Japan Fair Trade Commission

Endeavour to Establish a Rigorous Enforcement of the Antimonopoly Act in Japan

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Remarks for Session 1
"Recent Development of Competition Law and Policy
in East Asian Economies"

The 4th East Asia Conference on
Competition Law and Policy

Hanoi, Vietnam

May 3, 2007

I. Introduction

It is my great honour to speak here today before the fourth East Asia Conference on Competition Law and Policy. I would like to express my sincere appreciation to Director General Dinh Thi My Loan and her colleagues of the Vietnam Competition Administration Department ("VCAD") for hosting this significant conference. Especially, because Vietnam has participated in the WTO in this January, we believe that the VCAD's role will be more important in the East Asian region.

I believe that exchanging our experiences and opinions in the past East Asian conferences have been significantly meaningful for our active competition policy enforcement, especially in cooperating with each other in order to ensure the competitive environment in the East Asian region. Thus, I strongly hope that this year's conference will also be fruitful and contribute to our efforts to strengthen our competition policy enforcement and cooperation among us.

In this session, I would like to present our endeavour to ensure sound competition in Japan by introducing the recent developments of competition law and policy, and also touch upon our efforts to strengthen cooperation among competition authorities in East Asia.

Before starting today's subject, I would like to briefly mention the current economic environment in Japan and the role of the Japan Fair Trade Commission ("JFTC").

Since I joined the JFTC as the Chairman in 2002, the Japanese economy has been gradually revitalised. I believe that one of the reasons is that the private sector has recovered its dynamism and sustained its development by itself. I am sure that such economic recovery has been backed by the economic and financial structural reform, which has been actively pursued by former Prime Minister Koizumi. For ensuring such a dynamic economic environment, the JFTC has been actively enforcing the Antimonopoly Act ("AMA"), advocating that there is no economic growth without sound competition.

Now, in order to advance economic development further, Prime Minister Abe is trying to bring fresh energy into the Japanese economy by enhancing innovation and further opening it to the world. I believe that such proactive policy will provide strong incentive for market participants to take a further step toward innovation and then will make business activities more dynamic. However, if sound and effective competition is not secured in the market, the creative initiatives

of entrepreneurs would not be stimulated enough, and as a result, the economic development may lose its momentum.

Therefore, the JFTC continuously needs to play a significant role as the competition authority in order to ensure sound and effective competition. Especially, since the AMA was amended in a comprehensive way in 2005 aiming at strengthening its enforcement power and deterrent effect to the anticompetitive activities, it is necessary for the JFTC to enforce the amended AMA more vigorously than ever, so as to contribute to realising a vital, energetic, and robust economy and society.

II. Enforcement of the 2005 amended AMA

(1) Brief Explanation of the Amendments

In order to enhance significantly its deterrence to the anticompetitive conducts, the AMA was amended in 2005 and the amendment took effect in January 2006, in view of fully materialising the benefits of structural reform of the Japanese economy.

Among the specific provisions that were amended includes an increase in surcharge rates imposed on violators of the AMA, from 6% to 10% of the related turnover for the large-sized enterprises and application of 50% higher rates to repeat offenders. In addition, the amended AMA introduced criminal investigation power in order for the JFTC to treat with serious violation in a more strict and effective manner, which is expected to enable the JFTC to file criminal accusations much more aggressively.

Alternatively, a leniency program was introduced by the amendments, where 100% immunity from surcharge for the first applicant, 50% reduction of surcharge to the second applicant, and 30% reduction to the third applicant are afforded as long as they provide necessary information before the start of the JFTC investigation. Even after the initiation of investigation, 30% reduction is equally available up to the third applicant.

Moreover, the JFTC has made clear in “The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations”, that it will not file a criminal accusation against the first enterprise that files an application before the initiation of investigation as well as officers and employees of the applicant.

(2) Recent Case Management

Following the amendments, during the fiscal year 2006 (April 2006 to March 2007), the JFTC took legal measures on cartels and bid-riggings against 69

enterprises in 9 cases. The amount of surcharge payment ordered in the fiscal year 2006 was 36.3 billion yen (around US$ 302 million[1]) against 165 entrepreneurs, which is the highest record in the history of the AMA in terms of the amount of payment.

Moreover, the number of legal measures taken during the same period against unfair trade practices was 4, in which 2 cases were concerning abuses of dominant bargaining power.

