Antimonopoly Law

THE RECENT AMENDMENT OF THE JAPANESE ANTIMONOPOLY LAW

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I. INTRODUCTION

The "Law Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade" (Law No. 54 of 1947) ("Japanese Antimonopoly Law") is an important law which aims to promote free and fair competition in markets, thereby stimulating the creative initiative of entrepreneurs and assuring the interests of consumers in general. The model of the Japanese Antimonopoly Law is the American Antitrust Law, that is, the Sherman Act, the Clayton Act and the Federal Trade Commission Act. Since its enactment, the Japanese Antimonopoly Law was expected to develop and be applied in the same way as the American Antitrust Law. However, when it was enacted, the Japanese Antimonopoly Law was not at all compatible with the real operation of the Japanese economy and the dire economic situation just after World War II. It was therefore amended significantly in 1953 to introduce several exceptions to the prohibition of cartels, and to allow some collaboration among competitors with regards to such things as developing and researching new technology, something that was previously banned. This amendment, and successive further deregulation of cartels and enterprise combination, have been said to have facilitated the formation of cartels and the concentration of markets, reflecting a competition policy designed to reconstruct the national economy.[1] As a result of these measures, however, cartels have been established as general business practice in Japan beyond the boundaries of the regulations, and which are clearly illegal under the law.

The recent amendments to the Japanese Antimonopoly Law, proclaimed on May 29, 2002 and April 27, 2004, aimed primarily to strengthen the regulation of cartels. Through these amendments, the antitrust regulations of cartels have become considerably stricter, and the Japanese Fair Trade Commission ("JFTC") is expected to exercise its authority to crack down on cartels more aggressively.

On the other hand, with regard to the antitrust regulations of mergers and acquisitions ("M&A"), traditionally in Japan most of the cases screened by the JFTC have been settled through an informal consultation rather than strict application of the law. Consequently few guidelines have been outlined and little case law has developed to help determine whether or not proposed M&A transactions should be admitted from a competition law perspective.

The recent amendment to the guidelines by the JFTC concerning M&A dated May 31, 2004[2] ("Examination Concerning M&A") purports to respond to the request by Japanese industries to clarify the criteria for M&A under the Japanese Antimonopoly Law. Although the guidelines are not sufficient to provide the level of predictability that is evident in the Horizontal Merger Guidelines in the U.S. ("U.S. Horizontal Merger Guidelines"), [3] since the Examination Concerning M&A has adopted many of the concepts of the U.S. Horizontal Merger Guidelines, it is highly probable that the JFTC will take a stricter approach in its screening of proposed M&A transactions.

This article seeks to provide the big picture of the recent amendments to the Japanese Antimonopoly Law and its guidelines.

Part II of this article gives an overview of the Japanese Antimonopoly Law, focusing especially on its regulation of cartels and M&A. The purpose of this section is to provide the big picture of Japanese competition regulations with regard to the areas amended recently.

Part III of this article explains the recent amendments to the Japanese Antimonopoly Law, promulgated on May 29, 2002 and April 27, 2004. This article discusses four essential elements of the amendments. First, the criminal penalty for violation of the law has been made stricter and the JFTC is now able to exercise compulsory measures to investigate antitrust violation cases. Second, the strength of an elimination order (*Haijomeirei*) ("elimination order"), which is to be issued by the JFTC to eliminate an antitrust violation, has been reinforced significantly, so that the maximum criminal penalty for violation of an elimination order has been increased to 300 million Japanese yen. In addition, the JFTC is now authorized to deliver the order for a violation of the law beyond Japanese jurisdiction. Third, the amount of a surcharge (*Kachoukin*) ("surcharge"), an administrative penalty calculated by multiplying the amount that they have earned through their cartels by a certain percentage, has been increased. Fourth, the Leniency Program has been introduced. This aims to reduce the amount of a surcharge imposed on violators of the law when they voluntarily inform the JFTC of their violations.

Part IV of this article explains the basic structure of the Examination Concerning M&A. This section provides a general analysis of the several factors provided by the guidelines to be considered by the JFTC in screening potential M&A transactions.

II. THE OVERVIEW OF THE JAPANESE ANTIMONOPOLY LAW

(1) The Regulation of Anti-Competitive Conduct in General

As described below, the Japanese Antimonopoly Law prohibits a business from (1) preventing "free and fair competition" by consulting with other entrepreneurs ("Cartel Regulation"), (2) unjustly maintaining its monopolistic position or unjustly excluding other competitors ("Monopoly Regulation"), or (3) distorting competition by using any of the sixteen types of unfair trade practices ("Unfair Trade Practice Regulation") which are discussed below.

