

**Enforcement Activities against Cartels**

**- What is going on in Japan -**

**AKINORI UESUGI**

**Secretary-General**

**Fair Trade Commission of Japan**

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I am happy to have an opportunity to explain to the American audiences about some of the features on our enforcement activities against cartels.

I am not going to tell you about the figures explaining our enforcement activities against cartels, although I sincerely hope that more facts should be known by audiences on our enforcement activities against cartels. I prepared rather extensive facts sheets on our cartel enforcement activities, therefore, those who are interested in details please refer to the data contained in the course materials.

Rather, I want to use this precious time to tell you about the real situations in Japan, in other word, what kind of difficulties we face in our cartel enforcement activities, what is happening in Japan under so-called Koizumi structural reform, and what could be expected from this reform efforts, then, what kind of things the JFTC is doing with what purpose in mind.

(What needs to be changed in Japan)

First, I must start by mentioning traditional business attitudes towards cartels in Japan. There is no secret that the Japanese government has been adopting the view that cartels can sometimes be useful tools of industrial policy. In 1986, I wrote an article titled “Japan’s Cartel System and its Impact on International Trade” (27 Harv. Int’l L.R.389) and described one of the most extensive system of cartel exemptions existed at that time (We could eliminate most of them in the late 1990’s.).

Today, I want to mention a few things in this connection. In 1989 when Japan first introduced consumption tax, cartels are legalized for the small and medium sized businesses in order to allow them to shift the cost-up caused by the introduction of consumption tax to downstream purchasers. Very few people seemed to believe at that time simple facts of business life that a market can take care of those problems properly depending on the elasticity of demand on each products or services.

In 1999, we could eliminate depression cartel exemption provisions from the Antimonopoly Act, namely it was only four years ago (The last depression cartels authorized under the Antimonopoly Act was terminated by the end of year 1983.).

The bottom line of this fact is that we had a history where cartels were looked favorably, and although the illegality of cartel activities was firmly established by the Supreme Court of Japan in 1984, many people still feel that not all cartels are bad. Even now, few people regard cartels as serious things in Japan. Therefore, it is true that the enforcement systems against cartel activities we have at present, namely cease and desist order as well as surcharge order depriving gains of cartel activities from their participants, are more or less the reflection of these thinking prevailing in our economic society. And, this is what we want to change by our utmost efforts.

I don’t want to give you an impression that this is a unique problem found only in Japan. Last year, the former president of the Netherlands competition authority told us that when he was nominated to that position, bid riggings were prevailing in many sectors of her economy. He then explained to us that Dutch economy can get out of this situation under his leadership. If

Dutch can do it, I wonder why not we.

In this connection, I would like to explain to you one of the fundamental characteristics of our economy, namely we have a dual economy consisted by export oriented highly productive industries such as automobiles and electronics occupying 10 percent of working forces, and more or less inefficient domestic oriented industries and public sectors consisting the rest of our economy. The latter industries are far behind in productivities, and naturally, could be responsible for high cost structure of our economy. It is now very clear that we got to do something on those domestic sectors and public sectors to improve their productivities, otherwise, sustainable economic recovery could not be expected. This is the fundamental thinking behind the Koizumi structural reform.

(Competition policy is a vital part of structural reform)

The Japanese government has explicitly abandoned so-called “Convoy System”, or *Goso Sendan Hoshiki* in mid-1990’s, and drastic regulatory reform measures have been adopted in many sectors of those domestic industries since mid-1990’s. Frankly speaking, these deregulation measures were far more extensive than I thought Japan could adopt in view of my experiences at the JFTC.

As I told you already, economic difficulties we are suffering have been caused, not merely by cyclical elements in our economy, but rather structural ones deeply rooted in our economy. Put more accurately, the problems lie in the business behaviors themselves prevailing in Japan. This is why mere introduction of deregulation measures in 1990’s did not result in increased competition in the relevant market in many sectors.

Because this reform requires fundamental changes in the traditional business attitudes in Japan, audiences could easily understand the importance as well as difficulties of our task. But also, this fact would tell you that if we could succeed in this task, it could result in huge gains in efficiencies of our economy.

