

## JFTC's Grand Design for Competition Policy in the 21st Century (Speech Draft)

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\* The opinions, policies and characterizations expressed or implied herein are those of my own, and in no case those of any organization or group to which I belong currently or belonged in the past.

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### SUMMARY

Fully backed up by Prime Minister Koizumi and his Cabinet, the JFTC formulated its Grand Design for the 21st Century.

The Grand Design consists of three parts out of which first two are reported herein.

Part 1, "Stronger Enforcement of Antimonopoly Act," expresses the JFTC's firm resolution to more strenuously fight cartel and monopolization schemes.

For the purpose, the Grand Design proposes a series of substantive/procedural amendments in the Antimonopoly Act. The Grand Design also emphasizes new competitive challenges: speed of changes, information technology and globalization.

Part 2, "Affirmative Actions for the Creation of Competitive Environments," expresses the JFTC's resolution to affirmatively create competitive market, particularly in

recently deregulated industries such as telecommunications and electricity.

During the first year of the Grand Design, the JFTC have achieved some of its goals: For example, the JFTC took legal measures against law violators in the second largest number in history, and established an IT & Public Sector Task Force, which triggered a broadband revolution in Japan.

For the years to come, the JFTC has started its attempt to change its administrative surcharge system, from the current rigid type with no administrative discretion into a more discretionary type, that may hopefully lead to an effective leniency system.

## SPEECH DRAFT

### 1. Overview

Thank you, Chairman, ladies and gentlemen, for giving me an opportunity to speak, before such a celebrated audience, about what we are doing for the promotion of competition in Japan.

The year 2001 was one of the most memorable years in our history of more than half a century.

In May 2001, Prime Minister Koizumi stated, in his policy speech at the Diet, that his Cabinet would strengthen the structure of the JFTC, the guardian of the market, and thereby would establish a competition policy appropriate for the 21st Century.

In his fight for Japan's structural reforms for a more vigorous economy, Mr. Koizumi saw his enemy in the anticompetitive practices still existing among Japanese businesses.

In June 2001, the Cabinet adopted a decision fully implementing Mr. Koizumi's policy.

In a quick response, we published in June 2001 our basic policy statement in a single-page chart entitled "Grand Design for Competition Policy in the 21st Century".

At the same time, we summoned, as customary in our law-drafting process, a committee consisting of university professors, consumer- and business-leaders, and asked the committee what to do for the realization of our Grand Design.

In November 2001, the committee returned a 24-page recommendation report entitled "The Competition Policy for the 21st Century and the JFTC's Role for its Realization."

Because we have decided to fully implement the committee recommendation in pursuit of our policy goals, these two documents can be regarded as one single policy statement. I will therefore refer to the latter mainly as the JFTC's Grand Design in my speech. If you are interested in further detail, JFTC's website may be of some help.

## 2. Grand Design

The Grand Design consists of three parts in the order of priority:

Part 1, "Stronger Enforcement of Antimonopoly Act," urges us to more strenuously fight cartel and monopolization schemes.

In particular, the Grand Design emphasizes the need for our stronger actions against bid-rigging practices still prevalent in the public construction sector (1).

For the purpose of strengthening our law-enforcement capability, the Grand Design proposes a series of substantive, as well as procedural, amendments in the Antimonopoly Act as more fully discussed later.

As the basis of its recommendation, the Grand Design is fully aware of new competitive challenges, namely, speed of changes, information technology and globalization.

Due to the speed of changes in Japan's industry structure, the Grand Design requests us to make decisions in our merger review much more quickly than before.

In view of the progress of the so-called IT revolution going on in Japan, the Grand Design urges us to improve our capability to identify and fight enemies of the revolution.

Lastly, in order to fight international cartels, the Grand Design requests us to vigorously pursue international arrangements with foreign countries, either through bilateral or multilateral means.

Part 2, “Affirmative Actions for the Creation of Competitive Environments,” emphasizes the need for our affirmative actions to create competition in industries formerly heavily regulated, such as telecommunications and electricity.

This portion of the Grand Design may have looked aggressive to the eyes of other government agencies, because, for example, telecommunications is historically within the jurisdiction of Ministry of General Affairs (2) and electricity Ministry of Economy, Trade and Industry.

Part 3, “Promotion of a Rule-Oriented Competitive Society,” mostly deals with the consumer and small business protections, and I will skip it due to the press of time.

For the purpose of achieving these three goals, the Grand Design requests the Cabinet to increase our workforce from current 570 to, say, 1,000 in due course, and to reconsider our current position subject to an administrative control of the Ministry of General Affairs.

### 3. Looking Back at the First Year

A year has passed since the formulation of the Grand Design, and I can say that we have already achieved some of our goals.

In 2002, we were granted an increase in our workforce by 36 and are expecting a similar or more increase in 2003. This is very unusual in Japan in the midst of the administrative reforms towards smaller government.

In 2002, an amendment of the Antimonopoly Act passed the Diet to increase the corporate criminal fines for antimonopoly violation from 100 million to 500 million yen.

