

AUSTRALIA–JAPAN RESEARCH CENTRE

ANU COLLEGE OF ASIA & THE PACIFIC

CRAWFORD SCHOOL OF ECONOMICS AND GOVERNMENT

# **CAN THE NEW ANTIMONOPOLY ACT CHANGE THE JAPANESE BUSINESS COMMUNITY?**

THE 2005 AMENDMENT TO ANTIMONOPOLY ACT AND  
CORPORATE COMPLIANCE

Kazukiyo Onishi



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AUSTRALIA–JAPAN RESEARCH CENTRE

CRAWFORD SCHOOL OF ECONOMICS AND GOVERNMENT  
THE AUSTRALIAN NATIONAL UNIVERSITY  
CANBERRA ACT 0200

TELEPHONE: (61 2) 6125 3780  
FACSIMILE: (61 2) 6125 0767  
E-MAIL: [AJRC@ANU.EDU.AU](mailto:AJRC@ANU.EDU.AU)  
URL: [HTTP://WWW.CRAWFORD.ANU.EDU.AU](http://WWW.CRAWFORD.ANU.EDU.AU)

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# CAN THE NEW ANTIMONOPOLY ACT CHANGE THE JAPANESE BUSINESS COMMUNITY?

## THE 2005 AMENDMENT TO ANTIMONOPOLY ACT AND CORPORATE COMPLIANCE

### **Abstract**

It has been reported in the media that bid rigging is commonly practised in almost all public works projects in Japan. It was also said that the Japanese anti-trust authority, the Japan Fair Trade Commission (JFTC), was a watchdog that did not bite, in spite of having a long history of enforcement since 1947. However, the situation is significantly changing because the Japanese Antimonopoly Act was amended in 2005 to greatly strengthen anti-trust enforcement. The JFTC has already succeeded in cracking down against bid rigging committed by big and famous companies under the new Act. For the present, the Japanese business community has to seriously address compliance problems. Can the AMA change the business community?

### **1 Introduction**

Anti-trust laws have been increasingly common rules among jurisdictions the world over regardless of their stage of development. The International Competition Network (ICN), which provides competition authorities with a specialised yet informal venue for addressing practical competition concerns, was established in 2001. The original members consisted of 14 jurisdictions including big economies such as the United States, the EU and Japan. Now the members have increased to over 100 jurisdictions. Although one big new economy, the People's Republic of China, has not joined the ICN yet, it introduced a comprehensive anti-trust law called the Antimonopoly Law in 2007 after a more than 10-year drafting process. Russia held the ICN 6th annual conference in Moscow in 2007. Even countries which adopted a command economy in the past have adopted a market-driven approach and introduced competition laws to achieve a more efficient economy.

Focusing on developed countries which have long experience of anti-trust laws enforcement, many countries have recently reviewed anti-trust laws to strengthen en-

forcement, notably to fight hard-core cartels. In 1998 the Organisation for Economic Co-operation and Development (OECD) initiated an anti-cartel program with the adoption of the Council<sup>1</sup> 'Recommendation Concerning Effective Action against Hard Core Cartels'. The Recommendation condemns hard-core cartels as the most egregious violations of anti-trust laws and focused on two topics: effectiveness of laws prohibiting hard-core cartels, and international co-operation in enforcing laws prohibiting hard-core cartels. It called upon member countries to ensure that their laws adequately prohibit such cartels and that they provide for effective sanctions, enforcement procedures, and investigative tools with which to combat them.<sup>2</sup> The OECD Competition Committee also published the first comprehensive report about the ongoing fight against cartels in 2000 and follow-up reports twice in 2003 and 2005. In addition to the above two topics, the report put emphasis on public awareness of the harm caused by hard-core cartels. In line with the OECD Recommendation, in order to fight hard-core cartels, new legislation has been introduced in many jurisdictions. Major changes are as follows:

- The United States in 2004 increased maximum corporate criminal fines from \$10 million to \$100 million, the maximum individual fine from \$350,000 to \$1 million, and the maximum jail term from 3 to 10 years.
- The European Commission has administrative fines and no criminal penalties. It adopted new Guidelines on the method of setting fines in 2006 with a view to increasing the deterrent effect of fines. Within the company's 10 per cent total annual turnover, the revised Guidelines provide that fines may be based on up to 30 per cent of annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement.
- The United Kingdom in 2002 introduced criminal sanctions for individuals participating in cartels with a maximum jail sentence of 5 years by enacting the Enterprise Act.
- Australia significantly amended the Trade Practices Act (TPA) in 2006 in accordance with recommendations made by Dawson Committee in its report of 2003. In respect of cartels, an increase in penalties is the most important among the amendments to the TPA. Beyond the previous maximum pecuniary penalty of \$10 million, corporations found in breach of the TPA can now alternatively receive punishment of up to three times the financial value of the anti-competitive act or, where the value of the breach is difficult to ascertain, 10 per cent of the value of the turnover of the body corporate and all related businesses, whichever of the three penalties is the greater. However, criminal penalties were not introduced.
- Japan has also adopted epoch-making new legislation in 2005 that increased surcharge rates, introduced a leniency program, gave criminal investigation author-

ity to the Japan Fair Trade Commission (JFTC) and changed the administrative hearing procedures.

Japan was considered to be weak in enforcing anti-trust laws although it has a long history of anti-trust enforcement since the Antimonopoly Act (AMA) was enacted in 1947. It has been said that many hard-core cartels existed in Japan owing to weak enforcement. In particular, it is generally believed that Japanese bid rigging is still a habitual practice of the Japanese construction industry, although it is both a violation of Japanese criminal law and the AMA. The JFTC has long been criticised for operating as a watchdog which did not bark or bite, but the situation is changing after the 2005 amendment to the AMA was enacted.

Although the Japanese government recognised the importance of a market-driven economy and tried to strengthen anti-cartel enforcement, the situation did not change significantly until the Koizumi Government took office in 2001. Former Prime Minister Koizumi actively pursued structural reform during his administration. He said in his 2001 inauguration speech that Japan had to establish a competition policy for the 21st century and strengthen the organisation of the JFTC. However, there has been strong opposition to the amendment to the AMA in the Japanese business community.

Finally, in April 2005, with the Koizumi Government's strong commitment to the promotion of competition as part of its structural reform, the AMA of Japan underwent its first comprehensive amendment in the last quarter century. The amended act took effect in January 2006. The primary goal of this amended act is to eradicate hard-core cartels, which means anti-competitive activities such as price-fixing cartels and bid rigging, in a more active and stricter manner so as to contribute to achieving a vital, dynamic and robust economy and society.

Among the specific provisions that were amended in 2005 is an increase in the principal surcharge rate imposed on violators of the AMA, from six per cent to 10 per cent of the related turnover for the larger-sized enterprises, and imposition of 50 per cent higher rates to repeated violators. In addition, the amended AMA introduced criminal investigation powers so that the JFTC could treat serious violations in a stricter and more effective manner, which is expected to enable the JFTC to file criminal referrals much more aggressively. A leniency program was introduced by the amendments as an alternative approach, granting 100 per cent immunity from surcharge for the first applicant, 50 per cent reduction of surcharge to the second applicant, and 30 per cent reduction to the third applicant is afforded as long as they provide necessary information before the start of the JFTC investigation. Furthermore, in order to speed up its hearing procedures, the amended AMA abolished the recommendation system, under which the JFTC made a recommendation to a violator of the AMA and initiated *ex ante* hearing procedures after

the violator rejected the recommendation. Instead, the amendments introduced an ex post hearing procedure where a violator can lodge a complaint against a JFTC decision.

With regard to the 2005 amendments, debate continued about the further necessity to discuss several fundamental issues, including whether or not the scope of infringement to be surcharged should be expanded and how the administrative hearing processes of JFTC should be conducted to ensure due process. In view of this debate, an Advisory Panel was established in the Cabinet Office in July 2005, consisting of 20 academics and representatives from the business and consumer communities. The panel vigorously examined these issues for two years and concluded their discussions in June 2007. In the light of their conclusions, which in principle approved the 2005 AMA amendments, the JFTC released new draft amendments to the AMA in October 2007. After discussing this draft, the Fukuda Government submitted a new bill to the Diet in March 2008, which mainly consists of two revisions to the current AMA. The first is to expand the scope of surcharges by imposing surcharges on a part of 'unfair trade practices' such as unjustifiably low sales prices and abuse of a dominant bargaining position under specific conditions. The second is to further strengthen surcharges in two ways, namely imposing a surcharge 50 per cent higher against companies found to have played a leading role in AMA violations and extending the limitation of time to five years from the current three.<sup>3</sup>

After the amended AMA came into effect in January 2006, Japanese companies have a duty to comply strictly with the AMA despite the fact that hard-core cartels, and especially bid rigging, might be common throughout Japan. It was reported in the national press that top management of major general construction companies had decided to stop bid rigging in response to enforcement of the new AMA.<sup>4</sup> The Japan Civil Engineering Constructor's Association<sup>5</sup> also released a report on the reform of public procurement which said that constructors should cut their connection with old practices, including bid rigging, to restore public trust in the construction sector.<sup>6</sup> In addition, three major construction business associations, namely the Japan Federation of Construction Contractors<sup>7</sup>, the Japan Civil Engineering Contractors' Association, and the Building Contractors Society<sup>8</sup>, issued notifications requiring the enhancement of corporate compliance by their member companies.

Based on the current enforcement of the AMA, this paper aims to examine how the new AMA has affected Japanese companies' behaviour, notably corporate compliance. In other words, the purpose of this paper is to explore whether the new AMA and its enforcement have enough impact to change the Japanese business community.

## 2 Basic Structures of the AMA and 2005 Amended Act

The AMA was first enacted in 1947 when Japan was occupied by the Allied Occupation Forces. The Allies exerted a strong influence on the enactment. As a result, AMA was significantly influenced by US anti-trust laws, especially the Sherman Act, the Federal Trade Commission Act and the Clayton Act. Although the origin of the Japanese anti-trust law came from U.S. laws, the AMA has developed independently from U.S. laws in accordance with Japanese business practices and has been influenced by the Japanese legal system, which is quite different from the common law system. This paper describes basic structures of the AMA and the 2005 amendments to the AMA item by item below.

### *Substantive Regulations*

The Japanese AMA consists of regulations on three major anticompetitive activities and regulations on merger and acquisition.<sup>9</sup> Those activities are ‘unreasonable restraint of trade’, ‘private monopolisation’ and ‘unfair trade practices’. The first two are prohibited by Article 3 and the last is prohibited by Article 19. It is generally said that ‘unreasonable restraint of trade’ stems from Section 1 of the Sherman Act, ‘private monopolisation’ stems from Section 2 of the Sherman Act and ‘unfair methods of competition’ stems from Section 5 of Federal Trade Commission Act.

Article 3 of the AMA prohibits ‘unreasonable restraint of trade’ and ‘private monopolisation’. ‘Unreasonable restraint of trade’ is defined in Article 2 (6) to cover mutual restrictions of business activities of other firms by firms in concert with other firms, having the effect of a substantial restraint of competition in the relevant market, contrary to the public interest. It has been interpreted to mean anti-competitive horizontal restraints including hard-core cartels such as price fixing and bid rigging.

‘Private monopolisation’ is defined in Article 2(5) to be exclusion or control by a firm, independently or in concert with other firms, of the business activities of other firms, having the effect of a substantial restraint of competition in the relevant market, contrary to the public interest. Exclusion means the case where other firms go out of existence through mergers and acquisitions, etc. or the case where new entrants are excluded. On the other hand, control refers to the imposition of constraints on other firms through, for instance, the acquisition of stock, the dispatch of officers, and the utilisation of a dominant bargaining position. It can be considered to be close to abuse of market dominant position.

Article 19 prohibited ‘unfair trade practices’. These are defined in Article 2 (9) as six patterns of conduct which tends to impede fair competition and which is designated by the JFTC.<sup>10</sup> Pursuant to this article, in 1953 the JFTC designated nine specific defini-

tions of unfair trade practices for the first time and in 1982 replaced these by designating sixteen definitions in order to clarify each violation in more detail. These definitions have remained unchanged since then. They can be classified into the three broad categories. The first category consists of conduct which may restrain free competition, whose examples include refusal to deal, discriminatory pricing, unjustifiably low sales price, and resale price restrictions. The second category consists of conduct which in itself cannot be considered fair competition, the examples of which include customer enticement by deceptive methods or unjustifiable benefits and tie-in sales. The third category consists of conduct of large firms forcing unreasonable demands on trading partners by making use of dominant bargaining positions. In principle, these practices are not immediately deemed illegal. They are considered a violation only when they are likely to impede fair competition.

When we examine the relationship among the three regulations mentioned, it should be noted that the same actions may be regulated by the Article 3 or the Article 19, and the AMA has two standards of illegality, namely the substantial restraint of competition and the likelihood of impeding fair competition (or tendency to impede fair competition). It is generally considered that the likelihood of impeding fair competition sets a much lower standard than the substantial restraint of competition. The difference of illegality leads to that of penalties applied for actions in violation of the AMA. Regarding these substantive regulations, there were no changes in the 2005 amendments.

### *Procedures*

The AMA also prescribes procedures for violations of the AMA, which was significantly changed in the 2005 amendment. Firstly, the paper describes the procedures before the amendment, which had been in operation since 1947 and were different from the procedures prescribed by other administrative laws. Secondly, the paper describes why the Japanese government introduced the current procedures, which are similar to other administrative procedures.

