

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL
COURTS AND COMPETITION AGENCIES**

-- Note by the Delegation of Japan --

This note is submitted by the delegation of Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 February 2011.

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QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by Japan --

1. Introduction

1. Impediments to fair and free competition in the market harm the Japanese economy as they discourage the incentives of enterprises to exert their originality and ingenuity and disturb sound and democratic developments of the national economy. The Antimonopoly Act (hereinafter referred to as “the AMA”) provides for rules to be followed by enterprises in their business activities and the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) is responsible for enforcing the AMA with the aim of maintaining the competitive mechanism of the market.

2. Generally speaking, possible approaches for quantifying the harm caused by conduct that restrains competition include calculating damages incurred by the direct victims and estimating the deadweight loss, which refers to the loss to society caused by anticompetitive conduct. Japan has yet to undertake sufficient studies on the quantification of harm. The following focuses on the calculation of damages incurred by the direct victims, given that there are a relatively large number of such cases. Specifically, the following discusses the system for damage suit under the AMA, reports of the JFTC’s study group on quantification of harm, and examples of the calculation of harm in judicial practice.

2. Overview of the damage suit system

2.1 *Violation acts subject to liability for damages*

3. Pursuant to Article 25 of the AMA, any enterprise or trade association that has committed private monopolisation, unreasonable restraint of trade, unfair trade practices, certain international agreements or contracts (concerning unreasonable restraint of trade or unfair trade practices), or acts that restrain or inhibit competition shall be liable for faultless (i.e. non-existence of intention or negligence) damages suffered by another party.

4. Apart from cease and desist orders issued by the JFTC for ruling out any conduct in violation of the AMA, the provision for liability without fault for damages in relation to violations of the Act is intended to ensure that the damages caused by violations of the Act will be properly and swiftly covered to eliminate any harm from such conduct to the economy, while simultaneously restoring the competitive order and preventing violations of the Act.

2.2 *Scope of victims*

5. An enterprise or a trade association must accept liability without fault for damages caused by private monopolisation or any other violation with respect to the party suffering from the damages arising from the violation. This applies irrespective of whether the victim is a consumer or an enterprise, whether it is a competitor of or has trade with the violating party, or whether it trades with the violating party directly or indirectly.

6. It is understood that the scope of the victims is broadly interpreted for the purpose of increasing the effect of eliminating the harm caused by any act in violation of the AMA to the economic society and of preventing such acts.

2.3 *Liability without fault for damages*

7. The reason why the AMA provides for non-fault liability for damages is considered to be aiming at easing the burden on the plaintiff (i.e. the victim) to provide evidence and at facilitating compensation for damages caused by the violation. According to the Civil Code as general legislation that governs relationships between private persons, claims for damages on the grounds of tort require intent or negligence on the part of the party causing the damages. Nevertheless, the reason why the AMA does not have such requirements is thought to have the purpose of enhancing the effect of preventing any conduct in violation of the AMA by imposing greater liability to tort.

2.4 *Cease and desist order and decision of the JFTC as a prerequisite*

8. Under Article 26 of the AMA, no claim for damages may be filed prior to any finalised cease and desist order or decision of the JFTC. Without a cease and desist order or decision of the JFTC, any litigation seeking compensation for damages would be deemed without basis and would consequently be dismissed.

9. It is understood that finalisation of the JFTC's cease and desist order or suchlike brings into existence the effect of facilitating the plaintiff's proof of the existence of the violation of the AMA.

10. The right to claim damages expires by prescription three years after the date of the finalisation of the cease and desist order or the decision.

2.5 *System for seeking opinions*

11. The AMA prescribes in Article 84 that if a suit for damages under the provisions of Article 25 of the Act has been filed, the court may ask for an opinion of the JFTC with respect to the amount of damages caused by the violation as provided in the said Article.

12. This system where the court asks the JFTC for an opinion is intended to allow the court to seek opinions from the organisation specialised in the enforcement of the AMA and deciding on cases, as well as about the harm caused by the violation of the AMA. This system helps to ease the burden on the plaintiff to present evidence.

2.6 *Exclusive jurisdiction*

13. The Tokyo High Court shall have jurisdiction in the first instance over any suit seeking compensation for damages under the AMA and hearings shall be held before a panel of judges dealing exclusively with cases involving the Antimonopoly Act (Item 2 of Article 85 and Article 87).

14. Given that the suit is filed on the basis of a final decision of the JFTC and in connection with an alleged act in violation of the AMA requiring a technical and unified judgment, the provisions mentioned above are designed to concentrate the hearings and judgment in a single court so that relief can be swiftly given to the victim.