In 2002, a Congressman-sponsored bill passed the Diet to discourage illegal participation by national or local government employees in the bid-rigging schemes in

the public procurement sector more effectively than by conventional regulations.

During the fiscal 2001, we took legal measures against 928 law-violators mostly in bid-rigging cases, a number second largest in history (3).

In 2001, we established an IT & Public Sector Task Force within our Investigation Bureau, consisting of investigators with deep insight into such industrial sectors as computer, telecommunications and electricity.

For example, the Task Force made a formal warning against NTT, a telecommunications giant in Japan, for its exclusionary practices towards its competitors trying to enter the ADSL market.

This action triggered an explosion of the number of ADSL subscribers in Japan more than two hundred times in a year and a half (4).

In 2002, we reached a cooperation agreement on competition with the European Commission and have started a negotiation with the government of Canada. We already have one with the United States since 1999.

#### 4. Prospects for Years To Come

Now let me talk about our near future.

We are currently coordinating a bill to move the JFTC up into an administrative control of the Cabinet, still keeping independence in substantive decisions. I am expecting it would pass the Diet in early 2003.

Next, quite recently, we summoned a committee consisting of university professors to discuss how to strengthen our law-enforcement power especially against cartels.

The committee agenda includes possible change of our administrative surcharge system (5) from the current rigid fixed-rate type with no administrative discretion into a more discretionary type.

If this change proves successful, we will be able to make use of this discretion to adopt

an effective leniency system.

The committee may face a difficult question of whether or not our current corporate fines and the possible discretionary sanction can coexist, under our Constitution prohibiting double jeopardy.

As an ex-law-professor, I am expecting that the committee can solve this question, too, and that we will have a leniency system within half a decade.

In my speech, I have only emphasized the sunny side of the JFTC street. However, there are of course certain problems and challenges that we will have to overcome in coming years.

For example, the ratio of the number of concluded cases against the number of notifications submitted, namely our case-handling efficiency, has been gradually decreasing for the past five years (6).

For another example, the number of cases in which our formal cease-and-desist recommendation is challenged by the respondents, namely our backlog, is constantly growing (7).

These two trends may reflect a change in peoples' image of the JFTC, from an authoritative government agency to a law-enforcer subject to due process of law. Increasing number and accessibility of Japanese practicing lawyers is pushing these trends forward.

We therefore need, not only more investigators, but also better investigators.

Thank you.

Notes:

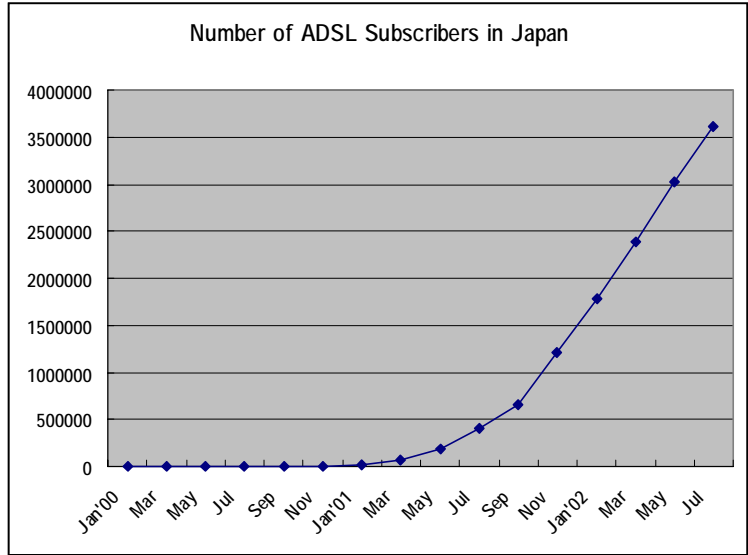
(1) National and local government spending in civil construction amounts to more than 100 billion dollars a year, representing 6.2% of Japan's GDP in 2001. This rate is two to three times as large as other industrialized countries. Japan is still a Keynesian state.

(2) "Ministry of General Affairs" is a direct translation from Japanese "Somusho".

Formal translation is rather messy “Ministry of Public Management, Home Affairs, Posts and Telecommunications.”

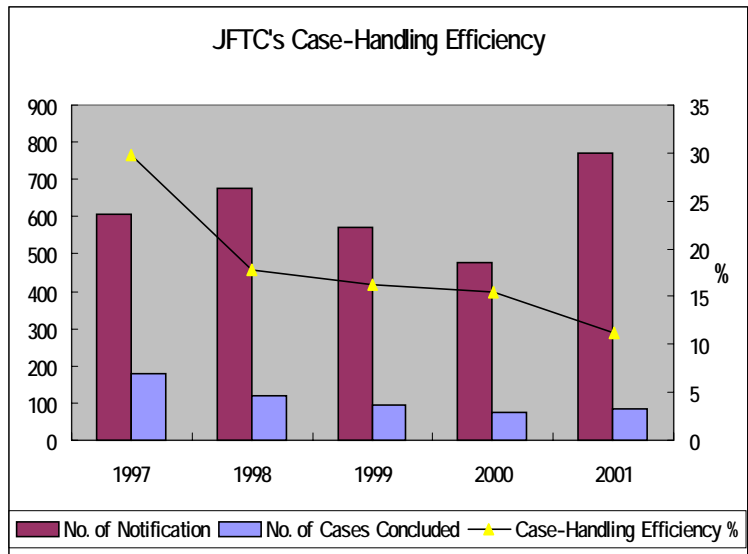
(3) During the fiscal 2001, the JFTC took legal measures in 38 cases, a number largest for the past 20 years, out of which 33 were bid-rigging schemes.