As to leniency application, contrary to some concerns prior to its introduction, the JFTC has received more than 100 applications since January 4, 2006, the effective date of the amendment. I believe that due to the increase in the surcharge rates and the introduction of criminal investigation power, a stronger incentive to avoid the surcharge or criminal prosecution seems to have grown up in the Japanese business society.

Our next step is to make the leniency programme more effective, through vigorous enforcement against cartels and bid-riggings, proving that they will never be paid off. I am sure that such an active enforcement would also increase a strong incentive for companies to establish effective compliance system, which leads to enhancement of the deterrent effect to anticompetitive activities.

Here, I would like to briefly introduce major cases, in which the newly introduced systems have been utilised. These cases would make clear how vigorously the JFTC has been engaging in anti-cartel enforcement especially against bid-riggings.

a. Bid-rigging case concerning human waste disposal facilities construction procured by municipalities etc.

The first case is a bid-rigging concerning human waste disposal facilities construction. In the investigation of this case, the JFTC, for the first time, conducted criminal investigation, and as a result, it accused 11 companies and their individuals with the Prosecutor General in May and June 2006. According to the investigation, 11 companies agreed to prearrange bid winners among bid participants for construction of human waste disposal facilities ordered by local municipalities etc. and to cooperate with each other for prearranged winners to win bids at their seeking price.

The JFTC found that the violation had extensive influence on people's living and thus decided to conduct criminal investigation in order to seek criminal accusation. The effect of introduction of criminal investigation power was found to be quite useful in gathering relevant evidence, and the JFTC successfully brought

[1] The calculation is based on one US Dollar equal to 120 Japanese Yen.

this hard core cartel into daylight.

b. Bid-rigging case concerning tunnel ventilation construction procured by the Metropolitan Expressway Public Corporation

The second bid-rigging case occurred over tunnel ventilation construction procured by the Metropolitan Expressway Public Corporation. This is the first case that the newly introduced leniency program has been applied since the amendment took effect. In this case, on September 8, 2006, the JFTC revealed that three companies were granted immunity from or reduction of surcharge by applying the newly introduced leniency program.

c. Bid-rigging case concerning floodgate projects procured by the Ministry of Land, Infrastructure, and Transport etc.

A bid-rigging has also been found on floodgate projects procured by the MLIT, the Japan Water Agency ("JWA"), and the Ministry of Agriculture, Forestry and Fisheries ("MAFF"). It was also found that the enterprises concerned had jointly rigged a series of bids and officials of those procurement agencies had facilitated such bid-riggings. To be more specific, over 20 enterprises jointly decided on the bid winners in advance, through involvement of officials of each procurement agency, in order to prevent price of floodgate projects from declining. Therefore, on March 8, 2007, in accordance with Article 3 of the Act on Elimination and Prevention of Involvement in Bid-Rigging etc., the JFTC demanded the Minister of the MLIT to implement improvement measures on the administration of bidding and contracts so as to prevent the involvement in bid-rigging by its officials. This is the first case where a central government agency has been subject to the Act on Elimination and Prevention of Involvement in Bid-Rigging etc.

Based on the result of investigation, the JFTC issued cease and desist orders and surcharge payment orders. The total amount of the surcharge was 1.67 billion yen (around US$ 14 million).

d. Bid-rigging case concerning subway construction procured by the City of Nagoya

The final case is a bid-rigging concerning subway construction procured by the City of Nagoya, where big name firms such as Kajima Corporation, jointly agreed to prearrange a bid winner for each competitive tender on construction for extending subway line, and they also agreed to make a bidding price convenient for the prearranged winner to win the bid.

Based on the criminal investigation, the JFTC found a criminal violation of

the AMA and, on February 28 and March 20, 2007, filed criminal accusations with the Prosecutor General against 5 companies and 5 individuals that had played a critical role for the violation.

In this case, the JFTC, for the first time, did not refer the first leniency applicant to the Prosecutor General in accordance with "The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations".

III. Address for Ensuring Fair Competition

In addition to the enforcement against cartels and bid-riggings, the JFTC has also devoted its considerable resources to ensuring fair competition in the market, mainly by regulating unfair trade practices in the retail sector, in which we often see large-scale retailers engaging in abusive conducts against suppliers by taking advantage of dominant bargaining position. Specifically, there have been many cases where a large-scale retailer forces its suppliers to send their own employees to assist product display works and inventory works, requests its suppliers to provide a certain amount of money without any justification, and/or returns unsold goods to its suppliers without any reason for which its suppliers are responsible.