When the JFTC concludes that alleged actions violate the AMA, it recommends that measures be taken to eliminate such actions. A recommendation can include fact finding, an allegation of violation, and a cease and desist order. Any firm which has received such a recommendation must notify the JFTC in writing without delay whether the firm will accept it. When the firm accepts it, the JFTC can issue a decision in line of the recommendation without initiating hearing. This is a simple procedure for cases without disputes. If the firm does not accept the recommendation, a hearing procedure, which is very similar to a trial procedure, is initiated by the JFTC. Hearing procedures

are conducted so that the firm (the respondent) can contest the factual findings and the application of law prior to the JFTC issuing a decision. This is to ensure due process. Hearings are usually held before three administrative judges appointed by the JFTC. In this case, the respondent can ask the Commission for an opportunity to state their views directly to it. The Commission can approve decisions without correction, or can correct proposed decisions submitted by the administrative judges. The designating investigators seek to prove the actions violate the AMA, while the respondent seeks to counter this. After the completion of the hearing procedure, the JFTC issues a decision ('hearing decision') which describes the fact finding and orders the respondent to take corrective measures. The decision takes effect when a certified copy is served on the respondents. If the procedure for issuing a decision is expected to take much time and the actions in violation of the AMA cannot be ignored during the period, the JFTC can apply to the Tokyo High Court for an urgent injunction order. If the respondent does not accept the hearing decision, they can appeal against the decision to the Tokyo High Court which is an appeal court under ordinary administrative cases. In this regard, hearing procedures conducted by the JFTC are given a special position compared with those of other agencies. There are also special rules in the court proceedings which were adapted for the JFTC procedures. One is the rule regarding substantial evidence, which means that fact findings made by the JFTC shall, if established by substantial evidence, be binding upon the court. The other is the rule that restricts submission of evidence, which means that an offer of new evidence relating to the facts found by the JFTC must be restricted. These rules, which are strongly affected by laws of the United States, remain unchanged after the 2005 amendment.

Under ordinary Japanese administrative procedures, when an administrative agency finds that a violation exists, the agency does not make a recommendation but issues an administrative order. The agency can immediately enforce the order. Before issuing an administrative order, the agency must conduct a hearing, which is a simple procedure not open to the public, unlike a trial procedure. The respondent may bring an action to a district court, not to an appeal court, to annul the order. These mechanisms are based on the administrative procedures of civil law countries, which were imported into Japan during the Meiji Restoration (1868-1912). On the other hand, the JFTC procedures are similar to the procedures of an independent administrative commission in the United States. The JFTC cannot enforce corrective measures until it issues a hearing decision, if the firm contests the fact findings and the application of law.

Although the JFTC's *ex-ante* hearing procedure has the advantage of securing due process by hearing a respondent's claim sufficiently, it takes a good deal of time to complete the hearing procedure. As a result, the JFTC cannot enforce the corrective measures

quickly, whereby it could easily restore competition in the market. In fact, according to the JFTC, it took an average of 24 months in the past three years for hearing procedures to be completed.<sup>11</sup> Furthermore, there was another problem with the JFTC's time-consuming procedures. Before the 2005 amendment, a surcharge payment order could not be issued until a hearing decision was issued. Under the former system, if a respondent with a complaint against the hearing decision also claimed that the payment order should be corrected, another hearing concerning the payment order would begin. The JFTC said it took an average of 14 months for this hearing to be completed. According to those figures, it took 38 months, or more than three years, from the start of the first hearing to the issue of the payment order. In general, administrative procedures should be simple and speedy so that a respondent can get a quick answer from an administrative agency. In an economic field, such as where the AMA applies, a quicker response to a violation should be required so that competition would be restored as soon as possible. In the light of the foregoing considerations, the ex-ante hearing procedure has been changed to an ex-post hearing procedure to facilitate quicker restoration of competition. Under the current system, the JFTC can issue an administrative order (cease and desist order) and a surcharge payment order at the same time if it considers that an action in violation of the AMA exists, and can also enforce these orders immediately. On the other hand, a respondent can complain to the JFTC about an administrative order to begin ex-post hearing procedures.

Regarding the current system, the Japan Business Federation (Nippon Keidanren)<sup>12</sup> has argued that the current procedure is unfair because the JFTC plays both roles of a judge and a prosecutor despite the JFTC taking the place of district court.<sup>13</sup> They are of the opinion that the JFTC hearing procedure should be abolished and a respondent should directly bring an action to a district court. This argument has much to do with power-sharing between a court and an independent administrative commission, but from the perspective of fairness a district court might be considered to be a proper agency for dealing with complaints. The new bill, submitted to the Diet in March 2008, provides that the current ex-post hearing procedures would be reviewed in the next amendment to the AMA after examining the roles of the JFTC from every aspect.

### *Remedies*

There are several remedies provided by the AMA and Japan's Civil Code. The most important is a cease and desist order, which is given to the relevant firm by the JFTC to transfer a part of his business, or to take any other measures necessary to eliminate acts in violation of the AMA. The JFTC has recently issued cease and desist orders including

compliance measures. A violating firm is generally required to stop any actions in violation of the AMA, to confirm that it is stopping these actions through its board of directors, and to notify that it is stopping its actions to any business connections. In addition to these requirements, the JFTC has recently required a firm to improve its compliance by providing or revising a compliance program, educating its employees, conducting an audit on compliance regularly, and establishing an in-house notification system. In a bid-rigging case concerning steel bridge construction in 2005, which was led by the Japan Highway Public Corporation (JHPC), the JFTC required, in addition to the above, that the violating firms should remove the sales staff involved in the violation from sales activities concerning the JHPC, and that directors or employees working for the JHPC should not engage in sales activities involving the JHPC.<sup>14</sup> In this case, the JFTC went as far as to recommend a personnel reshuffle within the violating firms and its cease and desist order therefore had a strong impact on the firms. Reviewing these orders, the JFTC apparently placed heavy emphasis on corporate compliance to prevent repeated violations.

The second remedy is single damage awards. While the US Clayton Act empowers an injured party to sue for trebled damage award, an injured person can sue for single damage under the AMA.<sup>15</sup> Plaintiffs who sue under the AMA need not prove negligence or intention of the defendants, but they can sue only after the decision of the JFTC about illegal conduct becomes final and conclusive, and can bring the action for damages only to the Tokyo High Court. An injured person can also sue for actual damage under the general tort provision of Civil Code, which does not require any special treatment.<sup>16</sup> Considering these requirements, plaintiffs might choose the Civil Code. In fact, it is said that most of the plaintiffs bring the action for damages to a district court based on the Civil Code.<sup>17</sup>

The third remedy is injunctions. The provision of injunctive relief was introduced into the AMA in 2000 and took effect in April 2001.<sup>18</sup> Any person whose interest is seriously injured or is likely to be seriously injured by acts in violation of Article 19 is entitled to seek the suspension or the prevention of the acts. The reason why injunctions are limited to the acts in violation of Article 19 relates not to the standard of illegality, but rather to the easiness of proof. A private party can easily prove an act in violation of Article 19 rather than an act in violation of Article 3.

### *Surcharges*

The current Japanese surcharge can be considered to be an administrative fine like other countries', but there are unique features in the Japanese surcharge system: The first is that the scope of surcharge is limited to cartels affecting price.<sup>19</sup> The second is that the

amount of surcharge is calculated by multiplying the sales of the relevant product by a fixed rate. The third is that the rate is provided by the AMA depending on the company's business and size. In the 2005 amendment, the basic rate, which is applied for large-sized companies other than wholesalers and retailers, was raised to 10 per cent from six per cent after a big argument with business community. The fourth is that the AMA provides that repeated violators, which legally means a person ordered to pay a surcharge in the past ten years, shall be fined 50 per cent higher than the regular rate and violators who stopped violations one month earlier than the JFTC investigation shall be imposed 20 per cent lower than the regular rate. To summarise, there is no JFTC discretion as to whether the JFTC should impose a surcharge or as to what amount of surcharge should be imposed. Instead of the JFTC, the AMA provides the detailed schedule on the surcharge. There have been hot arguments about concurrence of surcharge and criminal fines, and about the level of surcharges. These issues will be discussed in more detail in the next section.

### *Leniency Program*

A leniency program means the promise of lenient treatment, that is to exempt or reduce the fines to cartel participants who confess and provide evidence against their co-conspirators. It has proved an effective measure to resolve the main difficulty of detecting and punishing cartels that are conducted in secret. Japan had not had a leniency program, unlike other advanced countries, but finally introduced it in the 2005 amendments. The current AMA prescribes that as long as the necessary information is reported before the JFTC investigation starts, the first applicant is granted 100 per cent immunity, the second is granted 50 per cent reduction, and the third is granted 30 per cent reduction. Even if an applicant reports after the JFTC investigation, as long as they are within the third category and they provide necessary information, they are granted 30 per cent reduction. As a leniency program was being introduced into Japanese legal system for the first time, some argued against its introduction. This will be examined in the section on the leniency program below.

### *Criminal Penalties*

The AMA originally contained criminal sanctions against acts in violation of Article 3, like the Sherman Act. Although all acts in violation of the Sherman Act can be punishable as a crime in the United States, only the acts in violation of Article 3, that is 'unreasonable restraint of trade' and 'private monopolisation' can be punishable as a crime under the AMA, and acts in violation of Article 19 cannot be punishable as a crime. This is because 'unfair trade practices', which means the acts in the likelihood of impeding fair competi-

tion, has much lower illegality than the acts resulting in the substantive restraint of trade. However, in both countries, violations against which criminal sanctions are imposed have been practically limited to hard-core cartels. It should be noted that there has been only 11 criminal cases in Japan from famous petrochemical products cartel cases in 1974, where the JFTC filed criminal referrals against the Petroleum Industry Federation for output restrictions and twelve oil companies for price fixing, to March 2008 and there were virtually two petrochemical cartel cases from 1947 when the AMA was enacted to 1974.<sup>20</sup> In respect of criminal cases between 1947 and 1998, according to Haley (2001) the most telling problem with criminal sanctions was atrophy, not lack of severity.<sup>21</sup>

If the JFTC investigates an alleged violation and successfully establishes it as a criminal case, the JFTC can file a criminal referral with the Prosecutor General under the AMA. With regard to criminal referrals filed by the JFTC, there are three special provisions in the AMA not found in other administrative laws. The first is the exclusive authority for filing criminal referrals with the Public Prosecutor's Office.<sup>22</sup> Owing to this provision, the Public Prosecutor's Office can prosecute only when the JFTC officially files a criminal referral with it. The second is the provision for filing a criminal referral with the Prosecutor General while other agencies file criminal referrals to the District Office.<sup>23</sup> These provisions remained unchanged after the 2005 amendments. The third was that the Tokyo High Court was the first court to deal with a criminal case.<sup>24</sup> Since the Tokyo High Court corresponds to the Tokyo High Prosecutor's Office, before the 2005 amendment the Tokyo High Prosecutor's Office conducted a criminal investigation with the District Prosecutor's Office after the receipt of criminal referral. In the amendments, the court of first instance was changed from the Tokyo High Court to the district courts. As a result, district prosecutor's offices can easily conduct a criminal investigation into AMA violations. These provisions might be intended by original lawmakers to give the JFTC high prestige. However, they might lead to restriction of activities of the District Prosecutor's Offices, especially the provision of court jurisdiction. The review of this provision is considered to have the desired effect as the District Prosecutor's Offices have already conducted criminal investigations into violations of the AMA.

There are no penal provisions against corporations in the Japanese Penal Code. Each regulation under any law, therefore, contains a penal provision for the criminal punishment of corporations. As for violations of the AMA, Article 89 prescribes that any individual in violation of Article 3 shall be punished by imprisonment with hard labour for not more than three years, or by a fine of not more than five million yen. Furthermore, Article 95 provides that any corporation which employs the said individual in Article 89 shall be punished by a fine of not more than five hundred million yen. It should be noted that the Japanese criminal code punishes corporations not directly but indirectly through their

supervision obligations, unlike the US criminal code. Under the Japanese Penal Code, it has long been considered that corporations do not commit crimes. On the other hand, it became necessary to punish corporations as corporations came to play an important role in economic activities. In order to address this problem, each regulation under any law punishes corporations through their supervision obligations, which is considered to be their liability for any negligence.<sup>25</sup> As mentioned, each regulation under any law has a common provision about corporations' criminal liability, but the AMA, in addition, has a unique provision about a representative's criminal liability. Article 95-2 prescribes that a corporation's representative who has failed to take necessary measures to prevent or rectify a violation, despite knowledge of such a violation, shall be punished by a fine of not more than five million yen. However, no representatives have been prosecuted based on this provision. These provisions were not reviewed in the 2005 amendment. It is noteworthy that despite the existence of criminal penalty provisions, very few cases are ever brought, and that despite the special provision of the AMA, no case has ever succeeded once. The 2005 amendment is expected to improve this situation by raising the number of criminal referrals.

Following US complaints made in the Structural Impediments Initiative talks between Japan and the United States, in 1990 the JFTC adopted a rule that it will file a criminal referral only in cases having significant effects on the Japanese general public and/or concerns about possible repetition, although there is no legal limitation on the JFTC's criminal referrals.<sup>26</sup> In 2005, after the amendment of the AMA, the JFTC revised this rule to address a leniency program introduced by the 2005 amendment. The reviewed rule provides that the JFTC will not file a criminal referral against the first applicant with the Prosecutor General under the leniency program for violations of the AMA.<sup>27</sup>

### *Investigation Powers*

Since the original AMA was enacted, the JFTC was granted only administrative investigation powers. Administrative investigation powers are designed to match civil cases which require the predominance of evidence. Using its administrative powers, the JFTC has been able to enter the business premises of firms and any other relevant places to search for and inspect business documents and other items without a warrant issued by a judge. Exercising the administrative investigative power requires the consent of the targeted companies because there is no warrant. In other words, the JFTC could not investigate companies through physical force by using this power. Accordingly, until the 2005 amendment of the AMA, the JFTC's investigation powers have been limited to the level of matching civil cases in spite of the fact the JFTC has the authority to file criminal

referrals against a company that violated the AMA. Although other agencies such as the National Tax Agency and the Securities and Exchange Surveillance Commission have criminal investigation powers in addition to administrative investigation powers, the JFTC did not have any investigative powers which matched those in criminal cases. It had been also said that the JFTC's investigation powers are not strong enough to gather evidence to meet the standard required for criminal referral, namely the 'beyond reasonable doubt' burden of proof. The 2005 amendments introduced criminal investigation powers into the JFTC. Now the JFTC can conduct a compulsory investigation with a warrant issued by a judge.

