

54TH ANTITRUST LAW SPRING MEETING

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Addressing State Imposed or Facilitated Restraints

- Japan's example -

Kazuhiko Takeshima

Chairman

Japan Fair Trade Commission

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1. Introduction

Japan is now experiencing a modest economic recovery mainly led by private-sector demand. I believe that what is most needed to sustain such growth is realizing our economy and society of a high level of transparency and competitiveness. This is what I mean by saying on every occasion, “There is no growth without competition.” In other words, business enterprises can achieve sustainable economic growth only through competition in a marketplace, and economic growth is achieved as a result of such competition. Businesses and industries are doomed to see their business efficiency fall and their competitive edge is lost at an early stage, if they have evaded competition for one reason or another. Freedom in activity and creativity of business enterprises are the fountainhead of economic vitalization and development. It is also from this perspective that I believe it necessary for the Japanese government to strongly implement competition policy in the broader context of the structural reforms that are underway by its initiative.

The JFTC has been implementing competition policy with its emphasis on the active creation of a competitive business environment, in order to promote vitalization of an economy based on free and fair competition, as well as to further consumer interests. In the active creation of competitive business environment, it is becoming increasingly important to address the creation and implementation of state’s anti-competitive regulations and other state-imposed or facilitated restraints.

One of state regulatory systems that wield an anti-competitive influence on markets is exemption from the Antimonopoly Act (hereinafter called “AMA”) application. In view of this background, I would like to report on the activities of the JFTC in the elimination and narrowing of exemption from the AMA in the following Section. Then, I would like to direct your attention to activities of the JFTC in addressing bid-rigging aided or facilitated by government officials, or *kansei-dango*, which are attracting rising criticism in Japanese society.

2. Activities on eliminating and narrowing exemptions from the AMA

(1) Overview

Needless to say, strict enforcement of the AMA is vitally important in making market mechanism function and promoting free and fair competition in a market. Exemptions from the AMA should be approved as limited as possible as exceptions of market principles and kept to the very minimum.

However, the formulation of trusts and cartels was promoted as government policy since the early 20th century until World War II. With industries under the complete control of administrative authorities, dissemination of the concept of competition was no easy task. Since the enactment of the AMA in 1947, various exemptions from the AMA were created for various policy objectives. It may be no exaggeration to say that history of the AMA over the 60 years since the enactment is a history of elimination and narrowing of such exemptions.

(2) 1950s and 1960s : Proliferation of cartels and the dismal state of competition policy

In terms of promoting competition, the 1950s represented the lowest point of competition policy implementation. It was the year 1952 when the San Francisco Peace Treaty was signed and Japan became a sovereign, democratic nation and it was also the starting point of the AMA's history of hardships since the country began to work on the protection and development of its industries under its grand aspiration of becoming economically self-reliant.

As a result, the AMA was relaxed, and a large number of exemptions from the AMA were created through various laws for the purpose of lifting restrictions on cartels. The AMA was forced to take a large step backwards in terms of legislation. At one time there were as many as 76 such exemptions under 49 laws.

In addition to the creation of such exemptions, the recession that hit Japan in 1957 strengthened movement to escape the economic slump by cartels, with the number of cartels exempted from the AMA rising rapidly from 52 in 1952 to 595 in 1959, and these being only those that could be accounted for¹. In 1966, the number of cartels hit an all-time high of 1079.

(3) 1970s: Consumer prices and exemptions from the AMA

With the start of the 1970s, the consumer price problem began to be aggravated. The JFTC suspected that the extraordinary rise in some consumer prices was the result of illegal cartels aiming to increase prices and took aggressive action to attack illegal cartels.

The JFTC also launched a more rigorous examination in issuing approval of cartel exemptions. This led to the number of antirecession cartel exemptions dropping to only 5 in

¹ Regarding exemptions from the AMA in 1999 and earlier, the total number cannot be assessed due to the absence of system regarding mandatory applications and notification to the JFTC from administrative authorities when approving cartels.

1975², despite the economic slump. The number of cartel exemptions fell steadily from 844 in 1970 to 506 in 1979.

The rapid decline in the number of cartel exemptions was backed not only by the rigid stance upheld by the JFTC but also by growing public antagonism toward corporate behavior to force price increases taking advantage of the tight supply-demand situation through cartels. Such public antagonism made industries more cautious in applying cartel exemptions as well.

