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Updates and Development of Competition Policy and Regulatory Reform in Japan

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Up-dates and Development of Competition Policy and Regulatory Reform in Japan (January-December 2005)

Table of Contents

- I. Changes regarding competition laws and policies
 - 1 Amendment of the Antimonopoly Act
 - 2 Bilateral Cooperation Agreements
 - 1) Signing for “Agreement between the Government of Japan and the Government of Canada Concerning Cooperation on Anticompetitive Activities”
 - 2) Signing for “Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership”
 - 3) Other moves toward agreements
- II. Enforcement of competition laws and policies
 - 1 Measures against violations
 - 1) Measures taken in 2005
 - A) Legal measures
 - B) Surcharge payment orders
 - C) Criminal accusations
 - D) Hearing procedures
 - E) Implementation of the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc.
 - 2 Mergers and acquisitions
 - 1) Statistics relating to mergers and acquisitions
- III. The role of a competition authority in the formulation and implementation of other policies
 - 1 Coordination between the Antimonopoly Act and other economic laws and ordinances
 - 2 Administrative coordination
 - 3 Opinions concerning mutual entering in the business field of public utilities
 - 4 Partial revision of guidelines for proper electric power trade
- IV. Technical assistance activities
- V. Japan Fair Trade Commission resources (FY2005)
 - 1 Budget
 - 2 Number of officials

I. Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislations

1 Amendment of the Antimonopoly Act

1) Deliberation process of the act at the Diet

The bill to amend the Antimonopoly Act was submitted to the 161st extraordinary Diet session on October 15, 2004. Remaining under deliberation, the bill was carried over to the next 162nd ordinary Diet session and passed on April 20, 2005. The amended act was put into practice in January 4, 2006.

2) Outline of the amendment of the Antimonopoly Act

The outline of the amendment of the Antimonopoly Act is as follows.

A) Revision of the surcharge system

- The rate of surcharge which is ordered and paid by an enterprise engaged in unreasonable restraint of trade was increased as follows:

Manufacturers, etc.	Large-sized enterprises: 6% → 10% Small and Medium-sized enterprises (SMEs): 3% → 4%
Wholesalers	Large-sized enterprises: 1% → 2% SMEs: 1% (no change)
Retailers	Large-sized enterprises: 2% → 3% SMEs: 1% → 1.2%

- Reducing a surcharge rate by 20% on those enterprises whose duration of violation is less than 2 years and which have ceased the unlawful conduct more than one month before the Japan Fair Trade Commission (JFTC) initiates an investigation.
- Increasing a surcharge rate by 50% on those enterprises which were ordered another surcharge payment order within 10 years.
- Expanding the scope of conduct subject to the surcharge system and imposing a surcharge on those enterprises engaged in Private Monopolization (only in the case of enterprises which control the business activities of other enterprises) that restrains the price of their goods or services or that may affect the price of their goods or services by substantially restraining the volume of their supply, market share or customers.

B) Introduction of a leniency program

In order to give an incentive to withdraw from cartel and pursue early restoration of competitive order, we introduced a leniency program and shall apply immunity from or reduction in surcharge payments to enterprises that meet statutory conditions (e.g., enterprises committing unreasonable restraints of trade shall voluntarily disclose the existence of violations and provide related information to the JFTC).

1st applicant before initiation of investigation = total immunity

2nd applicant before initiation of investigation = 50% deducted

3rd applicant before initiation of investigation = 30% deducted

Any applicant after initiation of investigation = 30% deducted

Note: The total number of enterprises which may be applied under the leniency program is less than or equal to 3.

C) Introduction of compulsory measures for criminal investigations

For aggressive criminal accusations regarding vicious and serious cases, the enhancement of the ability for collecting evidence is necessary for fact-finding by the JFTC. Therefore, the provisions relating to compulsory measures for criminal investigations were developed for cases where officers of the JFTC may inspect, search and seize based on court-issued warrants.