The conduct dealt with by the Cartel Regulation is also described as "unreasonable restraint of trade", which means to mutually restrict business activities by making cooperative decision concerning sales price, sales volume, consolidation of manufacturing facilities and restriction of business partners among competitors, thereby substantially restricting competition in any field of trade. Unreasonable restraint of trade includes conduct such as "bid rigging", "price cartels", "market segmentation cartels", "transaction terms cartels", "cartels on supply restriction", "trading partner restriction cartels" and others.

The conduct stated in the Monopoly Regulation is called "private monopolization," which means for the entrepreneurs to exclude or control the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[4] Specifically, this means any conduct by a company with a large market share to exclude participation of new entrants or restrain the business activities of other competitors by using unjust means (in many cases, but not limited to, any means that violate the law) in order to increase or maintain its market share.

The conduct forbidden by the Unfair Trade Practices Regulation includes the sixteen types of conduct designated by the JFTC as a hindrance to efficient competition. The types of conduct that are prohibited are: (i) concerted refusal to deal; (ii) other refusal to deal; (iii) discriminatory pricing; (iv) discriminatory treatment of transaction terms, etc; (v) discriminatory treatment in a trade association; (vi) unjustly low price sales; (vii) unjustly high price purchasing; (viii) deceptive customer inducement; (ix) customer inducement by unjust benefits; (x) tie-in sales, etc; (xi) dealing on exclusive terms; (xii) resale price maintenance; (xiii) dealing on restrictive terms; (xiv) abuse of dominant bargaining position; (xv) interference with a competitor's transaction; and (xvi) interference with the internal operation of a competitor's company.

In the next section, this article explains in more detail the Cartel Regulation, because the recent amendments of the Japanese Antimonopoly Law purport to make the Cartel Regulation stricter. Understanding the basic overview of the regulation is indispensable to figuring out their effects on doing business in Japan.

(2) The Regulation of Cartels under the Japanese Antimonopoly Law

(A) Application of the Cartel Regulations

Under the Japanese Antimonopoly Law, forming cartels is a violation of the Cartel Regulation.

The Japanese Antimonopoly Law, art. 3. says that no entrepreneur shall effect private monopolization or unreasonable restraint of trade. The definition of unreasonable restraint of trade in the Japanese Antimonopoly Law is "such business activities, by which any entrepreneur, by contract, agreement or any other concerted action, irrespective of its name, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[5] It should be noted that in Japan the condition of "in any particular field of trade" is always construed together with the condition of "substantial restraint of competition" and has no independent significance.[6]

Therefore, the JFTC and Japanese courts dealing with Cartel Regulation violation cases will primarily deliberate whether or not three conditions have been satisfied, namely: is there (1) substantial restraint of competition in any particular field of trade, (2) such that the businesses mutually restrict or conduct their businesses, (3) against the public interest.

With regard to analysing these elements, the Japanese Supreme Court has adopted a principle similar to the American per se rule.[7] Under this principle, Japanese courts find that the three elements discussed above have been satisfied when evidence supports that cartel agreements exist, and the cartel agreements are presumed to be illegal. The difference from the American per se rule is that the Japanese Supreme Court held that cartel agreements could be justified as not against the public interest, upon which the parties of the cartels shall bear the burden of proof.

(B) The Effect of Violations of the Cartel Regulation

When the JFTC finds a violation of the Cartel Regulation, pursuant to the Japanese Antimonopoly Law, art. 7. para. 1., it may order the violators to cease and desist from such acts, to transfer a part of their business, or to take any other measures necessary to eliminate such acts in violation of the Cartel Regulation, even when the violations had ceased up to three years earlier.

Criminal sanctions will be imposed on violators of the Cartel Regulation under the Japanese Antimonopoly Law, art. 89., which says that any person who violates the Cartel Regulation

shall be punished by imprisonment of not more than three years or by a fine of not more than five million Japanese yen. Moreover, art. 95. of the law stipulates that when an individual, who is a representative of a corporate entity, an agent, an employee, or any other person in the service of a corporate entity or individual, has, with regard to the business or property of the corporate entity, committed a violation of the Cartel Regulation, that corporate entity or individual shall also be punished by a fine of not more than five hundred million Japanese yen, in addition to the punishment of the offender.

