

Where Japanese Competition Policy is going  
- Prospect and Reality of Japan-

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Note: The views expressed in this paper is strictly my own, and not those of the Fair Trade Commission of Japan.

## **1. Introduction**

I am very happy to come back to the Fordham Conference after just ten-year interval and talk about significant antitrust developments the Japanese economy is experiencing.

I think you have learned recently that the Japanese economy is showing clear signs for recovery from long-lasting deflation or stagnation. How much should be credited for the so-called structural reform program that the Koizumi Cabinet has been pursuing in the past 3 years or so is debated among Japanese economists. I am not an economist and I cannot give you the answer to such question today.

What I am going to tell you today is my thoughts on the necessity of structural reform of our economy and the facts that the necessity of structural reform is far from over, without regards to whether current economic recovery is real one or not.

In the midst of the socio-economic transformation in a global scale, the Japanese economy faced huge problems due to complex structural elements, not merely from cyclical changes of the economy. In order to overcome such huge economic problems and to make it possible to re-establish our economy ready for steady development by creating an appropriate economic structure for the 21st century, Prime Minister Koizumi has been struggling with bold structural reform program under the slogan of “No growth without structural reform.”

Enhancement of competition policy is the core of Koizumi structural reform. Competition is the vital part of economic strategy aiming at the sustainable recovery of our economy through structural reforms. A program integrating competition policy and regulatory reform constitutes an essential and indispensable component of structural reform. We use such slogans at the JFTC as “No growth without competition,” or “No innovation without competition” in order to convince our business community the importance of competition policy initiatives in Japan.

Needless to say, it is the JFTC that is responsible for promoting competition policy. As you may know, in April 2003, the JFTC changed its status into an agency under the Cabinet Office from that under the Ministry of General Affairs.<sup>1</sup> As the agency with principal responsibility in the area of competition policy, the more appropriate position of the JFTC within the government was that under the Cabinet Office which is headed by the Prime Minister and is in charge of planning and drafting proposals pertaining to key policies at Cabinet level. This change in itself symbolizes the firm establishment of competition policy as an important component of the government’s economic policies.

Today, I would like to touch on three topics that might be of your interest and that would enhance your understanding on competition policy situation in Japan.

First, I will describe the current status of Anti-monopoly Act reform program that we

are pursuing, and why it is so important, not only from the viewpoint of Japan but also from that of international antitrust community.

Secondly, I will describe our law enforcement activities in the area of intellectual property rights (IPR). We initiated several important cases in this area recently.

Thirdly, I want to draw your attention to the facts that Japanese business community seemed to start to look at judiciary branch as one of the proper place to resolve their business disputes. Needless to say, Japanese business community did not expect much from judiciary branch until recently and only moved to use it when they are ready to risk the long term business relationships with the respondent firms. Now you can observe many incidents of law suits filed by big firms to resolve the issues that were resolved outside the court in the past. And, importantly, Anti-monopoly is not an exception to this movement any more.

In addition, I would like to provide you some data and facts in order to show our activities other than I mentioned above under the Anti-monopoly Act, namely our case handling records, development in our merger area, our international activities etc..

## **2. Necessity of Anti-monopoly Act Reform in Japan and its Significance**

### **(1) Harmonization culture v. Competition culture**

When Japan's Anti-monopoly Act was enacted in 1947, our society believed in harmonious cooperation among businesses over competition. Anti-monopoly law was one of the things that were forced to accept as an occupation policy from the viewpoint of Japanese business community.<sup>2</sup>

During high-growth period, it was natural for the industrial policy consideration to be given priority over competition policy.<sup>3</sup> So long as Japanese business community believes that the economic success of Japan was brought about by successful industrial policy by MITI or other competent ministry and by having close relationship between the government and business, there were no room in Japan for "competition culture" to grow."

"Harmonization culture" has dominated business community for many years, probably up to 1970's. The result was considerable retrogression in terms of both systems and implementation of competition policy and we call this period of the JFTC history ironically as the "Dark Ages of the Antimonopoly Act."

The Japanese government had been adopting views that cartels could sometimes be useful tools of industrial policy.<sup>4</sup> We had very extensive systems of cartel exemptions from the applications of Anti-monopoly Act. Definitely, those were the period when "Harmonization culture" had dominated Japanese business thinking.

It required, in my opinion, to experience serious economic downturn in 1990's for

Japanese business community at large to start to appreciate competition policy and regulatory reform. The Japanese government explicitly has abandoned so-called “Convoy system” in mid-1990’s, and drastic reform measures have been implemented in many sectors of our economy. Since that time, more than a decade has passed. Is “competition culture” dominating Japanese business community nowadays? I must say that it isn’t doing so yet unfortunately.

“Harmonization culture” that dominated Japanese business thinking needed to experience culture shock in order to concede to the new one, “competition culture.” Needless to say, any culture requires a long time to change, and Japanese business community is in the midst of such cultural changes. I feel safe to say that understanding of competition policy in Japan is highest ever in our history. But not yet come to the stage where competition culture prevail among business community.

During the last two to three years or so, I have been involved in the task to convince our business community about the necessity of Anti-monopoly Act reform. Many business people seemed to agree to the JFTC slogan “No growth without competition” in view of the huge economic problems. However, when I am talking to various business people, mostly ranking officials of business organizations, about importance of enhancing competition policy in Japan, I can feel that the audiences are not fully convinced to my arguments.

