ENFORCEMENT OF COMPETITION LAWS IN JAPAN[1]

Akinori Uesugi[2]

In this paper, I would like to refer to my views, firstly, on how the Japanese competition laws and policies were developed, what kind of lessons could be presented for other countries that are trying to develop their competition law enforcement mechanism. Then, I would like to refer to recent changes in our legal environment that could be identified from various phenomenons taking place in Japan. Thirdly, I would like to describe the significance of the Antimonopoly Act (AMA) amendments, in particular, the increase of the surcharge rate, an introduction of a leniency program, and changes in the enforcement procedures of the AMA.

I. A few remarks on the development of competition laws in Japan

The Antimonopoly Act (AMA) was enacted in Japan in 1947. When looking at the competition laws of the world, it was a very early incident. However, the active enforcement of the AMA seen in early times could not continue for a long time because of the fact that the AMA was enacted during the occupation period and the Japanese business culture was not in harmony with competition culture, and since then the Fair Trade Commission (JFTC) had experienced for a long period of Dark Ages until about 1970. Since 1970, the enforcement of the AMA started to be strengthened gradually, and the provisions of the AMA had been strengthened through several law amendment attempts. By hindsight, the role that the AMA had played in our economy was not satisfactory one compared with the role that should be played by it, and it must be said that the AMA could be strengthened only by fulfilling the needs of the time a few steps behind. In addition, the number of the JFTC staffs was increased gradually since around 1990, but the situation can only be described as less than the desired level. Therefore, unfortunately, it must be said that Japan had experienced too late as well as too small steps taken in the field of competition law.

However, this might mean that Japan can offer valuable lessons to many countries in the world that are going to start serious enforcement efforts of their competition laws from now on. After 1990, many countries had adopted competition laws, but it seems to be very difficult for the enforcement agency of competition laws to establish itself in such a short period of around 10 years in view of the experiences of our country. In addition, there is a difficult problem where to place the priority of competition law enforcement depending on developmental stage of the economy of the country. Therefore, I want to look back the history of the AMA, and would like to describe some of lessons that can be presented to the world.

(1) Economic development and competition

Japanese economy could experience a very rapid economic growth at the rate of

approximately 10% as an average for 15 years from 1955 to 1970. When one looks back the situation surrounding competition policy throughout these high growth periods of our economy, it corresponds to the so-called “Dark Ages of the Antimonopoly Act” starting around 1950, and since then, the enforcement activity by the JFTC showed a remarkable slow down. It is a symbolic fact that the time when our country could enjoy high economic growth just coincides with the Dark Ages of the AMA. After around 1970, a significant slow down of the growth rate of our economy was observed and Japan experienced a long term stagnation period during 1990's after it experienced the bubble economy from the later half of 1980's. In this way, it is neither possible for the economy of one country to continue its growth course at the same speed, nor to accomplish economic development where various sectors with its economy could grow in a balanced way. The economy of one country could only grow like S shape curve and the economy of one country could only have growing sectors as well as non-growing sectors within the same economy.

(2) A role of competition policy in the period of high growth

It can be said, based on the experiences of Japan, that the period when the economy faces virtuous circle where growth invites further growth, it seems possible that the economy can grow without serious enforcement activities by competition authorities. However, this does not mean that the competition authorities are unnecessary. It is natural that the voice to ask for introduction of new regulation to protect low growing sectors as well as the pressure to ask for the relaxation of competitive pressure would arise as the economy grows. In addition, there will be a situation where the voice to ask for introduction of measures to alleviate competitive pressure under the name of achieving other policy objectives, e.g. the balanced development of the economy or the needs to secure jobs. It is a well-known fact today that the competition policy in Japan had established itself through the conflicts with the industrial policy.

