank all of you for participating in this international symposium, which is organized by the Competition Policy Research Center of the Fair Trade Commission in association with the Nihon Keizai Shimbun and a program of the Hitotsubashi University Center of Excellence for Research on Economic Systems entitled "Normative Evaluation and Social Choice of Contemporary Economic Systems."

I would also like to express my warm welcome to Professor Joseph E. Harrington of Johns Hopkins University and Professor Massimo Motta of the European University Institute, who have come over to Japan to attend this symposium. I must also express my great gratitude to Professor Akihiko Matsui of Tokyo University.

The Competition Policy Research Center, or CPRC, was established in June 2003 in order to effectively conduct theoretical research on the Antimonopoly Act and competition policy. The objectives are to strengthen the theoretical basis for carrying out the Act and other related legislation, as well as for planning and evaluating competition policy. The Center is headed by Mr. Suzumura, who just delivered the opening address. Since its inception, the CPRC has served as a forum for the exchange of information on competition policy with the business community, academia, and domestic and international institutions. It also actively distributes the results of its research to build support for our competition policy both in Japan and abroad.

As you all know, the amended Antimonopoly Act, or AMA, went into force on the 4th of this month. The revised AMA introduces the very first leniency program in Japan and the FTC's right to conduct criminal investigations. Japan's competition policy has thus entered a new era, and so it is particularly opportune for Japanese and foreign experts to be gathered together here to discuss this issue under the theme: "Towards Effective Implementation of New Competition Policy."

My keynote address today is entitled "Japanese Competition Policy in a New Era: Encouraging Free and Faire Competition." For about half an hour, I would like to outline the amendment from our viewpoint, and then talk about challenges in building a solid foundation for free and fair competition in the Japanese economy, now that the amendment has come into effect.

1. Amendment to the Antimonopoly Law

(1) Concept (no growth without competition)

I would like to start by explaining the reason for amending and improving the AMA.

As the economy starts to recover, it has become essential to create a transparent and fair economic society in Japan. One of my favorite phrases is “No growth without competition”. Corporate growth can only be achieved through market competition, and economic growth results from corporate growth. That means growth cannot be achieved without competition. Indeed, companies and industries that have avoided competition will eventually lose their efficiency and competitiveness. Freedom of corporate activity and ingenuity provide the foundation for economic stimulus and development. Thus, competition is crucial not only for consumers but also for businesses. Therefore, we believe that competition policy must be improved in order to support the government’s current drive towards structural reform.

The recent amendment to the Antimonopoly Act aims to promote competition policy by maintaining and facilitating free and fair competition in Japan, and by strictly punishing violations.

Unfortunately, Japanese companies continue to violate the AMA, including some of the leading companies in Japan. Surcharges are imposed on any AMA violations detected by the Commission, including bid-rigging and price cartels. For a company, a surcharge is an unnecessary expense and thus represents a loss. Such losses would normally prevent companies from repeating their misconduct, but as I mentioned, some companies continue to violate the AMA here. This suggested that the unfair profits gained by violations were so large that the surcharge was not an effective deterrent. So the recent amendment has raised the surcharge rates to make companies feel more pain if they violate the AMA. The amendment also introduced a leniency program to ensure proper fact-finding, eliminate irregularities, and prevent violations with regard to cases involving closed-door negotiations such as cartels and bid-rigging. As I will describe later in detail, the leniency program provides for the reduction and exemption of surcharges for companies that independently report a cartel or bid-rigging practice in which they themselves have been involved and submit supporting evidence to the Commission. Up to three companies in a case can benefit from this surcharge reduction. This program is intended to help prove a violation by encouraging the companies involved to provide information voluntarily, and to give them an opportunity to cut ties with other cartelists or bid-riggers. The program should also help discourage the formation of cartels, by creating distrust among potential cartelists as any of them might report the practice to the FTC. Finally, to strengthen law enforcement and preventive efforts against AMA violations, the amendment authorizes the Commission to conduct criminal investigations. This will help bring criminal action against flagrant cases and ensure that investigations are done properly.

Next, I'd like to describe the main features of the amended AMA. The amendment has four main features. As I mentioned earlier, the first of them is the revision of the surcharge system including an increase in surcharge rates. The second is the introduction of the leniency program, and the third is the authorization of criminal investigations. The revision of investigation and hearing procedures is the fourth element.

