

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

**ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO  
DETECT CARTELS**

**-- Note by Japan --**

*This note is submitted by Japan to the Competition Committee FOR DISCUSSION under Item X at its forthcoming meeting to be held on 30-31 October 2013.*

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## ROUNDTABLE ON EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS

-- Note by Japan --

### 1. Provisions of the Antimonopoly Act, etc. related to the detection of cartels

1. Regarding the detection of cartels, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the "Antimonopoly Act") and the Act for Establishment of the Small and Medium-sized Enterprise Agency<sup>1</sup> provide for the following systems.

#### 1.1 *Leniency (Article 7-2 of the Antimonopoly Act)*

2. When enterprises engaging in cartels or bid rigging etc. subject to surcharges submit a facts report and materials regarding the violations, immunity from or reductions in surcharges would be granted in certain conditions under the leniency program. This program has been introduced since 2006. The aggregate number of reports made under the program is 725 as of March 31, 2013. It is an important tool for cartel investigations.

#### 1.2 *Complaint (Paragraph 1, Article 45 of the Antimonopoly Act)*

3. It is provided under Paragraph 1, Article 45 of the Antimonopoly Act that "Any person may, when (s)he considers that a fact involving violation of the provisions of this Act exists, report the said fact to the Fair Trade Commission and ask for appropriate measures to be taken.". Complaints may be made by telephone, in writing, and by electronic means through the homepages of the Japan Fair Trade Commission (hereinafter referred to as the "JFTC"). Any suspicious acts that may violate the Antimonopoly Act, such as cartels and bid rigging, could be reported to the JFTC. The number of complaints for the fiscal year 2012 was 9,819. Of these, the number of complaints except for the number of those about unjust low price sales by retailers was 1,646.

#### 1.3 *Requests from the Small and Medium Enterprise Agency (Paragraph 7, Article 4 of the Act for Establishment of the Small and Medium-sized Enterprise Agency)*

4. It is provided under Paragraph 7, Article 4 of the Act for Establishment of the Small and Medium Enterprise Agency that "the Small and Medium Enterprise Agency may investigate any hindrance to the business of a small and medium sized enterprise due to unreasonable restraint of trade or unfair trade practice by other enterprises (...), report the associated facts to the Japan Fair Trade Commission and seek the appropriate measures to be taken." As such, any suspicious acts that may violate the Antimonopoly Act such as cartels, bid rigging may be reported by the Small and Medium Enterprise agency to the JFTC. (However, no such requests have been made in the past three years.

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<sup>1</sup> The act providing for the affairs under the jurisdiction of the Small and Medium Enterprise Agency, which has administrative jurisdiction over the policies for small and medium sized enterprises in Japan.

#### 1.4 *Ex officio detection (Paragraph 4, Article 45 of the Antimonopoly Act)*

It is provided under Paragraph 4, Article 45 of the Antimonopoly Act that "The Fair Trade Commission may, where it considers that there exists a fact involving violation of the provisions of this Act or a fact falling under the purview of monopolistic situation, take appropriate measures on its own authority.". The provisions are construed as the measures to be taken without the "complaint" as described above. The JFTC's proactive investigation is referred to be "ex officio detection" as those conducted under the provision.

## 2. **Cartel Screens**

5. One example of the JFTC's proactive measures is the ex officio detection described above. There are two types of proactive detection: one is the detection of cartels through the cartel screen from scratch by the authority; and the other is the cartel screen based on uncertain information provided. Whether or how the JFTC conducts the ex officio detection is on a case-by-case basis. Currently, the JFTC does not disclose any substantial information or data to the public regarding the ex-officio detection.

6. On the other hand, the Competition Policy Research Center (hereinafter referred to as the "CPRC") of the JFTC had been studying the possibility of the utilization of economic analysis for the detection and proof of cartels, making the following reports available. However, the economic analysis described below has not actually been used as cartel screen in any cartel investigations to date.

### 2.1 *Utilization of Economic analysis in cartel regulation - CPRC Handbook Series No.2 - (February 6, 2012)<sup>2</sup>*

7. In this research, the CPRC demonstrated and analyzed the structural factors of the industry prone to cartels using data<sup>3</sup> from the manufacturing industry in Japan based on a survey of theoretical analysis. It should be noted that the results of the analysis have certain limits, as not all the cartel cases in the manufacturing industry could be confirmed, so the data used was limited to that on the cartel detected. Nevertheless, the research found out the characteristics of the structural factors of the industry of Japan in which cartels were detected.

8. First, regarding the relationship between the demand factors and cartel formation, a statistically significant negative effect is confirmed for both the shipment value growth rate and the change in the shipment growth rate. With respect to the shipment value growth rate, the theoretical hypothesis (note: a positive relationship exists between the shipment value growth rate and cartel formation, and a negative relationship exists between demand fluctuation and cartel formation) was not supported. On the other hand, with respect to the change in the shipment value growth rate, the theoretical hypothesis was supported.

