Competition Policy in the Future

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Introduction

The position of the FTC in the reform of the central government

1. The Government of Japan reformed the more than 50-year-old structure of the central government's ministries and agencies into one comprising the Cabinet Office and 12 ministries and agencies on January 6 of this year.

2. The Fair Trade Commission, which used to be an external organ of the Prime Minister's Office under the old system, has been moved to be an external organ of the Ministry of Public Management, Home Affairs, Posts and Telecommunications. The FTC's relations with the Ministry remain unchanged from its relations with the Prime Minister's Office. The Ministry is responsible for not only public management and local governments but also posts and telecommunications business. Therefore, it is feared that the FTC will not be able to be independent in exercising its power. Since the Antimonopoly Act guarantees the FTC's independence in exercising its power, it will remain unchanged from the situation before the reform of the central government. The FTC will continue to be independent in strictly cracking down on Antimonopoly Act violations and actively implementing competition policy.

FTC

3. The FTC, an administrative commission comprising the chairman and four commissioners, is quite similar to the United States Federal Trade Commission. The General Secretariat is placed under the FTC in order to execute its duties. It also has an administration, two bureaus, two departments and seven local

offices. It has 564 staff members, an increase of 86 over the past decade.

4. In recent years, the organization of the General Secretariat has been reinforced and the number of its staff members has increased. Such a move is exceptional because the Government of Japan is required to carry out strict fiscal reform. The move demonstrates that the Government of Japan attaches particular importance to competition policy and the FTC.

5. I would like to talk first about the enforcement of the Antimonopoly Act and its relevant issues, and next about the challenge of competition policy. To begin with, I would like to talk about the enforcement of the Antimonopoly Act and its relevant issues.

I Enforcement of the Antimonopoly Act and its relevant issues

The outline of Antimonopoly Act violations and the procedure

6. Before going into the main subject, I would like to explain the outline of the Antimonopoly Act and its enforcement procedure.

7. The Antimonopoly Act provides for similar prohibitions on private monopolization, cartels and unfair trade practices to those provided for by the U.S. antitrust laws. However, the only difference between Japan's Antimonopoly Act and the U.S. antitrust laws involves the procedures of dealing with violations.

8. Specifically, criminal procedure is taken to crack down on hard-core cartels under the antitrust laws in the United States. On the other hand, the FTC, an administrative organization, enforces the Antimonopoly Act and violations are dealt with through administrative procedure. If the FTC suspects an Antimonopoly Act violation, FTC officials entere the premises and order the submission of documents and other evidence by exercising their power accompanied by criminal penalty. As a result of the investigation, if we find the activities we investigate constitute an Antimonopoly Act violation, the FTC orders to cease and desist the activities by an administrative disposition, called ‘decision’. The FTC issues a recommendation before issuing an administrative disposition. If an appeal is filed against the recommendation, the FTC initiates hearing procedures. If the defendant is dissatisfied with the decision, the defendant can file a suit with a court demanding that the decision be nullified. Except for the way to collect evidence, the procedure is quite similar to that of the U.S. FTC.

9. I would like you to note that the FTC issued cease and desist orders to a huge number of firms in about 30 or more cases of Antimonopoly Act violations a year. In fiscal year 1999, 938 firms were slapped with dispositions in 27 cases. From April to December in fiscal 2000, 545 firms were hit with dispositions in 14 cases. This demonstrates that the FTC cracked down on large-scale illegal cartels in which so many firms were involved. Since those who are hit with dispositions can appeal or file a lawsuit individually against such orders, the FTC's work load is heavy such as collecting sufficient evidence to prove Antimonopoly Act violations. In particular, those who are involved in bid-rigging will be ordered to pay surcharges. The amount of surcharges and the number of firms ordered to pay surcharges for bid-rigging are quite huge.

Priority of investigation

The FTC places top priority on investigation of 1) hard core cartels such as price fixing and bid-rigging; 2) blocking of market entry and excluding competitors; 3) unfair trade practices in the distribution sector; 4) non-governmental restriction in the private sectors, so-called "*Min-Min Kisei*"; and 5) international cases.

