KEYNOTE SPEECH: RECENT DEVELOPMENTS IN ANTIMONOPOLY LAW IN JAPAN

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Introduction

Good morning, ladies and gentlemen.

It is a great honor for me to have the opportunity to speak today before the International Competition Enforcement Conference cosponsored by the International Bar Association and the Japan Federation of Bar Associations. I want to heartily thank Mr. Michael Reynolds and Mr. Akira Kawamura of the International Bar Association who serve as co-chairpersons of this conference.

Recently in Asia, the number of countries which enacted competition laws has been increasing and worldwide conferences on competition policy have been held. Last April the International Competition Network (ICN) 3rd Annual Conference was held in Seoul, Korea. Today, we have a competition conference here in Tokyo.

More than two and a half years have passed since I took office as Chairman of the Fair Trade Commission of Japan (hereinafter referred to as "JFTC"). Based on my faith "There is no growth without competition," I have been fully committed not only to the application of the Antimonopoly Act to various types of anticompetitive conduct, but also to the revisions of the Antimonopoly Act out of my firm recognition that the Japanese enforcement against cartels and bid riggings is not sufficient enough to deter them. As the bill to amend the Antimonopoly Act is now under deliberation in the Diet, it is my great pleasure to have an opportunity to explain to all of you the contents and significance of the revision.

Since the theme of this conference is "Recent Developments in the Antimonopoly Act in Japan" I will begin by describing the challenges on competition law enforcement on which I place a high priority. Then I will state my own thoughts on the significance of the revision of the Antimonopoly Act. Finally, because there are participants from Asia and the Pacific area as well as Western countries in this conference, I also want to talk about the international aspects of Japanese competition policy and an East Asia competition authorities' top-level meeting to be held in Indonesia in the week after next.

I. The present conditions of the Antimonopoly Act and challenges

Economy in Japan has been in the process of modest recovery and looks as if it overcame severe conditions after the collapse of the bubble economy. However, some systems forming fundamentals of our economy have lost their capability to adapt to

rapidly-changing world economy, and I believe that we should promote regulatory reform of our economy further than ever. Indeed, although the sectionalist policy making has long been functioning in our economy, it led Japan to be a second-largest economy in the world. But the globalization made the economic environment change drastically. In order to cope with such changes properly, it is necessary to strengthen cross-sectoral policy, which has not been emphasized in Japan, and make competition policy well-functioned under such policy. Since I took office as Chairman of the JFTC, we have tackled with various tasks based on my understanding that it is essential for businesses to make good use of market mechanisms and gain efficiencies under competitive pressure.

I believe that the most important task for the JFTC is the strict enforcement of competition law against hard core cartels and other conduct impeding new entries, especially under the process of regulatory reform. In order for the Japanese society where collusive practices are one of its characteristics to accomplish evolution, it is necessary for Japanese businesses to depart from such collusive practices, and the JFTC should promote the growth of competitive firms through strict enforcement of competition law and foster a vital economy. Since my appointment to Chairman, the JFTC has made efforts to detect cartels and bid riggings by large firms, as well as entry-deterrence cases. Quite recently, the JFTC issued recommendations against global companies such as Microsoft Corporation and Intel Inc. We have also focused on deterrence of new entry involving misuse of intellectual property rights.

Besides, re-organization of businesses has been accelerating in Japan, and it has become an important task to ensure competition in markets under such circumstances. The JFTC should improve its analytical ability in order to cope with promotion of effectiveness and elimination of negative impact on competition related to business re-organization. For that purpose, we have staff economists participate in merger investigations, and try to disclose detailed reason as possible when releasing merger cases. We also established the Competition Policy Research Center (CPRC) in June 2003, and currently 16 visiting researchers including economists, legal scholars, and private practitioners are conducting collaborative researches with the staff member of the JFTC, to make full use of the results to the implementation of the Antimonopoly Act. Last year the JFTC revised merger guidelines (Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination), and clarified a market definition standard, and a framework and factors for analyzing whether merger transaction may be substantially to restrain competition through both unilateral and coordinated effects. In the past several months there were two cases where the merging parties abandoned their transaction plans in response to the competitive concerns indicated by the JFTC. Economic analysis played an important role in the examination process of these two cases.

It is also important to internalize expertise outside the JFTC to deal with recent complicated competition cases. In recent years we started to employ private practitioners, economists and experts, for example, in the areas of intellectual property rights.