I can also understand why the audiences are not fully convinced to my arguments. I think most of them have a strong belief that Japanese economy could grow up to the second largest in the world because of business culture to favor harmonization among business community as a whole. During high growth period, big firms and small firms could grow equally, and local firms as well as urban firms could grow equally. Isn’t it because of the harmonization culture?

During 1990’s, the dominance of “Harmonization culture” seems to be weakened, but influence of “Harmonization culture” is not yet overcome. In some domestic sector, influence of “Harmonization culture” is still very strong. Besides, the past memory of success of Japanese economy prevents them from accepting the new culture, “competition culture.” Almost all of them understand that our economy faced huge structural problems and prescription that used to be effective in the past could not be any more. Almost all of them accept that the Japanese economy needs structural reform based on market principle. To myself, this should be the same to accept that competition policy needs to be enhanced so that the Japanese market can perform well.

But I must say, unfortunately, that there exists certain wall between appropriate understanding of structural problems of our economy and acceptance of competition culture.

This is the factor that seems to cause much difficulty for the JFTC to move forwards to strengthen the Anti-monopoly Act. Let me explain why it is.

(2) Anti-monopoly Act reform project started

I think audiences know that during the past year or so the JFTC has been struggling to reform its Anti-monopoly Act fundamentally, a huge task for a small agency such as the JFTC. More than 55 years have passed since the enactment of the Anti-monopoly Act, the conditions of the Japanese economy have undergone tremendous changes. A quarter of a century has passed since the significant strengthening of the Anti-monopoly Act was carried out in 1977. The time has come to review the enforcement system as a whole from the perspective of whether the present enforcement system is functioning properly, and whether the Japanese anti-monopoly framework stands on par with international standards.

The JFTC convened the Study Group on Reviewing the Anti-monopoly Act since October 2002 and the Study Group delivered its report in October 2003. Based on this report, the JFTC prepared a package of legislative revision proposals designed to strengthen the Anti-monopoly Act in April 2004. This is the legislative revision proposals that would lead to the largest revision of the Antimonopoly Act since 1977.

The essential features of revisions are the following four areas (see figure 1). Firstly, as for surcharge system, surcharge rate shall be doubled, namely from 6% to 12%, and as for the repeated violators, the surcharge rate shall be 50% higher. On the other hand, when the same firms are accused and convicted as criminal violators, one half equivalent of the fine imposed on the firms shall be deducted from their respective surcharges.

Secondly, introduction of a leniency program to our surcharge system. I think this proposal does not require any explanations. Thirdly, introduction of search warrant power similar to the tax authority or security exchange authority in Japan in order to facilitate criminal accusations by the JFTC. The Fourth is elimination of recommendation system, and the JFTC will issue a remedial order and a surcharge order without conducting administrative hearing proceeding. On appeal to the remedial order, the case moves to the administrative hearing stage.

(3) What we can see from public comments submitted

First public comments were invited as to the Study Group proposals on Nov. 2003. Second public comments were invited as to the JFTC legislative proposals on April 4, 2004. First public comments counted 112, and second public comments counted 74. Those numbers are very large in Japan reflecting huge interest on this issue.

Main organizations that submitted respective comments are listing their comments at their homepages. I think those comments are good examples to illustrate what I have described about, namely thinking of various business organizations.

Those organizations that submitted supporting comments to the JFTC legislative proposals are; Keizai Doyukai, Japan Bar Association, various consumer organizations, Japan Federation of Labor Organizations (Rengo).

Business organization other than Keizai Doyukai submitted, more or less, critical comments against the JFTC legislative proposals.

Let me introduce some of the interesting comments in the eyes of American audiences.

Japanese Chamber of Commerce submitted the following opinion;

“From competition point-of-view, competition policy (Anti-monopoly Act ) is called for to exert its function, when market structure is non-competitive, anti-competitive conducts are prevailing, as a result, price is arbitrarily raised compared to the competitive market ( inflation is brought about ), in other words, when market performance is bad.....

Nowadays in Japan, due to change of internal and external economic circumstances, market is unprecedentedly competitive. It is clear that our economic stagflation (low economic growth) was brought about, not because anti-competitive conducts were prevailing. In spite of the facts that the JFTC personnel were increased drastically, legal measures taken remained at about 22 cartel cases per year in the past 14 years up to FY 2002. There is no increase compared to the previous period. It means, in our opinion, that either the JFTC efforts to handle cases are insufficient or real situation has shown no change...

In order to achieve re-birth of Japanese economy, we believe, that proper management of macro-economic policy, dynamic and pro-competitive measures supported by protection of intellectual property rights, are called for. What is called for is not the strengthening of the Anti-monopoly Act such as the increase of surcharge rate proposed by the JFTC...

The role that should be played by the competition policy is the speedy and effective enforcement of the Anti-monopoly Act against unfair trade practices such as sales below cost or an abuse of a dominant bargaining position that are causing hardships to the small and medium-sized businesses, because excessive and improper competition has been prevailing that ignores profitability, and deflation and hollowing of the Japanese economy has been going on.”

I will indicate the homepage address only for the rest of opinions.<sup>5</sup>

(4) Legal issues on the surcharge system and a leniency program

Hotly debated revision proposals by the JFTC are two folds: The rate of surcharges, and introduction of a leniency program.