Those kinds of conduct distort appropriate transaction by such suppliers and unduly burden them with competitive disadvantages in competing with other suppliers. Also allowing large-scale retailers to conduct such abusive behaviours would put them on advantageous place in competition compared with other retailers. That is, abuse of dominant bargaining position impedes fair competition among both suppliers and retailers.

Therefore, the JFTC has put its priority on regulation against such unfair trade practices and has taken necessary measures by strictly enforcing the AMA. In addition, it has also established and/or revised relevant rules so as to regulate such abusive conducts more effectively.

Specifically, the JFTC issued new rules applied to specific conducts by large-scale retailers, namely "Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers", which was made public in May 2005 and took effect in November of the same year. The designation clearly states that large-scale retailers, including department stores, supermarkets, mass-market discounters, and headquarters of convenient stores, are prohibited to engage in returning goods without any justification, unduly ex post facto wholesale price reduction, assigning own works to employees of

suppliers, requiring suppliers to provide economic benefits, and so on, as long as such conducts tend to impede fair competition.

In accordance with the designation, the JFTC has actively regulated unfair trade practices conducted by large-scale retailers, and it has issued cease and desist orders against a total of two cases since the designation took effect in November 2005.

By citing the two cases that the JFTC took measures, I would like to provide you with specific pictures that we have actually experienced in Japan.

(1) Case against Valor Corporation (October 2006)

The first case is caused by Valor Corporation ("Valor"), which is a large-scale retailer with its annual turnover of 163 billion yen in the fiscal year 2005 and mainly selling dietary items and daily goods. In this case, Valor coerced its suppliers to purchase gift goods, gift certificates, and/or beer coupons, and also forced them to dispatch their employees to assist Valor's own businesses such as displaying goods when it was opening new shops or renovating existing shops. Moreover, Valor, without prior explanations on grounds for calculation or purpose, compelled its suppliers to provide a certain amount of money in order to ensure its own gross profit.

Since those suppliers considered Valor an important trading partner and strongly wanted to continue a transaction with Valor, they had no choice but to accept Valor's various requests. Such a situation provided Valor with a significant advantage of its bargaining position to its suppliers and enabled Valor to force its suppliers to do what it wanted.

The above conducts by Valor correspond to the specific anticompetitive behaviours stipulated on the "Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers" and Item 14 of the Unfair Trade Practices, and therefore, the JFTC issued a cease and desist order to Valor in October 2006.

(2) Case against Nishimuta Corporation (March 2007)

In the second case, a large-scale retailer, Nishimuta Corporation ("Nishimuta"), took advantage of the situation where it has a superior bargaining power in transaction against its suppliers heavily dependent on Nishimuta in terms of their business activities, and coerced its suppliers to take back unsold goods despite no responsibility for its suppliers, by making use of its dominant bargaining position. Moreover, in order to cover the profit decrease caused by price discounts of specific goods, Nishimuta forced its suppliers, which had

supplied such specific goods, to accept ex post facto wholesale price reduction of those goods.

Since these conducts are prohibited by the “Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers”, the JFTC issued a cease and desist order to Nishimuta in March 2007.

IV. Ensuring Predictability and Transparency of the JFTC’s enforcement

Only focusing on enforcement without paying due attention to its predictability and transparency from the company’s perspective might result in making the market competition less effective. The reason is that, without such predictability and transparency, company would not be able to judge what conduct is illegal and then might refrain from engaging even in pro-competitive business activities, or might engage in anticompetitive activities without acknowledging their consequences.

Therefore, in order to avoid such risks and to ensure the effective competitive environment, the JFTC has revised its guidelines in a timely manner and has published new ones, so as to clarify what activity would be subject to regulation by the AMA.

Here, I would like to introduce our recent efforts to make the law enforcement by the JFTC more predictable and transparent.

< Merger & Acquisition Guidelines >

The recent example is the revision of the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination” (“M&A Guidelines”), which were published and took effect on March 28, 2007.

The objective of the revision was to further increase the extent of predictability and transparency of merger reviews by the JFTC, considering the economic globalisation.