The Japanese market is a big one, and naturally, it might take more time to re-orient such a big economy. However, there are other factors to prevent the implementation of necessary changes. I do not deny that Japan, in comparison with other countries, generally requires more time to change and re-orient itself. One of the obstacles to rapid change in Japan is the social and cultural preference for acting through consensus. This exercises a strong influence on all our affairs. Another obstacle is our past memory of success. After all, the business methods and government policies that we are now trying to change are the very same ones that supported Japan through its period of accelerated economic growth and delivered us to the rank of the world’s second largest economy. This belief and confidence in past formulas makes it difficult to opt for new policies and perspectives. There is no doubt that past experiences continue to exert a strong influence on the thinking of Japanese corporate executives today. The phenomenon of reform being obstructed by past success is a common phenomenon that can be seen anywhere. But in the case of Japan, the memory of success is so vivid and strong that it

makes it much more difficult to surmount the obstacles to change.

But I also would like to add the fact that when it changes, it really changes.

I think it is now very clear in the minds of intellectual people in Japan that the major reasons of long lasting economic difficulties of the Japanese economy lie in lack of competition due to traditional business thinking or behaviors. Without increasing productivities in those unproductive sectors, we can not expect full economic recovery. Therefore, the JFTC's mission is very clear now: that is, we should try to promote more competitive activities among as many sectors as possible in Japan through the rigorous enforcement of the Antimonopoly Act.

Enhancement of competition policy is the core of Koizumi structural reform. Prime Minister Koizumi says no growth without structural reform, and we are saying no growth without competition. Competition is the vital part of economic strategy aiming at the sustainable recovery of our economy through structural reforms.

Many people in Japan still believe that competition is something to be tolerated, but not something to be encouraged or promoted. And, it is this thinking that is in question nowadays.

(The JFTC enforcement activities in nutshell)

As you can see in the course materials, we have been rendering so many decisions against cartels recently. We have been continuing to do so in the past ten years. Between fiscal year 1991 and 2002, we took formal actions with a total of 350 cases, averaging 29 cases per year, showing a steady progress in enforcement. This figure pertains to the number of cases handled. In terms of the number of firms, we took formal actions against roughly 800 businesses during fiscal 2002 alone. In fiscal 2003, the JFTC issued decisions against 388 businesses by the end of Dec. Not only do we handle a large number of cases, but also we have frequently taken actions against major corporations that are well-known and active throughout the world.

Our activities are frequently and extensively reported by the media, and the business community has significantly bolstered its compliance efforts. In addition to the enforcement activities I just mentioned, we also emphasize the importance of the program to increase understanding on competition policy among as many businessmen as possible. Frankly speaking, understanding on competition policy by businessmen varies according to in what markets they compete. Outside of the big cities, more traditional business thinking seems to prevail. This is why we are organizing conferences in local cities and give speeches on why competition policy needs to be enhanced in order to get back once again to the growing course for our economy.

In the past, we didn't emphasize the importance of such program, because it did not look possible for local business community to change their traditional thinking and behaviors easily. However, the more we understand the seriousness of the Japanese problems, the more it becomes clear that increased productivities in those sectors would be a key in improving competitiveness of our economy.

(Are there signs to change?)

Looking from the outside world, Japan seems to change very slowly, so slow that may give outside world an impression that we are not understanding the seriousness of the problem we face. I believe many people in Japan understand where the problem is and what to do in order to re-orient our economy.

Let me indicate several signs towards real changes I could observe in our society. One is a move towards juridical solution of disputes among Japanese businesses. A suit is becoming an ordinary option for businesses, not exceptional solution for them. Sudden jump of cases that go to hearing stages in our legal proceeding is a clear sign for this. Nearly 150 cases are pending at the hearing stages now, and this is 5 times increase within 5 years. This itself is an indication that Japan is beginning to move in the direction of seeking judicial solutions to business disputes and could be symbolic of drastic changes in our society that have occurred in Japan.

These developments have forced the JFTC to assign a large number of staff members to these matters. In this sense, the growth of litigation may put huge burdens on our ability to enforce the Act. However, it is my belief that this development should be interpreted positively. That is, judicial procedures have a series of significant advantages. For instance, the review of evidence in a hearing procedure followed by a ruling provides for greater transparency and fairness than the recommendation decisions.