It has been a wide spread way of thinking in Japan that, because a harmful influence would be brought about to the national economy through excessive competition, the government is expected to take various policy measures in order to alleviate competitive pressures in a market. Also, the voice to ask for a recession cartel rose insisting that a recession would cause harmful consequences on jobs. This is based on the thinking that temporary halt of competition by allowing a cartel in such a depressed sector can be justifiable. It was difficult for our people to understand that such exception of competition cause a substantial harm for the sustainable growth of the economy at that time.

In addition, a transfer of resources to a low growth sector is demanded as the economy grows, and if this goes too far, because it would protect non-efficient or low-productivity sectors, it would become obstruct for the sound development of the economy eventually. Even now, it seems to constitute a big constraint for the re-birth of our economy. However, a national economy cannot develop without competition, and it is impossible for non-growing sectors to continue to prosper by taking assistance from growing sectors.

It will exert a decisive influence for economic growth potential whether these movements can be stopped or alleviated from the competition policy's point of view. In other words, it is an important task for a competition authority to perform coordination function with other policy objectives in a way to put a brake on those attempts that try to offer a limit / relaxation / an exception of competition as I described above, and to confine those attempts to the level as low as possible so that not to hinder growing potential of the economy. Sustained growth of the economy is difficult to achieve without effective utilization of a market mechanism, however, unfortunately, it takes time for the people to start to understand this fact.

In Japan, competition policy has been stagnant and competition law enforcement has been dull during rapidly growing period, and only after it entered into a period of low growth, competition policy started to be strengthened in order to make the better use of a market mechanism. However, I believe that, because the effectiveness of competition policy did not match with the needs of the economy of the time, Japan is suffering low growth period for such a long time.

(3) Importance of a core organization in the field of competition policy

Fortunately, in our country, the JFTC was established as a competition authority with functions that allowed it to perform independently from the start of the AMA, and the secretariat attached to the Commission were consisted of permanent staffs. This was an extremely important thing. Because the people's appreciation for competition policy was not high during early stages of economic development, it is important to establish a core organization at an early stage within the country. Although the JFTC had experienced ups and downs during the process of economic development, it is an important fact that the JFTC consistently carried out a role of a core organization to establish competition policy in Japan. Under a Japanese lifetime employment system, the JFTC, as a core organization, had functioned to feed and bring up experts of competition policy that were few in our country.

(4) Increased importance of judicial proceedings

During the time when low appreciation of competition policy had been prevailing, it was a customary practice for the JFTC to try to avoid a case moving to an administrative hearing stage or being appealed to the Tokyo High Court as much as possible. Measures to remedy violating conducts through the use of an administrative guidance were frequently utilized. Before 1977 amendment of the AMA, the JFTC was not authorized to take remedial measures when the entrepreneur stopped the alleged conducts voluntarily during the course of investigation. Recommendation against the respondent firms to take remedial measures under the Article 48 of the AMA is also a kind of administrative guidance based on the law. It cannot be denied that these attitudes brought about an unhappy result to make the Japanese competition law enforcement less powerful and, in a sense, delayed accumulation of case laws. Accumulation of case laws through judicial proceeding could bring about transparency and objectivity, and it is an important step to establish competition policy firmly. By this way,

lawyers and judges who are familiar with competition law would increase. The function to be called a semi-core organization can be established around a core organization in the field of competition policy when cases are handled by courts. Competition policy as a whole cannot become strong enough unless semi-core organizations also grow.

I think that this development brought about two side effects. One problem is that the interpretation of the AMA remained unclear as to many of its provisions because of the lack of accumulation of case laws. The second problem is that it seemed to contribute for an entrepreneur to look at a violation of the AMA lightly, and, therefore, it could not be easily understood by the people that cartels and bid riggings cause serious and harmful influence to the national economy. On the other hand, if competition authority imposes very severe sanctions that are far beyond the acceptable level for the business, it may cause only repulsion by the business, and the voluntary compliance of competition laws is hard to expect. How to maintain an appropriate balance during the course of economic development is an important issue for competition authorities.

