



Japan Fair Trade Commission

**Leniency Programme and Bid Riggings in Public Sector
- Enforcement Experiences in Japan -**

Kazuhiko TAKESHIMA
Chairman
Japan Fair Trade Commission

Speech for Session VI
“Investigation Procedures and Techniques of Monopoly Cases”

The International Symposium on Enforcement of
Antimonopoly Law of the People’s Republic of China

Beijing, China

December 14, 2007

Ladies and Gentlemen,

It is a great pleasure for me to be invited to speak here before the International Symposium on Enforcement of Antimonopoly Law of the People's Republic of China. I would like to express my sincere appreciation and respect to Minister Zhou Bohua and his colleagues of the State Administration for Industry and Commerce (SAIC) for hosting this significant symposium.

Also, I congratulate the Chinese authorities on the adoption of the comprehensive Antimonopoly Act. I have heard that significant efforts to make implementation rules necessary for transparent and consistent law enforcement are now going on. I believe that the new Chinese Antimonopoly Act will bring enormous benefits to the Chinese economy and consumers through realising sound market competition in China.

Today, I would like to take this opportunity to share with you our enforcement experiences against bid riggings in the public sector. At first, I will introduce to you the content of the amendments to Japan's Antimonopoly Act enacted in April 2005, particularly focussing on the leniency programme. In addition, our approach against bid riggings facilitated by government officials will be discussed. Several major bid-rigging cases will be followed to introduce actual law enforcement practices in Japan.

I. 2005 Amendments to Japan's Antimonopoly Act

When I was appointed as the Chairman of the Japan Fair Trade Commission (JFTC) in July 2002, one of the most important tasks was to encourage a competitive environment through enhancing compliance with the Antimonopoly Act in the business community. Since then, the JFTC has strived to achieve the task, advocating that there could be no economic growth without competition. In the process of this endeavour, the JFTC has engaged in vigorous law enforcement against violations, in particular cartels and bid riggings, and conducted comprehensive reviews of the Antimonopoly Act.

And in April 2005, Japan's Antimonopoly Act underwent its first comprehensive amendments in the last quarter century, with the objective of strengthening the JFTC's enforcement power and of developing sufficient

deterrence against cartels and bid riggings. The amendments included increases in surcharge rates imposed on cartelists from 6% to 10% of the related turnover for the large-sized enterprises and established the application of 50% higher rates to repeat offenders. They also provide the JFTC with criminal investigative power in order to handle serious and vicious violations in a more strict and effective manner.

II. Design of Japan's Leniency Programme

One of the most significant amendments in terms of realisation of more effective investigation was the introduction of a leniency programme. Before introducing the programme, we had to rely on voluntary cooperation from the entrepreneurs that we investigated and on voluntary provision of information necessary to demonstrate violations. As sanctions against cartel activity strengthened and society became more critical of cartels, cartel activities became more devious and covert. Thus, we had great difficulty in obtaining statements from corporate personnel involved in cartel activities.

When the JFTC started discussing the idea of introducing a leniency programme, public opinions in Japan were basically against it. Many said, for example, that the programme was undesirable because it encouraged betrayal, or that a leniency programme could not be expected to work in Japan because the Japanese society places value on mutual trust among members of group.

In the design of the programme, we drew on the lessons learned by leniency programmes in other countries. Moreover, in light of the comments just mentioned, we endeavoured to design a programme that was as transparent and as safe to use as possible so that those who committed the violative activities would be able to apply actively for leniency. This led to the following programme features:

- (1) Full immunity from surcharges is offered to the entrepreneur who is the first among the entrepreneurs that committed the violative activities to apply for leniency before the JFTC's investigation is initiated.
- (2) Japan has a system whereby the JFTC has some discretion to bring criminal charges at the Prosecutor General against an entrepreneur and its employees engaging in cartel activities. Therefore, the JFTC made public that it would not bring criminal charges against the first applicant for leniency, including its

employees.