In order to explain the significance to increase the rate of surcharges, let me explain the unique nature of the surcharge system in Japan. In 1977 when the surcharge system was first introduced in Japan to enhance the deterrent effects of the JFTC administrative measures, there were very fundamental legal issues, namely the relationship between surcharges and criminal penalty for a corporation. The surcharge system was established as a non-discretionary nature and, the JFTC was not authorized any discretion, therefore, even as to the convicted firms, the JFTC must order to pay the same fixed percentage of surcharges, regardless of the amount of fines imposed on the firm. This system was justified because surcharges only deprive of the supposed cartel profits from the Anti-monopoly Act violators. As such, surcharges can co-exist with criminal penalty, as well as civil damages under our Constitution. This legal theory was the same even after the rate was increased from 2 % to 6% of the turnovers during cartel periods.

The essential idea of the JFTC proposal is to make the surcharge system that would deprive of the cartel participants more than supposed cartel profits. So long as surcharges continue to deprive supposed cartel profits only, it means that cartel participants need to abandon the supposed cartel profits once they were caught. Lower the risk of being caught, higher the expected profits from the cartel activities. Therefore, it is imperative for the surcharge system to recover more than cartel profits from cartel participants.

The rate of surcharges was set at 6% because long term average of operating profit rate for big firms was around 6% during the preceding period. It is clear that, theoretically speaking, long term average profit rate cannot represent cartel profits properly. It is difficult to assume that cartel participants are satisfied with obtaining just an average profit available for any firms. However, at that time, no other data was available.

The JFTC conducted study last year as to actual cases handled by itself where price data could be obtained during the cartel period and after the end of the cartel. This study showed the facts that as to more than 90 % of cases, cartel profits exceeded 8 %, on average it amounted to 16.5% (see figure 2). Based on such data, the JFTC proposed that the surcharge rate should be doubled.

The reason for the JFTC revision proposal to charge 50% higher surcharges for repeated violators is based on our concern that repeated violation cases are seen very frequently in Japan. We prepared a figure 3 in order to examine the situation in Japan to see whether repeated anti-monopoly law violation problems are serious enough. We thought that

Japan has so many repeated violation cases because of weak sanction against cartel activities as I have described above. There are views in Japan, saying that repeated violation problem may be found in Japan, not simply because of weak sanctions against cartel activities. Some says that procurement rule on public works should be blamed for or government official's involvement into bid-rigging should be blamed for. Anyway whatever the reason for large number of repeated violation cases in Japan, it should be very clear that these arguments could not offer any justification for delaying to revise the Anti-monopoly Act as is proposed by the JFTC.

There are views in Japan that 12% is not sufficient enough as a sanction against cartels in view of international standard. However, I think that 12% is almost maximum as the surcharge rate so long as surcharges must co-exist with criminal fines against a corporation. This is the reason why the JFTC proposed a scheme to deduct one –half equivalent of fines from the surcharges.

Criminal accusation of Anti-monopoly cases remains difficult job for the JFTC. Burden of proof is one thing but not everything. We have a double punishment theory for a corporation, namely only individuals' criminal conducts can be punished, and a corporation can be punished in addition because of their responsibility to hire such persons as employees.

Criminal conducts can be committed only by individuals, therefore, in order to prove a commission of criminal violation by a corporation, criminal conducts by individuals must first be proven. The difficulty of proving such individual criminal conducts increase as staffs and officials change their positions and functions within the corporate structure frequently. There are rooms to improve of course, but the situation would not change drastically even after the JFTC would be authorized to use a compulsory power of investigation as is proposed by the JFTC.

(5) Why the increase of the surcharge rate and introduction of a leniency program are important for Japan

I believe this change of surcharge system in Japan has significant importance in order to establish “competition culture” in Japan. One of the essential aspects of “competition culture” is to regard cartel activities as something of serious nature.

The JFTC reform proposal is an attempt to upgrade cartel activities from something minor where wrongdoers abandon the supposed gains from the wrongdoing to something serious so that they lose more than the supposed gains. I think that it has significance similar to upgrading the Sherman Act violation from a misdemeanor to a felony.

As to the introduction of a leniency program, we met a strong opposition to the idea



of the program itself. It is clear that a leniency program is against “Harmonization culture,” as I explained above. Also, it is objectionable because the program was regarded as a plea-bargaining that has been rejected as an evil idea in Japan. An influential economic organization insisted that a leniency program should be examined in conjunction with the introduction of plea-bargaining system that would take years to argue.

There was a legal problem also because the surcharge system did not allow any discretion on the part of the JFTC, therefore, why the JFTC should be able to treat cartel participants leniently. How you can justify that the first informer need not pay surcharges in spite of the clear fact that he obtained cartel profits.

During the last year or so, we tried to explain the nature of a leniency program and emphasized that a leniency program is completely different from a plea-bargaining. Fortunately, nowadays, most people accept that a leniency program is different from a plea-bargaining. Also, we could establish the legitimacy of a leniency program by showing that the benefits outweigh the loss, namely society as a whole can gain more than the loss of surcharges payable by the leniency applicants. It is also true that even such applicants cannot escape the damage responsibility under our single damage system.

Remaining issue is a cultural one. Because it is a matter of culture, it is a matter whether you like it or not.

#### (6) A bill to amend the Anti-monopoly Act

The amendment of the Anti-monopoly Act based on the JFTC proposals would have an important impact on the Japanese economy and society. Not only that, the JFTC proposals might have a significant weight to dictate the future course of Japanese competition policy.

It was an unfortunate incident for Japan that the Anti-monopoly Act was introduced as a part of the occupation policy. This fact had worsened unnecessarily business attitudes towards Anti-monopoly Act in Japan. I hope this has nothing to do with the current negative reaction towards Anti-monopoly Act amendment on the part of communities.