(1) Revision of surcharge system

a. Increased surcharge rates

As regards the first feature, which is the revision of the surcharge system, we focused on making it a bigger deterrent to violations through much higher surcharge rates. For example, we used to charge 6% of sales of the products in question for large manufacturers. This rate has been raised to 10%. As I said earlier, a considerable number of cases of bid-rigging and other AMA violations in Japan involve repeat offenders, suggesting that 6% was too low to prevent violations. So we decided to raise this rate to 10%, in view of unfair profits actually gained in previous cases of cartels and other violations.

b. Harsher punishment for repeated violations

The amendment also provides for harsher punishment for repeat offenders, raising the surcharge by 50% for a company which has been ordered to pay a surcharge in the past 10 years. The fact that companies continue to violate the AMA even after paying a surcharge implies that the profits they gain by the violation far exceed the surcharge paid. So, harsher punishment is needed to prevent repeated violations.

This harsher punishment does not require that exactly the same violation in terms of geographical area and category be repeated. For example, a company that received a surcharge payment order five years ago in relation to a bid-rigging case in the Kanto area will receive the harsher punishment if it is involved in another AMA violation in the Kansai area. The same punishment also applies to a company that has been involved in cartels for different products.

c. Early disengagement

In order to promptly eliminate the adverse effects of a cartel or other AMA violation on competition, it is not enough simply to discourage companies from colluding. It is also essential to stop their misconduct as quickly as possible. The recent amendment therefore allows the surcharge rate to be reduced for a company that ceases its involvement in an antimonopoly violation before the FTC starts its investigation. The surcharge is reduced by 20% for any company that cuts its ties with other wrongdoers at least one month before the

on-site inspection, provided that its involvement in the violation lasted less than two years.

d. Others

In addition to administrative measures including surcharges, certain AMA violations are subject to criminal punishment. The concurrent imposition of surcharges and criminal punishment does not constitute double punishment in principle, because they differ in object and purpose. However, they do have a common purpose of preventing violations. In view of this common purpose, half the amount of the fine imposed in a criminal case will be subtracted from the amount of the surcharge imposed concurrently.

Finally, the recent amendment extends and clarifies the scope of surcharge imposition. Previously, surcharges were imposed on unfair practices affecting prices, such as bid-rigging and price cartels. The scope is now extended to other practices including purchase cartels and private monopolies through control.

(3) Introduction of leniency program

Let's now look at the leniency program.

Various leniency programs have been introduced around the world including in Europe, the United States, Australia and South Korea. The OECD also recommends its member countries to introduce such a program, noting that it has been highly successful in detecting and deterring violations. Since a leniency program is only effective when strict measures are taken against unfair practices, we worked hard to make sure that the program would be linked to the increase in surcharge rates as just mentioned. We are confident that the program will help detect and deter unfair practices.

Let me explain Japan's leniency program. The first company to report a violation will benefit from a total exemption from surcharges. The surcharge rate will also be cut by 50% and 30% for the second and third applicants, respectively. If fewer than three companies have reported the violation before the Commission starts its investigation, one or two more companies may benefit from a 30% reduction in the surcharge, provided that they apply for the program within 20 days of the initial investigation and do not continue to violate the AMA even after their application. In this case, however, the additional beneficiaries must report some facts that have not already been found by the Commission.

Various views were expressed on limiting the number of beneficiaries to three. We considered that granting a substantial reduction without priority might run counter to the objective of the surcharge scheme. This might not only create a “culture of impunity,” but also undermine the incentive to be the first to report the violation under the program. We decided to limit the number of beneficiaries to three based on an analysis of reporting in previous cases. However, this

program has been in place for less than a month, so we need to monitor its performance to judge whether it's effective for obtaining useful information.

As regards its relations with criminal prosecution, the total exemption from surcharges for the first applicant before the start of investigation may not be effective, for AMA violations including bid-rigging are subject to criminal punishment. So a potential applicant might refrain from applying for the leniency program out of fear of criminal indictment. In this regard, the FTC's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases regarding Antimonopoly Violations, published on October 6, clarified that the Commission would not criminally indict the first company reporting a violation before it starts its investigation. Directors and employees of such company who are responsible for the violation may also benefit from the same waiver, if they make comparable contributions by submitting useful reports and materials and cooperating with the FTC in its investigation.

(4) Authorization of criminal investigations

The amended AMA also provides the FTC with the authority to conduct criminal investigations.