10. Regarding blocking of market entry, we have made a commitment the international community to remove restrictive business practices if they block foreign companies access to the Japanese market. In relation to the ongoing deregulation, blocking of market entry is a harmful behavior that runs counter to the promotion of competition in the domestic market. The FTC is of the view that such behavior should be thoroughly eliminated.

11. Let me touch upon priority areas. By type of Antimonopoly Act violations, bid-rigging cases account for the largest percentage of violations. The FTC took legal actions in 42 bid-riggings cases of 68 violations from fiscal 1998 to fiscal 2000. In these cases, the FTC issued cease and desist orders against 1,994 firms.

12. Bid-rigging is a typical cartel and also harmful behavior that hinders the function of the competitive bidding system and harms taxpayers' benefit. Like many other developed countries, Japan is stepping up efforts to eliminate such activities.

13. However, the FTC alone cannot sweep away such vicious practices.

Regarding the construction sector, the Ministry of Land, Infrastructure and Transport, which has jurisdiction over the construction industry, and prefectural governments are empowered to issue an administrative disposition, such as an order to suspend business activities, to violators. Therefore, the FTC needs to cooperate with these government organizations. I would like to describe this point in later.

14. The Diet enacted the law concerning the promotion of the appropriate public bids and contracts during an extraordinary session last year. In accordance with the law, the government has introduced a transparent system that is unlikely to give rise to bid-rigging for public works contracts and a system where a government organization placing an order which obtains information on a practice suspected of constituting bid-rigging will notify the FTC.

15. Also, the FTC is strictly cracking down on practices that restrain business activities of companies that deal with imported goods and those who adopt new sales methods. One of the examples of cases of blocking market entry is a case where an trade association comprising companies that sell glass for automobile repair work restrained the sale of imported automobile glass by the members. In some cases, the FTC issued cease and desist orders in response to complaints or requests from abroad. For example, the FTC challenged a private monopolization case where a company obliged its customers to purchase the materials of radioactive pharmaceutical products exclusively from the company.

16. I would like you to notify the FTC if you find that acts that are alleged to constitute an Antimonopoly Act violation hinder market entry or business activities in the Japanese market and to report the details of the facts and any material which help prove a violation. Needless to say, those who submit such a report will remain anonymous and the confidentiality of the report will be protected.

Orders to pay surcharges with the aim of deterring violations

17. In addition to cease and desist orders, orders to pay surcharges for those who form an illegal hard core cartel serve as a deterrent. The government confiscates illegal profits that violators gain from a hard core cartel and prevents business from profiting from such a cartel, thereby securing social justice. They are not criminal fines but administrative measures. The FTC can

order offenders to pay surcharges as an administrative measure -- without a ruling by a court. Therefore, the FTC cannot determine the amount of surcharges at its own discretion. The amount of surcharges is calculated by multiplying the amount of the sales of goods or services during the period of the cartel by a certain rate provided in the Antimonopoly Act. The rate is 6 percent in principle. The ceiling of the administrative fine in the European Union is 10 percent of the offenders turnover of the previous year. On the other hand, in Japan, when the period of the cartel exceeds one year, offenders are ordered to pay 6 percent of their sales for more than one year, at the longest, three years. Therefore, it is impossible to determine which system has more deterrent effect against violations simply by comparing the percentages.

18.The record amount of surcharges was 11.2 billion yen in the cartels establishing sales quotas of cement industry. In the most recent case, the FTC ordered non-life insurance companies last June to pay about 5.45 billion yen in surcharges for forming a cartel on the machinery insurance.

19.The FTC ordered 576 firms to pay 3.15 billion yen in fiscal 1998, 335 firms to pay 5.44 billion yen in fiscal 1999 and 429 firms to pay 6.73 billion yen until December in fiscal 2000. In total, 1,340 firms were ordered to pay a total of 15.32 billion yen in surcharges over that period.