As I have emphasized, the amendment of the Anti-monopoly Act is something vital for the structural reform of the Japanese economy. The process for gaining necessary supports to the JFTC legislative proposals is very important, because it means that people must decide whether or not to support an economic reform program based on market principle. It might enhance a chance to change the business culture of Japan. This is why I believe that going through the process of gaining support to the JFTC proposals to amend the Antimonopoly Act is so important. Unless as wide business community as possible supports the JFTC

proposal, the amendment might lose its teeth, namely to change the Japanese business culture to more market-oriented one.

The JFTC experience tells that regulatory reform and enhancement of competition policy shall be implemented hand-in-hand. Structural Reform cannot be complete without competition policy enhancement. In view of these considerations, the JFTC tried to submit a bill to the ordinary session starting Jan. and ending 16<sup>th</sup> of June, 2004. However, at that time, business organizations except Keizai Doyukai strongly opposed to the JFTC amendment proposals and the Liberal Democratic Party could not reach any consensus whether or not to give go-sign to the JFTC proposals. On 15<sup>th</sup> of May, the LDP Anti-monopoly Act Research Committee concluded to continue discussions on the Anti-monopoly Act amendment issues and the JFTC abandoned to submit a bill to the ordinary session.

Since then, extensive discussions were started again among the JFTC and business organizations such as Keidanren, in particular in July and Sep. And LDP's Anti-monopoly Act Research Committee held 15 meetings as a whole to discuss on the JFTC Anti-monopoly Act amendment proposals. After these discussions, difference of opinions as I described above were narrowed down significantly and a leniency program could obtain wider supports among business organizations. A bill to mend the Anti-monopoly Act is going to be submitted to the extraordinary session of Diet starting on 12<sup>th</sup> of October.

### **3. Enforcement of the Anti-monopoly Act in the area of IPR**

Now, let me move to my second topics, namely enforcement of the Anti-monopoly Act in the area of intellectual property rights (IPR).

#### **(1) IPR Policy in general**

In Feb. 2002, the Prime Minister Koizumi spoke to the Diet in his policy statement saying that, "I will set, as a goal of nation, to strengthen international competitiveness of our industry by protecting, utilizing strategically the outcome of research and innovation activities, as intellectual property rights." Based on this policy statement, the Strategic Council on Intellectual Property was established in March 2002, and the Intellectual Property Policy Outline was adopted in July 2002. The importance of competition policy was stressed in this policy outline as follows;

“Although the strengthening of IPR is inevitable in the IT age, and as a nation, we should make efforts toward this goal, the strengthening of IPR is not free from adverse effects such as obstacles to the competition principle due to monopoly and

an abuse of dominant positions [...]. Such adverse effects resulting from strengthening of IPR shall be eliminated.

Competition laws such as the Antimonopoly Act focus on elimination of obstacles to competitive process and must be strengthened. In the United States, the Antitrust laws are also strictly applied to intellectual property monopolies. This engenders competitive process and may lead to the development of new industries. Japan too must find a balance between these two goals and take an appropriate measure.”

In consideration of this policy outline, the “Intellectual Property Basic Law” was enacted in March 2003. Section 10 (“Consideration of Promotion of Competition”) stipulates that “when adopting measures concerning the protection and use of intellectual property, it is necessary to keep in mind its fair use and interests of the public in general, and consideration shall be given to promotion of fair and free competition.”

One of the important characters of IPR policy in Japan is the emphasis of balance between protection of IPR and competition policy. An appropriate protection of IPR is expected to have positive effects on strengthening the Japanese economy. However, lack of proper balance between protection of IPR and promotion of competition may be detrimental to innovative activities.

Section 21 of the Antimonopoly Act provides that “the provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the copyright law, patent law, utility model law, design law or trademark law.” According to the interpretation expressed in the IPR Guidelines issued in 1999, abusive conducts cannot be exempted from the application of the Anti-monopoly Act even if such conducts may be looked as an exercise of IPR. Such conducts can no longer be deemed “acts recognizable as the exercise of rights,” and the Antimonopoly Act could be applied.

The JFTC will pay full regards to the exercise of IPR, and we have no concern to the situation where someone was excluded from entering a market because he was refused to get a license of a vital IPR. Nor we have concern to a situation where someone monopolizes a certain market because of a vital IPR. This kind of monopoly is necessary to give a full reward to IPR. However, we have a concern to a situation where monopoly position based on IPR is used in other market such as upstream market or downstream market.

The JFTC issued a “Grand Design for Competition Policy - Ensuring Effectiveness as Guardians of Market” in April 2003, and listed, as one of its priority areas, effective actions against anti-competitive and abusive exercise of IPR

In light of increasing speed at which the Japanese economy is facing, we are aware of the need to take prompt and effective enforcement actions. The time required to investigate a

case is certainly affected by the number of investigators allocated for the case, as well as the complexity of the case. We believe the key to the JFTC success lies in case handling by efficiently allocating our limited staffs to cases which correspond directly to the needs of the public and which may have the greatest economic impacts. In particular, speedy disposition is required to eliminate actions which stand as barriers to market entry.

For this purpose, we established a task-force to ensure prompt responses in those priority areas. Currently, we set up a task force in the area of IT and public utilities, and that of IPR.

## (2) JFTC cases in the area of IPR

In July 2004, the JFTC issued a recommendation against Microsoft Corporation (“Microsoft”) alleging that “Non-Assertion Provision (NAP)” in its OS licensing agreement fell under one of the unfair trade practice prohibition. Microsoft, when licensing Windows OS to personal computer (PC) manufacturers, has concluded a standardized agreement with PC manufacturers containing provisions that restrict a licensee covenant to sue, bring, prosecute, assist or participate in any judicial, administrative or other proceedings of any kind against Microsoft, its subsidiaries, or other licensees for infringement of the licensee’s patents. This provision is called NAP.