D) Revision of hearing procedures

Regarding the fast-changing and globalized economy, the enhancement of the effective processing of cases and the speedy restoration of competition is necessary. Therefore, we abolished the current recommendation system where we issue a recommendation to an entrepreneur and then make a decision as an administrative measure. We introduced a system where the JFTC issues orders for elimination measures after having provided the respondent a preliminary opportunity to submit his/her opinion. We also provided the related provisions for the hearing procedures.

2 Bilateral Cooperation Agreements

1) Signing for “Agreement between the Government of Japan and the Government of Canada Concerning Cooperation on Anticompetitive Activities”

The Government of Japan was continuing activities such as TV conferences, aimed at concluding an agreement with the Government of Canada regarding cooperation in competition matters. Negotiating parties from both of the governments largely agreed on the main features of the agreement in January 2005. After making efforts for the final settlement of the provisions of the agreement, the Governments of Japan and Canada signed the agreement on September 6, 2005 in Ottawa, Canada, and the agreement then came into effect on October 6, 2005. The agreement prescribes notification to the other party regarding enforcement activities, cooperation in enforcement activities, coordination of enforcement activities, requests for enforcement activities, and consideration of the other party’s important interests between competition authorities.

2) Signing for “Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership”

The Government of Japan and the Government of Malaysia, after efforts for settlement of the provisions of economic partnership agreement, signed the agreement in December 13, 2005 in Kuala Lumpur, Malaysia. The agreement will be put into practice after ratification and endorsement of related laws by the Diet. The competition chapter of that agreement prescribes taking appropriate measures against anticompetitive activities by each party, and co-operating, in accordance with each party’s laws and regulations, in the field of controlling anti-competitive activities subject to the available resources of each party.

3) Other moves toward agreements

The Government of Japan is preparing for the initiation of negotiation aimed at conclusion of a bilateral cooperation agreement with the Government of Australia. The Government of Japan is also conducting discussions concerning the text regarding competition policy matters as it pursues examinations aimed at reaching economic partnership agreements with the Governments of Indonesia, Korea, Thailand, the Philippines, and ASEAN.

II. Enforcement of competition laws and policies

1 Measures against violations

1) Measures taken in 2005

The JFTC conducts necessary investigations based on Section 46 of the Antimonopoly Act, and when the JFTC finds that there exists any fact of violation, it makes recommendations to take measures to eliminate a violation (Section 48 (1) and (2) of the Antimonopoly Act), or initiates hearing procedures (Section 49 (1) of the Antimonopoly Act). If it is unable to make recommendations because over one year has passed since the termination of misconduct, but it can still issue surcharge payment orders, it does so in this case (Section 48-2 of the Antimonopoly Act). Even if it doesn’t have enough evidence to take legal measures, when the JFTC identifies suspicions of violations of the Antimonopoly Act, it issues warnings and instructs the parties concerned to take measures. In addition, the JFTC issues cautions from the standpoint of preventing such violations when it doesn’t have enough evidence to identify the suspicions of the conduct of violation of the Antimonopoly Act, but it finds the conduct which could lead to violations of the Antimonopoly Act.

Out of 76 examinations concluded by the JFTC in 2005, the JFTC took legal measures in 20 cases ordering actions such as cease and desist orders for violations. The JFTC also issued warnings

in 8 cases in which it identified suspicions of violations of the Antimonopoly Act, issued cautions in 37 cases, and terminated examinations in 11 cases in which it did not uncover evidence of illegal conduct.

A) Legal measures

The JFTC has been especially engaged in continuous efforts to eliminate bid rigging. In 2005, 11 out of 20 of the JFTC's formal measures were against bid rigging.