(4) 1980s: International trade friction and exemptions from the AMA

In the 1980s, Japan began to post huge trade surpluses, following early recovery from economic stagnation of the international community caused by the oil crises. Under such external economic conditions, combined with the economic recession in other industrialized countries, international criticism grew over the impediments of access to the Japanese markets.

Facing with such criticism, open market and international harmonization became major policy issues for Japan. It became increasingly important to promote free and fair competition and to enable market mechanism to function more effectively.

Under such conditions, an advisory council on administrative reform for the Prime Minister³ issued a recommendation in 1988 that “precise and effective operation of market principles is important, and exemptions from the AMA must be reviewed flexibly and actively in consideration of the realities of the economy and changes in the environment.” Since then, the Japanese government, with the initiative taken by the JFTC, organized an all-out review into any exemptions from the AMA.

(5) 1990s: Collapse of the economic bubble and exemptions from the AMA

At the start of this decade, Japan fell into an economic recession, following the collapse of the bubble economy. Instead of addressing economic stagnation with the conventional approach of cartel exemptions, Japanese economy sought business reinvigoration by enhancing efficiency and international competitiveness through promoting competition among themselves.

² Generally speaking, antirecession cartels include fixing sales prices and limiting production output. In the recession of 1965, however, the number of items implemented under the antirecession cartel exemptions was 18.

³ Officially named the “Provisional Council on Administrative and Fiscal Reform”

As the recession was protracted, criticism toward such exemptions from the AMA intensified as an obstacle to industrial efficiency by allowing inefficient businesses to remain in operation. From 1995 and later, a series of cabinet decisions led to a pledge to review the exemptions from the AMA and move towards ultimate abolition in principle.

Through negotiations with administrative authorities, the JFTC produced a comprehensive bill aimed at abolishing exemptions from the AMA on separate occasions in 1997 and 1999. Both of these bills were approved and passed by the Japanese Diet. As a result of this legislation, 28 laws and 89 exemptions that had existed in July 1997 fell to 15 laws and 23 exemptions in March 2000.

(6) Today

The AMA exemptions are currently restricted to certain insurance businesses, joint domestic shipping operations, joint bus operations, etc., in addition to the IATA Agreement and Shipping Conference. The number of items is 24 as of January 2006.

Japan's departure from its dependence on cartels toward abolition of the exemption program was prompted directly by the growing public criticism that Japan's economic structure had heavily relied on cartels. I believe that the emergence of public opinion was a result not only of changing economic environment such as globalization, but also of uninterrupted efforts by the JFTC.

3. Activities in addressing *kansei-dango*

(1) *Kansei-dango*

Generally speaking, tenders submitted by national, local and regional government bodies and other public organizations, are organized for determining contractors and contract prices, etc., of projects, through free and fair competition among participants in such biddings. Restrictions of competition pertaining to the sale of relevant goods and services by prearranged choice of bid winners from among the participants, or so-called bid-riggings, erode the integrity of the entire bidding system and at the same time violate the AMA.

In bid-riggings, officials of national and local governments have increasingly been found to be involved as participants in them. For example, a government official in charge of the bid would attend a meeting of business representatives and provide yearly targets of order volume allocated for each enterprise and issue instructions to coordinate to achieve such targets. Also, in response to request from businesses entrepreneurs, the official would

designate a winner of bidding, suggest the name of the prospective winner or even leak the planned ceiling price, which should not be disclosed to them. Such bid-riggings are generally called *kansei-dango* (government assisted or facilitated bid-riggings) in Japan. In these cases, a government official's explicit direction for rigging, its expression of intention regarding bid winners and other forms of involvement of government officials are observed.

(2) Legislation of the Act concerning the Elimination and Prevention of Involvement in Bid Riggings

The move to review requirements for a law to prevent *kansei-dango* was prompted by a bid-rigging case for a local government project for which the JFTC issued a cease and desist order in May 2000. In that case, the evidence was found to prove that the project owner had communicated the intention regarding who should be a bid winner, and the JFTC issued a request of remedies to the local government in question. Spurred by this incident, government official's involvement in such bids known as *kansei-dango* drew strong criticism from society. While penalty may be imposed on business enterprises involved in such bid-riggings, there is no sanction on the side of officials who induce bid-riggings. This imbalance brought about a sense of unfairness toward service contractors.

