Report of the Study Group on the Antimonopoly Act

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October 2003

Study Group on the Antimonopoly Act

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Introduction – The Need for a Comprehensive Review of the Antimonopoly Act

Recently the implementation of structural reforms to achieve a society and economy based on market principles and the principle of self-discipline has become an urgent topic in Japan. To realize such reforms, active enforcement of competition policies in conjunction with the pursuit of regulatory reform has taken on greater importance.

Furthermore, 25 years have passed since amendments to broadly strengthen the Antimonopoly Act were enacted in 1977. During this period, the structures of Japan's economy and society have undergone immense changes. Therefore calls have been made to perform a review to determine whether the new system introduced in 1977 is consistent with today's economic circumstances.

Based on this standpoint, concerning the Antimonopoly Act enforcement systems, the Three-Year Program for Promoting Regulatory Reform (Revised) (Cabinet decision of March 29, 2002) states :"a uniform study should be made of existing Antimonopoly Act enforcement systems and the proper approach to provide the authority that should be granted to the Japan Fair Trade Commission" In addition, in a supplemental resolution of the House of Councillors Committee on Economy and Industry in April 2002 concerning the bill to amend the Antimonopoly Act, the JFTC was directed to "promptly review all enforcement systems." Furthermore, the Three-Year Program for Promoting Regulatory Reform (Second Revision) (Cabinet decision of March 28, 2003) states with regard to the public utilities sector the necessity to respond effectively against conduct to prevent market entry by new participants, against the backdrop in recent years of monopolistic and oligopolistic market structures originating in the existence of essential facilities. The latest revised plan noted, for example, that "dissatisfaction··· with the Japan Fair Trade Commission's competition surveillance function··· has been expressed by new market entrants in the network business sector concerning issues such as its specialization and promptness in dealing with cases··· This calls for strengthening the Fair Trade Commission's investigation system and functions, and accelerating the handling of matters suspected of violating the Antimonopoly Act."

As part of these efforts, the JFTC requested The Study Group on the Antimonopoly Act to study a comprehensive review of Antimonopoly Act enforcement systems and monopoly and oligopoly regulations.

The Study Group conducted a more specialized and intensive study of these respective issues by convening The Study Group on the Antimonopoly Act Subcommittee to Study a Comprehensive Review of Enforcement Systems (Chairperson: Akira Negishi, Professor, Graduate School of Law, Kobe University) and The Study Group on the Antimonopoly Act Subcommittee to Study a Comprehensive Review of Monopoly and Oligopoly Regulations (Chairperson: Akira Goto, Professor, Tokyo University, Research Center for Advanced Economic Engineering).

The Subcommittee to Study a Comprehensive Review of Enforcement Systems met nine times beginning in November 2002 and examined how best to review all enforcement systems. The Subcommittee to Study a Comprehensive Review of Monopoly and Oligopoly Regulations met five times beginning in June 2003, and examined how best to review regulations for monopoly and oligopoly markets based on the Antimonopoly Act.

Based on the results of the studies by the Subcommittee to Study a Comprehensive Review of Enforcement Systems and the Subcommittee to Study a Comprehensive Review of Monopoly and Oligopoly Regulations, The Study Group on the Antimonopoly Act prepared the following report concerning a comprehensive review of enforcement systems and monopoly and oligopoly regulations.

The Antimonopoly Act is one of the fundamental laws underpinning economic activity. As Japan promotes economic and social structural reforms, and continues to promote economic revitalization and greater consumer benefits, the role fulfilled by the Act grows more important with each passing year. The Study Group on the Antimonopoly Act looks forward to the JFTC quickly adopting the revisions necessary to achieve enforcement systems that demonstrate the effectiveness appropriate to the Antimonopoly Act as a fundamental rule for economic activity, and to achieve monopoly and oligopoly regulations capable of promptly and effectively addressing today's issues, after giving adequate consideration to the opinions of various sectors of the public, based on this report.