• Private monopolization	1
• Bid rigging	11
• Price cartels, etc. (excluding bid rigging)	4
• Unfair trade practices	4
• Unjustly restricting the functioning and activities of the constituent entrepreneurs by trade association	0

B) Surcharge payment orders

The Antimonopoly Act states that when enterprises or trade associations form cartels, a surcharge will be levied in the following cases:

- a) Cases related to the price of goods or services;
- b) Cases that affect the price of goods or services by effectively restricting the volume of supply.

The amount of the surcharge payment is calculated by multiplying the amount of sales of concerned goods or services during the period of the cartel by a certain percentage. In the case of trade associations, the surcharge payment is levied on the enterprises constituting the association. In 2005, the JFTC issued surcharge payment orders to 122 enterprises amounting to 8,371.62 million yen. (Except for enterprises ordered surcharge payments before 2005 and ordered as decisions via hearing procedures in 2005.) In addition, the JFTC issued 27 orders to enterprises totaling 2122.43 million yen following decisions in 2005 on a case for which a hearing procedure concerning a surcharge payment order before 2004 was conducted.

Of the 122 entrepreneurs ordered to pay surcharges (except for enterprises ordered to make surcharge payments before 2004 and given this order through decisions via hearing procedures in 2005), 14 enterprises requested hearings in 2005. The JFTC initiated hearings on all of the cases, and surcharge payment orders totaling 495.06 million yen were nullified. (With one enterprise' surcharge payment orders totaling 2.52 million yen as decisions via hearing procedures in 2005.)

C) Criminal accusations

The JFTC has adopted an active policy to apply criminal penalties to violations that (a) substantially restrict competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid rigging and boycotts, which constitute serious cases that are likely to have a widespread influence on the national economy; or (b) involve firms or industries that are repeat offenders or which do not take appropriate measures to eliminate a violation, and where the administrative measures of the JFTC are not considered sufficient to meet the aims of the Antimonopoly Act.

In 2005, the JFTC filed accusations regarding two cases.

- a) The JFTC found that companies of steel bridge construction had colluded to designate in advance the winner of a tender for a steel bridge construction project ordered for competitive bids by the Kanto Regional Development Bureau, Tohoku Regional Development Bureau and Hokuriku Regional Development Bureau of the Ministry of Land, Infrastructure and Transport (MLIT) and effectively allowed them to receive the orders. The JFTC filed an accusation with the Public Prosecutor General against the enterprises and individuals on May 23 and June 15, 2005.
- b) The JFTC found that companies of steel bridge construction had colluded to designate in advance the winner of a bid for steel bridge construction projects ordered for competitive bids by the Japan Highway Public Cooperation and effectively allowed them

to receive the orders. The JFTC filed an accusation with the Public Prosecutor General against the enterprises and individuals on June 29, August 1 and 15, 2005.

D) Hearing procedures

The JFTC initiated hearing procedures on 26 cases in 2005. As of December 2005, the JFTC was conducting pending hearing procedures for 138 cases, of which 29 concerned allegations of violations of the Antimonopoly Act, 103 concerned surcharge payment orders and 6 concerned allegations of violations of the Premiums and Representations Act. The JFTC issued decisions on 40 cases in 2005 after hearing procedures, including bid rigging case of oil products ordered by Defense Agency through designated competitive bidding.

E) Implementation of the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc.

The JFTC can demand improvement measures to the heads of ministries and agencies, etc., when it finds their officers involved in bid rigging as the result of its investigation of bid rigging cases. Heads of ministries and agencies, etc., must perform a necessary investigation and take improvement measures on the basis of the result of the investigation. They must also investigate the reasons for disciplinary actions to take disciplinary measures against employees and perform a necessary investigation if there is any damage to the government, etc., due to the said involvement in bid rigging, etc. The administrative institutions concerned are called on to coordinate and cooperate among them regarding elimination and prevention of involvement in bid ridding. The JFTC demanded the Executive Director of the Japan Highway Public Corporation to file a report on improvement measures based on this law in 2005.