In addition to the above, a surcharge will be imposed on violators of the Cartel Regulation pursuant to art. 7-2. of the Japanese Antimonopoly Law. Except for a reduction or exemption through an application of the Leniency Program and coordination with criminal penalties (discussed below), the basic equation to calculate the amount of the surcharge is to multiply the profit received from the sales of the products or services relating to the cartel which the cartel member provided during the cartel period by a certain percentage provided by the law. When cartel agreements are found, the JFTC is bound to order a surcharge: there is no discretion as to whether or not to do so. [8] After the introduction of the surcharge, although Japanese industries criticized it as a mere criminal sanction on forming cartels under the guise of an administrative order, it has contributed to the deterrence for violating the Cartel Regulation, and has helped to change the prevailing attitudes of industry so that the realization that forming cartels is illegal has become prevalent. After its introduction, the number of cartel cases brought by the JFTC clearly decreased, although this is also due to the careful fact finding practice adopted by the JFTC.[9]

(C) The Procedural Aspect of the Cartel Regulation

When the JFTC believes that a violation of the Cartel Regulation has occurred, it appoints auditors to investigate the case. If, based upon the result of the investigation, the JFTC is convinced that a violation did actually occur, then upon giving an opportunity of notice and hearing it will issues an elimination and surcharge order to eliminate the illegal situation.[10] If the parties suspected of forming cartels accept the order, they become final, meaning non-appealable by any means. However if the parties refuse to accept them, the JFTC will initiate a formal hearing, in which case the adversary system is adopted and independent referees will ultimately hand down the judgment.

If discontented with the judgment of the JFTC, the relevant parties may file litigation at the Tokyo High Court, which has exclusive jurisdiction in seeking the revocation of the judgment of the JFTC. At the Tokyo High Court, the relevant parties may plead to introduce new evidence, provided that there are reasonable grounds, either on this basis that the JFTC failed to adopt the evidence without good cause, or that it was impossible to adduce evidence at the hearing of the JFTC, and there was no gross negligence on the part of the party in failing to adduce such evidence.

The relevant parties may also file an appeal against the judgment of the Tokyo High Court with the Supreme Court for its review.

(3) The Regulation of M&A under the Japanese Antimonopoly Law

(A) The Overview of the Regulation

In relation to the regulation of M&A, the Japanese Antimonopoly Law forbids an acquisition or holding of stock, holding several directors' office concurrently, mergers and acquisitions, splitting a corporation, and transferring a business ("Enterprise Combination") that *"may be substantially to restrain competition in any particular fields of trade" ("SRC test")*.

Pursuant to the Japanese Antimonopoly Law, a formal report regarding an Enterprise Combination must be submitted to the JFTC.

In Japan, however, as general practice, before submission of formal merger reports, an informal consultation will be conducted at the JFTC so as to inquire into whether the SRC test is satisfied. The fact that the Japanese Antimonopoly Law stipulates, with regard to the SRC test, "may be substantially to restrain competition" not "will substantially restrain competition", has been considered the very ground that enables the JFTC to investigate, examine, issue elimination orders and initiate a hearing even when merger reports have not been filed.[11]

If parties of the proposed M&A transaction are discontent with the outcome of a consultation and try to complete their transaction, the JFTC may issue an elimination order to suspend them, an overview of the proceeding of which was explained in II (1) (C) of this article. In addition, the JFTC may file an application to invalidate their transactions.

With regard to the geographic scope of antitrust proceedings in connection with M&A, it has been held that as long as market places within the Japanese jurisdiction will be affected through the transactions, even when parties seeking to undertake the transactions are located outside of Japan, the Japanese Antimonopoly Law shall apply.[12]

The examination by the JFTC and the Japanese court as to whether or not the proposed M&A should be admitted will focus on whether the SRC test is satisfied. In determining the applicable standard to be met to satisfy the SRC test, two major judgments have been made, one by the Tokyo High Court,[13] and another by the referees at the JFTC.[14] In addition, for the purpose of clarifying the standard, the JFTC had announced the guidelines concerning M&A long before the Examination Concerning M&A was released.[15] Despite these guidelines, since most M&A cases have been settled through an informal consultation made before filing the merger reports, it has been very hard to predict an outcome of an examination by the JFTC with any certainty. As explained later in this article, the enactment of the Examination Concerning M&A is purported to enhance the predictability of the outcome of the screening process of the JFTC by providing several factors to be considered when applying the SRC test.