Furthermore, such rulings carry far greater weight in terms of the determination of the facts of the case. There are other important advantages as well. A growing number of suits are being filed with the Tokyo High Court for the annulment of the JFTC decisions, and cases that are referred to the courts as criminal cases are certain to be ruled on by the courts. The accumulation of legal precedence in these manners will lend greater clarity to the interpretations of the Antimonopoly Act and will in the long run have a positive impact on the firm establishment of the Antimonopoly Act.

Today in Japan, we are seeing a rapid increase in the number of Antimonopoly Act related suits. This inevitably has contributed to the growth in the number of private practitioners involved with the antimonopoly matters. In April 2004, a number of law schools, patterned after the American model, will be accepting students for the first time in Japan. Thus legal market for antitrust matters are expanding very rapidly, so rapid that it is becoming one of the promising market for lawyers in Japan.

Also noteworthy thing in Japan is a move towards antitrust compliance. Top management of big corporations became very serious to antitrust compliance and the legal divisions of big corporations are tackling with this new but important task for their corporate governance.

In the past, we could only observe a few taxpayers suits filed for redress of losses suffered by local government bodies from bid-riggings. However recently, in an increasing number of cases, local government bodies themselves, which were reluctant in the past, are now filing suits for compensation of damages against collusive participants under Section 25 of the

Antimonopoly Act. Many local government bodies now incorporate compensation clauses in their contracts in case bid rigging operations were revealed later-on.

(JFTC proposal to amend the Antimonopoly Act)

In order to tackle with the mission I just described, it is clear now that enforcement system of the Antimonopoly Act itself needs to be changed. However, what the JFTC is proposing now (see the course materials for the proposal) contains several issues that force very drastic changes in our legal thinking as well as business behaviors. The ongoing review of our enforcement systems would lead to the largest revision of the Antimonopoly Act since 1977. The contents of the proposal would have an important impact on the Japanese economy and society. As I mentioned at the outset, Japanese society attaches great importance to harmonious cooperation. In such an environment, considerable time will no doubt be needed to win the people over to a program which promises leniency to a corporation which delivers incriminating evidence to the authorities. Even in the United States, I have heard that because of the novelty and uniqueness of the leniency program, it took some time before the private bar and business community gained confidence in the program.

In order to increase the rate of surcharge against cartels, we must solve the difficult issues such as how much power can the administrative agency have for the purpose of deterring illegal conducts in the Japanese legal system? Isn't it a basic function for criminal enforcement? Can the administrative agency charge wrongdoers the amount exceeding gains by illegal activities? Is the concept of leniency acceptable for a Japanese business mind? Isn't it against business ethics firmly established in Japan? Which is more important, a harmony in business community or elimination of cartel activities?

Therefore, it is not a surprise for us at all that the initial response by many business organizations to the study group report published on 28 October of last year was mostly negative. Nevertheless, we can observe broad support and awareness of the need to implement structural changes and to reinforce competition policy as a key component in the overall program for structural change. As such, I can say that we are steadily moving in the right direction.

At this moment, I can not tell you whether we can manage to submit a bill to amend the Antimonopoly Act to the current session of the Diet. What I can tell you for sure is that the JFTC is trying hard to broaden understanding on our proposal and make it as a bill. The current session of the Diet will be over by June 16<sup>th</sup>, and I sincerely hope that I can report to you in the future about significant development of Japanese competition policy.

## Japan Fair Trade Commission: Enforcement of the Antimonopoly Act against anti-competitive conduct e.g. cartels

### 1. Investigation into the cases violating the Antimonopoly Act

#### 1) Investigation techniques

The Japan Fair Trade Commission (hereinafter JFTC) has eight local offices throughout Japan in addition to the head office located in Tokyo. The number of the staff of the JFTC is approx. 600, half of which belong to investigation department.

The JFTC has an Information Analysis Office in the Investigation Bureau which has approx. 20 staff and is specialized in conducting a preliminary investigation on suspected violations against the Antimonopoly Act (hereinafter AMA). The JFTC, based on the information collected, initiates formal investigations with powers authorized by the AMA. Usually the JFTC undertakes on-the-spot inspections by entering premises of businesses in order to collect necessary information. In 2002 FY (April 2002 through March 2003), about twenty on-the-spot inspections were undertaken and approx. 80 staff per case (maximum approx. 200 staff) were mobilized. With regard to the cases concerning cartels other than bid riggings, the JFTC has undertaken on-the-spot inspections with approx. 170 staff.