Microsoft licenses its OS to PC manufacturers through two different channels: one by directly negotiating licensing terms and conditions with Microsoft (Direct Channel) or by purchasing the compact discs, from the distributors of Microsoft (Distributor Channel). Many PC manufacturers in Japan preferred Direct Channel to Distributor Channel because of costs and end-users’ inconvenience (OEMs” refers to PC manufacturers who are granted license of Windows OS through Direct Channel.).

The OEMs have manufactured almost all of PCs installing Windows OS in Japan. The licensing agreement through Distributor Channel did not contain NAP.

Since Microsoft started to license Windows 95 in 1995, its market share has dramatically increased. In 2003, its market share reached around 95 percent. Microsoft, since around 1993, has licensed Windows OS by entering licensing agreements with OEMs which contained NAP.

In 1998, Microsoft started to license Windows 98 which contained Windows Media Player, that had audio and visual function applicable to digitized forms of music and pictures. Since then, Microsoft has been expanding and strengthening those AV functions of Windows OS. Some OEMs have been active in developing technologies of AV function of their own.

In December of 2000, Microsoft presented OEMs the draft licensing agreement

containing NAP. Some OEMs, which owned patents in the area of technologies related to AV function, objected to NAP, but Microsoft did not respond to. The OEMs had no choice but to enter into licensing agreement containing NAP in view of the time limit.

Around February 20, 2004, Microsoft announced to eliminate NAP from its next draft licensing agreement that will become effective from August 1, 2004 to July 31, 2005. However, according to the stipulation, NAP would survive even after the termination or expiration of the licensing agreement that became effective on or before July 31, 2004, NAP in such licensing agreement still remains effective after August 1, 2004.

The JFTC found that OEMs were precluded from suing against Microsoft or other PC manufacturers for infringement of OEMs' patents. Especially, OEMs, which own patents in the area of technologies related to AV function, even though such OEMs' patents are infringed by Windows OS, are restrained from exercising such patents against Microsoft and/or other PC manufacturers. This may cause these OEMs to lose their incentives to invent and develop the technology related to AV function, resulting in tendency to impede fair competition in the area of technology related to AV function in Japan.

Microsoft did not accept the recommendation, then, the JFTC decided to commence the hearing procedure against Microsoft on September 1st, 2004. Recommendation itself has no binding power, and the hearing examiners will hold administrative hearing from now on.

We are now under investigation process against a 100% subsidiary of Intel Corporation, for alleged violation of Section 3, namely predatory pricing charge. The case against Daiichi Kosho Corporation involves copyright licensing practices of popular music called "enka" that is vital for Karaoke sets installed at restaurant, snack and bar.

We also started an investigation against recording companies for alleged violation of their licensing practices of music by way of mobile phones.

#### **4. Increased use of court proceeding by Japanese business**

Recently, you might be surprised to know that the Sumitomo Trust Bank filed a law suit in order to temporarily suspend ongoing merger negotiation between the Tokyo-Mitsubishi Financial Group and the UFJ Holdings. Our business community was astonished by the Tokyo District Court decision of July 27, 2004 ordering suspension of the merger negotiation between the two groups so long as the UFJ Trust Bank is concerned. On Aug. 11, the Tokyo High Court cancelled the district court decision, and on Aug. 30, the disposition by the Tokyo High Court of this case was approved by the Supreme Court.

In the area of patent and other IPR, the cases filed to the court increased so much, special High Court that handles only IPR related cases was established within Tokyo High

Court. More and more Japanese firms file patent and other IPR infringement suits in order to resolve their disputes on IPR.

In the area of Anti-monopoly Act, various municipal governments started to file a damage suit against collusive participants to recover their damages caused by bid-rigging, after the JFTC decision finding bid-rigging operations. In the past, we could only observe a few taxpayers suits filed on behalf of municipal government, for the redress of their losses caused by bid-riggings. These suits were filed by a group of residents because municipal governments were reluctant to do so in the past.

In May, 2000, private actions for injunctions are made possible under the Anti-monopoly Act so far as unfair trade practices are concerned (violations of Section 19). These cases can be filed in the district courts, and once such case is filed, the district court must inform the JFTC of such filings. The district court may seek the JFTC views on the case. The JFTC has a policy to respond to the plaintiffs' requests for materials to be used in the court proceeding. This measure improves plaintiffs' ability to recover damages when the JFTC issued a final and conclusive decision. Since this newly created injunction action became available in 2001, there have been 25 cases filed (as of May 2004). This number looks fairly large in such country as Japan.

Finally, I want to report a sudden jump of cases which go to the hearing stage at the JFTC, namely those cases where a recommendation was not accepted or where initiation of hearing proceeding was requested by the respondents of the surcharge orders. More than 150 cases are now pending at the hearing stage, this is 5 times increase within 5 years.

The suits to revoke the JFTC decision which go to the Tokyo High Court have also increased. Recently, around 4 cases are filed per year.

As the number of cases increase which go to the court, the ruling by the court increases naturally. The accumulation of legal precedents in these manners will lend greater clarity to the interpretation of the Anti-monopoly Act, and will in the longer run have a positive impact for the firm establishment of the Anti-monopoly Act.