Criminal penalty

20.The Antimonopoly Act provides for criminal punishments for offenders since Antimonopoly Act violations are anti-social crimes. A person who participates in an illegal cartel could face up to three years in prison or up to a 5 million yen in fine.

21.However, the Antimonopoly Act is aimed basically at authorizing an administrative organization to prevent and eliminate violations. Therefore, Antimonopoly Act violations can develop into criminal cases only when the FTC files a criminal accusation with the public prosecutor general and the public prosecutors office files an indictment of offenders with the Tokyo High Court.

22.In recent cases, the FTC filed a criminal accusation against three companies including Kubota and 10 board members and employees of these companies for conspiring to fix the output amounts of ductile iron pipe used as tap water pipes.

23.The FTC also filed a criminal accusation against 11 companies including

Cosmo Oil and nine employees for colluding to determine which company would win the order by the Defense Agency in automobile gasoline, kerosene, light oil and Type-A heavy oil and aircraft turbine fuel respectively. The Tokyo High Court is now trying the case.

Growing numbers of lawsuits filed by local residents and damages lawsuits

24. Nowadays, when the FTC issues an order to cease and desist Antimonopoly Act violations – particularly in bid-rigging cases –, lawsuits are often filed afterwards. Since the local government offices that placed orders for contracts are the victims of such crimes, the residents of the cities and prefectures often ask the local government to demand money damages from offenders and if the local government neglects to do so, residents can file a damages suit on behalf of the local government. Currently, courts across the country are trying 63 such lawsuits. A growing number of local governments are demanding compensation from violators that are subject to dispositions by the FTC. For example, the Tokyo Metropolitan Government demanded about 4.3 billion yen in damage from tap water meter manufacturers for bid-rigging. Osaka City, Kyoto City and Osaka Prefecture demanded a total of approximately 700 million yen in damages from offenders who rigged the bids for tap water disinfectant.

25. Thus, lawsuits demanding a huge amount of damages are filed after the FTC issue a ceased and desist order. I believe that such lawsuits are serving as an effective deterrent.

Mergers and Acquisitions

26. Let me explain corporate mergers and other forms of concentrations. The Antimonopoly Act prohibits any corporate mergers or take-over of business and acquisitions of shares that restrain competition. To that end, the law requires companies concerned to file a notification or report on the proposed merger with the FTC in advance.

27. The merger regulation clauses in the Antimonopoly Act were amended in 1998 to apply to mergers and acquisition between foreign companies.

28. Currently in Japan, in conjunction with structural reform in Japan, corporate take-overs, mergers, consolidations and joint ventures are increasing. This activity is based on the need to deal with rapid changes in information technology as well as the necessity among individual firms to clean up excessive debt, reacts to slack demand despite heavy investment in plant and

equipment in the bubble era, and create an international corporate strategy.

29.There are a growing number of mergers between foreign capital companies and international alliances. For example, mergers between Exxon and Mobil and the acquisition of the tobacco operation outside the United States by Japan Tobacco from RJR Nabisco.

30.The FTC issued “M&A Guidelines” in December 1998 to make clear the factors determining whether a merger will restrain competition. I would like you to use the guidelines as a reference. Furthermore, the FTC has a system of prior consultations on mergers. Many companies use the system. Exxon and Mobil are among the companies that consulted with the FTC on their merger plan under the system. The FTC publicizes the results of such prior consultations unless they involve the secrecy of the business activities of the companies concerned. You can also access to it on our home page.

31.I know that several civil lawsuits have been filed by the U.S. competition agencies for mergers that may constitute violations of the antitrust law in the U.S. In Japan, it is rare that an administrative order is issued against mergers which constitute violations. This is because the FTC notifies companies that consult with it over their merger plans whether merger will constitute a violation. In response, the companies concerned either abandon their merger plans or modify the plans to remove the problems under the Antimonopoly Act.

32.In recent cases, the FTC concluded that the proposed merger between the Nippon Paper, the No. 2 company in the paper industry, and the Daishowa Paper, the No. 3 company, would restrain competition in some particular markets and therefore constitute a violation. In response, the two companies proposed remedies such as divestiture of their facilities of the products concerned to a third party.