2 Mergers and acquisitions

1) Statistics relating to mergers and acquisitions

Based on the provisions of Section 10, Section 15, Section 15-2 and Section 16 of the Antimonopoly Act, stockholdings, company mergers, divisions and business acquisitions of a particular size in Japan must be reported to the JFTC. The JFTC conducts an examination of reported cases, and when it determines that a transaction may substantially restrict competition in a relevant market, the JFTC has power to take measures, including the prohibition of said transaction. During 2005, 841 stockholdings are reported to the JFTC based on the provisions of section 10 of the Antimonopoly Act, 83 company mergers were reported based on the provisions of Section 15, 16 company divisions were reported based on the provisions of Section 15-2, 152 cases of business acquisitions were reported based on the provisions of Section 16. None of the stockholding, merger, division or business acquisition cases reported in 2005 were cases in which the JFTC took any legal measures.

Number of reports concerning stockholdings, company mergers, divisions and business acquisitions

	2003	2004	2005
Stockholdings	1,126	745	841
Mergers	118	80	83
Divisions	19	25	16
Business acquisitions	168	170	152
Total	1,431	1,020	1,092

III. The role of a competition authority in the formulation and implementation of other policies

1 Coordination between the Antimonopoly Act and other economic laws and ordinances

When administrative bodies propose to enact or amend an economic law or ordinance from the standpoint of a specific policy requirement, the JFTC acts in consultation with these bodies to ensure coordination among the proposed provisions, the Antimonopoly Act and competition policy. In 2005, the JFTC acted in consultation with other administrative agencies and submitted the JFTC's

opinions.

2 Administrative coordination

As necessary, the JFTC also coordinates with administrative bodies when they take administrative measures based on specific policy requirements, in order to prevent such measures from causing problems concerning the Antimonopoly Act and competition policy. Considering the "Guidelines Concerning Administrative Guidance Under the Antimonopoly Act," the "Three Year Plan for Regulatory Reform and Opening to the Public-Private Partnership" (Cabinet Decision on March 19, 2004) states that ministries and agencies concerned are required to hold prior consultations with the JFTC to ensure that anticompetitive administrative guidance does not replace similar restrictive regulations. The JFTC ensures the necessary coordination with the ministries and agencies concerned.

3 Opinions concerning mutual entering in the business field of public utilities

The JFTC published the "Opinions concerning mutual entering in the business field of public utilities" on February 18, 2005. This opinion explains the view of the Antimonopoly Act concerning a mutual entrance by existing competitive entities into the business field of public utilities such as electricity, gas, and telecommunication.

4 Partial revision of guidelines for proper electric power trade

In December 1999, the JFTC published, in cooperation with the Ministry of International Trade and Industry (the present Ministry of Economy, Trade and Industry), the "Guideline for Proper Electric Power Trade" which describes controversial acts, etc. in the electric business concerning the Antimonopoly Act or the Electricity Utilities Industry Law from the perspective of fair and effective competition.

In May 2005, the JFTC revised this Guideline in cooperation with the Ministry of Economy, Trade and Industry. This revision is based on the new provisions of the Revised Electricity Utilities Industry Law and examples of cases brought to the government for advice, taking into consideration enforcement of this revised Law of April 2005 and accumulated cases of requests for advice. In this revision, the JFTC and METI added activities in the retail electric business sector which may be desirable or problematic in light of the Antimonopoly Act.

IV. Technical assistance activities

The Japan Fair Trade Commission (JFTC), taking into consideration the growing demands of developing economies for introducing competition law or reviewing competition policy, has been providing a wide variety of technical assistance programs, such as training courses (multilateral and bilateral), short-term seminars (multilateral and bilateral) as well as dispatch of competition policy experts to international conferences, etc. The JFTC's technical assistance programs are directed for various levels of competition policy experts from developing or transitional economies, in particular from East Asian developing countries.