(5) Importance of competition policy appreciation by the business

From a longer term point of view, enhancement of competition policy appreciation by the people, in particular by business people is indispensable. Based on the Japanese experience, it cannot be said that understanding of competition policy deepens without any efforts as the economy develops. Business culture plays an important role, too. In a country with business culture favoring to avoid legal disputes and favoring to solve business troubles through mutual talks, a special effort is required for the establishment of competition policy. It can be said that a tendency to avoid judicial solutions of business troubles seen among Japanese businesses had delayed competition policy to be established in Japan. Therefore, when one is trying to establish competition policy within a country, business culture of the country shall be afforded a high consideration. Japan had a business culture to attach a great importance to WA (harmony), and does not like to see only somebody to prosper. It can be understood under such background that a convoy system (*gosou sendan housiki*) has been effective for a long time in Japan. These cultural aspects constituted a constraining factor for the establishment of competition policy in Japan.

Competition policy has two sides like coin. One is to maintain or to promote competition in a market through the enforcement of competition laws. The other is to promote compliance efforts of competition laws by the business by way of deepening their understanding that competition would bring about benefits for business in the longer run. It is a well-known fact from the time of Adam Smith that business people have a strong incentive to avoid competition. The latter side is particularly important in order to promote a sustainable development of the economy, and in this regard, competition authorities should have a leading role.

The JFTC recognized from the very beginning that understanding for competition policy by the people was low in our country, and has engaged in public relation activities in order to enhance understanding of competition policy for many years. In order to enhance

competition policy understanding, the JFTC has engaged in such activities as holding a round-table conference composed by well-informed persons of various fields (after 1968), holding of a seminar or conference with well-informed persons in local districts (after 1972), appointing well-informed persons as "the Anti-monopoly cooperation members" (after 1999) and holding of teaching classes on competition policy at junior high schools (after 2002). During these periods, the JFTC had prepared and distributed many pamphlets and video tapes for this purpose. In this way, the JFTC has engaged in various activities for the enhancement of competition policy understanding in Japan. Competition policy is the policy that can prove to be effective only in the longer run, and it is important to continue the efforts to enhance competition policy understanding by the people.

II. Recent changes in the legal environment in Japan

I explained in Part I about the importance of judicial proceeding to solve business disputes in the area of competition policy. In this regard, one can clearly observe a recent trend in Japan that the number of cases is increasing where Japanese firms resort to judicial branches for solving business disputes.

One may remember last year that the Sumitomo Trust Banking & Co., Ltd. filed a law suit for injunctive relief to halt the negotiations for merger among the Tokyo Mitsubishi Financial Group and the UFJ Holdings. And quite recently, a rising IT-related company named the Livedoor Co., Ltd. filed a law suit to the Tokyo District Court for the injunction of issuance of preemptive rights to the Fuji Television Network Inc. by the Nippon Broadcasting System Inc. The issuance aimed at evading the hostile acquisition of the stocks of the Nippon Broadcasting System by the Livedoor Co., Ltd. and the court ruled on this case in favor of the Livedoor. This incident had occupied the interest of public in general for a couple of months.

In the area of patent and other intellectual property rights (IPR), the cases filed to court increased so much that a special High Court that handles only IPR related cases was established within the Tokyo High Court as of April 1st of this year. More and more Japanese firms file patent and other IPR infringement suits in order to resolve their disputes on IPR.

In the area of the AMA, municipal governments by themselves started to file damage suits against collusive participants in order to recover their damages suffered by bid-riggings. The claim is based on the AMA or the Civil Code, after the issuance of JFTC decision finding bid-rigging operations. Before then, we could observe some taxpayers' suits filed on behalf of municipal governments for the redress of their losses caused by bid-riggings, and this trend moved forward to other municipal governments. These suits were filed by a group of residents because municipal governments were reluctant to do so in the past. In recent years, many municipal governments conclude compensation clause in their contracts in case bid rigging is found.