The revised M&A Guidelines, first of all, clearly provide that the JFTC will define a particular field of trade (a relevant market) based mainly on the substitutability for users, making use of the notion of SSNIP (Small but Significant Non-transitory Increase in Price). As for the geographic range, the revised guidelines make it clear that a particular field of trade (a relevant market) might be defined across the national border.

The second point of the revision is about so-called safe harbour. The previous safe harbour was delineated by the market share of the parties and the Herfindahl-Herschmann Index (“HHI”). On the other hand, taking into

consideration the safe harbour in other major competition authorities, the JFTC has adopted the HHI and the increment of the HHI as the revised safe harbour.

Finally, the revised M&A Guidelines clarify how pressures of import and entry into the relevant market would be assessed in reviewing specific cases, showing factors to be considered such as transportation costs, substitutability of product, various barriers, etc.

In addition to the revision of the M&A Guidelines, the JFTC has released the compilation of reviews of main cases as references for companies having a business combination plan, because its fact-findings and competitive impact analysis may be useful for them. I believe that both the revision of the M&A Guidelines and continuous publications of reviews of main cases have significantly increased predictability and transparency of the JFTC's M&A review.

V. Discussions in the Study Group set under the Cabinet Office

Another important topic that I would like to introduce here is the current situation of the discussion in the "Antimonopoly Act Study Group" ("Study Group") set under the Cabinet Office in July 2005. When the AMA underwent the comprehensive amendments in April 2005, there remained strong arguments for further necessity to discuss several fundamental issues, including whether or not the scope of infringement subject to surcharge should be expanded, and how investigation and hearing procedures should be so as to ensure due process and effective enforcement.

Accordingly, the supplementary provision of the 2005 amendment law stipulated that the government examine those fundamental issues and then take necessary measures based on the result of the examination within two years from the enforcement of the amendment. Following the supplementary provision, the Study Group was established in the Cabinet Office, consisting of 20 academicians and representatives from business and consumer societies.

The Study Group started its discussion in July 2005 and so far 30 meetings have been held. It is now in the process of wrapping up the discussion to conclude its examination in June this year. Among the topics covered in the Study Group, I will touch upon a couple of issues: scope of surcharge and administrative hearing procedure.

(1) Scope of Surcharge

One of the important issues raised at the Study Group is whether surcharges or any other forms of administrative pecuniary sanctions should be

levied on exclusionary conduct by a dominant company, or “private monopolisation through exclusionary conduct” in our term.

Although, even now, it is still unclear how the Study Group will conclude this issue, there have been a number of opinions already expressed at the Study Group for introducing legislation to make it possible to impose surcharges on exclusionary type of private monopolisation in some way or another. At the same time, however, quite a few members of the Study Group have observed that it would be necessary to clarify those specific cases on which surcharges are to be imposed, in order to avoid chilling pro-competitive business activities.

In the course of the discussion of the Study Group, the JFTC had an opportunity to explain its views on the main issues at the Study Group last October.

On that occasion, we expressed our views that exclusionary type of private monopolisation should be subject to administrative surcharge. One of the reasons is that we have continuously observed cases of exclusionary type of private monopolisation, and another is that the expansion of the scope of surcharge is expected to bring a deterrent effect to specific unfair trade practices, such as unjust low price sales, discriminatory pricing, and so on, which are often used as a means of private monopolisation. Imposing administrative surcharges on private monopolisation is consistent with regulations of some of other developed economies such as the EU and Australia, which impose fines on abuse of dominant position.

Also on agenda in the Study Group is whether unfair trade practices should be subject to administrative pecuniary sanction. Opinions are divided on this issue, and further discussion is expected in the Study Group.

(2) Administrative Hearing Procedures

Another important issue is the discussion concerning the hearing procedure of the JFTC.

According to the current system, when an enterprise, which has received a cease and desist order or a surcharge payment order, is dissatisfied with the order, the enterprise shall request commencement of the hearing procedure from the JFTC. After receiving the request, the JFTC normally entrusts a hearing examiner in the JFTC’s General Secretariat to conduct the hearing procedure. In case there is still a complaint on the decision issued by the JFTC after the hearing procedure, the enterprise may bring a suit for revocation of the decision before the Tokyo High Court.

In the Study Group, it has been discussed whether or not the current

hearing procedure should be abolished. One of the main opinions supporting abolishment of the hearing procedure is derived from distrust against the hearing procedure in which the JFTC hears the administrative appeal by itself. Thus, it argues that complaint on the order should go directly to the district courts without the JFTC's hearing procedure.