### 3 Surcharges (*Kachokin*)

#### *Concurrent surcharges and criminal fines*

A surcharge was introduced into Japan in 1977 by amending the AMA to target hard-core cartels. This was the first case in Japanese legal system where monetary penalties were introduced into administrative laws. In general, Japanese administrative law can impose criminal fines against violations of laws, but cannot impose administrative (or civil) monetary penalties. The second example of this occurred in 2004, almost 30 years after the introduction of this provision. The amended Securities and Exchange Law (SEL) introduced administrative civil monetary penalties (*kachokin*) system to prevent certain violations of the SEL more effectively.<sup>28</sup> Accordingly, there are two kinds of *kachokin*, administrative monetary penalties, in Japanese legal system. Japan's *kachokin* system has unique features compared to that of other countries: firstly, the rate of *kachokin* is fixed, so an administrative agency has no discretion on calculating the amount; secondly, there is a problem with adjusting *kachokin* to criminal fines in terms of function and amount. These features stem from having concurrent administrative monetary penalties and criminal penalties.

Why did the AMA need administrative penalties? This is because there was practically no penalty to prevent hard-core cartels under existing law enforcement provisions. There were only criminal penalties in the AMA before the 1977 amendment, but they had not worked in law enforcement. In fact, in the first criminal case, two petrochemical products cartel cases were prosecuted in 1974; after that no criminal case was pursued until 1991. This might be because the level of proof required is so high in criminal cases that the JFTC could not collect adequate evidence. Only cease and desist orders were, practically, issued against cartel participants. Even if cartel participants were ordered to cease any acts in violation of the AMA, they could keep the illegal gains earned during the

duration of the cartel. From the point of view of economic profits, there was no deterrent effect in the remedies of the AMA. The AMA, therefore, needed another monetary penalty which was easier to impose on violators rather than criminal penalties.

Since the AMA was originally enacted, there had been criminal penalties but no administrative penalties in the AMA until 1977. These criminal penalties were considered to be measure against crime, or a sanction. In order to distinguish surcharges from criminal fines, it was emphasised at their introduction that their purpose was not a sanction but seizure of illegal gains from cartel participants. Accordingly, it was generally accepted that the amount of surcharges should be confined to illegal gains and it should not be permissible to raise rates of the surcharges over illegal gains. When the JFTC intended to raise the surcharge rates, some people argued that if the surcharge rates are raised over illegal gains, they would be close to criminal sanctions and that this would amount to double jeopardy, which the Japanese Constitution prohibits. Double jeopardy means concurrent imposition of criminal fines and surcharges having the same features as criminal fines. Since the surcharges would become sanctions if their amount exceeds illegal gains, their purpose would be the same as criminal fines. If their purposes are the same, surcharges would be unconstitutional. The argument is based on the interpretation of the latter part of Article 39 of the Japanese Constitution, which reads ‘No person shall be placed in double jeopardy for the same criminal offence.’ However, regarding this problem, there is a Supreme Court case, which ruled in a tax case that although an additional tax is administrative sanction, it differs from criminal fines in terms of its purpose and nature, such that the concurrent imposition shall not be construed as a case of double jeopardy banned under the Constitution. According to the court ruling, even if the purpose of surcharges is to impose a sanction, the concurrent imposition of criminal fines and surcharges is constitutional.<sup>29</sup>

When the 2005 amendment was discussed in the Diet, the Chief Cabinet Secretary said with regard to this issue, that ‘while the reviewed surcharge system has been strengthened in terms of its function as an administrative sanction by changing it into a framework for collecting money in excess of the amount of illegal gains, the legal character thereof to date remains unchanged after the latest review in terms of the imposition of monetary penalties on violating businesses by administrative agencies to prevent violations’.<sup>30</sup>

In light of the above official statement, surcharges should be considered as administrative fines which work as seizure of illegal gains and an administrative sanction. The argument on the double jeopardy has been rejected by both the government and the court. When discussing the 2005 amendment, some Japanese businesses were, however, arguing that the increase in surcharges would cause problems under the Constitution.<sup>31</sup> At that time, their first priority might be to avoid significant increases in surcharges by

provoking discussions on the concurrence of both fines. At the present time, they emphasised that criminal fines should be unified into surcharges whether or not applying them concurrently is constitutional;<sup>32</sup> administrative fines can play the same role as criminal fines in punishing a company or preventing a violations. Furthermore, they maintained that there are no jurisdictions having both types of fines. In fact, big economies such as the United States and the EU do not apply concurrent criminal fines and administrative fines. In the United States, hard-core cartel participants are as a matter of practice punished as a criminal offender pursuant to the Sherman Act. On the other hand, as the EU has no authority to impose criminal penalties, there is naturally no criminal charge in the EU competition laws. In light of these claims, we shall examine how fines are designed below.

### *Design of Fines*

Even if there is no problem with the Constitution, there are still some problems remaining in terms of how to design administrative fines and criminal fines. Both criminal fines and administrative fines have a common feature in that both have the negative financial impact on the violator. While imprisonment and fines represent criminal penalties for an individual, only criminal fines can be imposed against a company. Some people, considering the above point, have argued that criminal fines are not needed to punish a company because administrative fines can cause enough financial damages to punish. In practice, unitary fines may work more efficiently because one agency can control them. However, there are generally two important differences between criminal fines and administrative fines: The first is the difference in the level of proof. While criminal cases require proving ‘beyond reasonable doubt’, ‘the preponderance of evidence’ which is a lower level of proof is required in administrative cases. The second is the difference in the impact on society. Criminal penalties can create a huge impact by stigmatising a violating corporation as a criminal offender, while administrative penalties have a more limited impact of bringing dishonour to the offender. In the Japanese AMA, there is also a difference in calculating the amounts of fines. A criminal fine is calculated up to 500 million yen under the court’s discretion, taking into account aggravating or mitigating factors in terms of the culpability of the violator, while a surcharge is calculated based on the fixed rate prescribed by the AMA without any JFTC discretion.

In light of these points, a design should consider which is more appropriate in Japan in terms of deterring violations, concurrent fines or a unitary fine. Firstly, we explore other countries’ systems of penalties imposed against hard-core cartel participants. The U.K. introduced criminal penalties for individuals engaged in cartels with a maximum

jail sentence of five years in 2002 by the Enterprise Act, but for corporations there are no criminal sanctions. In Australia, criminal penalties have not been introduced yet, but the Dawson Committee, which was set up to comprehensively review the Trade Practice Act, recommended that criminal penalties should be introduced for serious or hard-core cartel behaviour, with penalties to include fines against corporations and imprisonment and fines for individuals, after the matter is resolved.<sup>33</sup> The problems are that the development of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Now we can classify those systems into four types: the US-type of only criminal penalties, the EU-type of only administrative penalties, the UK-type administrative penalties but criminal penalties for individuals, and the Japan-type concurrent criminal and administrative penalties.

As the OECD recommendation said that hard-core cartels are the most egregious violation of competition law, they should be punished as a crime and should attract social stigma. Criminal penalties can be theoretically considered as the most effective deterrent for hard-core cartel participants. From this point of view, the US-type is the best way to deter hard-core cartels. On the other hand, criminal penalties require such a high level of proof that there may be some cases where criminal penalties can not be imposed, but administration penalties can be applied. Especially in Japan it is said that prosecutors need such extensive evidence that it may take much more time to collect evidence, without any plea bargaining, than in administrative cases. Considering the limited resources available, it is more convenient to impose administrative penalties. Practically, the Japan-type approach is considered to be a good system as long as criminal penalties work. The U.K.-type model has an advantage that one agency can determine the amount of fine considering all the factors in the violations, but there might be a contradiction that while an individual who carries out an action in violation of the AMA is a criminal, the corporation employing the individual is not a criminal. If the U.K.-type system is introduced in Japan, Japan will have to eliminate criminal sanctions, which it had originally adopted against corporations, but this may lead to a perception in society that violations of the AMA are not serious. At least in Japan it is, therefore, difficult to introduce the U.K.-type of measure. In conclusion, Japan should maintain its concurrent fines, but Japan should also step up criminal enforcement. With regard to hard-core cartels, the JFTC should, in principle, deal with them as a crime and first conduct a criminal investigation, since this authority was granted to the JFTC by 2005 amendment.

There are still some problems in designing concurrent fines: the JFTC discretion as to how to calculate the amount of administrative fines, and setting an adjustment between criminal fines and administrative fines. As mentioned, the JFTC has no discretionary power as to the amount of surcharge and cannot take account of the culpability of the violator

in calculating the amount of a surcharge. This is because a discretionary administrative fine has the same character as a criminal fine in terms of addressing the various aspects of any violation. Although there are no constitutional problems with concurrent fines, the difference in calculating each monetary penalty is required for a court to perform its important role that a criminal should be punished according to their culpability.

When discussing the 2005 amendment to the AMA, some people in Japan claimed that if administrative fines are increased, concurrent fines need to incorporate an adjustment between criminal fines and administrative fines when both fines are imposed. In response to this argument, the AMA provides that when a criminal fine is concurrently imposed along with a surcharge, an amount equivalent to half of the applied criminal fine is deducted from the surcharge as otherwise calculated.<sup>34</sup> This adjustment provision was based on the idea that the surcharge and the criminal fine share a common feature in deterring violations of the AMA.<sup>35</sup> Criminal fines and administrative fines differ, however, in their aims and procedures, as explained above. Given that they are independent processes, it should not be necessary to adjust both amounts. It is, furthermore, desirable that the adjustment provision should be eliminated because it may reduce the effectiveness of criminal sanctions.

### *Level of Surcharges*

At least before the 2005 amendments, the surcharges in the AMA had not functioned effectively to deter hard-core cartels. This is because the rate of surcharges was limited to the level of illegal gain, which it had been believed could not be easily estimated. However, in June 2004 before the Council on Economic and Fiscal Policy, the JFTC produced data analysing 24 hard-core cartel cases, where the average of illegal gains was 16.3 per cent of the turnover in question and in 90 per cent of all the cases companies were able to make illegal gains of more than eight per cent.<sup>36</sup> At that time the basic rate of surcharges was six per cent. In view of these figures, even if the surcharges must be not more than illegal gains, six per cent was too low to prevent hard-core cartels from occurring, while the current basic rate 10 per cent was also too low compared with actual illegal gains. In this sense, a criminal fine, which is up to 500 million yen for a corporation, should be imposed on hard-core cartel participants in addition to administrative fines.

**Table1: History of Surcharge Rates (Small business)**

Year	Basic	Retailers	Wholesalers
1977	1.5 %	1.0 %	0.5 %
1991	6.0% (3.0%)	2.0 % (1.0 %)	1.0 % (1.0 %)
2005	10.0 % (4.0 %)	3.0 % (1.2 %)	2.0 % (1.0 %)

*Sources:* AMA of Japan

*Note:* Small businesses are defined by Paragraph 4 Article 7-2 of the AMA. For example, in case of manufacturing business and construction business, small business is in principle defined as companies whose amount of capital is not more than three hundred million yen, or whose number of regular employees is not more than 300.

Furthermore, in comparison with the fines of other developed countries, Japan's fines are not regarded as an effective deterrent to hard-core cartels. In the United States, hard-core cartel participants are punished criminally under Section 1 of the Sherman Act. Under the Sherman Act, fines of up to 100 million dollars can be imposed on corporations, and on individuals fines of up to one million dollars and/or the imprisonment for up to 10 years can be imposed. In general, the Sentencing Reform Act of 1984 raises the maximum fines to the amount which is the greater, the amount provided by each law or twice 'the gross gain or loss'. Furthermore, Federal sentencing guidelines for organisations was enacted in November 1991 to provide certainty and fairness. According to this guideline, the amount of a fine for a corporation is determined by multiplying the gross gain, which is deemed to be 20 per cent of the relevant turnover, and the multiplier derived from the culpability score in anti-trust cases. As a result, the amount of the fine is determined from 15 per cent to 80 per cent of the relevant turnover, while Japan's administrative fine is in principle fixed to 10 per cent of the relevant turnover. In the EU, the European Commission has the power to impose administrative fines of up to 10 per cent of the worldwide turnover of violators of EU anti-trust law. In the U.K., administrative fines are up to 10 per cent of the worldwide turnover, just as the EU fine is. Those fines would result in being much higher than the Japan's because those are calculated based on the worldwide turnover.<sup>37</sup> In Australia, for a corporation the administrative fine is whichever the highest is: 10 million Australian dollars, three times the value of the benefit, or 10 per cent annual turnover. For an individual, the maximum fine is 500 thousand Australian dollars.

In conclusion, Japan's administrative fines are not high enough to fight hard-core cartels in cooperation with other countries' authorities, but Japan can take advantage of criminal sanctions, including imprisonment for an individual. Now that criminal investigation powers have been granted to the JFTC, the JFTC should put a heavy emphasis

on criminal investigations to prevent and deter hard-core cartels.

### *Compliance Program*

In Japan, some people have argued that the existence of an effective compliance program should be taken into account in calculating the amount of administrative fines in order to improve corporate compliance.<sup>38</sup>

In the United States, when a company has an effective compliance program in place, the criminal fines would be reduced even if the company violates the Sherman Act. This reduction will encourage companies to comply with anti-trust laws. On the contrary, it has been argued that if a company with an effective compliance program in place commits violations of the AMA, the compliance program has proved ineffective. From this perspective, an effective compliance program should not be considered to be a mitigating factor in calculating the amount of fines.