The FTC has actually filed criminal complaints against flagrant cases including last year's bid-rigging case concerning steel bridge construction projects. The authorization of criminal investigations is designed to act as a powerful deterrent against AMA violations through active criminal indictment, and to ensure due process in criminal cases through investigations based on warrants.

A warrant issued by a judge enables the Commission to inspect and search the offices of those related to the case, which may result in seizure of articles. This right of inspection is similar to that exercised by the Securities and Exchange Surveillance Commission or the National Tax Agency. The targeted company may not resist such search or seizure. In this respect, criminal inspection is different from administrative inspection, which requires approval of the party concerned. The Commission files a criminal complaint with the Prosecutor-General if it is convinced that a violation has been committed. The prosecutor follows up on this prosecution with further inspection.

As this recent amendment has given the rights of both criminal and administrative investigation to the Commission, we have set up a "firewall" between the administrative investigation and criminal investigation divisions. In other words, criminal investigations may only be conducted by the staff of the newly created Criminal Investigation Division.

(5) Revision of investigation and hearing procedures

In addition to the three features just mentioned, the revised AMA also provides for a procedural change regarding the investigations and hearings conducted by the FTC. Let me

touch on this point briefly.

In today's fast-moving, globalized economy, it is crucial that we handle cases more efficiently and quickly restore competitive order. Traditionally, the FTC recommended that the perpetrators of a violation take appropriate action, and decided on the case without holding a hearing, provided that the violators agreed. This simplified method was called the "recommendation system." Under this system, investigation procedures had to ensue if the violating companies did not follow the issued recommendation. Therefore, effective countermeasures were limited as long as the investigation continued before reaching a decision, even if it was clear that the same unfair practice had not stopped. In order to improve the efficiency of handling cases and ensure that competitive order is quickly restored, the system was changed to allow the Commission to issue a cease-and-desist order in case its investigation revealed a violation. Any of the parties concerned may file a complaint against the order and demand a formal decision on the case. In issuing a cease-and-desist order, we give prior notice of the content to the parties concerned. We also ensure due process by giving them an opportunity to express their views and submit supporting evidence.

These are the main features of the amended Antimonopoly Law which came into effect on January 4.

2. Future Challenges

I hope that this amendment represents a major step forward in meeting the international standard of competition policy. Since the amended Act was adopted last April, the FTC has held briefing sessions around the country to raise awareness about the new provisions. Still, we need to try even harder to keep everyone informed about the amendment. In this connection, I would like to present my view on three topics.

(1) Strict enforcement of AMA by FTC

The first topic concerns the strict enforcement of the Antimonopoly Act by the Commission.

As the revised AMA took effect, the FTC acquired new tools to fight cartels and bid-rigging, including the leniency program and the right of criminal investigation. The effectiveness of future competition policy in Japan will depend on how well these tools are used, and how strictly. It is still too early to judge whether the leniency program and the right of criminal investigation are effective, as they were introduced less than a month ago. But we are determined to use the tools for actively prosecuting cartel and bid-rigging cases. Although the revised AMA focuses on tighter controls on cartel and bid-rigging practices, we are also committed to acting swiftly and firmly against other unfair practices that inflict unreasonable losses on SMEs, including dumping and

abuse of dominant bargaining position. In short, we are committed to ensuring that free and fair competition will take root throughout the Japanese economy.

(2) Promotion of cooperation between competition agencies

The second topic is related to cooperation between competition agencies.

The internationalized character of antimonopoly violations and business combinations in recent years entails cooperation and collaboration between national competition agencies. With this backdrop, antimonopoly cooperation agreements have been increasing between foreign agencies. Japan has signed agreements with the U.S. and EU on the exchange of information and procedures for cooperation, and a similar agreement was concluded with Canada last September. As the amended AMA took effect, the Commission acquired tools against cartels and bid-rigging, including higher surcharge rates and the leniency program. Those tools are almost on a par with those available to major competition authorities in Europe and North America, and I hope the amendment will help us work with other competition authorities in detecting international cartels. Through such cooperation, we will work with major competition authorities in Europe and North America to monitor and eliminate cross-border cartels, which may have a severe impact on Japanese markets.

Recently, economic partnership agreements have expanded on a global scale to encourage the free movement of goods, people and services. Japan has concluded such agreements with Singapore and Mexico, both of which contain a chapter concerning competition, allowing for cooperation in restricting anticompetitive acts. Also, frameworks for multilateral cooperation have been gaining ground recently. Some of them, including the OECD and ICN, have established a forum for national competition agencies to discuss common policy issues. Last May, a Top-Level Officials' Meeting on Competition Policy was held in Indonesia. This meeting, at which the heads of competition agencies in East Asia gathered for the first time, was organized at the initiative of Japan to promote networking among antitrust agencies and to develop a competitive environment that matches the specific conditions of the region. In 2008, antitrust agencies from all over the world will get together here in Japan at the Annual ICN Conference.