The number of staff of investigation department has been increasing and amounted to 318 in 2003 FY (more than twice of that in 1990 FY (154)). This made it possible for the JFTC to have larger-scale inspections than before. In recent years, entrepreneurs tend to be skillfully engaged in cartels without leaving evidence. However, the JFTC can frequently get important information by employing large-scale on-the-spot inspections and the JFTC believes that on-the-spot inspections are one of the most effective ways for the JFTC to collect necessary information on cartel conduct.

#### 2) Measures for eliminating violations of the Antimonopoly Act

The Japan Fair Trade Commission (JFTC), when it finds that there exists any conduct in violation of the AMA, shall render a recommendation to the entrepreneurs who have committed such violation to take appropriate remedial measures.

In case such conduct falls within a cartel which (i) pertains to the price of goods or services, or (ii) results in affecting the price of such goods or services by restricting the volume of supply, the JFTC shall issue a surcharge payment order to the entrepreneur concerned. The amount of surcharge is equivalent to an amount calculated by multiplying the sales amount of such goods or services during the period of the cartel by six percent in principle.

In case the entrepreneur will not accept recommendations or surcharge payment orders, the JFTC initiates hearing procedures. After the completion of hearing procedures, the JFTC shall render a formal decision. But if dissatisfied with the decision, the entrepreneur can appeal

to the Tokyo High Court.

In addition to the procedures above, the JFTC shall file a criminal accusation with the Public Prosecutor General when it considers that there exists a crime violating the AMA. The JFTC, from the standpoint of strengthening deterrence against AMA violations, made public its policy of active criminal accusation on serious or repeated violation cases in 1990.

### 3) Characteristics of cartel regulations in Japan

Under the AMA, bid riggings are regulated as a series of collusive bids based on some arrangement or agreement, rather than as each collusive bid. The JFTC is obliged to prove continuous collusive bids conducted by many entrepreneurs and therefore has a lot of difficulties in proving such conduct. For the past five years (1998 FY through 2002 FY), the JFTC has taken formal actions against more than 100 entrepreneurs in 11 cases concerning bid riggings. In one of those cases, the JFTC took formal actions against nearly 300 entrepreneurs.

On-the-spot inspections by the JFTC, which are not published by the JFTC, are frequently reported by the media and the JFTC are expected to complete investigations within one year after such inspections. With such time constraints, cartel investigations in Japan may be characterized by the fact that the JFTC has been concluding cases in relatively a short period of time after the initiation of investigations.

The fact that the depression cartel provision existed until it was abolished in 1999 is one of the examples that show the weakness of Japanese businesses in perception of cartels as an evil. A significant number of businesses are repeating violations of the AMA. With regard to cartel regulations (other than bid riggings), the JFTC has also taken formal actions against major corporations that are well-known and active throughout the world such as electric appliances manufacturers and steel manufacturers. For the past five years (1998 FY through 2002 FY), the JFTC has taken formal actions against 15 listed companies and 10 companies whose capitals are more than 10 billion yen (approx. 100 million US dollars). Therefore, time has come to consider raising the rate of surcharge payment in order to improve the deterrence of the AMA.



## 2. Statistics

(Note: Fiscal year (FY) shall be from April 1 to March 31 of next year. All data cover the period up to 31. December 2003)

### (1) Surcharges

#### a. Data on surcharges

FY	Total amount of surcharges (million yen)	Total number of recipients
1993	3,553	406
1994	5,668	512
1995	6,446	741
1996	7,486	368
1997	2,833	369
1998	3,149	576
1999	5,459	335
2000	8,517	719
2001	2,199	248
2002	4,334	561
2003	1,966	233

the average amount of surcharges 4,801 million yen/FY

the average number of recipients 471/FY

#### b. Ranking of cases with the largest amount of surcharges

	FY	Name of cases	Total amount of surcharges (million yen)
1	1991	12 cement manufacturers	11,231
2	1998	28 insurance companies (machinery insurance)	5,451
3	1997	6 manufacturers of guardrails and guardcables	4,843
4	1999	102 construction companies in Nagoya-city etc.	3,094
5	1981	20 manufacturers of linerboard (K liner, J liner)	2,118

c. Data on the number of cartels other than bid riggings and proportion of large-sized entrepreneurs concerned