33.The financial sector has been realigned to revive the financial system following the financial Big Bang. It involves the consolidation of the Tokyo Mitsubishi Bank and Mitsubishi Trust Bank, the formation of the Mizuho Group, the merger between the Sumitomo Bank and the Sakura Bank, and the consolidation between the Sanwa Bank, the Tokai Banks and Toyo Trust Bank. In the process of the review of three mergers, the FTC conducted inquiries in writing and hearings on a wide variety of matters over the companies that receive loans from the banks concerned. The review focused on two points. First, the financial institution that would expand the operational scale may interfere in the operation of its customers by taking advantage of its increased

share in customers. For example, it may demand that a certain securities company be the underwriter of the customers stock. This behavior would constitute a violation. Secondly, since these major banks have become the core of their respective corporate groups, they may integrate their corporate groups or established closed, exclusive trade relationship based on the membership of the corporate groups.

34. Therefore, the FTC urged these banks to take preventive measures. In response, the Mizuho group for example, committed:

__to strictly abide by the Antimonopoly Act to prevent itself from interfering the management of its customers;

__not to form exclusive corporate groups and

__to review the operation of the corporate groups formed with the banks as core and consider the possibility of their dissolution before the consolidation.

Consequently, the FTC concluded that the merger between the three banks(The formation of the Mizuho Group) would not constitute a violation of the Antimonopoly Act. The FTC will pay close attention to the implementation of the consolidation and take strict measure against possible violations.

Introduction of injunctive relief through civil litigation

35. Last year, a system was introduced for the first time, under which those who suffer from unfair trade practices can file a suit with a court seeking injunctive relief against an Antimonopoly Act violation. The FTC has been the only government organization to crack down on Antimonopoly Act violations. Under the system, however, courts can now deal with such cases as private civil suits. The FTC has played a leading role in interpreting and enforcing the Antimonopoly Act, but courts are now being required to make judgments in such cases. By this way, in due course people's interest and understanding of the Antimonopoly Act are expected to increase. The system will take effect in April 2001.

II Tasks on competition policy.

36. There are four tasks of competition policy:

(1) Promotion of the IT revolution;

(2) Deregulation, particularly promotion of competition in the public

utility sector;

(3) Consideration of amendments to the Antimonopoly Act; and

(4) Advocacy of competition policy.

Promotion of the IT revolution

37. First, I would like to describe the promotion of the IT revolution and competition policy. The IT strategy Council adopted the “IT Basic Strategy” at the end of last year. This provides that the FTC should play a role in competition policy regarding the IT revolution, including prevention of anticompetitive activities in the telecommunication sector and establishment of rules on e-commerce. The FTC will develop competition policy in response to the IT revolution with the eyes on its future.

38. First, the FTC is promoting competition policy in the telecommunication sector that is basis of the IT revolution. As part of the efforts to enforce the Antimonopoly Act, the FTC actively covers and cracks down on anticompetitive activities in this sector. The FTC is determined to make policy proposals regarding deregulation and the promotion of competition in the telecommunications sector.

39. The task of establishing a high-speed network infrastructure is the most important task for the Government of Japan as a whole. Last June, the JFTC published a Study Group report which raised problems on this matter and made proposals of ways to promote competition in the regional telecommunications market that now suffers from the bottle neck in the so-called “last one mile”. More specifically, the report proposed that transparency in NTT interconnection should be ensured, and that a telecommunications network utilizing new methods and technologies, such as cable TV and DSL, should be created as substitutes for the networks of NTT regional companies. It has also pointed out the restructure of NTT by establishing the holding company is insufficient and proposed that the NTT holding company should reduce its stake in the NTT DoCoMo.

40. These proposals have been highly evaluated, and had a huge impact on discussions at the Ministry of Posts and Telecommunications Council on Telecommunications and the ruling parties Administrative Reform Promotion Headquarters.

41. As to examples of cases against anticompetitive activities, the FTC issued a warning to NTT East against blocking entry into the DSL service market.