3. Quantification of harm

3.1 Report on quantification of harm in a damages claim under Article 25 of the AMA

15. The JFTC published a report titled “Quantification of Harm in a Damages Claim under Article 25 of the AMA” in 1991. The report studied methods for quantification of harm caused by an act in violation of the AMA. The following shows specific methods for quantification of harm:

Table 1: Approaches for quantification of harm by type of conduct

Plaintiff Type of Conduct	A party directly trades with the plaintiff		A party indirectly trades with the plaintiff	
	Consumer	Enterprise	Consumer	Enterprise
Price raising cartel	([Actual purchase price] – [Assumed purchase price]) x [Purchase quantity during the period of causing damage]	$\{(A - B) \times C\} - \{(D - E) \times F\}$	([Actual purchase price] – [Assumed purchase price]) x [Purchase quantity during the period of causing damage]	$\{(A - B) \times C\} - \{(D - E) \times F\}$
Bid rigging	[Bidding price for the project] – [Assumed bidding price without violation (e.g. the lower limit price set by the ordering party)]		--	--
Refusal to deal	--	[Hypothetical Profit without violation] – [Actual profit]	--	[Hypothetical Profit without violation] – [Actual profit]
(in the event of new market entry)	--	[Hypothetical profit in the case of entry into the market] – [Actual profit]	--	--
Resale price restriction	--	$\{(A - B) \times C\} - \{(D - E) \times F\}$	([Actual purchase price] – [Assumed purchase price]) x Purchase quantity during the period of causing damage	$\{(A - B) \times C\} - \{(D - E) \times F\}$

Notes:

A: Assumed selling price without violation

B: Assumed purchase price without violation

C: Assumed sales quantity without violation

D: Actual selling price

E: Actual purchase price

F: Sales quantity during the period of damage

3.2 *Estimation of assumed price*

16. As discussed above, for the purpose of quantification of harm arising from a violation, it is necessary to demonstrate the price that would have been realised without the cartel (“the assumed price”), for example, in the case of a price raising cartel. This price actually did not come into being and has to be estimated somehow so that the existence of the actual damages can be confirmed and that the amount of the damages can be estimated. The methods described below may possibly be employed for estimating the assumed price.

3.2.1 *Method based on comparison with the actual price*

17. In a case of a price raising cartel, for example, the assumed price may be estimated as the actual price prior to the violation based on the before-and-after theory or as the actual price in a similar region where the violation did not occur based on the yardstick theory. The resulting assumed price may then be compared to quantify the harm with the actual price resulting from the violation. (This approach is hereinafter referred to as “the method based on comparison with the actual price.”) Given the limitation that the yardstick theory is only applicable on the condition that a similar region exists, the before-and-after theory will be more commonly used for “the method based on comparison with the actual price” in the case of a price raising cartel. In this method, as the price before the violation is not affected by the violation, it is empirically reasonable to assume that this price would have been maintained subsequently if the violation had not taken place. It is therefore considered appropriate to estimate the assumed price as identical with the price before the violation. Court precedent suggests that this method is generally valid for cases concerning a price raising cartel.

3.2.2 *Method based on regression analysis*

18. However, the Supreme Court has ruled that it is impermissible to estimate the assumed price solely from the actual price just before the violation if there is any outstanding change in the economic factors that influence the determination of the retail price between the time when the cartel was implemented and the time when consumers purchase the goods concerned, and that the assumed price must be estimated by overall consideration of the price determining factors such as the characteristics in the pricing of the goods, the details and extent of the economic change and others, in addition to the price immediately before the violation.

19. The judgment on whether or not particular circumstances constitute an outstanding change in economic factors mentioned above is made depending on the individual cases of violation. If any such change is deemed to have taken place, the amount of damages will normally be quantified after estimating the assumed price as a result of comprehensively studying various pricing factors as well as the actual price immediately before the violation. For statistical analysis in a case like this, it is possible to use regression analysis, for instance, in cases concerning price raising cartels.

20. This approach ensures an estimate of the assumed price in overall consideration of pricing factors to the extent they can be measured. If the regression analysis is statistically reliable, it is possible to quantitatively calculate how much of the actual price increase can be attributed to the price raising cartel. That suggests that this approach is appropriate to quantify the harm where it is difficult to employ the method based on a comparison with the actual price.

21. However, the use of this method involves plenty of constraints. For instance, it is necessary to secure data on pricing factors for a length of time sufficient to make an analysis, as well as information on actual market conditions that constitute a basis for the use of the data. In addition, the theoretical

foundations for the regression model must be confirmed as being appropriate and the results of estimates must be statistically reliable.

4. Recent court cases claiming compensation for damages

22. Among the court cases claiming compensation for damages based on Article 25 of the AMA, to the extent the JFTC realises, the following two judgments are the most recent judgments where violations of the AMA were found and claims for compensation for damages were affirmed.