Now let me touch upon the issue on buying power, which is currently attracting the interest among the wide public. Formerly in Japan, it has been the case that Japanese businesses have not sought judicial solution of business disputes and, without assuming that such disputes may happen, the contracts provide only basic terms, and peculiar business practices were formed in many industries. It may be surprising and difficult to understand for participants from western countries that there still exist business dealings based only on an oral contract in many industries.

Recently, reflecting the intensified market competition, we have observed many cases of abuse of buying power, among others, in retail sector. The JFTC detected some cases on unfair trade practices recently, and found that such problems are seen nationwide. In order to cope with the issue of the exercise of buying power by large-scale retail businesses, the JFTC is now working to issue notification which will designate specific unfair trade practices regarding the purchasing activities by large-scale retail businesses. We will finalize the notification in the near future.

The JFTC has advocated toward executives of private businesses that complying with the Antimonopoly Act will bring them profits in the long run. Fortunately, their understanding on competition policy has been improved far better than before, but we cannot say it is enough. Let me take an example. Most of large corporations in Japan have compliance programs with the Antimonopoly Act. However, we can observe many companies with such programs that could not keep away from involvement in the Antimonopoly Act violations. As the proverb says, “Ploughing the field and forgetting the seeds.” It is quite regrettable.

Worse than this, there is no end to companies repeating violations of the Antimonopoly Act in Japan, including listed companies. I recognize that the pain which such offenders suffer is not severe under the current enforcement system. Based on such recognition, the JFTC has been making every effort to strengthen such pain, and at the same time, to introduce into Japan a leniency program whose effectiveness has been recognized internationally. Fortunately, last October we could prepare the concrete draft after active discussions on various occasions for more than a year. It is exactly the bill to amend the Antimonopoly Act which is deliberated at the current session of the Diet.

II. Revision of the Antimonopoly Act to strengthen its enforcement

The revision of the Antimonopoly Act this time, if realized, will be the most radical since 1977. Since the release of the report by the Study Group on the Antimonopoly Act in October 2003, active discussions with various business associations, bar associations, consumer associations and the leading political parties were held, and the draft bill was prepared through necessary coordination of opinions. Such discussions promoted the nationwide debate on the characteristics of administrative surcharge and better understanding that a leniency program is effective to crack down on cartels which are difficult to detect due

to their nature of secrecy, which led to the broad support of the leniency program. This may look natural from global perspectives, but in comparison with the situation one and a half years ago, I think this is a remarkable progress.

The bill to amend the Antimonopoly Act is consisted of the following four pillars.

Firstly, the increase of the surcharge rate.

Specifically, the surcharge rate for large-sized manufacturers for example will be increased from current 6% to 10%, and as for repeat offenders, the surcharge rate will be time and a half. The current scope of conduct subject to the surcharge system has been selling price cartels. However, we can observe allocations of market share or customers as well as price cartels, and such allocations shall be made clear to be subject to surcharge. Also, the scope of surcharges shall be extended to purchasing cartels and private monopolization through controlling the business activities of the other firms which may cause the same effect as cartels.

Secondly, an introduction of a leniency program.

There is no tradition of plea-bargaining in our country, and it is generally considered as undesirable. Therefore, we took every care to formulate transparent and objective system, with no elements of bargaining, in introducing a leniency program. Another issue was the possibility of applying leniency because, in the current system, surcharges must be necessarily paid by all the offenders. We appealed to the national public that cartels and bid riggings are difficult to detect because they are conducted behind closed doors, and argued that an introduction of a leniency program would create national gains more than the losses brought by not collecting surcharge from offenders. We also emphasized that increase of surcharge rate and an introduction of the leniency program must be realized in a lump because stiff sanctions ensure the effectiveness of the leniency program. Our point was accepted in general and I am satisfied with the contents of the bill.

The total number of firms that may receive leniency in one case is up to three, but there were various arguments on this issue. I would like to assess whether, by launching this system, our leniency program is effective for obtaining incipient information on violations.

Thirdly, an introduction of search warrant power (compulsory measures for criminal investigations).

The JFTC has filed a criminal accusation approximately one case in every two years. But I think that there is a limitation for the JFTC to accuse actively on serious and egregious cases under the current system, where the JFTC has only an administrative investigation power. This is the reason for introducing search warrant power into the JFTC investigation. Also, there have been views that it is problematic from the viewpoint of due process of law that the JFTC would be able to file criminal accusations based on the results of administrative

investigations. So I think that an introduction of such power contributes to protection of due process in the criminal accusations.

Lastly, the revision of administrative hearing system.