42. Secondly, in order to ensure fair trade which uses information technology, the FTC has been making various efforts to address cooperative practices or exclusive practices in B to B e-commerce and secure adequate provision of information and exclude misleading advertisements and representations in B to C e-commerce.

43. Thirdly, let me touch upon the interface of the Antimonopoly Act with intellectual property rights and technological standards -- which comprise the basis of the IT revolution. We would like to study the matter by analyzing specific examples of problems that could raise concerns under the Antimonopoly Act and experiences of other countries.

Promotion of competition in the public utility sectors

44. The promotion of deregulation is one of the top priority tasks for the Government of Japan in order to promote economic restructuring. In particular, reform of the regulations on the public utility sectors is an important task in recent years.

45. With the amendment of the Antimonopoly Act in 2000, an exemption to the Antimonopoly Act for the electricity and gas business as natural monopoly was abolished, and the law now applies to such business. Regulations had been enforced on the entire business activities including pricing in this sector in the name of the protection of public interest. For example, government authorities in charge had guaranteed regional monopoly and market entry had been restricted by the license system. As a result of the ongoing regulatory reform, however, new market entry has come to be gradually permitted. However, since incumbent companies own essential facilities, it is difficult for newcomers to enter the market unless they have access to these facilities.

46. Therefore, the FTC worked out guidelines for the first time, jointly with the Agency of Natural Resources and Energy, Ministry of Economy, Trade and Industry regarding appropriate transactions of electricity and gas that are consistent with the Electricity Utilities Industry Law and Gas Utilities Industry Law and the Antimonopoly Act. Last autumn, the Ministry of Economy, Trade and Industry introduced a competitive bidding system for electricity supplied to its head office building. Furthermore, a newcomer -- not Tokyo Electric Power – won the bid, so this demonstrated to not only the industry but also the general public that the electric power sector has been liberalized.

Preparations to amend the Antimonopoly Act

47.The current Antimonopoly Act was enacted in 1947, and has since been amended several times. The largest amendment was made in 1977. The system of surcharges and measures against monopoly and oligopoly were introduced under the amendment in 1977. A quarter century has passed since the 1977 amendments. When a total ban on holding companies was lifted in 1996, it was provided that the Antimonopoly Act would be reviewed five years later. – that means next year. Therefore, the FTC will research the situation of holding companies established since 1996 and their business activities and consider the possible amendments this year.

48.In some cases, officials of governmental organizations that hold a public bid are deeply involved in bid-rigging. Officials of governmental organizations that are involved in bid-rigging are subject to criminal punishments for aiding and abetting the crime. However, since the Antimonopoly Act applies only to behavior of businesses, measures cannot be taken under the law against governmental organizations. If the FTC finds in the process of investigation that the way of placing orders by governmental organizations make it easy for bidders to commit illegal conduct, it strongly urges the organizations concerned to rectify the problems and prevent such conduct. In response, the governmental organizations rectify the problems and report to the FTC.

49.However, these acts by officials of the governmental organizations that place orders is called "*kansei dango*" or "bureaucrat-organized bid-rigging". There are mounting calls for legislation that provides for measures against governmental officials who organize bid-rigging. The ruling party is poised to consider such legislation because it does not only involve the Antimonopoly Act.

International cooperation and advocacy of the Antimonopoly Act

50.As a result of the globalization of business activities, there have been cases that violate competition laws of multiple jurisdictions, such as international cartels and mergers across national borders. So it is important to cooperate among competition authorities. In addition to multilateral consultations at the OECD and other frameworks, the Government of Japan entered into a bilateral antimonopoly cooperation agreement with the Government of the United States in October 1999. The Government of Japan is also negotiating a similar

agreement with the European Communities.

51.Fifty years have passed since the Antimonopoly Act was enacted in 1947. Competition policy has gradually come to be recognized as a pillar of Japan's basic economic policy. Unfortunately, however, I can't say that the Antimonopoly Act has taken root throughout Japan.

52.We would like to make further efforts so that people feel their life has become richer and more convenient through specific cases of competition and that competition policy and laws take firm root in Japan.