The US Sentencing Guidelines, which were tightened in 2004 in response to major corporate crimes and scandals, provide that if a company has in place an effective compliance and ethics program that meets the seven requirements set out in the Guidelines, the compliance and ethics program may be considered as a mitigating factor in determining the culpability score.<sup>39</sup> The Guidelines also say ‘Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective. The failure to prevent or detect the instant offence does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct’. According to these provisions, even if a violation occurs in a company implementing an effective compliance and ethics program, the fine may be reduced by considering the program as a generally effective one. In the UK, the Office of Fair Trading’s guidance as to the appropriate penalty says that mitigating factors for determining the level of a penalty includes ‘adequate steps having been taken with a view to ensuring compliance with competition laws’. In Australia, an effective compliance program is also taken into account as a factor in setting the level of monetary penalties.<sup>40</sup> The Australian Competition and Consumer Commission emphasises the importance of a compliance culture, saying on its web page that ‘If something does go wrong and a contravention of the Trade Practices Act (TPA) is established, the existence of a substantial and successfully implemented compliance program and whether the company has a corporate culture conducive to compliance with the TPA (compliance culture) is likely to be taken into consideration when the quantum of penalty is determined. On the other hand, the courts may impose a higher penalty if there is a poor or ineffective compliance regime. A poor compliance culture exposes a company to negative consequences such as adverse publicity

and substantial financial and human resource costs.’ However, the EU guidelines for setting fines have no explicit provisions of taking into consideration an effective compliance program, despite providing a large number of aggravating or mitigating factors relevant in setting fines.

Although compliance programs are generally important in encouraging companies to obey laws, as far as the AMA of Japan is concerned, it is difficult to take into account an effective compliance program in calculating the amount of fines given the following circumstances. The JFTC has no discretionary powers as to how to calculate the amount of administrative fines, and the level of administrative fines is not so high compared to other countries. In addition, if a company periodically conducts an audit under an effective compliance program, the company can easily detect a violation of the AMA earlier than other companies and take advantage of a leniency program. Most of the companies having an effective compliance program in place can virtually enjoy the effect of the compliance program.

## **4 Leniency Program**

### *Introduction of a Leniency Program*

The leniency program is the most important in the 2005 AMA amendments in terms of strengthening investigations into cartels. The JFTC explained in June 2004 to the Council on Economic and Fiscal Policy (CEFP) why a leniency program was necessary for Japan.<sup>41</sup> It gave two main reasons to the CEFP: one is that a leniency program provides a financial incentive for companies to improve their compliance. If a company conducts a regular audit under a compliance program and finds an act in violation carried out by an employee, the company has no incentive to report it to the authorities, and the company may decide to keep it secret. Despite having a compliance program in place, it may not work well without a leniency program. The other is that a leniency program provides an effective means for detecting a cartel conducted in secret by its nature. Competition authorities the world over have great difficulty in detecting cartel activities conducted in secret by a limited number of cartel participants. Thus, in order to address this problem, many advanced countries adopted a leniency regime and Japan, as a big economy, needed to introduce it as soon as possible.

Besides explaining its position to policy makers in the government, the JFTC has also advocated introducing a leniency program to business communities. There were, however, two main arguments against it: the first is that it might encourage betrayal. Some people argued that a leniency program is contrary to the justice system, because it

will result in doing a deal with a violator of the law, like a plea bargaining in the United States, which does not exist in Japanese criminal law. In other words, a leniency program permits a violator to avoid the consequences of their action by confessing and shifting the burden to others. However, detecting a cartel might outweigh the concerns of injustice because detecting a cartel leads to bigger social welfare gains and self-reporting by an individual is considered to be generally worthy of lenient treatment in the Japanese Penal Code.<sup>42</sup> Secondly, a leniency program could not be expected to work in Japan because Japanese society places value on mutual trust among members of a group. Notably, Japanese companies respect harmonisation among themselves so highly that a leniency would not work. There is, however, a fact that several Japanese companies used leniency programs in other countries in famous international cartels such as the vitamin cartel. In terms of aiming to make economic profits, Japanese companies are considered to be the same as other countries' companies. In light of those arguments, a leniency program was successfully introduced by amending the AMA in 2005.

Let us supplement the above explanation by describing an international cartel case. Considering those difficulties of investigating international cartels explained below, the JFTC needed a leniency program to fight cartels when cooperating with other countries' authorities which had already introduced a leniency program. For example, a leniency program was adopted in the United States in 1978, the EU in 1996, the UK in 1998, and Australia in 2003. Furthermore, jurisdictions such as the United States and the EU succeeded in cracking down on several huge international hard-core cartels by making use of their leniency programs. Under the circumstances, the JFTC was internationally considered to be weak in fighting international cartels because it was not able to participate fully in international cooperation.

To take one example in which the JFTC was not able to impose surcharges on Japanese cartel participants, a famous international cartel was sanctioned by the relevant competition authorities around 2000. This cartel, one of the largest cartels ever detected, related to a variety of vitamins including vitamin A, B2, B3, B5, C, E, beta carotene. Indeed, Hoffman-La Roche (based in Switzerland) which was recognised as the instigator in this cartel, was given the highest ever fine 500 million dollars in the United States and 462 million euro, the highest fine at that time in the EU. With regard to these vitamins, Japanese and other countries' vitamin manufactures and distributors were suspected of fixing each company's worldwide market shares of vitamins used as a basic ingredient in various medical and pharmaceutical products, and also of fixing each company's prospective annual sales in the world market and in several regional markets. It was a typical cartel to divide markets and to restrict output. According to Corner<sup>43</sup>, the US courts imposed fines totalling \$915 million on thirteen companies in the United States, Switzerland,

Germany, Japan and Canada in 1999; the EU imposed fines totalling 855 million euros on eight companies in Switzerland, Germany, Netherlands, France and Japan in 2001; the Canadian court imposed 85.5 million Canadian dollars fines on five companies in 1999; the Australian court imposed 26 million Australian dollars fines on three companies in 2001; the Korean government levied surcharges totalling 3.1 million dollars on six companies in Switzerland, Germany, France, Japan and Netherlands; but the Japanese government merely issued warnings, which are nothing but an administrative guidance, saying that the companies concerned should not repeat suspicious activities, to Japanese companies.<sup>44</sup> The other countries' authorities having a leniency program were able to receive information from the companies involved. On the other hand, at that time Japan did not have a leniency program and was unable to receive such information from the companies. If there had been a leniency program in place in Japan, the JFTC might have obtained information from the company and might have been able to take legal action and impose surcharges.

### *Design of the current leniency program*

It has been frequently pointed out that transparency is essential in designing a leniency program in order to maximise the incentive for defection and cooperation from companies and their employees. Anti-trust authorities must provide enough transparency so that a prospective cooperating company can predict with a high degree of certainty their treatment at the hands of the anti-trust authorities following self-reporting. The United States was the first to introduce a leniency program, but its first program in 1978 did not work well because of a lack of transparency.<sup>45</sup> The US program was reviewed in 1993 to eliminate the exercise of prosecutorial discretion as much as possible. The new program was successful in detecting cartels owing to its transparency. In the light of the experience of the United States and other countries, and in order to address the criticism from business community mentioned above, the Japanese leniency program was designed carefully so that it would be as transparent as possible to applicants to secure its workability.

The Japanese leniency program has the following program features:

- Firstly, full immunity from surcharges is available to only one informant, who is the first to apply for leniency before the JFTC's investigation is initiated. The second informant and the third informant are respectively entitled to 50 per cent reduction and 30 per cent reduction in surcharges. Even after the investigation is initiated, an informant is entitled to 30 per cent reduction as long as it is within the third category. The Japanese leniency program is applicable to only the first three informants. Under this program, it is important how the order among inform-

ants should be decided. To decide the order among informants transparently, an informant is required to send information to one particular facsimile machine set up in the JFTC, the number of which is open to public. The Japanese program selected this method to avoid confusion about the order among informants as much as possible, while it represents a powerful incentive for informants to provide information as soon as possible.

- Secondly, Japan introduced a marker system, which had been already functioning effectively in the United States to heighten the incentive to provide information as early as possible.<sup>46</sup> It provides a tentative order, an indicative marker, for an applicant who could not submit a detailed report at once and is acknowledged to be submitting it later. The tentative order would be confirmed once the applicant submits a detailed report by a deadline.
- Thirdly, as an exception, it is admissible for an applicant to provide an oral report only, although an applicant must in principle transmit a written report by facsimile. This is because there are concerns that discovery of information would be sought in international cartel cases if any action for damages were to go to the US courts, and it might reduce the incentive for applying for leniency to require a written report always.
- Fourthly, the JFTC had a problem with the relationship between a leniency program and a penalty levied by central or local governments when a company commits bid rigging. This penalty is a suspension from bid participation for a certain period of up to 36 months. The suspension has a great effect of causing economic damage on a violator.

Under the AMA before it was amended in 2005, a suspension of business was imposed when the JFTC issued an order after a hearing was finished. Under the former system, it was said that the reason why many violators did not accept the recommendation of the JFTC and opted to have a hearing panel was to avoid or to postpone the suspension being imposed by the government. Under the current system, the suspension is imposed when an order is issued before the hearing begins. It is said that hearings are decreasing in number owing to the new system.<sup>47</sup> If the suspension remained the same, a leniency program was likely not to work effectively in a bid-rigging case. The Ministry of Land, Infrastructure and Transportation had drawn up guidelines on the treatment of violators of bid rules with other central government agencies. To enhance the effectiveness of the leniency program, it was decided to amend these guidelines to reduce the suspension period for a leniency applicant to half of the regular period. Furthermore, there is another problem with bid-rigging cases: governments, especially local governments do not have

any means of knowing which company has applied for leniency. In order to address this problem, the JFTC decided to release the names of companies given lenient treatment on the webpage when the company consents to the release.

Finally, the most important issue is the relationship between a leniency program and a criminal prosecution. If an applicant for leniency is not allowed to be immune from criminal charges, the leniency program might result in failure to detect cartel activities. Under the AMA, the JFTC has exclusive authority to file with the Prosecutor General a criminal referral against a company and its employees believed to have violated the AMA. To address this problem, the JFTC has announced that its policy on criminal referrals is that it would not file criminal referrals against the first applicant for leniency, including against employees of the company.

### *Functioning*

Under the above framework, how has the Japanese leniency worked in the business community? Contrary to the initial negative forecast, the leniency program has produced significant results since its introduction. The JFTC has already received 105 leniency applications from January 2006 to March 2007.<sup>48</sup> We can also see on the web page of the JFTC the names of companies which were granted lenient treatment if the companies consented to publication of their names. As of December 2007, a total of 33 companies in 13 cases had applied and been granted lenient treatment. Most of the companies that were accepted into the leniency program are deemed to have consented to place their names on the web page in order to reduce the suspension period levied by a government. Two important cases are described among 13 cases in which the JFTC took legal measures taking advantage of the leniency program.

One is the first case in which the newly introduced leniency program was applied since the 2005 amendment took effect. It was a bid-rigging case in Tokyo that occurred over tunnel ventilation construction works procured by the Metropolitan Expressway Public Corporation. The MEPC had sought application for bid participation by public notice containing the requirements, where applicants who fulfilled those requirements had been automatically admitted as participants for the competitive bidding. In order to prevent a decrease in the bid price, seven companies had reached an agreement to pre-arrange the winner for each bid by holding sales staff meetings in April and June 2004. On 8 September 2006, the JFTC revealed that three companies were granted immunity or reduction of the surcharge under the new leniency program. Mitubishi Heavy Industries Ltd. was granted immunity, and Ishikawajima-Harima Industries Co., Ltd. and Kawasaki Heavy Industries Ltd. were granted 30 per cent reductions. It should be noted that these

companies used the leniency program repeatedly. In fact, the following nine companies (from 20 companies in all) applied twice or more times:

- Mitsubishi Heavy Industries, Ltd 4 times
- Ishikawajima-Harima Industries Co., Ltd twice
- Kawasaki Heavy Industries, Ltd twice
- JFE Engineering Corp 3 times
- Hitachi Shipbuilding Corporation twice
- Sumitomo Metal Industries Co., Ltd 3 times
- Fuji Kako Co., Ltd twice
- Sekisui Chemical Co., Ltd twice
- Nippon Steel Engineering Co., Ltd twice

The other case is the first criminal case where the JFTC did not refer the first leniency applicant to the Prosecutor General so that the first applicant would be exempt from criminal penalties. This is a bid-rigging case concerning subway construction contract with the City of Nagoya, where the JFTC brought charges against several large, famous general construction companies, some of which were reported by newspapers to have stopped bid rigging at the end of 2005, just before January 2006 when the new AMA took effect. In around mid-December 2005, five companies which played an important part in these AMA violations—including Obayashi Corporation, Kajima Corporation, Shimizu Corporation, Okumura Corporation, and Maeda Corporation—agreed with other construction companies to pre-arrange a bid winner from among special joint ventures for each competitive tender on construction for extending the subway line in Nagoya and also agreed to make a bidding price convenient for a pre-arranged winner to win the contract. Based on the criminal investigation of the case, the JFTC established a criminal violation of the AMA and filed criminal referrals with the Prosecutor General against five companies and five individuals in February and March 2007. This case was frequently reported in the media because some of the biggest construction companies were involved even though they were supposed to have stopped bid rigging. Moreover, the first applicant for the leniency program was also a well-known general construction company. This case might be considered to have had a dramatic impact on the business community.

The results show that the Japanese leniency program was effective and has had a great impact on Japanese companies so far. The current leniency program might be, at the moment, considered to offer a strong incentive for a company to provide information for the competition authority. Why was the current program so effective, contrary to

the business community's expectations? First of all, its design maximises transparency so that companies easily made use of the program. Secondly, especially in bid-rigging cases, the total penalties—including the suspension term—were enormously increased. Thirdly, most of the companies might have calculated that the probability of detection was considerably increased by the introduction of a leniency program and the heightened activities of the JFTC, which filed criminal referrals with the Prosecutor's Office against steel bridge companies for bid rigging just before the new AMA came into effect. Finally, in addition to the AMA, corporate compliance requirements were significantly strengthened under the Japan Companies Act. If top managers knew about a violation of the AMA in the past, they might have kept it secret because there was no incentive to go public. However, since the Companies Act has specifically required executive directors to control their companies' operations properly according to the laws, they can be individually charged with neglecting their duties by bringing a derivative action to court if they kept the violation secret. This might lead companies to accept their names' release on the JFTC webpage in order to prove the propriety of the company's operations. We will discuss this issue later along with corporate compliance.