In April, 2004, law schools started to offer two year course for the graduates of law faculty of universities, and three year course for the rest of graduates of universities. New entry of 3,000 lawyers per year is expected to, when graduates of those law schools join to the Bar. In particular, legal market for antitrust matters is expanding very rapidly, so rapid that it is becoming one of the promising market for lawyers in Japan.

The Japanese law firm used to be small in terms of number of lawyers. It was rare to have more than 50 lawyers belonging to a law firm, none of them had more than 100 before FY 2000. Since around FY 2000, big merger wave took place among law firms, and now we

have 4 law firms with more than 150 lawyers. Largest one has 179 lawyers. Certainly, the economy of scale and scope works in the legal service market too. I believe this trend for concentration in legal market has something to do with what I described above, namely increased importance of judicial solution of business disputes in Japan.

## **5. Other Activities by the JFTC**

### **(1) Enforcement activities of the Anti-monopoly Act**

The most important duty of any competition authority is the rigorous enforcement of competition laws. Strict enforcement and prompt elimination of illegal conducts serve to foster competitive process, to encourage new entry and innovation, to vitalize the economy and the benefit of sound competition law enforcement to consumers in general is obvious. Moreover, strict and predictable enforcement of the Anti-monopoly Act could be highly effective in opening and transforming the Japanese market into one where the same rules of competition apply as in the United States and European Union.

The JFTC has been rendering so many decisions against violators of the Anti-monopoly Act. Between FY 1994 and FY 2003, we took formal actions with a total of 279 cases, averaging 28 cases per year,<sup>6</sup> showing a steady progress in enforcement of our law. This figure pertains to the number of cases handled. In terms of the number of companies so ordered, the JFTC took formal actions against 405 firms during FY 2003. In FY 2002, the number was 805, and in FY 2001, the number was 928.

It is notable that those actions were taken against so many firms, notwithstanding the fact that Japan does not have a leniency program. Not only do we handle a large number of cases, but also we have frequently taken formal actions against major corporations that are well-known and active throughout the world.

To ensure a prompt and effective action, we understand that it is absolutely essential for us to enhance our investigative capabilities. For this purpose, the JFTC started to employ lawyers, economists, and accountants to serve as its staffs. This also represents a major change in the Japanese system. The government agencies used to recruit graduates of schools who passed the examination for civil servants at various level, and those people are expected to work for the agency up to the time of retirement. Necessary capability can be acquired through on-the-job training. The JFTC was no exception to such Japanese custom. If one works in the same field for a long time, expertise necessary to carry out the task could be acquired in this way, even in such a special field as competition law enforcement.

However, as an agency expected to have high expertise in law and economics, a lack of professional staffs at the JFTC such as lawyers and economists might diminish its

credibility. One particular feature of the Japanese system, making the situation to be very much complicated, is that government lawyers are not members of the Bar. The government lawyers are those who passed the legal division examination for civil servants. The start of law school might change the situation in the future, but it might take a long time to see what will happen in Japan.

## (2) JFTC Initiatives in the Process of Regulatory Reform

Needless to say, the activities of the JFTC are focused on the enforcement of the Antimonopoly Act. However, enforcement efforts might be meaningless if government regulations obstruct competitive process to work, or chance of competition minimized through government regulations. That has been the situation in Japan for many years. And, this is the reason why the JFTC has been active in the regulatory reform area. Competitive process cannot function fully if there is a lapse in either law enforcement or regulatory reform. Both enforcement of the Anti-monopoly Act and promotion of regulatory reform should be promoted hand-in-hand, like the left and right wheels of a car.

The JFTC started to be actively engaged in working on regulatory reform around 1980. In the beginning, our efforts were not appreciated at all by other government ministries and agencies. Moreover, it was not until 1990 and the publication of the final report of the Second Council on Administrative Reform that the government as a whole began working towards regulatory reform in a full-fledged way.

From our perspective, the intervening ten years constituted a “lost decade” which lies at the root of many of the serious problems with the Japanese economy today. Furthermore, I must point out that even more time had to elapse before general support could be generated for an integrated approach to regulatory reform and competition policy, and for the realization that regulatory reform required effective enforcement of competition policy.

What is clear by hindsight is that the Japanese process of deregulation might be initially supported simply out of the desire to be liberated from the nuisance of government regulations. The problem was that there was no basic commitment to using regulatory reform as a tool for activating functions and operations of a market. For a competition authority, importance of the integrated approach to regulatory reform and competition policy seemed obvious, but it was not obvious for the rest of ministries and agencies, and it took so many years for this understanding to be shared among the rest of government ministries and agencies.

The JFTC continued to advocate its position at every opportunity, but it was not until the Three-Year Program for the Promotion of Deregulation was formulated in 1995 that the



government adopted this pro-competitive approach as its basic policy. In order to strengthen competition policy in Japan, the strengthening of the JFTC organization was an urgent task. Under the Koizumi Cabinet, the JFTC added more than 100 staffs, reaching over 670 as for FY 2004, and those staffs are mainly allocated for investigation bureau. The process of strengthening Japan's competition policy was at long last started in earnest.

To promote regulatory reform, the JFTC has dedicated in various activities of competition advocacy. At an early stage of regulatory reform, the JFTC examined existing regulations in a given field, investigated their impacts on competition and formulated concrete recommendations for deregulation based on its findings. After regulatory reform became a policy for the Japanese government as a whole, in the promotion of regulatory reform, the JFTC collaborated with the responsible ministries and agencies to develop a legal system that will support and promote greater fairness in competition. In newly deregulated areas such as telecommunications, electricity and gas sectors, the JFTC has issued guidelines which define actions that might violate the Anti-monopoly Act in order to encourage new entry and to establish the competitive environment effectively.