FY	Total amount of surcharges (million yen)	Total number of recipients	Number (proportion) of large-sized entrepreneurs
1993	2,005	48	17(35.4%)
1994	3,195	48	31(64.6%)
1995	196	38	1(2.6%)
1996	5,759	71	18(25.4%)
1997	287	53	21(39.6%)
1998	54	6	5(83.3%)
1999	1,440	27	7(25.9%)
2000	5,486	31	22(71.0%)
2001	480	8	8(100.0%)
2002	1,112	15	7(46.7%)
2003	0	0	-

the average rate of large-sized entrepreneurs to total recipients 40%

(2) Formal actions

(Note: Formal action refers to recommendations and surcharge payment orders issued without cease-and-desist orders.)

a. Data on formal actions

FY	Total number of formal actions	Total number of recipients
1993	29	664
1994	24	298
1995	31	749
1996	21	115
1997	31	405
1998	27	585
1999	27	938
2000	18	608
2001	37	894
2002	37	805
2003	21	391

the average number of formal actions 28.2/FY

the average number of recipients 600/FY

b. Data on formal actions concerning cartels other than bid riggings and proportion of large-sized entrepreneurs concerned

FY	Total number of formal actions	Total number of recipients	Number (rate) of large-sized entrepreneurs
1993	9	49	32(65.3%)
1994	2	2	0(-)
1995	4	17	9(52.9%)
1996	10	39	19(48.7%)
1997	3	47	18(38.3%)
1998	2	18	4(22.2%)
1999	2	12	12(100.0%)
2000	2	8	8(100.0%)
2001	3	18	16(88.9%)
2002	3	39	9(23.1%)
2003	3	21	16(76.2%)

the average rate of large-sized entrepreneurs to total recipients 53%

### 3) Hearing procedures and lawsuits

a. Data on hearing procedures and lawsuits

FY	Cases of hearing procedures in effect at the end of each FY	Cases of lawsuits in effect at the end of each FY
1998	35	2
1999	47	1
2000	50	4
2001	65	4
2002	91	4
2003	158	3

b. Results of lawsuit to annul the decision by the JFTC (past five FYs)

Number of lawsuits completed for the past five years: 15

(sum of the decisions and withdrawals at the Supreme Court and the Tokyo High Court)

FY	Court	Name of entrepreneurs concerned	Court decisions
1998	Supreme Court	Dai Nippon Printing	Dismissed
		TOPPAN FORMS	Dismissed
		Kobayashi Kirokushi	Dismissed
	Tokyo High Court	Kansei Cooperative Association	Dismissed
1999	Tokyo High Court	Hiroshima City Federation of Hiroshima Prefectural Association of Oil Dealers	Withdrawal
2000	Tokyo High Court	Kanonji City & Mitoyogun Medical Association	Dismissed
2001	Supreme Court	As above	Withdrawal
	Tokyo High Court	18 insurance companies (Machinery Insurance)	Granted in part
2002	Supreme Court	Kansei Cooperative Association	Referred back to the Tokyo High Court
	Tokyo High Court	12 Landscape Contractors in Fukuoka City	Withdrawal
		International Geology	Dismissed
		Okazaki Kanko	Dismissed
2003	Supreme Court	As above	Dismissed
	Tokyo High Court	<i>O-Enu-Potori</i> (a baby chicks producer)	Dismissed
		Kansei Cooperative Association	Granted

c. Rate of winning the lawsuit (past five FYs)

The rate of winning the lawsuits by the JFTC: 80.0% (12 cases out of 15)

(Note: The issues in all three cases that the JFTC did not win are the calculation of the amount of surcharges.)

(4) Human resources of the JFTC

FY	The number of staff of the JFTC (the number of staff engaged in investigations)
1990	474 (154)
1995	520 (220)
2000	564 (263)
2001	571 (269)
2002	607 (294)
2003	643 (318)