For this reason, the government began to study in light of preventing government officials from committing such involvements, resulting in the legislation of the Act concerning Elimination and Prevention of Involvement in Bid Riggings, in January 2003. Based on the law, the aim of which is eliminating and preventing involvement of government officials in bids, the JFTC may require that a head of organizations offering the concerned bids make corrective measures to eliminate the involvement of government officials. Also receiving request from the JFTC, a head of relevant ministries and other government organizations have to investigate whether there is evidence substantiating disciplinary punishment on those officials involved in bid-riggings. Cooperation and coordination among relevant administrative organizations, etc are also required by the law. Since enactment of the law, there have been three cases in which the law was applied.

(3) Case studies in the application of the Act concerning Elimination and Prevention of Involvement in Bid Riggings

I would like to give you an example of application of the Act concerning Elimination and Prevention of Involvement in Bid Riggings, in the most recent case in

September 2005, involving the Japan Highway Public Corporation(The Corporation was privatized into East, Middle and West of Nippon Expressway Company Limited in October 2005.).

Recommendation on participants in the bid for steel bridge construction project for the Japan Highway Public Corporation

(a) Outline of the case

Japan Highway Public Corporation (hereinafter called “JHPC”) was a public corporation responsible for ordering projects on Expressway construction, etc., across Japan. Mitsubishi Heavy Industries, JFE Engineering, and 43 other bridge building enterprises, through involvement of officials representing the JHPC, jointly decided on the bid winners, in order to prevent a decline in the project price and to guarantee stable profit levels regarding the steel bridge construction ordered in the forms of competitive bidding for the JHPC, later than April 1, 2002, thus substantially restricting the competition over the project.

(b) Outline of involvement

Here is a summary of involvements in bid-riggings regarding the steel bridge construction project of the JHPC:

- (i) An executive official of JHPC (hereinafter called the “JHPC official”) received from a concerned entrepreneur’s employee, who was once an executive official of the JHPC (hereinafter called the “former employee”), an “allocation chart” in which bid winners were designated, approved the terms stipulated on the chart on each occasion, and made the allocation chart submitted to and stored by the Toll Road Department of the JHPC.
- (ii) In response to a request from the former employee, the JHPC official had the project broken up into separate orders when the project was initially planned to be contracted in bulk. Moreover, one of the JHPC officials front-loaded a separate steel bridge construction project, in response to a request from the former employee when an initially planned project had been scrapped.
- (iii) In response to a request from the former employee, one of the JHPC officials reduced the level of minimum corporate scale eligible for participating in a bidding as a form of joint corporate contracting for steel bridge construction, from 1.5 billion yen or higher to one billion yen or higher.
- (iv) Furthermore, the JHPC official disclosed unpublished information that was

otherwise to be kept confidential, such as the name of the steel bridge construction project, total steel weight, the scheduled date of order, etc., in response to a request from the former employee.

The actions described in (i), (ii), and (iii) had been conducted for the purpose of securing employment for the retirees of the JHPC, through maintaining bid-rigging operated. Action described in (i) demonstrates that the JHPC official approved of bid-rigging in which bid winner was selected in advance by the hand of the former employee and that participants in bid-rigging decided the bid winner based on the designation and terms described in the allocation chart which was authorized as a form of approval taken by the JHPC. Actions in (ii) and (iii) facilitated the selection of the bid winner by the former employee and those actions demonstrate that the JHPC official not only permitted tacitly and confirm the bid-rigging but also organized such bid-riggings. Since above-mentioned actions fall under the articles of the Act concerning Elimination and Prevention of Involvement in Bid-rigging, an order to implement corrective measures was issued to the president of the public corporation.

4. Conclusion

Finally, I would just like to touch upon the first comprehensive amendments of the AMA in the last quarter century in April 2005. These amendments took effect on January 4 of this year and those include increasing the rate of surcharge imposed on violators of the Act and the application of higher rate to entrepreneurs with a repeated history of violations as well as introducing criminal investigation powers. Those amendments aim to regulate AMA violations in more active and stricter manner. On the other hand, the amendments provide a motivation for terminating violations at the earliest opportunity. For example, a leniency program was introduced, taking into account models in the United States, the European Union and other developed countries. Under the program entrepreneurs reporting their violations to the JFTC are able to enjoy immunity from or reduction of surcharges.

New systems have been introduced by the amendments and current challenge before us is implementing these systems precisely and effectively in order to adequately deter AMA violations. For revitalizing the economy and furthering consumer interests through free and fair competition, we are fully committed to continuous promotion of competition policy through rigorous enforcing of the AMA as well as addressing state-imposed or facilitated restraints.