## 5 The JFTC and its Enforcement Role

### *High Prestige of the JFTC*

The Japan Fair Trade Commission, which consists of a chairman and four commissioners, was created under the AMA to implement competition laws as an independent administrative organisation. In other administrative fields, such as communications and public utilities, this type of organisation was created under the strong influence of the United States during the Allied occupation. Its aim was to curb political influence and exert its power neutrally. However, organisations other than the JFTC were abolished because while ministries traditionally had a long history as governmental organisations, the neutrality of other organisations was not considered to be so essential. The AMA prescribes that the chairman and commissioners are independent in the performance of their duties. The JFTC is administratively attached to the Cabinet Office, but performs its duties of administering the AMA independently without being directed by the Cabinet Office.<sup>49</sup>

The JFTC has not only powers to enforce the AMA, but also powers to propose amendments to the AMA and other competition laws. Under the Constitution of Japan, the Cabinet has power to submit bills to the Diet, and based on this power, each ministry prepares bills and submits them to the Diet through the Cabinet. The JFTC drafted the 2005 amendments to the AMA and submitted them to the Diet through the Cabinet

under the direction of the Chief Cabinet Secretary, who is a member of the Cabinet. No less important is the fact that all the bills drafted by each ministry of the government need to be approved by the ruling Coalition. It goes without saying that the amendments to the AMA had to be approved by the ruling parties. In this regard, there is a powerful ‘study group’ in the Liberal Democratic Party called the AMA Policy Council, which examines the JFTC’s proposals and conducts hearings with business associations such as the Japan Business Federation.

To summarise, the JFTC has strong and unique powers provided by the AMA, which was originally enacted in 1947 under the influence of the United States. Firstly, the JFTC is an independent organisation when it performs its duties of enforcement, but it is directed by the Cabinet when it drafts bills. Secondly, although the JFTC is the agency for enforcing the AMA, it is allowed to take the place of a court of first instance and it is also granted the rule of substantive evidence, which is not granted to a court of first instance. Thirdly, the JFTC has a monopoly in anti-trust enforcement. Namely, the JFTC has the exclusive power to charge violators through the Prosecutor’s Office, and it involves private damage actions prescribed by the AMA. Considering these provisions of the AMA, the AMA gave the JFTC high prestige and concentrates enforcement powers on the JFTC. Accordingly, achieving fair and free competition sought by the AMA greatly depends on the JFTC’s enforcement.

### *Brief History of Enforcement*

After the end of the occupation in 1952, the AMA was under pressure to relax its controls from the business community and other ministries such as the Ministry of International Trade and Industry (MITI) that regulated industries. In fact, in the first half of the 1950’s, the Japanese government reviewed the AMA to relax its regulations and enacted other laws in order to allow specific cartels by way of authorising certain types of cartel activities, notably depression cartels.<sup>50</sup> While many depression cartels were authorised and implemented until the 1980’s, the JFTC had a hard time implementing anti-cartel enforcement because stringent enforcement could have led to accusations of unfairness due to the existence of depression cartels. Although those provisions for authorising cartels were finally repealed in the 1990s, the JFTC’s cartel enforcement was relatively weak during this long period from the 1950’s to the 1980’s because so many exemptions were authorised on specific cartels. However, during this period, in 1974, the JFTC successfully detected oil cartels and file criminal referrals against oil companies with the Prosecutor General virtually for the first time. When the global oil crisis occurred and consumer prices increased dramatically during the 1970’s, Japanese consumers began to pay scrupulous

attention to corporate behaviour. Most companies raised prices more than cost increases, taking advantage of the tight supply-demand situation. In these circumstances, the JFTC proactively investigated oil companies in response to consumers' antipathy toward the oil companies. After the incident, the AMA was reviewed to strengthen its deterrent effect and surcharges were incorporated into its counter-measures.

In the 1980's, Japan began to post huge trade surpluses, following its quick recovery from the economic stagnation of the international community caused by the oil crisis. Under such external economic conditions, combined with the economic recession in other industrialised countries, criticism from other advanced countries, especially the United States grew over the impediments to access to the Japanese markets. In order to address this problem, the Structural Impediments Initiative (SII) talks with the Government of the United States began in 1989 and continued until 1992. The SII aimed at eliminating trade barriers in Japan and the United States. As a result, it created a pro-competition policy atmosphere in Japan. In the SII talks, it was pointed out that there were two major issues, relating to competition policy, in Japanese business. The first issue was that a culture of harmonisation existed in Japanese business community which tended to induce cartels or bid rigging, which created difficulties for foreign companies entering the Japanese market. To solve this issue, various penalties under the AMA were strengthened. One step was to raise surcharges so that cartels would be deterred. The basic rate was increased from 1.5 per cent to six per cent in 1991. Another relates to criminal sanctions. The upper limit of criminal fines for a corporation was raised from five million yen to one hundred million yen in 1991, and the JFTC announced its policy of filing criminal referrals against violations of the AMA with the Prosecutor General in 1990. In response to these reviews, the JFTC in 1991 restarted criminal enforcement for the first time in 17 years and filed criminal referrals against eight companies for fixing prices of plastic film used for wrapping food. The second issue was over '*keiretsu*', which means vertical trade restraints. In response to this, the JFTC released new guidelines in 1991. After the SSI, competition policy became a major priority in Japan. A comprehensive bill aimed at abolishing exemptions from the AMA was drawn up twice by the government, in 1997 and in 1999, and approved by the Diet. As a result, many exemptions, including depression cartels, were abolished.

It has been argued that Japan's enforcement was weak because of the nature of the JFTC. Some people argued to the contrary, that the JFTC actively enforced the AMA and commended the series of reforms of the JFTC launched in the 1990's, although no one disputed that the JFTC's anti-cartel enforcement was weak before the 1990's. According to the former Commissioner Itoda (2000), the JFTC vigorously enforced the AMA emphasising that the JFTC amended the law itself to improve its effectiveness.<sup>51</sup> Most researchers in

the United States and Japan have, however, asserted that Japan's enforcement regime was still weak after the 1990's reforms. Considering the current enforcement regime, JFTC's enforcement might be assessed as weak at least until the 2005 AMA amendments.<sup>52</sup> There are several reasons for the relatively weak performance of anti-trust enforcement in the past. First is Japan's often negative view of the utility of anti-trust as economic policy, compared with the dominance of industrial policy conducted by the MITI. Second is the position of the JFTC in relation to other government ministries. These two reasons have been often pointed out.<sup>53</sup> According to First and Shiraishi (2005), no less important than these reasons is the concentration of enforcement authority in the JFTC or the JFTC's monopolisation of enforcement.<sup>54</sup> However, in the past this concentration might have resulted in weak enforcement, but in the future it might lead to tougher enforcement. The future depends on the JFTC's attitude and efforts.

### *Organisation*

The Japanese Government has strictly controlled the size of the government organisations in accordance with the law. While the other ministries and agencies have been decreasing in size, the number of the JFTC's employees has been significantly increasing, especially after 2002. The increase in its employees was only seven in 1998, six in 1999, eight in 2000, seven in 2001, and then 36 in 2002. After 2002, the increase in each year was between 29 to 36. In 2001, as the Koizumi Government began to plan its 2002 budget, it put emphasis on competition policy, and the number of JFTC's employees increased significantly compared with other government organisations. Furthermore, we can easily understand the connection in the long run between the number of its employees and the priority on competition policy within the Japanese Government by looking at Table 2, which shows the number of its employees from the start of the JFTC to 2008. The number in 1960 was less than the number in 1947 when the JFTC established. During the 1950's and 1960's, the JFTC faced difficulties with anti-trust enforcement owing to many exemptions under the AMA. Obviously, competition policy was given a low priority by the then government. After the SSI talks, the importance of competition policy was recognised by the government. Especially, after the Koizumi Government started, the top priority was finally placed on competition policy, as his inauguration speech in the Diet stated.

**Table 2 History of the Number of JFTC's Employees**

Fiscal Year	1947	1950	1960	1970	1980	1990	1995	2000	2005	2008
Employees	284	316	238	351	422	474	520	564	706	795
Increase		32	-78	113	71	52	46	44	142	89

*Source:* JFTC annual reports

In addition to the number of the employees, the JFTC's organisation was significantly reformed in 1996. The grade of the JFTC's office was raised from the simple 'Secretariat' with no bureaus, to the 'General Secretariat' with two bureaus, whose grade equals to those of other ministries. At a time when the size and number of government organisations was being strictly controlled, this reform was an extremely rare case. Now that, in terms of size or grade, the JFTC can compare to other ministries, it should make the most of its organisation to achieve the AMA's goal of fair and free competition.

### *Recent Activities*

Regarding administrative enforcement, we can see how the JFTC enforced the AMA over the past five years. Table 3 shows the number of legal measures, which means cease and desist orders and surcharge payment orders (without cease and desist orders), issued by the JFTC from 2002 to 2006. There are two features of JFTC activities: the first is that bid-rigging cases represent the most frequent violations of the law. The total number of JFTC legal measures over five years was 129. Altogether 85 cases out of 129, or 66 per cent, were bid-rigging violations. In addition to this ratio, the number of companies involved in bid rigging is generally large compared with the number involved in price fixing. The JFTC has, thus, allocated major resources to bid-rigging cases. The second feature is that the number of legal measures widely fluctuated between 37 and 13, but decreased to 13 in 2006 when the new AMA came into effect. Moreover, the number of bid-rigging cases sharply decreased from 13 to six in 2006. This is supposedly because the JFTC dealt with big cases including two criminal cases.

**Table 3: The Number of Legal Measures taken by the JFTC**

Fiscal Year	2002	2003	2004	2005	2006	Total
Bid Rigging	30	14	22	13	6	85 (65.9 %)
Price Cartel	2	3	2	4	3	14 (10.9 %)
Private Monopolisation	0	1	2	0	0	3 (2.3 %)
Unfair Trade Practice	3	7	8	2	4	24 (18.6 %)
Others	2	0	1	0	0	3 (2.3 %)
Total	37	25	35	19	13	129 (100 %)

*Source:* JFTC annual reports

Regarding criminal enforcement, the JFTC has been more active since a bid-rigging case over steel bridge construction was brought in May 2005. For the years from May 2005 to April 2008, for three years the JFTC filed referrals in four cases, but for 14 years from 1991 to 2005 it only filed referrals against 7 cases at a rate of one case every two years. Recent cases are all bid rigging, as Table 4 shows.

**Table 4: Recent Criminal Cases from 2002 to 2007**

Referral	Prosecution	Case
24 May 2007	13 June 2007	Bid rigging over main forest road projects procured by Japan Resources Agency
28 Feb. 2007	20 March. 2007	Bid rigging over subway construction procured by Nagoya City
23 May 2006	12 June 2006	Bid rigging over human waste disposal facilities construction procured by local municipalities
23 May 2005	15 June 2005	Bid rigging over steel bridge construction procured by the Japan Highway Public Corporation and the Ministry of Land, Infrastructure and Transport (MLIT)
2 July 2003	23 July 2003	Bid rigging over water meters procured by Tokyo Metropolis

*Source:* Press releases of the JFTC

We now describe two most important cases in the above five cases. The first case is a bid rigging concerning steel bridge construction works procured in the financial year 2004 by the Ministry of Land, Infrastructure and Transport (MLIT) and the Japan Highway Public Corporation (JHPC). Firstly, the JFTC detected bid rigging in the MLIT procurement and filed criminal referrals against 26 companies and eight individuals with the Prosecutor General in May and June 2005. After this detection, more extensive bid rigging was detected in the JHPC projects. While in the first detected case the JFTC did not recognise any involvement of officials, in the JHPC case the JFTC discovered that 50 construction companies, including important members of Nippon Keidanren, decided on the bid winners in advance, jointly and through involvement of officials of the JHPC. Naturally, the purpose of these companies was to secure stable profits from public procurement by preventing declining bridge construction prices. In this case, facilitation by an executive official of the JHPC enabled the companies concerned to rig a series of bids by jointly approving a ‘bid winner allocation chart’, which was made and submitted by an employee of one of the companies who was once an executive official of the JHPC. The reason why those current and former executive officials were involved in bid rigging is that they wanted to secure jobs for retirees of the JHPC in construction companies, through distributing profits of procurement for those companies which employed the retirees, by means of organising such bid rigging.

Since the JFTC found a criminal violation of the Antimonopoly Act, it filed criminal referrals in June and August 2005 with the Prosecutor General against six companies and seven individuals that had played a critical role in the violation. Included were two executives of the JHPC who allegedly committed the crime. Besides these criminal referrals, because officials of the JHPC were found to have tacitly permitted the bid rigging and facilitated selection of bid winners among bid participants, the JFTC, based on the Government-led Bid Rigging Prevention Act, ordered the President of the JFTC, to implement corrective measures to eliminate and prevent involvement of its officials in bid rigging. This case is distinguished from other criminal cases in that it made an enormous impact on the Japanese public, including the business community just before January 2006 when the new AMA took effect. Most Japanese people, for the first time, noticed that violations of the AMA involved a serious crime owing to sensational reports in the media, which paid full attention to this case because two executive officials of the JHPC (scheduled to be privatised in October 2005) were prosecuted. Moreover, well-known big companies were also involved. Nippon Keidanren ordered the 15 representatives of member companies that were prosecuted in this case to suspend their activities as a member for three months and to establish corporate compliance and ethics. In this case, the total surcharges, levied on 44 companies ranging from 854 million yen to four million yen, amounted to approximately 13 billion yen, largest surcharge for a bid-rigging case at that time in Japanese history. The six companies prosecuted were: Yokogawa Bridge Corp., Mitubishi Heavy Industries, Ltd., Ishikawajima-Harima Heavy Industries Co. Ltd., Kawada Industries, Inc., JFE Engineering Corporation, and Miyaji Iron Works Co. Ltd. It should be noted that three companies applied for a leniency program later.

