

## **RECENT ENFORCEMENT TRENDS OF SURCHARGE PAYMENT ORDERS AND CRIMINAL PENALTIES AGAINST CARTELS AND BID-RIGGING ACTIVITIES IN JAPAN**

**Kiyoshi Hosokawa  
Commissioner  
Japan Fair Trade Commission**

### **1 Introduction**

#### **Slide 1**

It is a great pleasure for me to be invited here to speak before distinguished lawyers from various corners of the world.

Today, I would like to introduce and highlight recent developments in the JFTC's endeavors to enforce the Anti-Monopoly Act (AMA), specifically focusing on measures to deter cartels and bid-rigging activities. These activities are "unreasonable restraints of trade" prohibited by Article 3 of the AMA.

### **2 Division of roles between surcharges and criminal penalties**

Under the AMA, we have two measures to penalize cartels and bid-rigging activities, i.e., the "surcharge payment order", which is an administrative measure, and a "criminal penalty."

#### **Slide 2**

The amount of the surcharge is calculated by multiplying the sales amounts of the goods or services in question by certain rates.

For example, in the case of large-sized manufacturing business enterprises, the surcharge calculation rate is 10%.

#### **Slide 3**

When the JFTC finds that the cartels or bid-rigging activities in question are serious and significantly impact the life of people, the JFTC will file a criminal accusation with the Prosecutor General against the individuals and/or enterprises that committed such criminal activities. The prosecutor, after conducting a supplementary investigation, may then bring an indictment in a competent court against the offenders.

Criminal penalties for cartel and bid-rigging cases are, for enterprises, a fine of not more than 500 million Yen, and for individuals, a fine of not more than 5 million Yen and/or imprisonment with labor for a term of not more than 5 years.

#### **Slide 4**

While advocating that there can be no economic growth without sound competition, the JFTC has been actively conducting enforcement activities against cartels and in bid-rigging cases.

The amount of the surcharge payment has increased every year, with the amount of surcharge payments ordered by the JFTC reaching 72 billion Yen in the 2010 fiscal year. This figure was the highest ever.

#### Slide 5

The number of criminal cases was only 2 before 1990. However, the number increased to 6 in the 1990s.

#### Slide 6

The number increased to 7 after 2000.

The upper limit of the surcharge payment imposed on enterprises was increased twice during the above mentioned period. These amendments of the AMA contributed to the increase in the amount of the surcharge payment imposed on enterprises.

Although a sentence of imprisonment of more than 1 year was rare in the 1990s, a sentence of more than 1 year was frequently imposed in the last decade. There was even a case in which a sentence of 3 years imprisonment was imposed.

### **3 The amendment of the AMA in 2005 and 2009 and their outcomes**

#### Slide 7

While carrying out active and vigorous enforcement activities against violators, the JFTC conducted a comprehensive review of the AMA with the objective of strengthening the JFTC's enforcement power. Consequently, the AMA was amended in both 2005 and 2009.

The 2005 amendment came into force in January 2006 and introduced three significant changes regarding enforcement power, with such changes significantly impacting our enforcement.

(1) The first change is the increase in the surcharge calculation rate, with the rate applying to large-sized manufacturing business enterprises being increased from 6% to 10%. Further, a new system of increasing the surcharge rate to 150% of the normal surcharge rate for violators who commit a subsequent offense ("repeat violators") within 10 years was also introduced. Accordingly, the upper limit of the surcharge rate for repeat violators was increased to 15% of the turnover of related goods or services.

### Slide 8

Now, I would like to introduce to you a case in which the JFTC imposed a surcharge rate of 15% on the violators. This is a price cartel case in 2010 involving 14 manufacturers of optical fiber cable products. In this case, the JFTC issued a surcharge payment order of 16 billion Yen in total to the 14 violators along with cease and desist orders.

### Slide 9

**(2)** The second change is the introduction of a leniency program to promote voluntary notification of violations from the violators themselves.