- (3) Under the Japanese leniency programme, a total maximum of three entrepreneurs, including those who apply for leniency after an investigation is initiated, can receive immunity from or reduction of surcharges. This means that the order of application submission is very important to the applicants. To ensure that the order of application submission can be objectively established, applicants are required to complete a set form with the necessary information about the commodity handled in the cartel or bid rigging and to transmit it to the JFTC by facsimile.
- (4) To heighten the incentive to provide the JFTC with information as early as possible, we introduced a marker system, which was already functioning effectively in the U.S. at the time when we were designing our programme. Under this system, when an applicant makes an initial application, the applicant is given a tentative place in line. Even though the applicant cannot submit a detailed report at that time, a marker is given. And the position is formally determined once the applicant submits a detailed report by a certain deadline. Such a marker system was later introduced by the European Commission as well.
- (5) To apply for leniency, the applicant must transmit by facsimile a written report providing the necessary information. It is sufficient, however, for applicants to report detailed information orally rather than in writing. We chose this method for the following reasons: there were concerns that discovery of information would be sought in international cartel cases if action for damages were brought to the U.S. courts. Requiring that the details of a cartel be written on the form would reduce the incentive for applying for leniency.
- (6) The application form must be completed in Japanese. If relevant materials are written in foreign languages, the key points of these materials shall be selected out and translated into Japanese. As for parts other than the key points of the materials, applicants are only required to prepare a Japanese translation of such parts if so requested by the JFTC. This system was adopted because preparing full Japanese translations of a large volume of foreign-language documents was thought to pose an excessive burden on leniency applications by foreign entrepreneurs.

III. Effectiveness of Japan's Leniency Programme

Contrary to the initial negative forecast, the leniency programme has produced significant results since its introduction. We have already received more than 150 leniency applications since January 2006. Based on information submitted in these leniency applications, the JFTC took legal measures on 10 cases and lenient treatment was granted to a total of 26 companies in the same period, whose names along with their applied reduction rates of surcharges were made public on the JFTC's homepage. Seven out of the 10 cases were bid riggings. In addition, the JFTC investigated three bid-rigging cases utilising the criminal investigative power and filed criminal accusations on these cases, where in one case the JFTC launched its investigation based on information submitted by a leniency applicant who was granted immunity from criminal charges.

IV. Enforcement of the "Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc."

In Japan, there have been cases where the officials of procurement agencies were involved in bid riggings through, for instance, having entrepreneurs or trade associations engage in bid riggings, indicating a specific entrepreneur as contracting party prior to conducting competitive bids, or facilitating bid riggings with other means. In such cases in the past, no legal measures could be taken to those officials, while entrepreneurs were sanctioned by the Antimonopoly Act. In order to address this problem and to prevent such kinds of bid rigging, the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc. (Involvement Prevention Act) was enacted in July 2002 and put into effect in January 2003.

According to the Involvement Prevention Act, when the JFTC recognises that the officials of procurement agencies have been involved in bid riggings, it may demand that the heads of the procurement agencies should take corrective measures based on the Involvement Prevention Act. Once the procurement agencies receive the demand from the JFTC, they shall perform necessary inspections and implement corrective measures necessary to eliminate and prevent such involvement by their officials.

Since the Involvement Prevention Act took effect, the JFTC has found involvement of officials in four bid-rigging cases on construction works procured by

municipalities, public corporations and central government agencies respectively. The JFTC demanded in these cases that each of the entities should carry out corrective measures to eliminate and prevent their officials' involvement in bid riggings.

In December 2006 the Involvement Prevention Act was amended to be strengthened in terms of the expansion of the scope of "involvement" prohibited by the Act and the introduction of criminal penalties imposed on officials involved in bid riggings. The amendments to the Involvement Prevention Act came into effect on March 14, 2007.

V. Recent Enforcement Actions

There are several cases that I would like to introduce here to you to make my explanation more specific and understandable. In each of the following cases the JFTC utilised the tools equipped with Japan's Antimonopoly Act by the 2005 amendments. It would also be made clear how vigorously the JFTC has been implementing the Antimonopoly Act against cartels and bid riggings.

(1) Bid rigging case concerning steel bridge construction

The first case is a bid rigging concerning steel bridge construction works procured in the financial year 2004 by the Japan Highway Public Corporation (JHPC), in a case which around 50 bridge construction companies jointly and through involvement of officials of the JHPC, decided on the bid winners in advance, in order to prevent declining of bridge construction prices and to secure stable profits from the public procurement ordered by the JHPC.

This case is distinguished from normal bid riggings in that an executive official of the JHPC facilitated for companies concerned to jointly rig a series of bids by approving a "bid winner allocation chart", which was made and submitted by an employee of a company concerned who was once an executive official of the JHPC. One of the main reasons why those current and former executives involved in bid riggings is that they wanted to secure jobs for retirees of the JHPC in construction companies through distributing profits of procurement for those companies that employed the retirees, by means of organising such bid riggings.