The second is a bid-rigging case over human waste disposal facilities construction works, in which the JFTC, for the first time, conducted a criminal investigation. Eleven companies had agreed to pre-arrange bid winners among bid participants for construction works of human waste disposal facilities ordered by local municipalities and to cooperate with each other for pre-arranged winners to be able to win bids at their seeking prices. The JFTC took advantage of its new investigation powers shortly after the new AMA came into effect and successfully filed criminal referrals against 11 companies and their employees with the Prosecutor General in May and June 2006. Accordingly, the new criminal investigation powers might be considered be highly effective in gathering relevant evidence.

## 6 Japanese Bid Rigging (*Dango*)

A bid rigging (*dango*), in which companies get together beforehand and agree the winner of supposedly competitive bidding, is the best known corporate crime in Japan. It has been said that it is commonly practised in almost all public work procurement throughout Japan, although it is difficult to prove objectively that *dango* is a common practice in Japan. A great deal of bid rigging is indeed cracked down on by the JFTC, police officers or prosecutors. After a steel bridge bid-rigging case was detected, Chairman of Nippon Keidanren, Okuda reportedly said that since *dango* was a kind of work sharing practised everywhere in Japan, it would be difficult to stop it in the near future.<sup>55</sup> A report released by the Japan Civil Engineering Constructors Association said that they had determined to cut their connection with old practices, including *dango*, in order to set up a new business model.<sup>56</sup> It was reported that more than 80 per cent of the Japanese people believed that there were illegal conducts including *dango* in public works procurement.<sup>57</sup>

### *Penal Code*

There are, besides the AMA, the two important laws regulating bid rigging on public bids in Japan: one is the Penal Code; the other is the Government-led Bid Rigging Prevention Act.

The Japanese Penal Code includes provisions imposing sanctions against bid rigging which was enacted in 1941 during the Second World War.<sup>58</sup> Thus, bid rigging has been a crime in Japan for a long time. In spite of this fact, bid rigging was allegedly practised very widely in Japan. Why didn't the Japanese Penal Code work? According to Takeda (1994), this is because some court decisions admitted that bid rigging were divided into two groups: good bid rigging and bad bid rigging.<sup>59</sup> Although bad bid rigging is a crime, good bid rigging is not illegal. In accordance with these court decisions, the Public Prosecutor Office was not eager to prosecute bid rigging for a long time.<sup>60</sup> Article 96-3 of the Penal Code was interpreted by the courts to mean that illegal bid rigging should be limited in terms of its purpose.<sup>61</sup> It reads 'for the purpose of preventing a fair determination of price or acquiring wrongful gains'. The issue is how these two terms, 'wrongful gains' and 'a fair determination of price' should be interpreted. 'Wrongful gains' means some money for which a bid winner pays other companies, thereby committing bid rigging. It is said about adjustment among bid-rigging participants that a winner does not pay money to other companies, but a possible winner will be sifted in turn among participants under the recent Japanese bid rigging. Accordingly, there have been no arguments over this interpretation, but legal arguments were put forward over 'a fair determination of price'. 'A fair determination of price' was interpreted by the courts not

to mean that a price should be determined in competitive bid process, but to mean that a price should be within the cost and the proper profit of the bid winner. This means that even if a bid is rigged, the bid rigging is not a crime as long as the bid price is proper. Of course, at the moment, it is generally considered that this interpretation is wrong, but it was claimed that these court decisions prevailed so that the Japanese *dango* system was firmly established in the construction industry during 1960's and 1970's.<sup>62</sup>

As explained above, the AMA has criminal sanction provisions against hard-core cartels including bid rigging. There are, accordingly, two laws providing criminal sanctions against bid rigging, but there are several differences between the AMA and the Criminal Code. Firstly, the AMA provides a maximum fine of 500 million yen against a company and a maximum fine of five million yen or up to three-year imprisonment against an individual, while the Penal Code provides a maximum fine of two and a half million yen or up to two-year imprisonment against an individual. The AMA provides more severe sanctions than the Penal Code and also provides criminal sanctions against a company, which cannot be punished under the Penal Code. Secondly, regarding violations of the AMA, the JFTC has exclusive power to file criminal referrals with the Prosecutor General. In other words, without the JFTC's criminal referral against a company committing bid rigging, the company can not be prosecuted. Thirdly, under the AMA a bid rigging is violation of regulations on 'unreasonable restraint of trade' 'in any particular field', which is generally interpreted to require repetition or possible repetition of a violation. On the contrary, the Penal Code does not require repetition so that a single violation will constitute a criminal offence. Under the Penal Code, authorities might easily establish a crime of a bid rigging, but they can not punish a company.

During 2005 and 2006, the Prosecutor's Office continuously prosecuted several big criminal cases constituting bid rigging not under the AMA but under the Penal Code: There are, firstly, three local government cases where the governors of Fukushima, Wakayama, and Miyazaki Prefectures were arrested from October to December 2006 for interfering in bidding or violation of Paragraph 1, Article 96-3, Penal Code, or for taking bribes from a company which committed bid rigging. It was reported that the governors interfered in a bidding process to facilitate bid rigging for local construction companies' benefit, because they badly needed cooperation in elections from them. Secondly, there are two central governmental organisation cases; the former Tokyo International Airport authority (TIAA), and the Defence Facilities Administration Agency (DFAA) case. In the TIAA case, the former two TIAA's managers were arrested in December 2005 for leading a bid rigging over electricity facilities procurement carried out by three companies. In the DFAA case, the Deputy Director-General (the number three position in the DFAA) and two other officials were arrested in January 2006 for leading a bid rigging

over air conditioning facilities procurement. Those arrests led to the detection of other bid-rigging cases concerning civil engineering and construction projects procured by the DFAA, in which 60 companies were involved throughout Japan. It became such a big political problem that it caused the abolition of the DFAA. In both cases, those officials aimed at securing a place in the companies for the employees who were supposed to leave their organisations, and as a result, one of the five officials was sentenced to one and half in prison and the others were given suspended sentences of one year to one-and-a-half year imprisonment. On the other hand, the companies' sales staffs were only fined 500 thousand yen and the companies themselves were not fined at all owing to the Penal Code having no penalties against companies.

### *Government-led Bid Rigging Prevention Act and Other Penalties*

The AMA had been not been applied in the case of bid rigging over public works until the JFTC investigated construction companies in Shizuoka Prefecture and issued a surcharge payment order against them in March 1982. After the SSI talks, the JFTC's enforcement was strengthened and it cracked down in several bid-rigging cases, but they were not dealt with as criminal cases. In 1994, bid rigging involving sewage electricity facilities procured by the Japan Sewage Works Agency (JSWA) was investigated and developed into a criminal case, where the JFTC found out that an official of the JSWA led the bid rigging and the JFTC filed a criminal referral with the Prosecutor General based on the findings. After this case, there were many cases where the government officials led bid rigging or were at least involved in bid rigging. They facilitated bid rigging by providing bid participants with information such as a planned ceiling price or by indicating in advance a specific company as a contracting party, which was called 'champion' in the Japanese *dango* community. Among these cases, bid rigging concerning agricultural civil engineering construction procured by Kamikawa Office, Hokkaido Prefecture drew attention and criticism from the Japanese public in 2000 because local government officials initiated the bid rigging. Since the JFTC had requested Hokkaido Prefecture unofficially to correct the illegal involvement of the officials in any bid rigging, Diet members began to discuss the enactment of a special law to prevent officials' involvement in bid rigging because of the limitation of the AMA that the JFTC was not able to issue a legal request or order against a government agency. After a long argument, in July 2002 the Act Concerning Elimination and Prevention of Involvement in Bid Rigging (the Government-led Bid Rigging Prevention Act) was enacted and put into effect in January 2003.

According to the Government-led Bid Rigging Prevention Act, when the JFTC recognises the specific behaviour of officials involved in bid rigging which facilitated bid

rigging committed by private companies, the JFTC may demand the head of the procurement agency should take corrective measures. Once the procurement agency receives the demand from the JFTC, they shall perform necessary inspections and implement corrective measures necessary to eliminate and prevent bid rigging led by their officials.

Since the Act took effect, the JFTC has recognised involvement of officials in four bid-rigging cases on construction works and demanded the four agencies for which those officials worked should carry out corrective measures to eliminate and prevent their officials' involvement. The first case is a bid rigging in Iwamizawa City, Hokkaido Prefecture in January 2003. The second is a bid rigging in Nigata City in July 2004. The third is bid rigging in the Japan Highway Public Cooperation in September 2005, as already explained. The last case is bid rigging in the Ministry of Land, Infrastructure and Transport in March 2007.

Among the cases mentioned above, the JFTC found bid rigging over floodgate construction projects procured by the Ministry of Land, Infrastructure, and Transport, and other agencies. The investigation by the JFTC revealed that officials of the MLIT facilitated such bid rigging. 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 8 March 2007 in accordance with Article 3 of the Government-led Bid Rigging Prevention Act, the JFTC demanded that the MLIT should carry out corrective measures on the administration of bidding and contracts so as to prevent involvement of its officials in bid rigging. This was the first case where a central government agency had been subjected to the Government-led Bid Rigging Prevention Act. Besides the demand against the MLIT for corrective measures, the JFTC issued cease and desist orders and surcharge payment orders. The total amount of the surcharge was 1.67 billion yen.

In spite of the enactment of the Act, bid rigging with involvement of officials, including the DFAA case, continued to be detected throughout Japan and to draw strong criticism from the nation. To address this problem, then Prime Minister Koizumi gave two directives in December 2005 to the Secretary General of the Liberal Democratic Party and the Chief Cabinet Secretary: the first directive was to amend the Government-led Bid Rigging Prevention Act to prevent government officials' involvement with bid rigging, given criticism from the business community that a government official should be sanctioned more severely. The second directive was to improve tendering and contracting system in the public works so that a bid rigging would not occur under the new system.

In response to the first direction, the Coalition Parties immediately set up the study group consisting of the Diet members to discuss reviewing the Act. In December

2006, the Act was amended and strengthened in respect to the following two items: the introduction of the criminal penalty, the maximum of five years imprisonment or the maximum of two-and-a-half million yen fine, imposed on officials involved in bid rigging, and expansion of the specific definition of the behaviour of officials. The amendment to the Act came into effect on 14 March 2007.

Based on the second direction, the government launched the Liaison Conference of Relevant Ministries and Agencies for Promoting Proper Public Procurement. In February 2006, a policy statement titled ‘Action to Secure Justness in Public Procurement’ was released. It aims at strengthening administrative penalties such as suspension of the right to participate in bidding; where bid rigging is on a large scale and systematic, the government could extend suspension of bid participation term up to 24 months. The statement also reviewed procurement rules with a view to preventing bid rigging; the government should change its bidding system to open and competitive bidding from designated competitive bidding.

Regarding a bid rigging, we have several penalties imposed by a government as a procurer or a regulator: First is suspension from participating in bidding. In light of the bid rigging in the MLIT, the suspension term was furthermore extended from the 24 months mentioned in the policy statement to 36 months in March 2007. Second is damage payment. Considering the recent bid-rigging cases mentioned above, almost all governments have introduced a special provision into public works contracts, which prescribes that if a company rigs any bidding, the company shall pay a damage up to 15 per cent of the amount contracted in case of the central government. The rate of damage to the amount contracted depends on the government, but 97 per cent of Prefectures and Ordinance-designated Cities (the 13 largest cities in Japan) adopted 10 per cent or more than 10 per cent rates according the JFTC’s survey released on 31 October 2006. Third is business suspension up to one year, which is imposed by the MLIT under the Construction Industry Act.

## 7 Corporate Compliance

### *Legal Framework*

In Japan the circumstances surrounding corporate compliance have changed significantly. First are the amendments to laws pertaining corporate compliance such as the Companies Act and the Securities and Exchange Law, whose name was changed to the Financial Instruments and Exchange Law in 2007. The other is the fact that a great deal of corporate misconduct in violation of laws is occurring. Recent examples regarding

violations of other laws than the AMA, include Mitsubishi Motors' systematic, long-term cover-up of fatal vehicle defects which finally ended in suspended prison terms for two former senior employees, and Akafuku, a famous confectioner in Mie Prefecture, was found guilty of passing goods as fresh in 2007. Such changing circumstances really require companies to make a substantial improvement in corporate compliance. With respect to the improvement of corporate compliance program, companies should endeavour to do this voluntarily regardless of legal requirements. However, companies are now legally required to structure a system to ensure the properness of their business activities under the new Companies Act. Besides, the amendment to the Securities and Exchange Law of 2006 requires companies to report on their internal controls for in-house reporting systems. Furthermore, the system to urge corporate compliance indirectly by protecting in-house whistleblowers was introduced in 2004. Turning to the AMA, a leniency program, which is to exempt or reduce the surcharge payments for a voluntary reporter of its own violation, was introduced in 2005. The leniency program is expected not only to encourage self-reporting, but also to function as an incentive for companies to improve their compliance. These recent systemic revisions represent a strong call for the enhancement of corporate compliance. However, specific methods for deploying a compliance program are left to each company's own decision. From such viewpoint, it is vital that a company itself should endeavor to improve its compliance program. These revisions on basic laws will be explained in the next paragraphs.