(4) From 16,000 in January 2001 to 3,600,000 in July 2002.

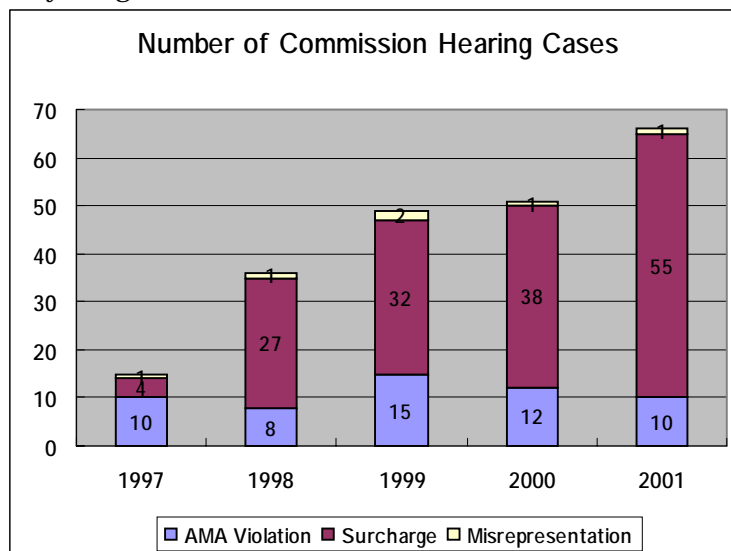


(5) The administrative surcharge to be levied by the JFTC is different from criminal fines. In principle, a 6% surcharge is levied upon the turnover of the violating goods or services. This procedure is automatic and there is no discretion on the part of the JFTC as to whether or in what amount surcharge is to be levied.

(6) Unlike a complaint filed before the court, a notification from a complaining party is taken up by the JFTC at its discretion. The JFTC receives thousands of such notifications each year, out of which most are for alleged unfair pricing by retail competitors. The following graph disregards such unfair pricing notifications.



(7) Usually, a cease-and-desist recommendation is served with the respondent as the result of an investigation. If the respondent accepts the recommendation, it becomes a decision and a surcharge order is issued if appropriate. If the respondent denies either, the case will go to the commission hearing. If the respondent is unsatisfied with the commission determination, he/she has the right to a judicial review at the Tokyo High Court.



#### POSSIBLE Q & A:

Q1. How are your competition-law violators punished?

A1. Depending upon the substance and the mode of law violations, violators are subjected to criminal fines, administrative cease-and-desist order, administrative surcharge, civil damages and civil injunction. However, most of the JFTC's activities consists of administrative warnings and cautions short of legal measures.

Q2. Was the government employee participation to bid-rigging not illegal before the Congressman-sponsored bill?

A2. It was and is illegal under conventional Government Employees Act, but the new Act gives the JFTC an administrative initiative to request the government agencies to take appropriate action against such illegal participation by their employees.

Q3. What are the arguments in Japan against the adoption of a leniency system?

A3. There is a general feeling especially among local people that double-cross is ethically worse than law-violation. Also, there is a very rigorous belief among old-fashioned lawyers that a criminal should be punished without discrimination, no matter how cooperative he has become after he had committed a crime. I don't have much concern about these elementary arguments. The strongest argument I have to overcome is based upon our Constitution prohibiting double jeopardy—double punishment. We currently have both criminal fines and administrative surcharges. The rigid, automatic nature of our surcharge system barely avoids double-jeopardy criticism. If we convert the surcharge system to more discretionary system, we may face a constitutional problem.

Q4. What is your theory?



A4. If you kill a person in a traffic accident, you may be liable both for criminal term, administrative fines and civil damages. If you violate Antimonopoly Act, you may be subjected to both criminal fines, administrative cease-and-desist order, administrative surcharge, civil damages, civil injunction and possibly disqualification of public vendorship. The double jeopardy prohibition only refers to double punishment in the same legal context. The JFTC's administrative surcharge is interpreted as the recovery of the 'deadweight losses' incurred by the society in general as the result of a cartel (or monopolization) scheme. It is entirely different from criminal fines imposed upon a specific conduct a punishment, or from civil damages to compensate for the personal losses from a tort or contract-violation. Because the JFTC's administrative surcharge represents the recovery of such social losses, it can be returned by some of the conspirators in the form of social services including cooperation to the investigation.