In this case, since the JFTC found a criminal violation of the Antimonopoly Act, it filed accusations in June and August 2005 with the Prosecutor General against 6 companies and 7 individuals that had played a critical role for the violation. Included were two executives of the JHPC who allegedly committed the crime.

Besides the accusation, because officials of the JHPC were found to have permitted tacitly the bid riggings and facilitated selection of bid winners among bid participants, the JFTC, based on the Involvement Prevention Act, ordered the President of the JHPC to implement corrective measures to eliminate and prevent involvement of its officials in bid riggings.

(2) Bid rigging case concerning human waste disposal facilities construction

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

The JFTC found that the violation had extensive negative impact on people's living conditions and thus decided to conduct a criminal investigation in order to seek a criminal accusation. The effect of the introduction of criminal investigation power was found to be quite useful in gathering relevant evidence, and the JFTC successfully brought this hard core cartel into daylight.

(3) Bid rigging case concerning tunnel ventilation construction

In this case, bid riggings that seven companies were involved in occurred over tunnel ventilation construction works procured by the Metropolitan Expressway Public Corporation. This is the first case that the newly introduced leniency programme has been applied since the 2005 amendments took effect. On September 8, 2006, the JFTC revealed that three companies were granted immunity from or reduction of the surcharge by applying the newly introduced leniency programme.

(4) Bid rigging case concerning floodgate construction

Bid riggings had also been found on floodgate construction projects procured by the MLIT, the Japan Water Agency, and the Ministry of Agriculture, Forestry and Fisheries. The investigation of the JFTC revealed that officials of those procurement agencies had facilitated such bid riggings. To be more specific, over 20 companies jointly decided on bid winners in advance, through involvement of officials of each procurement agency, to prevent prices of floodgate construction projects from declining. Therefore, on March 8, 2007, in accordance with Article 3 of the Involvement Prevention Act, the JFTC demanded that the Minister of the MLIT should carry out corrective measures on the administration of biddings and contracts so as to prevent involvement of its officials in bid riggings. This was the first case where a central government agency had been subjected to the Involvement Prevention Act.

Besides the demand against the MLIT for taking corrective measures, the JFTC issued cease and desist orders and surcharge payment orders. The total amount of the surcharge was 1.67 billion yen (around US\$ 14.5 million).

(5) Bid rigging case concerning subway construction

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 the subway line. They also agreed to make a bidding price for the prearranged winner to be able to win the bid.

Based on the criminal investigation, the JFTC found a criminal violation of the AMA and filed criminal accusations with the Prosecutor General against 5 companies and 5 individuals in February and March 2007 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.

VI. Concluding remarks

So far, I have briefly explained Japan's experiences focussing on the leniency programme and the system for preventing public officials from being

involved in bid riggings. I hope that our enforcement experiences highlighted today will be of some help to Chinese competition authorities in their efforts to make rules, guidelines, etc., to realise efficient and effective law enforcement. On this occasion, let me emphasise that such efforts are indispensable to create an enforcement environment with a high degree of predictability and transparency. Specifically, making and publicising rules, guidelines, policy statements, etc., would promote understanding among businesses as to what kinds of conduct should not be engaged in. As a result, sound and vigorous competition would be achieved without chilling pro-competitive business activities that are normally caused by ambiguity of enforcement, and the economy would be able to retain its dynamism. Therefore, the JFTC has published various guidelines and revised them in a timely manner so as to clarify which activity would be subject to the Antimonopoly Act.

Finally, but no less important, I would like to mention the importance of strengthening of the cooperative relations among competition authorities, particularly in the East Asian region. We are now facing an unprecedented advancement of economic globalisation, which is strengthening economic ties among the East Asian economies and activating various types of international transactions. In such an environment, the JFTC has made significant efforts to develop and enhance cooperative relations with other competition authorities by utilising various opportunities such as bilateral meetings, ICN, APEC, East Asia Top Level Officials' Meeting on Competition Policy, and so forth. It is essential because of the necessity of realising the effective and efficient enforcement against anticompetitive activities that adversely affect the markets across borders. Now that our neighbouring country, China, has adopted a comprehensive competition law, I really look forward to working together with Chinese competition authorities to contribute to developing a further competitive environment, particularly in the East Asian region.

Thank you very much for your kind attention.