Firstly, the new Companies Act was enacted in April 2005 in order to correspond to recent needs of companies, such as strengthening corporate governance, and came into effect in May 2006. It comprehensively reviewed basic corporate systems such as minimum capital, formation of corporate bodies and responsibility of directors. It also requires companies to establish systems to secure the properness of corporate activities, which are so-called internal control systems. Under the new Act, the board of directors has an obligation to make decisions on the basic policy concerning the establishment of a system necessary to ensure compliance<sup>63</sup>. Although a new legal structure on corporate compliance was set up, the Companies Act does not stipulate any specific details on the basic policy, but leaves it to each company's own judgment and decision. In order to establish an effective internal control system, a derivative action is expected to play an important role. A derivative action, which already existed under the former Commercial Code, is a measure for shareholders to pursue the liability of a director instead of a company in case that the company does not accept liability itself. If a huge fine is imposed on a company because of a violation of the AMA, shareholders of the company might bring a derivative action against the directors because the internal control is insufficient. When the directors are defeated in court, they must pay the amount of the fine which

would cause them serious financial problems. There was already a famous Daiwa Bank case with a derivative action in which Osaka District Court ordered 12 directors to pay approximately 83 billion yen<sup>64</sup>. The existence of a derivative action can lead directors to seriously address the establishment of an effective control system.

The second is as regards financial statements, which are regulated under the Securities and Exchange Law, the cabinet office ordinance concerning disclosure of corporate information was revised in March 2006, and so companies are now required to report the situation of corporate governance in the ‘Reference Information of the Submitting Company’. Also, in December 2005 the Subcommittee on Internal Control under the Business Accounting Council released a report titled ‘On Standards for Evaluation and Audit of Internal Control concerning Financial Reporting’. In light of the above ordinance and report, the amendment to the Securities and Exchange Law was enacted in June 2006 and as a result the internal control report was introduced as a mandatory report.<sup>65</sup> It is a legal requirement that a chartered accountant or an auditing firm should certify the internal control report of the audited company.

The third is an enactment of the Whistleblower Protection Law. In recent years a string of corporate scandals were revealed, triggered by internal information disclosed by whistleblowers. Under such circumstances, the Whistleblower Protection Law was enacted in June 2004 for the purpose of prohibiting unfair treatment of a whistleblower, who is an employee of the accused company, including their dismissal. The Law took effect in April 2006. In July 2005 the Cabinet Office released the guidelines concerning the Whistleblower Protection Law. It says that a company should set up so-called ‘Helpline’ within the company to have its employee easily submit information to the company. It also suggests that it is desirable to place a compliance officer, who is a member of the management and takes responsible for the operation of the scheme. These guidelines were released for Whistleblower Protection Law, but they might be available for other laws including the AMA.

### *Corporation Behaviour*

Let us examine how Japanese companies changed their behaviour after bringing the AMA into force. Firstly, let us consider a basic theory on how a company responds to monetary penalties; and secondly we shall examine actual corporate behaviour concerning violations of the AMA.

It is frequently pointed out that the magnitude of penalties should be inflated from the level that would be appropriate if the possibility of detection is 100 per cent.<sup>66</sup> Inflation of penalties is needed to compensate for the possibility that a violator will not be detected.

For example, if a company which makes a profit of one million dollars by participating in a cartel is detected at the possibility of 20 per cent, then the amount of a penalty should be one million dollar multiplied by five ( $1/0.2$ ), or five million dollars. Accordingly, we can make a simple formula from the point of view of deterrence:

$$S \geq 1/p \cdot G \text{ or } G \leq p \cdot S$$

Where S=the amount of penalties

p=the possibility of detection expected by a cartel participant

G=illegal gains earned by a cartel participant

From the perspective of welfare economy, G should include social losses or dead-weight loss, but here G is smaller amount in order to mainly consider companies' behaviour because companies might be considered to decide their conduct reflecting only overcharges, not social losses.  $G \leq p \cdot S$  means that illegal gains expected from a cartel are equal to the expectation value of penalties or are smaller than that. In this case, a company, which is assumed to be risk neutral, will determine not to participate in a cartel. Law makers should, accordingly, set S at the level that meets the formula  $S \geq 1/p \cdot G$ . On the other hand, from the viewpoint of legal liability, the level of S should be limited even if p is extremely small. This is because a balance between the violation and the penalties imposed against it is legally required. For example, the United States and Australia limit the level of S to a couple of times illegal gains.

S was considerably increased by the new AMA as follows: the basic rate is raised from six per cent to 10 per cent of the relevant turnover, and the highest rate of 15 per cent; 1.5 times the basic rate of 10 per cent is applied to a company that repeated a violation. Some people still think that the rates of surcharges are too small because actual illegal gains may be much larger and other countries impose much higher fines. Certainly, the current rates are still low, but there are generally several penalties other than surcharges. First are criminal penalties. If a company is criminally investigated on the suspected violation of the AMA, the company has to worry about a monetary penalty up to 500 million yen, the potential possibilities of prosecuting executives, and serious damage to reputation, in addition to surcharges. Unfortunately, these penalties were revised in the direction of relaxing, not strengthening them; an adjustment between criminal fines and surcharges was set up so that a half of criminal fines can be deducted from surcharges. In spite of introducing the adjustment, the actual impacts of criminal penalties including reputation risk are so strong that the business community might want to integrate criminal penalties with administrative fines. Second are derivative actions. The AMA has a special provision that a representative can be criminally punished the same as persons who actually violated the AMA if he/she knows about the act in violation but does not prevent it, but this provision has not worked because there is no case where it applied.

Practically, derivative actions have had a great impact on the business community as mentioned. Derivative actions may significantly affect companies' behaviour in the future against the background that surcharges were considerably increased. Moreover, we have three penalties regarding bid rigging as already mentioned: suspension from participating in a public bidding, damage payment, and business suspension imposed by the MILT. They are so large that a company that violated the AMA may face a financial crisis if all of them, besides surcharges, are imposed on it.

As long as a leniency program works well,  $p$  might be considered to be dramatically increased. As the number of cartel participants is larger, a leniency program works better because the large number of participants makes it difficult to keep the cartel secret. In general, there are larger participants in bid rigging concerning public works than in other hard-core cartels like price fixing, and a leniency program is inclined to work well. Under a given legal system,  $p$  crucially depends on how the JFTC enforce the AMA. Since most Japanese think that the JFTC has actively enforced the AMA, owing to the recent criminal cases reported frequently by the media, it is possible that most of companies also think  $p$  is significantly increased.

In conclusion, regarding bid rigging,  $S$  and  $p$  were dramatically increased by revising the AMA, reviewing the tendering and contracting system, and strengthening enforcement. In this case,  $G \leq p \cdot S$  is possibly realised. Regarding other hard-core cartels,  $p$  was certainly increased, but might be small because there has been recently no criminal case concerning other hard core cartels such as a price fixing and a leniency program might not work better than in a bid rigging case.  $S$  is also increased but is small too because surcharges alone are too small to deter cartels. Accordingly,  $G \leq p \cdot S$  might not be realised under the current circumstances.

In the real world, there is some evidence of corporate behaviour being changed as to bid rigging, but no evidence as to other hard-core cartels. In recent bidding cases, contracted prices have been decreasing after around January 2006 when the new AMA took effect. It was reported that the rate of the contracted price to the planned ceiling price decreased from 91.1 per cent to 83.5 per cent.<sup>67</sup> The Japan Federation of Bar Associations was reported to have conducted a survey concerning the improvement of a bidding system in local governments.<sup>68</sup> They defined 'public works with high prices' as those with the contracted prices more than 90 per cent of the planned ceiling prices. The rate of 'public works with high prices' to total public works was regarded as an index of improvement. As the rate is lower, the bidding system improved. The average rate in prefectural governments decreased around 14 points to 58.2 per cent in the first half of 2007 from the rate in 2006. The average rate in Ordinance-designated cities also decreased around 11 points to 47.3 in the first half of 2007. The rate in Miyazaki pre-

fecture decreased most, from 58.1 points to 24.8 per cent. The decrease of these figures may show that bid rigging has decreased. It has been argued that construction companies has faced stiff competition because bid rigging does not exist any more in major public work projects. In fact, the JFTC issued a warning, which was not a legal action but an administrative action, to five construction companies on 26 June 2007 because their acts may fall under ‘unjustifiably low price sales’ constituted ‘unfair trade practices’ of Article 19 of the AMA, based on the fact that these companies offered such an unreasonably low price in bidding for a public works project that they would be a bid winner.

### *The Current Status on Corporate Compliance with the AMA*

In order to grasp actual state of measures taken by companies for improving their corporate compliance, the JFTC conducted a questionnaire survey covering 1696 companies listed on the Tokyo Stock Exchange (TSE) in January 2006, and released this result in May 2006.<sup>69</sup> Let us introduce some of the key results below.

Firstly, a number of companies have taken measures to improve corporate compliance, such as setting up a helpline and a committee, but the practical effectiveness is not yet to be secured; while 86 per cent of the company have made a manual, 77 per cent have installed a helpline for their employees to consult about illegal actions, and 72 per cent have set up a compliance committee within the company to address compliance problems, 68 per cent of the companies have made a manual after 2000, a helpline was never used as to violations of the AMA in 81 per cent of the companies set up a helpline, and the president assumed a position of chair in the compliance committee in 38 per cent of the companies which set up a committee. The survey also asked if the current compliance program practically effective; 69 per cent of the company answered that it was not.

Secondly, for question that asked the most important factor of a defective compliance, the common answer was as follows; 55 per cent of the companies answered the awareness of the top management, 15 per cent answered the creation of a manual and 13 per cent answered the establishment of a monitoring organisation.

Thirdly, training for employees and audits for each division are so important practically that the survey asked about them regarding the AMA. 44 per cent of the companies did not provide training programs about the AMA for their employees. 56 per cent did not generally conduct internal audits about the AMA and only seven per cent conducted internal audits in response to the revision of the AMA. The result showed that companies were not very serious about training and auditing under the AMA.

In the above survey, the JFTC also undertook research concerning repeated violations of the AMA. The results showed that 77 companies (1.6 per cent) were repeated

violators in 4,802 companies ordered to pay a surcharge payment twice and more from 1995 to 2004. The ratio is not so high because the orders for surcharge payment were issued to a wide variety of companies. However, if 4,802 companies are limited to 123 companies listed on the Tokyo Stock Exchange (TSE), the ratio rises from 1.6 per cent to 13.8 per cent. This might be because the listed companies do such various business in wide geographical areas that they possibly make significant impact on the market, in addition to their compliance. Moreover, among 45 companies (24 listed on the TSE) participated in the recent major bid rigging concerning steel bridge projects, nine companies (20 per cent) violated the AMA repeatedly in the past 10 years and three companies violated the AMA three times. Nine companies are listed in all categories, accounting for 38 per cent of 24 listed companies. They are supposed to be treated with the highest surcharge rate of 15 per cent under the new AMA. These figures may show that even big companies do not give the first priority to compliance with the AMA.

### *Enhancement of Compliance*

Although strict law enforcement can be achieved by the authorities, corporate compliance cannot be forcibly improved by its nature by the authorities so that a company must make a conscious effort to improve its compliance on its own initiative. A company must provide a compliance program for its employees including release of a compliance manual and establishing an organisational framework such as compliance committee. This should not be so difficult for a company to carry out since many companies have already implemented and publicised such regimes. However, the implementation of such a regime may not necessarily secure a substantial and effective compliance within a company. This is shown by the fact that a number of companies are repeat violators of the AMA even though they have implemented a compliance program. The result of the survey conducted by the JFTC also revealed companies' awareness of the ineffectiveness of their compliance program. In order to secure an effective compliance program, a company, notably its top management, should take full responsibility for implementing its compliance program. A company is inclined to have only its employees take responsibility for violating the AMA considering the past violations. For example, it is said that a construction company has '*yogore-yaku*' (filth manager) in place for a *dango* for top management not to directly have a hand in it.<sup>70</sup> A company must always consider organisational responsibility, including top management's, instead of having an employee bear responsibility.

To secure a corporate compliance, a company must consider not only a compliance program but also organisational culture. It is naturally necessary for a company to comply with laws, but is not enough. It also needs to foster a corporate culture which fosters

awareness of the importance of complying with laws among a company's employees. If an employee notices there is any trade practice that impedes fair competition, the fact should be immediately reported to the top management and the company must get rid of it. It might be very difficult without a proper corporate culture to deal with unfair practices. The most important thing when finding out unfair practices is the clear declaration of management's determination, inside and outside the company, to exclude unfair practices even if the company loses huge profit.

As has been the case in the United States and other countries, the high level of financial penalties may contribute to the enhancement of a company's internal control system by giving a great incentive for top management to improve its compliance. Japan has also significantly raised the rate of the surcharges, which is not 10 per cent but 15 per cent for a big company that violated the AMA in the past, in an amendment to the AMA. It is expected to provide an incentive, together with other penalties, for a company to take serious measures to comply with the AMA. In order to promote a company's efforts to improve its compliance, the JFTC should assure that the AMA would be strictly enforced.

On the other hand, to improve corporate compliance, a company should also develop an internal control system so that it will be able to find illegal violations by auditing regularly. It is also required under an appropriate internal control system that employees can easily report to top management when they notice an act in violation. In a case where an illegal act is identified, top management must report to the authorities. The new leniency program introduced in the AMA is expected to provide an incentive for a company to develop such a system. Leniency programs, which are generally included in other country's anti-trust laws, are credited to have contributed much not only to the detection of illegal activities such as cartels and bid rigging, but also to the improvement of corporate compliance.

## 8 Conclusions

Japan imported an advanced and comprehensive anti-trust law, which is formally called the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the AMA) more than 60 years ago from the United States, which had developed anti-trust laws earlier than any other country. As the Sherman Act did, the AMA incorporated criminal penalties supposed to be a strictest penalty to prevent violations of the AMA. Unlike the US system, all the power to enforce the AMA was concentrated in the JFTC which was independent from political power and consisted of experts having deep knowledge of laws and economics. The AMA called 'the Constitution of the Economy' in Japan was

set up as an ideal law, but did not work in reality as the law makers expected. Moreover, the government after the occupation revised the law to allow many exemptions from the AMA.