However, we find it appropriate to maintain the administrative hearing system at the JFTC, mainly because there is a necessity to ensure consistency and stability in interpreting and applying competition law, and also because ground rules for day-to-day business activities should be formulated by the specialised commission and under the exclusive jurisdiction of the Tokyo High Court. Moreover, as stipulated in the AMA and related rules as well as new investigation and hearing schemes based on the amended AMA, independence and neutrality of hearing examiners ensure a proper hearing procedure. Furthermore, the history of judicial decisions, where the JFTC's decisions were rarely reversed by the court, shows that the JFTC's decisions are impartially and fairly made based on the expertise.

The Study Group is now vigorously examining those fundamental issues on the AMA, and is expected to conclude its discussions in June this year.

VI. International Cooperation

We also perceive the significant necessity to strengthen cooperation among competition authorities in the East Asian region by utilising various opportunities, such as bilateral meetings, ICN, APEC, and this conference as well as the tomorrow's Top Level Officials' Meeting. The main reason is that we are facing rapid progress of economic globalisation, which is strengthening economic ties among the East Asian economies and activating various forms of international transactions, including foreign direct investments. In such an environment, it is extremely important for respective jurisdictions to develop and enforce their competition laws adequately and to cooperate with each other in order to effectively and efficiently regulate anticompetitive activities that adversely affect international trade and investment.

Thus, in the negotiation of Economic Partnership Agreement ("EPA") with other countries, the JFTC has emphasised competition policy and cooperation as an important component of EPA, and Japan and the countries that have signed EPA, such as Singapore, Malaysia, the Philippines, Thailand, etc., have successfully established mutual understanding on competition policy and

cooperation. I believe that the JFTC should continuously emphasise an importance of competition policy and international cooperation, making use of every opportunity.

In addition, the JFTC has provided technical assistance on competition policy and law implementation to various economies mainly in the East Asian region, so as to support their establishment and/or enforcement of competition law. Since the JFTC has a wealth of experience gained through the 60-year history, we will continuously provide a variety of technical assistance based on such experience in order to ensure the competitive environment in East Asia.

On the other hand, it is very important for both donor and recipient economies to have a dialog to achieve more effective technical assistance. Also I believe that there is a necessity to exchange information among donors on their efforts and plans of technical assistance. Since our resource is limited while demand for technical assistance is huge, we had better consider a framework to make technical assistance more efficient and effective.

In tomorrow's Top level Officials' meeting, by the way, we will discuss how we could coordinate technical assistance in the future. I expect that the discussion will be constructive one for not only donors but also recipients.

VII. To the Future

So far, I have touched upon recent activities of the JFTC along with some main issues that we need to challenge in the near future. As you can see, our important tasks are to strengthen enforcement of the AMA and to enhance deterrent effect to the anticompetitive activities. In addition, we need to take significant efforts to ensure predictability and transparency of our enforcement activities, which is effective to avoid chilling pro-competitive business activities.

Moreover, since the Study Group will issue its report this June on the future framework of the antimonopoly regulation in Japan, we will consider it on our side, fully taking into account the discussions of the Study Group. This year marks the 60th anniversary of the AMA and the JFTC. Thus, I think that it is opportune to consider the future shape of the AMA suitable for the 21st century, thoroughly taking stock of our long history of the competition law and policy.

Finally, before closing my remarks, I would like to announce that the 2008 ICN annual conference will be held in Kyoto, Japan, from Monday April 14, 2008, to Thursday 16, starting with a welcome reception on Sunday April 13.

The reason why I have chosen Kyoto as the venue is that the better

understanding of the culture of the other country would be of great help to deepen the relationship among authorities. As you know, Kyoto is the ancient capital of Japan as well as a representative of the Japanese culture and tradition, and thus, I have considered Kyoto to be the best place to invite competition authorities from the world.

Normally and no exception for the ICN Kyoto conference, the top officials of the competition authorities in the world will gather, and thus, we will be able to exchange opinions directly and candidly with each other. It will also provide a great opportunity for us to strengthen international cooperation among competition authorities. Therefore, as one of the East Asian competition authorities, we would like to take advantage of such a precious opportunity and play a role of bridge between the East Asian competition authorities and the others coming from the rest of the world.

Thank you very much for your kind attention.