9. Next, regarding the relationship between the supply factors (market concentration ratio and entry barriers) and cartel formation, although not statistically significant, it was observed that a negative relationship existed between market concentration ratio and cartel formation as opposed to the theoretical hypothesis (note: a positive relationship exists between market concentration ratio and cartel formation, and a positive relationship exists between high entry barriers and cartel formation). Regarding the relationship between entry barriers and cartel formation, a positive relationship was observed. In other words, the theoretical hypothesis that the higher entry barriers are, the more easily cartels are formed was supported by the observation.

<sup>2</sup> CPRC report CR07-11 available at [www.jftc.go.jp/cprc/reports/index.files/cr-0711.pdf](http://www.jftc.go.jp/cprc/reports/index.files/cr-0711.pdf) (In Japanese only)

<sup>3</sup> The data on cartels from FY1990 to FY2004 was used in the analysis.

10. Based on the results of the analysis above, the probability of cartel formation (cartel occurrence probability) in each industry was estimated, and around the top 30 industries with high probability were identified in descending order. It was found that the top 10 industries with a high estimated probability of cartel occurrence included the seven industries<sup>4</sup> in which cartels were actually detected by the JFTC.

11. The analysis provides useful practical guidance for the authority, as the cartel occurrence probability is a useful indicator for discovering or identifying the industry (in which a cartel is deemed to be formed), and estimating the cartel occurrence probability will enable the competition authority, which has limited personnel and other resources, to identify the industries to focus on.

## **2.2 *Review of Means for Proof in Cartel Cases - Application of Circumstantial Evidence - (June 26, 2013)***<sup>5</sup>

12. In this report, the methods of proving the existence of cartel based on the circumstantial evidences were reviewed, mainly by verifying the methods of proof used for past cartel cases in Japan. The report contains some examples of relevant facts that may prove the existence of a cartel. Specifically, the following examples of relevant facts are identified in the report: means to ensure the effectiveness of the cartel, meetings with obscure purposes or substances, pay-for-delay, pricing not in accordance with the price movement of raw materials, and too orderly bidding behavior regular bids, etc.

13. The report also proposes a method for proving the existence of a cartel using an economic analysis of changes in price and quantity for a certain period by taking up past cartel cases.

14. Generally, it is considered that unnatural concurrent price rises occur primarily due to an increase in demand, a decrease in supply, and/or collusion among enterprises. This report seeks to estimate the existence of collusion among enterprises through identification of the factors for price changes by performing a regression analysis, etc. based on the actual data gathered on changes in demand, supply and prices.

15. Applying such a method to the past three cartel cases, a price rise of around 3% to 7% was identified, whose cause was estimated to be a cartel rather than demand and supply factors.

16. These results show that economic analysis is useful for proving the existence of a cartel by showing any unnatural concurrent acts of raising the price by each enterprise (when insufficient evidence is available to prove the communication of intentions), although availability of the relevant data is still at issue.

## **2.3 *Application of the two research reports of the CPRC to the investigation***

17. The first analysis indicates the possibility of application to the investigation mainly as the structural screen, and the second analysis indicates the possibility of application to the investigation as the behavioral screen. In other words, the results of the analysis may be used as reference information to

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<sup>4</sup> The seven industries were the following: Motor Vehicles, Parts, and Accessories; Fabricated Constructional and Architectural Metal Products, including Fabricated Plate Work and Sheet Metal Work; Rolling of Non-ferrous Metals and Alloys, including Drawing and Extruding; Miscellaneous Iron and Steel; Printing; Industrial Organic Chemicals; and Furniture. These industries and the following three industries constitute the top 10 industries with a high probability of cartel occurrence: Household Electric Appliances; Electrical Generating, Transmission, Distribution and Industrial Apparatus; Heating Apparatus and Plumbing Supplies.

<sup>5</sup> CPRC report CR02-13 available at [www.jftc.go.jp/cprc/reports/index.files/cr-0213.pdf](http://www.jftc.go.jp/cprc/reports/index.files/cr-0213.pdf) (In Japanese only).

identify the industries to be focused on at all times and judge the credibility of the leniency information and the complaint. It should be noted, however, that the analysis is based on the data on the cartels that were actually detected, so strictly speaking, the first analysis estimates the probability of cartel detection rather than the probability of cartel occurrence. Accordingly, there may be industries with a low estimated possibility of cartel occurrence in which a cartel actually occurred (and was not detected). Because of this limitation, the JFTC conducts investigations of other industries in addition to those with a high estimated probability of cartel occurrence.

18. Regarding the second analysis, it is impossible to prove the existence of a cartel from scratch, using the economic analysis, as data on the price of the products subject to a cartel for a certain period of time are usually not available. However, it is extremely useful to consider the consistency between the information obtained under the leniency program, etc. and the change in price, etc. In addition, the JFTC calls for the cooperation of the procurement agencies to prevent collusion and provide information, taking into consideration the fact that bid rigging is frequently seen as a form of collusion. The JFTC also provides specific examples of behavior to which attention should be paid, such as price changes, changes in the bid acceptance ratio and acts to participate in bids as discussed below for the procurement agencies.

### **3. Screen for procurement officials**

19. The JFTC has training seminars for officials in the procurement agencies and holds meetings with these agencies as efforts regarding the screen for procurement officials. An outline of the efforts is provided below.