Under this system and prior to the initiation of a JFTC investigation, surcharge immunity is granted to the first applicant for leniency, with a surcharge reduction being granted to the next 2 applicants. When the number of applicants before the initiation of investigation is 2, an applicant after its initiation can be granted surcharge reduction.

### Slide 10

The leniency program has produced significant results since its introduction. Through the end of fiscal year 2009 (March 2010), we have received 349 applications in total. Furthermore, the number of applications in fiscal year 2010 is significantly greater than fiscal year 2009 (I refrain from mentioning the exact number here because procedures inside the Government have not been completed.).

### Slide 11

**(3)** The third change is the introduction of compulsory measures for criminal investigations and the establishment of a “Criminal Investigation Department” in the JFTC which has exclusive power to conduct criminal investigations.

In an administrative investigation procedure, compulsory measures to collect evidence are quite limited and indirect, with investigators being forced to rely heavily on the voluntary cooperation of related enterprises, especially those who have applied for leniency.

Under the new criminal investigation system, JFTC investigators may conduct visits, searches, or seizures based on a warrant issued by a judge and subsequently question criminal suspects and witnesses.

Under this new system, the criminal investigation department conducted an investigation of 3 recent cases from among the cases listed in slide 6.

## 4 The amendment of the AMA in 2009

### Slide 12

The 2009 amendment came into force in January 2010 and introduced 3 significant changes with regard to cartels and bid-rigging.

(1) The first change is the increase of the surcharge rate which is applicable to enterprises that played a leading role in cartels and bid-rigging by 50%.

### Slide 13

(2) The second change is a review of the leniency program. A new system of joint application has been introduced, under which multiple violators within the same company group may jointly apply for leniency and receive the same order of application. In addition, the number of leniency applicants who will receive a surcharge reduction has been increased from 3 to 5.

### Slide 14

(3) The third change is an increase in the maximum term of imprisonment of individuals from 3 to 5 years. Although the upper limit of the fine imposed on enterprises has been occasionally raised, this amendment is the first increase of the maximum imprisonment term for individuals since 1977.

Up to now, there has been no case where these amended provisions have been applied. However, I assume that they will be of considerable use to prevent cartels and bid-rigging in the future.

## **5 Act Concerning Elimination and Prevention of Involvement in Bid-Rigging (Involvement Prevention Act)**

### Slide 15

In Japan, there have been cases where the officials of procurement agencies were involved in bid-rigging through, for example, suggesting that enterprises engage in bid-rigging, by selecting a specific enterprise as a bid winner before conducting a competitive bidding process.

Because legal measures cannot be taken against those officials under the AMA, the "Involvement Prevention Act" was enacted in 2002 specifically to address this problem.

This act permits the JFTC to demand the head of procurement agencies to implement improvement measures in order to eliminate and prevent such involvement by officials.

This act was amended in 2006 in order to expand the scope of prohibited activities and to introduce criminal penalties for the officials involved.

### Slide 16

In 2010, the JFTC determined that officials had been involved in 2 bid-rigging cases.

The first case involves bid-rigging for office furniture ordered by the Air Self-Defense Force (ASDF). The JFTC determined that ASDF procurement officials were involved in bid-rigging and demanded that the Minister of Defense implement correctional measures in accordance with Involvement Prevention Act. The JFTC also requested the Ministry of Defense to disseminate the purposes and contents of the AMA and the Involvement Prevention Act to those officials engaged in procurement services, and to take any other measures necessary to prevent a recurrence.

The second case involved bid-rigging for engineering work ordered by the City of Aomori. In this case, the JFTC also determined that an employee of the City of Aomori was involved in bid-rigging and demanded that the Mayor implement improvement measures in accordance with the Involvement Prevention Act.

## **6 Concluding remarks**

Through this presentation, I have briefly explained our experiences applying and enforcing the law against cartels and bid-rigging. I hope that our experiences will be of some assistance to the lawyers gathered here today.

I thank you for your kind attention.