Through these activities, the FTC will continue to enhance cooperation among competition agencies in various ways.

(3) Raising awareness to promote free and fair competition

Last but not least, I would like to stress the importance of raising awareness of free and fair competition.

With the enforcement of the amended Antitrust Act, attention is now focused on competition policy. I would like all those concerned to take this opportunity to reflect on the importance of free

and fair competition, to which the Fair Trade Commission is committed. I am not making this request only to the companies covered by the Act. As indicated by the expression “government-led bid-rigging,” many problems cannot be solved without changing the mindset of public officials at the national and local levels. Free and fair competition can only develop through the collective efforts of all market players, including consumers and government departments placing orders, as well as private companies.

With provisions for increased surcharge rates, the leniency program and the right of criminal investigation, the amended AMA has greatly strengthened the law enforcement powers of the FTC against violations including cartel and bid-rigging. However, the mere introduction of a new legal system will not make free and fair competition a reality. Companies themselves must be made more aware of compliance. Indeed, the complaint filed last year by the FTC against bid-rigging concerning steel bridge construction projects has raised public concern about the problems of antimonopoly violations including bid-rigging and cartels. Furthermore, such practices are now much more likely to be detected than in the past, and the public will never tolerate such practices as “necessary evils.”

Thus, we sincerely hope that each company, based on a thorough understanding of the revised AMA, will develop a compliance program to prevent violations of the Act. We therefore call on the management to clarify the structure of internal responsibility for AMA violations, including developing strict disciplinary action. In particular, the revised AMA provides for higher surcharge rates, including a further 50% increase against repeat offenders, while introducing a surcharge reduction scheme, which allows a 20% reduction for those who promptly cease their violations. As a result, the financial loss incurred by a company may vary widely depending on how well it complies. Companies should fully consider this when drawing up their compliance programs.

Meanwhile, national and local government officials should remember that their policy measures need to be consistent with antitrust policy and foster as much competition as possible. For example, a number of measures are possible to prevent bid-rigging, such as using a general competitive bidding system to make the most of the market mechanism, and eliminating bid participation requirements that might excessively restrict competition. Needless to say, government officials must refrain from any behavior that might induce or encourage bid-rigging or other antimonopoly violations.

Finally, I ask consumers to keep a careful watch over the activities of the Fair Trade Commission and companies. Unfair practices damage the interest of consumers though overpriced goods and services. We need your help in keeping a close eye on market players. If you find any suspected violation of the Antimonopoly Act, please do not hesitate to inform us at the Fair Trade Commission.

For our part, we will help companies improve their compliance programs by studying the AMA

compliance efforts of leading Japanese companies and publishing the findings. We will also actively participate in designing policy measures to be taken by other ministries and agencies, to promote competition. Strict measures will be taken under the Act concerning Elimination and Prevention of Involvement in Bid-rigging, etc. against any official in the ordering agency who is found to be involved in bid-rigging or other unfair practices. Furthermore, we will make the necessary investigations when we find hints of unfair practices, and will swiftly take firm measures if our suspicion turns out to be warranted.

Conclusion

My presentation today focused on the amended AMA and future challenges. Japanese competition policy has just adopted a new system. The system is surely not perfect, and will require constant review to check whether it fits the current economic situation. In light of its substantial impact on society, the amendment was adopted last year on condition that the status of its implementation be reviewed within two years of the effective date in line with changes in the socioeconomic environment. As part of this review, discussions will also examine the optimum surcharge system and appropriate procedures for ordering necessary measures to eliminate acts of violation. We will act on the results of this review and adopt required measures. Currently, these issues are being discussed in the Advisory Council on Basic Issues of the Antimonopoly Act, which was established last July in the Cabinet Office.

Today is a timely opportunity to discuss the future direction of Japanese competition policy, with the participation of Professors Joseph Harrington and Massimo Motta, who are experts in the advanced competition policies of the United States and European Union respectively, including leniency programs and cartel regulation.

To conclude my keynote address, I would like to encourage all participants to give their frank opinions in a lively discussion on the future of Japanese competition policy.

Thank you very much.