### (3) Merger Enforcement

The Anti-monopoly Act prohibits mergers and acquisitions that would substantially restrain competition in a particular field of trade. Notification is compulsory if the asset scale of merging parties is above thresholds given by the Antimonopoly Act.

One of the important characteristics of Japanese merger enforcement policy is the fact that merging parties frequently apply to the JFTC for prior consultation, at their own discretion, to avoid risk of merger being blocked, during a formal notification stage. When prior consultation is applied, the JFTC will conduct a factual review of the case in question, reaching a tentative conclusion as to the case. Then, the JFTC will answer to the merging parties whether it finds any problem under the Anti-monopoly Act (including remedial measures if there were anti-monopoly problems). Therefore when the merger is formally notified, there is no need to review the report de novo. This approach is preferred by business community because it could offer high predictability for business, and it also gives the JFTC flexibility to handle merger cases.

In recent years, the JFTC has received around 1,200 notifications of mergers and acquisitions each year, and as to about 100-150 cases, prior consultations are applied for. In other words, of mergers and acquisitions that satisfy notifications thresholds, about 10% are subject to prior consultations, and the vast majority being processed only after notifications were filed. However, almost all cases found by the JFTC to be potentially problematic are

cases that have been subject to prior consultations. This suggests that, the merging parties tend to apply for prior consultations as to cases that look potentially problematic under the Anti-monopoly Act.

Given this fact, to ensure the fairness of procedures, it is considered important to give the same level of clarity and timescale for prior consultations as for statutory procedures. Also it is thought important to increase transparency and predictability of findings by the JFTC as to prior consultation cases.

In view of the above, the JFTC formulated ‘Policies Dealing with Prior Consultations Regarding M&A Plans’ in December, 2002. In order to treat prior consultation cases in line with statutory procedures, these policies set out clearly the timetable for review of such cases (Phase I; 30days, Phase II; 90 days) and it also made clear a policy that, when conducting detailed reviews, the legal points to be cleared will be explained to the merging parties, and that the final response, including the reasons for the JFTC findings, will be delivered to the merging party in writing. This response is published later.

On May 31, 2004, the JFTC made public new guidelines on mergers and acquisitions namely, “Guidelines on the Application of the Antimonopoly Act for Reviewing M&A.” The preceding guidelines was published on December 21, 1998, therefore, it looks to be true those guidelines in the area of M&A, would be good for 5 years instead of 10 years.

We have been using CR 3 for market share analysis, but new guidelines adopted the HHI. The HHI has much more advantage compared with CR3 or CR4 as an index, but there raised some concern about continuity as an index. Therefore, we decided to make it possible to rely on CR 3 data if HHI data is not available.

As for market definition, the new guidelines continue to rely on products classification analysis. We share the view that the hypothetical monopolist analysis is very useful tool to define a market, but we thought that product classification analysis should remain in the guidelines, because our Notification Form asks to provide data and figures according to product classification.

The new guidelines adopted unilateral analysis and coordinated interaction analysis. We have been using similar kind of analysis for many years, and we found that this distinction is very useful in order to go through reviewing process.

The new guidelines adopted fairly complicated safe harbor rule, because such a demand was very strong from business community. We made careful analysis on almost all our past cases examined, and made sure that this complicated safe harbor does not give too much safe harbor for business.

New addition to the new guidelines is the analysis on remedy. The new guidelines

made clear that a structural remedy is preferable, but non-structural remedy can be considered when structural remedy is not available or difficult to adopt.

As a whole, the new guidelines came very close to the U.S. Merger Guidelines, closer than ever before.

#### (4) The Competition Policy Research Center

Economic thinking and rationality should be the bottom-line in competition policy. In Japan, however, economists working in the competition policy area are rare, and most of them work at academics. To correct this shortcoming, the JFTC established the Competition Policy Research Center in June 2003 in order to provide the JFTC staff with opportunities to engage in joint research with economists and other specialists.

The aim of such activities will be to promote theoretical studies on competition policy from the perspective of both economics and law and to bolster the JFTC's research capabilities. The collaboration between scholars and JFTC staff might be effective as functional and continuous platform. In 2003, the Center carried out collaborative studies on nine topics, five workshops and two public symposiums, and issued ten discussion papers.

#### (5) International cooperation

Economic globalization is deepening ties among various jurisdictions and activating all forms of international economic transactions, including foreign direct investments. In such an environment, it is extremely important for respective jurisdictions to develop and to enforce their competition laws in order to maintain and promote competition in their domestic markets.

Given continued growth in cross-border corporate activities reflecting progress of economic globalization, there is a real need for competition authorities throughout the world to come together to develop closer cooperation. 5 Years has passed since the signing of the Japan-U.S. Antimonopoly Cooperation Agreement with the United States in 1999. Japan concluded a similar agreement with the European Community in July 2003. Japan is now engaged in negotiations for the conclusion of a cooperation agreement with Canada. Also we started discussions about the possibility of concluding a cooperation agreement with Australia.

Such cooperative ties could be made possible when we share the belief in competition policy. We look forward in the future to using such networks of cooperation to develop closer ties with other competition authorities and to play our part in the surveillance and elimination of international cartel activities that obstruct free trade and investment.

The JFTC is making some progress in enforcement against international cartels. For

instance, in February 2003, the JFTC cooperated with the competition authorities of the United States, EU and Canada in carrying out simultaneous raids in the cartel case involving modifier.