○ Organization of the Study Group on the Antimonopoly Act

Study Group on the Antimonopoly Act

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Study Group on the Antimonopoly Act

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	Jiro Tamura	Professor, Faculty of Law, Keio University
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Study Group on the Antimonopoly Act Subcommittee to Study a Comprehensive Review of Monopoly and Oligopoly Regulations

Study Group on the Antimonopoly Act

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	Noriyuki Yanagawa	Associate Professor, Graduate School of Economics Tokyo University
	Hiroko Yamane	Professor, National Graduate Institute for Policy Studies

○ Summary of the Examination Process by the Study Group on the Antimonopoly Act

1 Study Group on the Antimonopoly Act

Date	Topic
Meeting #1 (October 31, 2002)	Proper approach to the entire enforcement system Subcommittee to Study a Comprehensive Review of Enforcement Systems
Meeting #2 (June 12 2003)	Interim Report of the Subcommittee to Study a Comprehensive Review of Enforcement Systems Subcommittee to Study Comprehensive Review of Monopoly and Oligopoly Regulations
Meeting #3 (October 28, 2003)	Report of the Study Group on the Antimonopoly Act (draft)discussion

2 Subcommittee to Study a Comprehensive Review of Enforcement Systems

Date	Topic
Meeting #1 (November 19, 2002)	Report of the first meeting of the Study Group on the Antimonopoly Act Specific direction for comprehensive revision of enforcement systems Matters that should be studied regarding the specific direction
Meeting #2 (December 17, 2002)	Report on the present situation in the U.S. Report on the present situation in the EU, Germany
Meeting #3 (January 16, 2003)	Proper approach for the surcharge system
Meeting #4 (February 18, 2003)	Proper approach for the surcharge system
Meeting #5 (March 5, 2003)	Revision of the criminal accusation system and penal regulations
Meeting #6 (April 7, 2003)	Problems related to hearing procedures, etc. Economic considerations concerning a comprehensive review of enforcement systems
Meeting #7 (May 13, 2003)	Interim report of the Subcommittee to Study a Comprehensive Review of Enforcement Systems (draft)
Meeting #8 (July 15, 2003)	Report of the Second Meeting of the Study Group on the Antimonopoly Act Revision of hearing procedures
Meeting #9 (September 19, 2003)	Report of the Study Group on the Antimonopoly Act (draft)

3 Subcommittee to Study a Comprehensive Review of Monopoly and Oligopoly Regulations

Date	Topic
Meeting #1 (June 25, 2003)	Report of the Second Meeting of the Study Group on the Antimonopoly Act Discussion points related to comprehensive review of monopoly and oligopoly regulations
Meeting #2 (July 30, 2003)	What activities should be subject to monopoly and oligopoly regulations, viewed economically? Possibility of addressing through the provisions for private monopolization, unfair trade practices Definition of bottlenecks
Meeting #3 (September 2, 2003)	Direction of a comprehensive revision of measures regulations against monopoly situations Direction of a comprehensive review of the reporting system concerning parallel price increases
Meeting #4 (September 24, 2003)	Report (draft) discussion
Meeting #5 (October 7, 2003)	Report (draft) discussion

Part 1 Comprehensive Review of Enforcement Systems

Introduction

Recently the implementation of full-fledged structural reforms to achieve a society and economy based on market principles and the principle of self-discipline has become an urgent topic in Japan. To realize such reforms, ensuring adequate enforcement and deterrence capabilities against conduct that violates the Antimonopoly Act, such as cartels, bid rigging and private monopolization to eliminate market entry by new participants is considered necessary.

Therefore, since October 2002 The Study Group on the Antimonopoly Act has continued to study issues concerning a comprehensive review of the Antimonopoly Act enforcement systems, including (1) the role of competition policy based on actual economic conditions in Japan, (2) the function and division of administrative sanctions and criminal penalties in enforcement systems and the requirement for measure promptness and (3) the functions the JFTC should fulfill, and devoted itself to discussion points such as the standpoints from which reviewing enforcement systems is necessary and what direction for review is appropriate. Because it is necessary to pursue these issues in a specialized, intensive manner when conducting a review, the Study Group set up a Subcommittee to Study a Comprehensive Review of Enforcement Systems composed of legal scholars, economists and knowledgeable individuals recommended by consumer and economic organizations. This subcommittee carried out a study and met nine times.