In May, 2000, private actions for injunction are made available under the AMA concerning unfair trade practices (violations of Article 19). These cases can be filed to the district courts, and once such case is filed, the district court must inform the JFTC of such

filing. The district court may seek the JFTC views on the case. The JFTC has a policy to respond to the plaintiffs' requests for submission of materials to be used in the court proceeding, if necessary. 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 30 cases filed (as of the end of March 2005). This number looks fairly large in such country as Japan where disputes between firms were solved in ways other than judicial proceedings.

Finally, I want to report a sudden jump of cases that go to the administrative hearing stage at the JFTC, namely those cases where a recommendation was not accepted or where initiation of hearing proceeding was requested by the respondent in case of the surcharge orders. More than 130 cases are pending at the administrative hearing stage (as of the end of March 2005) and this is 3 times increase within 5 years. In view of this sudden increase, the number of hearing examiners will be increased from 5 to 7.

The suits to revoke the JFTC decision which must go to the Tokyo High Court have also increased. Recently, around 4 cases are pending at the end of each year.

As the number of cases increases that goes to the court, the ruling by the court increases naturally. The accumulation of case laws in these manners will lend greater clarity to the interpretation of the AMA, and will in the longer run have a positive impact for the firm establishment of competition policy.

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 the graduates of universities. Economic Law is going to be one of the selective subjects for the bar examinations. New entry of 3,000 lawyers per year is expected, 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 markets for lawyers in Japan.

The Japanese law firm used to be small in terms of the number of lawyers. It was rare to have more than 50 lawyers belonging to a law firm, and 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 almost 200 lawyers. Certainly, the economy of scale and scope works in the legal service market too. I believe that 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.

III. Tools for competition law enforcement and the Antimonopoly Act amendment

The most important duty of any competition authority is rigorous enforcement of competition laws against cartel activities. Strict enforcement and prompt elimination of cartels and bid-riggings, in particular, serve to foster competitive process, to encourage new entry and innovation, to vitalize the economy. The benefit of effective competition law enforcement to consumers in general is obvious.

The JFTC was for the first time authorized to have teeth to bite against cartel

activities in 1977, namely surcharge powers. However, many cartels and bid riggings were revealed every year after 1977, and it became apparent that the teeth were not sharp enough to deter cartel activities. In 1991, the surcharge rate was strengthened from 2% to 6% so far as large firms are concerned. Some said that the enforcement tools the JFTC currently has against cartels and bid riggings are sufficient enough to deter such illegal activities because there are other enforcement tools than the JFTC surcharge power: namely, the firms who are involved in bid riggings of public works are subject to 6% surcharge orders (3% in case of small businesses), suspension from designated biddings for several months, and 10% of compensatory payment to the contracting agencies. They say that these tools as a whole should be sufficient to deter those illegal conducts.

However, there have been not a few repeat offenders in Japan even after the surcharge rate was increased. There were even firms that were subjected the JFTC surcharge orders 4 times within the past 10 years. What does this imply? It implies that sanctions against cartels and bid-riggings in Japan are not severe enough to deter those illegal conducts. For an effective anti-cartel policy, the enforcement agency must have very sharp teeth to bite. As a watchdog of a market, the JFTC must have sharp teeth to bite, in particular against cartel activities. I believe repeated violation problem frequently seen in Japan can only be explained by either the firms concerned are thinking that the JFTC lacks sharp teeth to bite and/or that the probabilities to be caught by the JFTC is not high.

Based on this recognition, the JFTC has started its attempt to amend the AMA including the increase of the surcharge rate and an introduction of a leniency program. The bill to amend the AMA was deliberated at the current session of the Diet and enacted as a law on April 20th of this year.

(1) Increasing surcharge rate

The surcharge rates is increased basically to 10% and the coverage of surcharge order is extended from price cartels, output cartels, etc. to so-called hard core cartels in general. In addition, the surcharge rate for repeat offenders is 50% higher because we could observe more than a few repeat offenders.