What is the current status of competition policies in the economies of East Asia? Some of them established competition-related provisions in the business laws governing specific industries and businesses. However, thus far, only several countries have gone to enact and enforce comprehensive competition laws. Among these, some have just recently enacted such laws and started to apply and enforce them. Some others are currently engaged in drafting their comprehensive competition laws. These economies that are endeavoring to introduce or strengthen the enforcement of competition laws need support and assistance, primarily in the form of technical assistance.

For more than half a century, the JFTC has been engaged in firmly establishing the concepts of competition laws and policy in Japanese society. The wealth of experience that we have gained through this process is now being used to promote the development of the competition environment in East Asia. Currently, we are actively engaged in assistance in the area of competition advocacy and support for the implementation of training programs and other initiatives. We are fully committed to maintaining this active stance in the future.

With regard to the economic cooperation in East Asia, Japan concluded with Singapore an agreement for economic partnership in 2002. Currently, Japan is engaged in negotiations with Korea, Thailand, the Philippines and Malaysia for the conclusion of Free Trade Agreements or Economic Partnership Agreements. Through this negotiation process, we can share a common understanding on the importance of competition policy. Thus, it is sure to include provisions concerning competition once both governments could reach an agreement on Free Trade Agreement or Economic Partnership Agreement.

## **6. In Conclusion**

I believe that for an effective anti-cartel policy, the enforcement agency must have sharp teeth to bite. The JFTC was authorized to have teeth to bite against cartel activities a quarter century ago, but not sharp enough to bite. As a watchdog of a market, the JFTC must have sharp teeth to bite. I believe repeated violation problem frequently seen in Japan can be explained by the lack of sharp teeth to bite on the part of the JFTC.

The JFTC is attempting the third jump try to complete its triple jump play in its anti-cartel policy. However, this jump means a very big jump from the traditional business thinking, it seems natural to have a very negative reaction from the business circles. However,

without the third jump, a triple jump play could not be completed.

This incident also offers a good chance to see whether Japan would start to accept “competition culture” or prefer to stay in the world of “harmonization culture”, which became apparently outmoded in view of drastic changes in her economic surroundings.

Serious debates and discussions on the contents of the Anti-monopoly Act amendment held in recent months in Japan would greatly helped to enhance the importance of competition policy in the pursuits of structural reform of the Japanese economy, even before the completion of the third jump attempt by the JFTC.

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<sup>1</sup> Law No. 23 of 2003 enacted on April 9, 2003

<sup>2</sup> See, Iyori & Uesugi, *The Antimonopoly Laws and Policies of Japan*, Federal Legal Publications, Inc. (1994), at pp. 18.

<sup>3</sup> See Iyori & Uesugi, *supra* at pp. 41-48.

<sup>4</sup> See Iyori & Uesugi, *supra* at pp. 357-363.

<sup>5</sup>

Japan Bar Association

[http://www.nichibenren.or.jp/jp/katsudo/sytyou/iken/04/2004\\_37.html](http://www.nichibenren.or.jp/jp/katsudo/sytyou/iken/04/2004_37.html)

Japanese Consumers' Co-operative Union

[http://www.co-op.or.jp/jccu/Press\\_Release/Press\\_040611\\_02.htm](http://www.co-op.or.jp/jccu/Press_Release/Press_040611_02.htm)

Shodanren (Consumers Japan)

<http://www.shodanren.gr.jp/database/111.htm>

Nishoren (Japan Consumer Association)

<http://www1.jca.apc.org/nishoren/statement/statement-contents/bunsho15-040625dokkihohou.htm>

Tokyo Consumers' Co-operative Union

<http://www.coop-toren.or.jp/>

Tokyo Shohisha Renraku Center (Tokyo Consumers' Association Liaison Office )

[http://www.coop-toren.or.jp/14/14\\_028.htm](http://www.coop-toren.or.jp/14/14_028.htm)

Keidanren

<http://www.keidanren.or.jp/japanese/policy/2004/056.html>

Keizai Doyukai

<http://www.doyukai.or.jp/policyproposals/articles/2004/040624a.html>

The Japan Chamber of Commerce and Industry

<http://www.jcci.or.jp/nisshyo/iken/040625dokkinhou.htm>

The Association of Japanese Corporate Legal Departments

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<http://www.keieihoyukai.jp/opinion/opinion28.html>

Zendoku Kensetusgyo Kyokai (Construction Contractors' Association )

<http://www.zenken-net.or.jp/tegen/20040628.pdf>

Japan Federation of Construction Contractors

<http://www.nikkenren.com/news/index8.html>

Building Contractors Society

[http://www.bcs.or.jp/asp/ano/news\\_view.asp?n\\_yy=2004&id=302&select\\_yy=detail](http://www.bcs.or.jp/asp/ano/news_view.asp?n_yy=2004&id=302&select_yy=detail)

Japan Civil Engineering Constructors' Association, Inc.

[http://www.dokokyo.or.jp/topics/c\\_topics\\_20040625\\_01.html](http://www.dokokyo.or.jp/topics/c_topics_20040625_01.html)

<sup>6</sup> Table: the number of formal actions (FY 1994-FY2003)

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Formal Action	24	31	21	31	27	27	18	38	37	25
Recipients of actions	298	731	113	395	585	935	608	928	805	405

Sources: JFTC's annual reports, etc.

“Formal Action” means recommendation cases and surcharge payment orders case without cease and desist orders preceding.