#### ***3.1 Training seminars for the procurement officials***

20. The JFTC provides training seminars for procurement officials of the procurement agencies and dispatches lecturers to the training seminars held by the procurement agencies as efforts to prevent bid rigging. The number of the training seminars held was 235 for FY2012. In the training seminars, it is made clear that any suspicious acts discovered by the procurement agencies that may violate the Antimonopoly Act must be reported to the JFTC. In addition, the examples of the information reported are indicated as follows: (1) the date and time when the procurement agencies receive information on bid rigging, (2) the name of the construction, (3) the (scheduled) date of the bid, (4) the provider of information, (5) the receiver of the report (the person in charge at the procurement agencies), (6) the means of obtaining the information (by telephone, in writing, etc.), (7) the particulars of the information, (8) summary of the response to the information on bid rigging, and (9) the bid results (when the bid is carried out). Furthermore, the information that must be especially reported is indicated as follows: (i) relevant information about the bid including the bid record (not processed information), (ii) the information about the rules for or the methods of bid rigging that is assumed to exist based on the experiences of the procurement agencies, the information received, and other sources, (iii) work of the relevant information about the work of the construction (the publicly available information, the place of announcement about the work of the construction or the annual amount of orders placed for the work of the construction and the other information). Additionally, the textbook actually used in the training seminars explains the overview of the report system and the points to be borne in mind when making a report. The textbook also indicates the cases to be reported as follows, in addition to the information about bid rigging that the procurement agencies receive from the outsider.

##### ***3.1.1 Case where it can be considered that the existence of bid rigging is presumed***

- Case 1

21. Some regularity of bid results is seen, such as successful bids according to the number of designations of bid participants and the accumulated amount of past successful bids for each type/scale of construction work to be ordered, and the equal number of successful bids among the bid participants.

- (Ex.) Regarding the construction work X ordered by procurement agency A, the value of the orders received for each fiscal year in the past were almost equal among the bid participants, irrespective of the number of orders received.
- (Ex.) Regarding the construction work Y ordered by procurement agency B, the ratios of the orders received (the number of orders received / the number of orders placed) for each fiscal year in the past were almost the same among the bid participants, irrespective of the different number of orders placed for each fiscal year.
- Case 2

22. Unnatural states were seen where the lowest price was the same for each of several bids, and the other companies except for the one company waived the bids as a result of a series of suspensions of bids, even though no regularity as described in Case 1 above was seen.

- (Ex.) Regarding the construction work Z ordered by procurement agency C, the bid prices exceeded the target price, so the bid was conducted three times. Prior to and during the third bid, the bid participants except for a certain company waived their bid, and thus only the bid participant who had been identified by the information provided made a bid.
- (Ex.) Regarding the construction work U ordered by agency D, the general ratio of contract price to the target price remained at around 95%, however the ratio dropped significantly to around 70% when a certain company participated in the bid.
- Case 3

23. When the information received by the division in charge of procurement indicates the existence of the rules for successful bids applicable among the bid participants rather than anything related to single bid rigging and also the specific materials, etc. to support it are provided.

- (Ex.) The information provided regarding the construction work V ordered by procurement agency E indicated that the same bid participant would continue to make a successful bid in any works related to the previous work. It was then found out from the inquiry into the past bid results that the relevant bid participant of the previous work actually continued to make a successful bid.
- (Ex.) The information provided regarding the construction work W ordered by procurement agency F indicated that the bid participant to undertake the work would prepare the accompanying documents of the other bid participants. It was then found out from the property of the accompanying documents submitted in an electronic file by each bid participant that the displayed name (the name of the bid participant to undertake the work) was different from the name of the each bid participant.

### **3.2 *System for reports to the JFTC from the procurement agencies***

24. The Act for Promoting Proper Tendering and Contracting for Public Works (hereinafter "Proper Tendering and Contracting Act") obligates the procurement agencies to notify the JFTC of the information

gathered about the facts regarding the bid and contract for public works sufficient to support the suspicious violation of the provisions of Article 3 or Item 1, Article 8 of the Antimonopoly Act. The number of reports under Proper Tendering and Contracting Act was 14 for FY2012. In addition, the procurement agencies may notify the JFTC of any information on bid rigging at their discretion. The number of discretionary notifications was 632 for FY2012. The number of bid rigging cases in which legal action was taken, based partially on the information reported or notified as described above for the past three years (FY2010 to FY2012), was four.

### **3.3 *Liaison officers' meetings***

25. The JFTC has held liaison officers' meetings regarding bids for public works participated in by the liaison officers of each procurement agency since FY1993 where the liaison officers are the designated personnel of each procurement agency. Their duties are to provide information to the JFTC regarding any possible violation of the Antimonopoly Act and other relevant works. The purpose of the meeting is to prevent any violation of the Antimonopoly Act such as bid rigging by means of ensuring that the liaison officers provide information to the JFTC smoothly and establishing a system for cooperation between each procurement agency and the JFTC. The meetings were held ten times in FY2012.