Until the oil cartel cases in 1974, there were virtually no cases where criminal sanctions were applied in Japan. The oil cartel cases had such a huge impact on the then Japanese society that the AMA was reviewed to introduce surcharges, which were expected to prevent hard-core cartels more effectively than criminal sanctions, leaving criminal sanctions unchanged. In a sense, the introduction of surcharges resulted in stopping criminal accusations because there were no criminal cases for 17 years after the oil cartel case. Moreover, the basic rate of surcharges was 1.5 per cent of relevant turnover, which was too low to prevent hard-core cartels. Even if a company pays the 1.5 per cent surcharge for a violation of the AMA, it might still earn a profit from a cartel and could simply view the surcharge as a cost of doing business. In light of these facts, it should be concluded that the AMA could not practically function to prevent hard-core cartels in spite of having surcharges. Under these circumstances, the United States again called on the Japanese government to address the structural impediments of Japan. As a result of the SSI talks, the Japanese government restarted criminally punishing violators of the AMA, and dramatically increased the basic rate four times from 1.5 per cent to six per cent. In fact, the anti-trust enforcement was activated much more than before the SSI, but still too weak to prevent hard core cartels because the basic rate of six per cent was too small and there were a quite few criminal cases. The AMA and its enforcement were so strengthened to prevent hard-core cartels after the SSI talks, but it was not enough.

After the Koizumi Government took office, the staff of the JFTC significantly increased from 571 in 2001 to 795 in 2008, and the AMA was dramatically reviewed. Nowadays, the JFTC is not a small agency compared with other agencies such as the Securities and Exchange Surveillance Commission (SESC) with 358 employees, and has a series of weapons to fight hard-core cartels; a leniency program; and criminal investigation powers. While the SESC has filed criminal referrals against 55 cases in five years from 2002 to 2006, the JFTC has filed referrals against five cases in six years from 2002 to 2007. Although it is difficult to compare with other agencies, five cases in six years might be considered to be too small. Fortunately, Japan has for a long time had both criminal penalties and administrative penalties in spite of the fact that other countries have recently introduced criminal penalties or made efforts to introduce them. Japan should take full advantage of the concurrence of two kinds of penalties so that hard-core cartels would be deterred effectively.

Finally, to answer the question 'Can the AMA of 2005 Change the Japanese Business Community?', my answer is 'yes', but it depends on the efforts of the JFTC from

now on. I think bid rigging in Japan is now collapsing, but it can easily revive if companies feel detection is difficult. Regarding other hard-core cartels, they may still remain in the Japanese business community because there have been no criminal cases and penalties are not enough to destroy them. The following conclusions are suggested. First, the JFTC should investigate as many cases as it can by improving the productivity of the increased staff. Second, the JFTC should place first priority on criminal investigations in spite of the fact that it takes a great deal of resources to conduct them.

## Notes

- 1 This was adopted by the OECD Council at its 921st session.
- 2 The Recommendation 'a hard-core cartel' is defined as an anticompetitive agreement, anticompetitive concerned practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories.
- 3 This paper is based on information released by 30 April 2008.
- 4 The Asahi Shimbun reported on 29 December 2006 that in light of the reviewed AMA, big four general constructors agreed on stopping bid rigging.
- 5 The Japan Civil Engineering Constructor's Association consists of about 140 major companies engaged in civil engineering construction.
- 6 The report 'Tomeisei aru Nyusatsu Keiyaku Seido ni mukete'(Toward Transparent Tendering and Contracting System) was released 27 April 2006. It pointed that the current public procurement system has several problems that might lead to violations of the AMA.
- 7 The Japan Federation of Construction Contractors consists of about 50 major general construction companies.
- 8 The Building Contractors Society consists of about major 70 builders. These associations consist of only big companies. Small companies located in local areas do not participate in them.
- 9 Articles in Chapter 4 of the AMA prohibit market concentration which has the effect of being likely to substantially restrain competition in the relevant market.
- 10 Article 2 (9) provides that the term 'unfair trade practice' as used in this Act means any act falling under any of falling items, which tends to impede fair competition and which is designated by the Fair Trade Commission: 1 Unjustly treat other entrepreneurs in a discriminatory manner; 2 Dealing with unjust consideration; 3 Unjustly inducing or coercing customers of a competitor to deal with oneself; 4 Dealing with another party on such conditions as will unjustly restrict the business activities of the said party; 5 Dealing with another party by unjust use of one's bargaining position; 6 Unjustly interfering with a transaction between an entrepreneur in competition with it in Japan with oneself or a corporation of which oneself is a stockholder or an offer and another transaction counterparty; or, in case such entrepreneur is a corporation, unjustly inducing, instigating, or coercing a stockholder or a director of such corporation to act against the interests of such corporation.
- 11 The materials submitted on 21 April 2006 by the JFTC to the Advisory Panel on Basic Issues Regarding the AMA set up in the Cabinet Office.
- 12 The Japan Business Federation (Nippon Keidanren) is a comprehensive economic organisation. Its membership of 1662 is comprised of 1343 companies, 130 industrial associations, and 47 regional economic organisations as of June 2007.
- 13 'Dokusen kinshiho Kihon Mondai nikan suru Komento' (Comments on the Basic Issues on the AMA) released by Nippon Keidanren on 1 August 2006.
- 14 It was released on 29 September 2005 by the JFTC.
- 15 Article 25 and 26 of the AMA.
- 16 Article 709 of the Civil Code.
- 17 Kanai, T., Kawahama, N., and Sensui, F.ed., 2006 'Dokusen kinshiho'(The Antimonopoly Act) p.440
- 18 Article 24 of the AMA.
- 19 Article 7-2 (1) (2) of the AMA
- 20 There was the other case accused under the AMA by the JFTC, but not prosecuted.
- 21 See John Owen Haley's Antitrust in Germany and Japan: the first fifty years, 1947-1998, University of Washington Press, Seattle, 2001.
- 22 Article 96 of the AMA

- 23 Article 74 of the AMA
- 24 Article 85 of the AMA before the 2005 amendment
- 25 Kawasaki, T. 1999 'Ryobatsu kitei niokeru Hojin no Keiji sekinin to Kompriaansu Programu' (Corporate Criminal Liability and Compliance Program) *Doshisha law review* 50(3).
- 26 The JFTC's policy of filing criminal referrals against violations of the AMA was released on 20 June 1990.
- 27 The revised policy of filing criminal referrals was released on 6 October 2005.
- 28 *Kachokin* is defined in the Japanese dictionary (Kojien) as money imposed by the government except for tax and it has no meaning of penalty or sanction as a Japanese word. There are two laws in Japan, the AMA and the SEL, having the same *Kachokin* system, but official translations of *Kachokin* are different in these laws. Considering the relation to criminal penalties, *Kachokin* of the AMA has been translated into surcharge. On the other hand, putting emphasis on penalty, that of the SEL was translated into civil monetary penalty. In my opinion, these *Kachokins* have the same characters, and so should be translated into the same word.
- 29 Ruling of the Supreme Court handed down on 30 April 1958, Supreme Court Civil Decisions Reporter, 12(6): 938.
- 30 Explanation given by the Chief Cabinet Secretary before the House of Representatives on 4 November 2004.
- 31 The view on Review of the AMA released by Nippon Keidanren on 15 April 2004.
- 32 See endnote 13.
- 33 The Dawson Committee consisted of Sir Daryl Dawson, Ms Jillian Segal and Mr. Curt Rendall. The Committee's Report was released in January 2003. The scope of the report was quite broad, with recommendations regarding mergers and acquisitions, exclusionary provisions, third line forcing, penalties and remedies, and powers of the ACCC. As a result, in 2006 some significant amendments have been made to the TPA.
- 34 Article 7-2 (14) and Article 51 of the AMA
- 35 The Chief Cabinet Secretary said on 4 November 2004 before the House of Representatives that in light of the existence of common functional elements of both sanctions for preventing violations, it would be appropriate in terms of policy considerations for half the amount to be deducted from the surcharge amount as an adjustment.
- 36 The JFTC, 'Kyoso Seisaku ni tsuite' (Competition Policy) explained by Chairman Takeshima on 11 June 2004 to the Council on Economic and Fiscal Policy.
- 37 EC guidelines for setting fines in anti-trust cases originally provide that companies may be fined up to 10 per cent of their total annual turnover. New guidelines revised in June 2006 also provide that within this limit, fines may be based on up to 30 per cent of the company's annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement, and that a part of fine, which is called the entry fee, may be furthermore imposed irrespective of the duration of the infringement.
- 38 This problem was discussed in the Advisory Panel set up in the Cabinet Office. They concluded that a compliance program should not be taken into consideration because it is very difficult to make a decision on whether the program is effective or not.
- 39 These requirements are: 1. The organisation shall establish standards and procedures to prevent and detect criminal conduct. 2. The organisation's governing authority shall be knowledgeable about the program, high-level personnel shall be assigned overall reasonability, and specific individual shall be day-to day operational responsibility for the program. 3. The organisation shall use reasonable effort to include within the authority personnel any individual whom has engaged in illegal activities. 4. The organisation shall take reasonable step to communicate to its standards and procedures to the individuals by conducting effective training programs. 5. The organisation shall take reasonable steps to ensure the program is followed by e.g. monitoring and auditing, to evaluate the program, and to have a system for employees to report criminal conduct without fear of retaliation. 6. The program shall be promoted and enforced through appropriate incentives and disciplinary measures. 7. After criminal conduct has been detected, the organisation shall take reasonable steps to respond appropriately to the criminal conduct and prevent further similar criminal conduct.
- 40 *TPC v CSR Ltd* (1991) ATPR 41-07 at 51, 152-3.
- 41 See end note 36.
- 42 Article 42 of the Penal Code.
- 43 Connor, John M, 'The Great Global Vitamins Conspiracy: Sanctions and Deterrence' Draft 2/14/06 available at [www.anti-trustinstitute.org](http://www.anti-trustinstitute.org)
- 44 Press Release of the JFTC on 5 April 2001, Warnings against Daiichi Pharmaceutical Co., Ltd and Eisai Co., Ltd.
- 45 Hammond, S. 'Detecting Detering Cartel Activity through an Effective Leniency Program' presented before the International Workshop on Cartels Brighton, England November 21-22, 2000.

- 46 Hammond, S. 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on Individual Freedom?' presented at ABA's Criminal Section on 8 March 2001
- 47 Negishi, Akira 'Heisei 17nen Dokkinho Kaiseiho Ichinen no Hyoka' (The Evaluation of One-year Enforcement of the 2005 Amendment to the AMA) Kosei torihiki No.667 March 2007
- 48 Press Release of the JFTC 'Heisei 18-Nendo niokeru Dokusen Kinshiho Ihan Jiken no Shori Jokyo ni tsuite'( Cases in Violation of the AMA in 2006) on 30 May 2007
- 49 The JFTC was positioned as an external organ of the Ministry of Public Management, Home Affairs, Posts and Telecommunications at the time of the government reform in 2001. However, considering the independence of competition policy, notably relation with telecommunication authority, it shifted to the Cabinet Office in 2003.
- 50 Depression cartels were defined as temporary cartel arrangements designed to alleviate economic hardship caused by disequilibrium in supply and demand..
- 51 Itoda, Shogo 2000 'Japan Fair Trade Commission Barks' presented at Chatham House, London, U.K. on 22 February.
- 52 For example, Harry First 1996 'Anti-trust Enforcement in Japan', *Anti-trust Law Journal* 64 pp 137–182, Beeman, M. 1999 'Japan's Flawed Anti-trust Regime' A Japan Information Access Project 1999 Working Paper, Fry, J. 2001 'Struggling to Teeth: Japan's Anti-trust Enforcement' *Law & Policy International Business* 32 pp 825–857, Lin, Pin 2005 'Competition Policy in East Asia' in Erlinda Medalla (ed), *The Evolution of Competition Law in East Asia* RoutledgeCurzon, and Harry First and Tadashi Shiraishi, 2005 'Concentrated Power: The Paradox of Anti-trust in Japan' New York University Law and Economics Working Papers.
- 53 Lin, P. see endnote 52.
- 54 First, H. and Shiraishi, T. see endnote 52.
- 55 Asahi Newspaper on 11 July 2005.
- 56 See endnote 6.
- 57 See endnote 6.
- 58 The Japanese Penal Code reads in Article 96-3 (1) that person who by the use of fraudulent means or force commits an act which impairs the fairness of a public auction or bid, shall be punished by imprisonment with hard labour for more than 2 years or a fine of not more than 2,500,000 yen and in Article 96-3 (2) that the same shall apply to a person who colludes for the purpose of preventing a fair determination of price or acquiring a wrongful gain.
- 59 Takeda, Haruto 1994 '*Dango* no Keizaigaku' (Economics of Bid Rigging) Shueisha, Tokyo pp.211–224.
- 60 See endnote 59.
- 61 Okayama District Court decision on 4 May 1951, Tokyo High Court decision on 20 July 1953, Otsu District Court decision on 27 August 1968
- 62 Kamemoto, Kazuhiko 2003 'Kokyo koji to Nyusatsu Keiyaku no Tekiseika' (Normalisation of Tendering and Contracting System) Reference (September 2003).
- 63 Article 348 of the Companies Act.
- 64 Osaka District Court decision on 20 September 2000.
- 65 Article 24-4-4 of the Financial Instruments and Exchange Law, whose name was changed from the Securities and Exchange Law in September 2007.
- 66 For example, Hylton, Keith N. 2003, *Anti-trust Law; Economic Theory and Law Evolution*, Cambridge University Press, pp.43–67.
- 67 Nikkei BP News on 25 September 2007. Yomiuri Shimbun on 21 November 2006 also reported that the rate of the contracted price to the planned ceiling price in the MLIT projects was falling from 96 per cent in April 2003 to 88.8 per cent in July 2006.
- 68 Yomiuri Shimbun on 14 April 2008, Nikkei BP News on 21 March 2008.
- 69 The JFTC released on 24 May 2006 'Kigyo niokeru Kompuraisansu Taisei nitsuite' (Corporate Compliance System)
- 70 Logan, Tom 1994 'On *Dango*: The Famous Yokosuka Navy Base Toilet Job', JPRI Occasional Paper No.1(November 1994)

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