Chapter 1 Comprehensive Review of All Enforcement Systems

1 Necessity for Review of Enforcement Systems (Problems with Enforcement Systems Currently in Force)

Under the current economic conditions prevailing in Japan, firms in numerous industries are confronted with robust international competition. Companies are focusing their efforts in areas such as improving technological capabilities or production efficiency, and conditions under which energetic competition has developed domestically can be noted. Nevertheless, in sectors that may be said to be little affected by international competition and where productivity is relatively low, it has been pointed out that together with entities committing repeated violations of the Antimonopoly Act, deeply-rooted cartel and bid rigging habits remain. For example, so-called *government-made bid rigging* at the initiative of government agencies in which procuring officials participate in bid rigging continues to be seen (For more information on this topic, see *Basic Policies for Macroeconomic Management and Structural Reform of the Japanese Economy* (June 2001 Cabinet Resolution) and *OECD Economic Surveys - Japan* (November 2002) in the Appendix1).

It has also been pointed out that although progress has been made recently in the public utilities sector, including liberalization of entry as a result of regulatory reform, the benefits of regulatory reform have not been realized because it is not possible to adequately act against problems such as conduct to eliminate market entry by new entrepreneurs.

Based upon these situations, there is a need to ensure adequate enforcement and deterrence powers against conduct that violates the Antimonopoly Act, in order to assure the interests of general consumers, and to revitalize Japan's economy, including restoration of Japan's international competitiveness. From this standpoint, it is necessary to comprehensively review enforcement systems (For materials that quantitatively analyze the relationship between the existence of protection measures in each industry and the degree of domestic competition and international competitiveness, and the relationship between competition policy and economic growth, see Appendix 2; for materials that analyze the causes of Japan's economic slowdown in the 1990s, including the relationship to competition, see Appendix 3).

The need for a comprehensive review of the enforcement systems in force can be stated as follows, based on considerations such as recent unlawful conduct.

○ Numerous entrepreneurs repeatedly engage in unlawful conduct, and the effectiveness of regulations prohibiting cartels and bid rigging cannot necessarily be said to be adequately assured.

The enforcement systems in force include elimination measures, surcharges and criminal penalties. Moreover, because civil compensation for damages, termination of subsidy payments and, in cases of bid rigging, measures to halt designation of bidders by procuring officials or breach of contract provisions can be applied, the view also exists that the effectiveness of enforcement systems is already sufficient. Nevertheless, looking at circumstances in which cartels and bid rigging continue with no apparent end in sight, it is difficult to state the effectiveness of provisions to prevent cartels and bid rigging have been adequately assured. Furthermore, the deterrence power of Japan's enforcement systems remains relatively weak when viewed internationally as well (see Appendixes 4 – 7).

Accordingly, there is a need to conduct a comprehensive review from the standpoint of further ensuring effectiveness. When doing so, it will be necessary to continue giving attention to issues such as the function and division in enforcement systems between administrative sanctions, taking into consideration the need to accelerate the disposition of cases in conjunction with increased speed and greater information about economic activities, and criminal penalties, as well as the proper approach for the investigation power required for elucidation of the facts in each case, and to review with the proper balance enforcement systems overall that are comprised of elimination measures, surcharges and criminal penalties.

○ Responses to complex or sophisticated cases or international cartel cases is inadequate, and there is no system to provide incentives (measures to induce or persuade) for entrepreneurs that violate the law to voluntarily quit cartels.

According to the investigation report on the U.S. and the EU by the Study Subcommittee, one large factor behind the recent ability of U.S. and EU competition authorities to increase their exposure of cartel cases is the fact they have introduced leniency programs (i.e., programs to exempt from measures entrepreneurs that voluntarily provide information concerning unlawful conduct, based on requirements designated in advance; so-called "leniency") (refer to Appendix 8 and Appendix 9; Japanese firms are also included among entrepreneurs that have been subject to these systems in the U.S. and EU). The OECD also recommends the governments of its member states introduce such systems (refer to Appendix 10).

Moreover, simultaneously with providing opportunities for firms to voluntarily quit cartels, a

leniency program can be expected to produce other results, such as increasing the intent of officers and employees of firms to observe the law. In contrast, the problem with Japan's surcharge system is that it makes it difficult for incentives to quit a cartel voluntarily to be effective because, for example, entrepreneurs that violate the law are uniformly ordered to pay a surcharge. Both domestically and internationally, it has been suggested that Japan introduce a leniency program (See Appendix 11).

○ Although the forms of unlawful conduct are proliferating along with regulatory reform and the ongoing IT (information technology) revolution, the effectiveness of measures against serious unlawful conduct other than cases such as price cartels (private monopolization, etc.) cannot be declared adequate.