In 2005 the JFTC provided the following technical assistance activities:

(a) Long-term /Short-term Training Course

The JFTC in cooperation with Japan International Cooperation Agency (JICA) has provided a group training course for developing economies on antimonopoly act and competition policy with the support of the academic community and international organizations since 1994. The courses are provided both on multilateral basis and on bilateral basis. These one-month training courses cover a wide range of themes and issues, from theoretical to practical ones, reflecting needs of participating trainees from different economies, and aims to contribute to the effective enforcement of competition law and the encouragement of competition culture in those economies. In 2005, the JFTC provided a training course on a multilateral basis and several bi-lateral training course for China, Indonesia, and Thailand.

The JFTC has provided several theme-specific short-term (usually from one to three days) seminars

for developing countries such as Thailand (March 2003, January, March 2004 and May, July 2005), Malaysia (March 2003), Vietnam (August 2003), Philippines (September 2003 and July 2004) and Indonesia (December 2004, and March, August, November 2005), dispatching its officials and Japanese university professors. The agenda of these seminars are tailor-made based on the needs from recipient economies.

(b) Dispatch of Competition Policy Experts

With financial aid from JICA, the JFTC has dispatched competition policy experts to developing countries as a short-term or long-term resident advisor for in-depth technical assistance to some developing countries. Short-term advisors had been sent to Thailand and Vietnam for several weeks in the past. Long-term advisors had been sent to Thailand, Malaysia, Lithuania and Latvia in the past as well. Currently, a long-term advisor has been dispatched to Indonesia since July 2004.

(c) Dispatch of Competition Policy Experts to International Conferences

The JFTC in collaboration with host economies organized a short-term training course and a conference. In 2005, the JFTC, in collaboration with Indonesia, held the 2nd East Asia Conference on Competition Law and Policy in Bogor, Indonesia in May. Also, in collaboration with the Philippines, the JFTC held the first APEC Training Program on Competition Law and Policy in Manila, the Philippines in August.

In addition, the JFTC has been engaged in international conferences hosted by international organizations such as OECD, and UNCTAD.

In 2005, the JFTC dispatched its officials to the International Cooperation Program on Competition Policy hosted by Chinese Taipei FTC and OECD in Vietnam in August, and to the Training Program of OECD-Korea Regional Center for Competition in Seoul in October.

V. Japan Fair Trade Commission resources (FY2005)

1 Budget

Fiscal Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Budget amount (¥ billion)	5.38	5.56	5.62	5.78	5.9	6.04	6.16	7.85	7.82	8.13
Change over previous year (%)	2.7	3.3	1.1	2.8	2.1	2.3	2.0	2.2	- 0.4	4.0
General Expenditures Budget - change over previous year (%)	2.4	1.5	- 1.3	5.3	2.6	1.2	- 2.3	0.1	0.1	0.0

(Notes)

1. The General Expenditures Budget refers to the total budget of the Japanese Government and is the amount of General Account Budget Expenditures less National Debt Service and Local Allocation Tax Grants.
2. The rate of increase for the JFTC budget of FY2003 is compared to the post-reclassification budget (7.69 billion yen) in order to avoid the effects of an increase in personnel expenses, which required independent calculation, in line with the JFTC's transfer to the Cabinet Office.

2 Number of officials

The number of officials in the General Secretariat of the Fair Trade Commission (unit: persons)

Fiscal Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Number of officials	534	545	552	558	564	571	607	643	672	706
Enforcement against anti-competitive practices	236	248	254	260	263	269	294	318	331	360
Merger review enforcement	18	18	19	19	22	22	28	30	32	32
Advocacy efforts	23	23	23	22	22	22	25	30	30	37

(Notes)

1. The number of officials engaged in enforcement against anti-competitive practices refers to the Investigation Bureau and Investigation Divisions of local offices.
2. The number of officials engaged in merger review enforcement refers to the Merger and Acquisitions Division.
3. The number of officials devoted to advocacy efforts refers to the General Affairs Division of the Economic Affairs Bureau and the Coordination Division.