4.1 Bid-rigging case in pavement restoration work for the remains of water service pipes ordered by Osaka city

23. On May 18th, 2004, the JFTC made recommendation decisions containing orders to eliminate violations against a total of 26 companies for 7 violations concerning bid-rigging for the construction contracts of pavement restoration work for the remains of water service pipes ordered by Osaka city. After the recommendation decisions became final, the Osaka municipal government, which ordered the contracts, filed a lawsuit claiming compensation for damages, to the Tokyo High Court, against Okumura Engineering Corporation and 3 other juridical persons based on the provision of Article 25 of the AMA.

24. With regard to the case, on December 11th, 2008, a settlement between Osaka city and one of the defendants was reached. On June 8th, 2007, a judgment was made in which claims against 2 of the defendants were affirmed. On January 25th, 2009, a judgment was made in which claims against 1 of the defendants was dismissed with prejudice on the merits. Thereafter, all these judgments became final and binding after the period of appeal expired. The following is the outline of the method of quantifying the damages based on the judgment in which the claims were approved.

4.1.1 Outline of the method of quantifying the damages in the judgment

25. The damages incurred by the plaintiff are the difference between the amount of money for the construction contract resulting from the violation (actual price) and the amount of money for the construction contract assuming no violation (assumed price).

26. In this case, the objects of each construction work are different from each other, and thus, there is no identical object of the work. Therefore, there is no choice but to calculate its assumed price based on the ratio between the actual price for construction works irrelevant to the violations and a target price set in advance by the plaintiff (winning bid ratio).

27. The assumed price is a price that does not actually exist. Therefore, it is typically appropriate that the assumed price is estimated based on a winning bid ratio immediately before the violation unless there are any changes in economic factors, including economic conditions, market structure or the like, which underlie the formation of prices. On the other hand, if there is a possibility that similar conducts existed before the violation, it is appropriate to estimate the assumed price based on not the winning bid ratio immediately before the violations but the winning bid ratio immediately after the termination of the violations.

4.2 Bid-rigging case in a construction display ordered by Japan Highway Public Corporation

28. On April 27th, 2005, the JFTC made a recommendation decision that ordered the elimination of violations to SEIWA ELECTRIC MFG. Co., Ltd. and 2 other juridical persons for violations of bid-rigging, associated with a construction display ordered by Japan Highway Public Corporation. After the recommendation decisions became final and binding, Japan Expressway Holding and Debt Repayment

Agency (a juridical person that succeeded the rights and the duties of Japan Highway Public Corporation dissolved on October 1st, 2005, according to the law) filed a lawsuit claiming compensation for damages incurred by Japan Highway Public Corporation due to the bid-rigging found in the recommendation decision, to the Tokyo High Court, against SEIWA ELECTRIC MFG. Co., Ltd. and two other juridical persons based on the provisions of Article 25 of the AMA.

29. With regard to the case, on October 1st, 2010, a judgment was made by the Tokyo High Court in which the claims against 3 defendants were affirmed. A final appeal and a petition for acceptance of the final appeal thereto were made by the 3 defendants. The following is the outline of the method of calculating the damages based on the judgment.

4.2.1 Outline of the method of calculating the damages in the judgment

30. The damages incurred by the ordering party from the bid-rigging is the difference between the actual winning bid price and the winning bid price based on the assumption that there has been no bid-rigging (assumed winning bid price). It is appropriate that the assumed winning bid price is estimated to be the winning bid price immediately before the violation. However, if there is a possibility that violations existed before the found violation and lasted for a considerable period of time, it is appropriate that the assumed winning bid price is calculated based on the actual winning bid prices in bids submitted under fair and free competition after the termination of the violation in question. In addition, if there is no identical object which can be compared to the object that was the target of the bid-rigging due to the differences in size and specifications and thereby the estimation using the actual winning bid price is inappropriate, it is appropriate to make use of the ratio (winning bid ratio) between the actual winning bid price and the target price of an object irrelevant to the violation in question. In this case, it should be necessary to gather a considerable number of similar cases both in a period during which the violations were committed and in a period during which there are few significant changes in economic factors, including economic conditions, market structure or the like, which underlie the formation of prices. With regard to the concerned bid-rigging case, in light of the recommendation decision, since there is a possibility that similar violations have been committed by defendants before April 1st, 2001, on which date the bid-rigging was found, it is appropriate that a plurality of similar bid cases during the equivalent period after the termination of the violation is used as a reference thereto. Since the construction works ordered by Japan Highway Public Corporation differ in size and specifications depending on each object, it is to a certain degree reasonable to employ a method of estimating the amount of damages by using an assumed winning bid price which is calculated by use of average winning bid ratio thereof.