Over the past few years, as regulatory reform has proceeded in areas such as the public utilities sector and the IT revolution has continued, market entry efforts using innovative technologies have been stimulated, and previously unseen forms of unlawful conduct have become evident. Although strictly controlling such unlawful violations is both necessary and indispensable for creating an environment that promotes competition, the conduct to which the surcharge system currently in force is applied is limited to only certain unfair trade restriction practices (those related to prices or those that affect prices by effectively restricting supply quantities). Under the present situation, Japan has not prepared a means to ensure adequate effectiveness related to provisions to prevent unlawful conduct to prevent market entry, such as private monopoly conduct or boycotts.

2 Direction of a Comprehensive Review of Enforcement Systems (Measures to Address Existing System Problems)

(1) Ensuring the Effectiveness of Enforcement Systems

As described above, as measures currently in force against conduct that violates the Antimonopoly Act, Japan employs elimination measures, surcharges and criminal penalties. Moreover, civil compensation for damages, termination of subsidy payments and, in cases of bid rigging, measures to halt designation of bidders by procuring officials or breach of contract provisions can also be applied. Given this situation, it is necessary to consider how to allocate the functions of each measure currently in force, and investigate what sort of comprehensive review is suitable to achieve.

From the standpoint of deterrence, the point was made that Japan should employ

enforcement systems centered on criminal penalties, apply criminal penalties more aggressively against individuals such as employees, and broadly increase the number of criminal accusation cases, which is assumed to be the most effective approach. On the other hand, the thinking (see Appendix 12) also exists that when studying the preferred and proper approach to enforcement systems, the following points should be considered.

① Criminal penalties involve modesty and self-control and supplementation principals (the thinking that from standpoints such as protection of human rights, use of criminal penalties should be restrained when it is possible to achieve the law's purpose by other means that do not involve the use of criminal penalties.
② The expense and effectiveness of criminal penalties and administrative sanctions, respectively, must be considered.
③ The question of whether there is a requirement for prompt resolution should be taken into consideration as a characteristic of each case.
④ There is a need to also consider whether a specialized administrative institution exists to provide administrative sanctions.

When coordinating the relationship between these points and conduct that violates the Antimonopoly Act, there is a need to consider the principals of modesty, self-control and supplementation of criminal penalties while taking into account (1) the existence of expansive time and cost factors demanded by criminal evidence, because of the unique nature of a cartel or bid rigging, the unlawful "organized conduct" carried out in back rooms, and need to specify individuals' actions (see Appendix 13), (2) the increase in the need for prompt handling of cases accompanying the increased speed and greater volume of information on economic activity, and (3) the reason why the JFTC, a specialized administrative institution, was established to investigate and administratively resolve cases through hearing procedures, quasi-judicial procedures which employ the substantial evidence rule. (For relation between administrative measures and criminal penalties of a specialized administrative institution, see Appendix 17.)

When these factors are taken into consideration, we believe that opting for enforcement systems built around criminal penalties against individuals such as employees is not appropriate and that the following alternatives are preferable as enforcement systems.

Establish enforcement systems around a core of administrative sanctions by the JFTC, as in the past. For heinous, serious cases for which administrative disposition is considered inadequate, however, aggressive pursuit of criminal accusation is appropriate.

Furthermore, compared to other specialized administrative institutions such as the Securities and Exchange Surveillance Commission or the National Tax Agency, the number of criminal accusation cases is relatively small. Given it has been pointed out that this result also stems from the fact it is difficult to effectively accuse under the systems currently in force, it will be necessary to also study a review of systems such as investigation power aimed at more aggressive criminal accusation.

(2) Introduction of a Leniency Program

In light of the fact other countries have improved results by introducing leniency programs, and the fact such programs are believed necessary to provide an incentive for firms to voluntarily quit cartels as described above, the Study Group investigated issues such as the need to introduce a leniency program in Japan and related problems.

Given the recent trend at firms to establish legal compliance organizations, it was noted that the need for systems to assist firms wishing to voluntarily quit cartels has grown.

According to research in the U.S., which was the first country in the world to introduce a leniency program, such programs are assumed to have effects that change firms' actions in a much broader sense, namely (1) making it possible for the reporting firm to halt unlawful conduct, (2) enabling other firms participating in a cartel to halt their unlawful activity and (3) making it more difficult to form a cartel itself because of the risk a participating firm may come forward and report to the authorities. Considering the fact pointed out in Japan that a single firm alone finds it difficult to halt unlawful conduct in a cartel or bid rigging case, we anticipate a leniency program can also function effectively in Japan as well.