Some says that increasing the surcharge rate up to 10% is still not sufficient as deterring measures against cartels in view of international standard. However, we cannot deny that there is a legal limit to increase the surcharge rate up to the international standard so long as surcharge orders must co-exist with criminal fines against a corporation. And it should be noted that the rate applied (10% of affected turnovers) is not the upper limit, but the rate must be applied equally to every applicable cases. Moreover, repeat offenders are imposed 50% higher than the regular rate, namely 15% at maximum. Therefore, I believe that the surcharge rate is fairly high and can be compatible with international standard. Anyway, the issue is not the level of the surcharge rate itself but how it could function effectively as deterrence against cartel activities in real economy. I believe that this increase of surcharge rate would work as an effective tool to deter cartels and bid riggings in Japan.

The risk to face high amount of surcharges will stimulate incentives of firms to try to

avoid the surcharges, if possible. Therefore, a mere introduction of a leniency program does not ensure its effectiveness. Sanctions must be powerful enough in order for a leniency program to be applied for. Higher surcharges will certainly offer businesses with a stronger incentive to avoid the surcharges to be imposed. The existence of a leniency program would increase mutual suspicion among cartel participants, and cartel participants would be encouraged to apply for a leniency program earlier than anybody else. Thus, it is expected to result in destabilization of cartel and bid-rigging rings and disappearance of them altogether.

(2) An introduction of a leniency program

In a society favoring harmonious cooperation, there was a possibility that a leniency program would be regarded as against its "business culture." Is the concept of leniency acceptable for Japanese businesses? Isn't it against business ethics firmly established in Japan? There have been active discussions whether Japan should introduce a leniency program in the last year or so. After the long period of active discussions, a leniency program could obtain necessary support to go through a legislative process within Japan. I think that an introduction of a leniency program will be an important step for establishing "competition culture" in Japan.

The leniency program incorporated into the AMA that is just enacted on April 20th of this year is to afford 100% immunity for the first applicant, 50% reduction to the second applicant, and 30% reduction to the third applicant so long as they provide necessary information before the start of the JFTC investigation. If necessary information is provided after the start of the JFTC investigation, 30% reduction is equally available up to the third applicant. The JFTC made clear that it will not file a criminal accusation against the first applicant who filed application before the initiation of the JFTC investigation.

In this regard, I would like to refer to the international aspect of a leniency program. A leniency program presents an effective means for detecting cartel that is undertaken secretly by its nature. Let suppose some of the jurisdictions affected by an international cartel do not have a leniency program. When a participant in the international cartel decides to apply for a leniency program, it will decide to apply simultaneously for a leniency of all the affected jurisdictions and to seek a lenient treatment by those competition authorities. Simultaneous applications for a leniency program would facilitate the cooperation in their investigation activities among relevant competition authorities. Of course, information provided with competition authorities in accordance with the leniency program shall be treated as confidential and it cannot be provided to the competition authorities of other jurisdictions without consent of the applicant.

In other words, a leniency program is one of the important elements for extending international cooperation among competition authorities in different jurisdictions. However, we observed cases where some Japanese firm applied for a leniency to the affected jurisdictions other than Japan due to the lack of a leniency program in Japan, and this incidence revealed one of the serious problems, namely the absence of a leniency program in some key jurisdictions may act as an obstacle for uncovering international cartels. It was

revealed that a cartel participant could apply for a leniency program in some jurisdictions, while choosing to fight against the charges in other jurisdictions without a leniency program. Thus, the absence of a leniency program in some jurisdictions may carry the risk of creating "weak links" in international cooperation for cracking down international cartels. If one takes these observations into consideration, one may realize that the introduction of a leniency program into Japan is an important step to fight against international cartels. Therefore, I think that international antitrust community should be interested in seeing how many Japanese firms would apply for a leniency program once such system becomes effective in Japan in early next year.