From the viewpoint of promoting efficient case handling and restoring a competitive environment in a globalized, high-speed economy, I believe it necessary for the JFTC to be able to eliminate violations promptly. Current recommendation system will be abolished and the new system will be introduced under which the respondent of a cease and desist order will be given prior notice and the opportunity of rebuttal including submission of evidence to ensure due process. While administrative hearing system which allows the respondent to give a chance to contest the cease and desist order under the adversary system will be maintained, the provisions which clarify the power and authority of hearing examiners, etc. is also incorporated into the bill.

III. International aspects of Japanese competition policy

(1) Framework of bilateral relationship

We have to strengthen cooperation framework among competition authorities of various jurisdictions to cope with international cartel cases effectively. The JFTC initiated investigation into the cartel case involving modifiers simultaneously with the competition authorities of the United States, EU and Canada and was the first to take measures against manufacturers of modifiers.

Reflecting the globalized economy, collaborative relationship in other areas should also be much closer. The Japanese government has concluded bilateral agreements concerning cooperation in the field of competition policy with countries and regions that have particularly strong economic ties to us and have been positively cooperated in activities such as information exchange between competition authorities. The agreements concerning cooperation on anticompetitive activities were concluded with the U.S.A in 1999 and with the EU in 2003. In January 2005, we reached an agreement in substance with Canada about contents of cooperation agreement. Also, we are currently continuing negotiations for the conclusion of an agreement with Australia.

In addition, the Japanese government is pushing forward with negotiations for the conclusion of an Economic Partnership Agreement, mainly with East Asian economies. From the viewpoint of competition policy, it is indispensable that the Parties cope with anti-competitive activities adequately so that competition promotion effects through the liberalization of trade and investment are not lost. Therefore, the JFTC is participating in negotiations of EPAs so that an adequate proscription of anti-competitive activities and cooperation between competition authorities are prescribed in the agreements. We already concluded such an agreement with Singapore in 2002 and another one with Mexico, which

took effect this month (April 2005). We are now continuing negotiations for agreements with Korea, Thailand, the Philippines and Malaysia.

(2) Framework of multilateral relationship

A basic principle of competition is a general idea common in all countries, but competition law and its enforcement are different, depending upon the composition of each country. Convergence of competition law is enabled by shared experiences of competition authorities of various countries set in different backgrounds. The sharing of such experiences is useful for looking back on competition law and policy of one's own country and picturing a future ideal structure. I think that the multilateral framework is extremely important in enabling such a function.

(3) Competition Policy in East Asia and a Top-level Officials' Meeting

Although international competition fora such as the ICN and the OECD have involved world wide competition authorities, there has been no specific forum focusing on East Asia to exchange views among competition authorities. Since East Asian economies are closely interrelated enough to form a regional economic forum, I firmly believe in the importance of networking competition authorities to foster a competitive environment in this region as a whole. To this end, I proposed establishing a top level officials' meeting on competition policy in East Asia at the 2004 Seoul Competition Forum last April. I appreciate the kind response of the Indonesian competition authority, the KPPU, to my proposal and hosting the meeting. The first Top Level Officials' Meeting is going to be held in Bogor, Indonesia, on May 5th this year. At the meeting, I wish to have frank discussions with participants, rather than meeting for forming principles or agreements in competition law implementation. Further, I would like to conduct free exchange of views on challenges facing East Asian competition authorities and their measures to overcome them. Experiences, challenges and difficulties of competition authorities and competition related authorities in East Asia are often similar among them, and I believe that the dialogues and partnership among the top officials will be meaningful. At the meeting I also wish to discuss how to efficiently and effectively deliver capacity building activities to developing competition authorities from standpoints of both donors and recipients. I believe it significant to continue to hold the Top Official's Meeting in East Asia.

Conclusion

Competition policy is not necessarily a panacea for all the economic problems, but its importance is universal. At the developing stage of economy, some emphasize importance of development rather than that of competition. I think, however, that both are

compatible and should be. I believe that the JFTC can share its accumulated experiences on competition policy with competition authorities of other jurisdictions. Our active capacity building activities on competition laws in Asian jurisdictions is based on this recognition.

Firms can acquire sustainable competitiveness only through market competition. This will lead to economic growth of the economy. I usually like to say that "there is no growth without competition". I think that it is necessary to let such a philosophy pervade in the economy and make efforts to foster a competitive environment even more.

Thank you for your kind attention.

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[1] Chairman, Fair Trade Commission of Japan. The views expressed in this paper are strictly my own, and not those of the Fair Trade Commission of Japan.