As this suggests, we believe that there is sufficient need to introduce a leniency program. Objectives of a leniency can be surcharges and criminal penalties. With regard to criminal penalties, the Program for Promoting Justice System Reform (Cabinet Resolution of March 2002) assumes the government agencies with jurisdiction (National Police Agency, Ministry of Justice) will study new criminal investigation procedures such as a criminal immunity system from multiple standpoints. The surcharge system, on the other hand, is an administration measure to ensure the effectiveness of provisions prohibiting cartels and is believed to be consistent with the intent of a leniency program to induce entrepreneurs to voluntary terminate

unlawful conduct. Accordingly, we believe it would be appropriate to introduce a leniency program for the surcharge system, and to study criminal penalties as a problem of accusation administration against parties subject to surcharge leniency at the JFTC possessing accusation authority.

On the other hand, from an opposite standpoint the following problems were also pointed out with regard to a leniency program.

- ○ If Japan introduces a leniency program to the surcharge system, fees that originally should be collected will not be collected and the result will be synonymous with a type of reward system. It will be a problem to introduce such a system without precedent in other statutes into the Antimonopoly Act.
- ○ A national consensus may be difficult to achieve because a leniency program has an aspect of whistle-blowing in the sense that the application for a leniency will result in a report of other companies' unlawful conductto the authorities,
- ○ Introducing a leniency program will also affect the administration of parties subject to leniency during the criminal accusation stage, but this should be debated as a problem for Japan's overall legal system as part of judicial system reform.

Accordingly, we believe it is possible to coordinate these problem points in the following manner.

① As described below (see Chapter 2, Section 2(1)), the surcharge system can be positioned as an administrative measure to achieve administrative objectives such as ensuring social equity by making entrepreneurs cover or compensate for economic welfare losses caused to society by their unlawful conduct, or encouraging entrepreneurs to fulfill their obligation to not engage in unlawful conduct in the future. On the other hand, with regard to self-reporting of information by entrepreneurs involved in a violation, in addition to helping ensure social equity, such as preventing the spread of economic losses caused by continued unlawful conduct by simplifying case investigations, the act of leniency itself is likely to encourage entrepreneurs to quickly terminate unlawful conduct given the characteristic of cases such as cartels where it is difficult for one company alone to stop unlawful conduct. Because this will contribute to achieving the administrative objectives, we believe it is within the range of lawmaking discretion to establish a system to offer leniency alongside a surcharge system.

② Accordingly, it was pointed out that there is sufficient rational cause for introducing leniency into the Antimonopoly Act because the act of leniency itself does not provide a monetary reward, and because cartels are characteristically conducted in secret and the possibility of discovering them is small.

③ We believe it will not be possible to achieve public understanding on the alternative of a situation that leaves cartels undiscovered. (Furthermore, this system is one in which firms themselves report unlawful conduct, and differs from so-called whistle-blowing where employees report to the authorities. In addition, with regard to so-called whistle-blowing as well, the direction for enacting into law a system of safeguards for individuals who disclose information in the public interest is under debate, and we believe the public's thinking is also changing.)

④ With regard to the handling of criminal accusations, assuming these are handled under the JFTC's accusation policy it will be possible to coordinate conducting accusations within the framework of the legal system currently in force, separately from the discussions related to legal system reform (see note below), as described below.

(Note) We view the question of whether to introduce a criminal leniency program (a so-called plea bargaining system) as part of legal system reforms as one study topic, and discussions in which such a system and a leniency program are mixed together can also be found. Nevertheless, a leniency program lacks bargaining elements and is applied automatically if required conditions are met. Accordingly, such a system clearly differs from a plea bargaining system in which disposition of conduct is lightened through negotiation, as a quid pro quo for some action such as the suspect providing specified information (See Appendix 15 with regard to the leniency programs in the U.S. and EU).

When we take these points are into consideration, we believe the act of introducing a leniency program into the surcharge system cannot in itself be deemed a problem.

Accordingly, introducing a leniency program into the surcharge system is appropriate from the standpoint of providing incentives for entrepreneurs to quit cartels and ensuring the effectiveness of provisions prohibiting cartels.