(3) Revision of enforcement procedures of the Antimonopoly Act

The last topic in this chapter is the revision of enforcement procedures of the AMA. Important changes of enforcement system are incorporated into the AMA that is just enacted on April 20th of this year. This can be called a kind of modernization of enforcement procedures of the AMA. Under the new system, the JFTC will issue a remedial order and/or a surcharge order after affording the respondent prior notice and a chance of rebuttal including submission of evidences. On appeal to the remedial order and/or surcharge order, the case moves to the administrative hearing stage at the JFTC. Under the old system, once the JFTC finds a violation, a recommendation to cease and desist is issued to the respondent without affording any prior notice, then, when the recommendation was not accepted by the respondent, a complaint is issued so that the case moves to the administrative hearing stage. When the recommendation was accepted by the respondent, the JFTC will issue a recommendation decision based on the acceptance.

The problem of the old system lies in its inflexibility, namely, the respondent has only a choice to accept or reject the recommendation. No rooms for negotiation or clarification were afforded. The legal nature of the recommendation is, according to our legal theory, a kind of so-called administrative guidance based on law. It is merely a suggestion to comply or a request to comply by the government agency, therefore, the respondent should be completely free to accept or reject the recommendation. Due to such nature of the recommendation, no prior notice or a chance of rebuttal is afforded to the respondent.

The recommendation system could have been effective when the Antimonopoly Act was not functioning properly in Japan. Change of the recommendation system is one of the important steps for the modernization of the JFTC enforcement procedure. Up to now, even when the respondent has an objection only as to a part of the recommended cease and desist order, the respondent has no choice but to move to the administrative hearing stage and contest it altogether. And once it moves to the administrative hearing stage, the respondent tends to contest all the fact-findings and application of laws. After the revision, the respondent has a chance to receive a prior notice and a chance of rebuttal including submission of evidences before cease and desist order is finalized. If there is something unacceptable in the draft of cease and desist order, the respondent can submit evidence for rebuttal, focusing on the specific aspect. This change is also a progress from the viewpoint of

due process and the JFTC can expect prompt and effective case handling in a sense that the JFTC can avoid time-consuming hearing procedures as much as possible.

With respect to the surcharge order, the JFTC could not initiate procedures to impose surcharges before the remedial order become final and conclusive. That is why the surcharge order is often issued long after the issuance of a recommendation. This results in the problem that it will take a long time to issue surcharge orders after the violation took place, in case the recommendation was not accepted by the respondent. This is not desirable even for respondent firms and may not be consistent with the requirement for prompt investigations. Furthermore, in the process of administrative hearing contesting the surcharge order, which is issued as a separate and independent order, respondents sometimes contest the relevant fact -findings by the JFTC again, even if necessary facts are found in the preceding remedial order. Such duplication is inconsistent with promptness and effectiveness rule of hearing procedures.

Under the new enforcement procedure, the JFTC can issue a remedial order and a surcharge order at the same time. The respondent may contest both of the orders at the same administrative hearing if he does not accept the facts contained in the remedial order. Furthermore, the respondent cannot contest the fact-findings of the remedial order if what the respondent asked for was the initiation of the administrative hearing on the surcharge order. The newly enacted AMA contains some other provisions contributing to prompt and effective hearing procedures.

IV. Conclusion

The bill to amend the AMA was deliberated at the House of Councilors during April and made a law on April 20th of this year. This revision is significant in confirming legally that cartels and bid riggings are serious and egregious violations of laws that deserve strict sanctions. The business culture in Japan may change due to the revision of the AMA. The provisions ensuring the modernization of enforcement procedures of the AMA are also incorporated. In this sense, I can say that this revision is far more important than the 1977 amendments. In order to revitalize our economy, it is necessary to increase productivities of our economy by way of increased competition in a market. Therefore, unless competition policy of Japan can enjoy a high evaluation as active and aggressive one from international antitrust communities, actual economic recovery would not be possible. This revision is an important step for the JFTC to accomplish such challenges.

From now on the JFTC will engage in the preparation for related cabinet ordinances and regulations with an aim to start the implementation of amended AMA in the beginning of year 2006.

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[1] This text was modified from the original, reflecting the enactment of the amended Antimonopoly Act on April 20th, 2005.

[2] Secretary-General, 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.