(B) The Procedural Aspect of the Regulation

As indicated earlier, the first thing which parties of the proposed M&A transaction have to do under the Japanese Antimonopoly Law is file an application to commence an informal consultation at the JFTC, the detailed procedures of which have been announced in the guidelines.[16] According to the guidelines, the following documents should be submitted to the JFTC for review: first, documents explaining an overview of the relevant parties (company's name, and their business activities); second, documents explaining an overview of the transaction (purpose, means, scope of the transaction, schedule, and relevant documents already publicized); third, documents giving an overview of the products and services provided by the relevant parties (specification and substitutes of products and services, and channels and forms of sales); fourth, documents outlining the status of parties in the relevant market (both their own and their competitor's market share); fifth, documents explaining factors which the relevant parties consider will affect the relevant markets in question significantly; and sixth, other relevant documents.

In principle, the JFTC will inform the relevant parties within thirty days from the filing of these documents either that there are no antitrust illegalities in the proposed transaction, or that a more detailed examination is required before a decision can be made. The result of the examination given at this stage is based solely upon a review of the documents explained above.

In the latter case, the JFTC will inform the relevant parties what antitrust concerns it has and request them to submit further documents regarding these concerns. Also, the JFTC will make it public that it will conduct detailed examinations of the transactions, and anyone will have the opportunity to file an opinion statement within thirty days from publication.

If the JFTC conducts detailed examinations, in principal it will inform the relevant parties of the outcome of the examinations within ninety days from filing the requested documents.

III. THE RECENT AMENDMENTS TO THE JAPENESE ANTIMONOPOLY LAW

(A) The Stricter Criminal Sanction and the Introduction of the Compulsory Measures

Through the amendment of the Japanese Antimonopoly Law proclaimed on May 29, 2002 ("First Amendment"), the maximum criminal penalty imposed upon violators of the Cartel Regulation was increased from a hundred million Japanese yen to five hundred million Japanese yen, the highest amount of all criminal penalties in Japan. Some commentators analyze that, due to this amendment, the enforcement of Japanese Antimonopoly Law will become more rigid. [17]

In addition, through the amendment of the Japanese Antimonopoly Law proclaimed on April 27, 2004 ("Second Amendment"), the JFCT is now able to exercise compulsory measures to investigate suspected antitrust violation cases. Before this amendment, the JFTC was permitted to investigate antitrust cases only with the voluntary cooperation of the relevant parties. For that reason, if suspected parties refused to hand in relevant documents, the JFTC was forced to take a great deal of time to persuade the submission of them, during which time important evidence might have been destroyed. Through the Second Amendment, upon getting a writ from the courts the JFTC can, without getting consent from relevant parties, search for and seize evidence. Further, written statements obtained by the JFTC can now be used in court proceedings, whereas before the amendment they could not be admitted as evidence.

The JFTC announced that it would positively denounce antitrust violations as criminal cases in 1991, and the policy adopted at that time was that criminal indictments should be made when appropriate to do so. However, since the JFTC had insufficient means to investigate violations, criminal indictments were only made at a rate of one in two years.[18] Given the introduction of compulsory measures, because there are broader possibilities for the JFTC to expose antitrust violations and thus obtain more evidence, it is expected that the number of criminal indictments will increase.

(B) The Reinforcement of an Elimination Order

Elimination orders have been strengthened in a number of respects. The first significant reform is that, through the First Amendment, the JFTC is now able to deliver documents constituting an elimination order beyond Japanese jurisdiction, and even to deliver them to parties of antitrust violations with unknown places of businesses. Before this amendment, since the JFTC had adopted the strict principle of territorial jurisdiction and the Japanese Antimonopoly Law lacked any means to deliver documents beyond Japanese jurisdiction,[19] it had been impossible to issue elimination orders if the relevant parties were situated in foreign nations. Although the JFTC has not changed the strict principle of territorial jurisdiction entirely, through the First Amendment, it is expected that the JFTC will exercise its authority more positively.[20] If parties to whom the documents of elimination orders are delivered should disobey the orders, this will constitute the crime of breaching elimination orders. Further, if the relevant parties committing that crime should not pay the criminal penalty, the JFTC can seize their asset located in Japan.

The second significant reform is that, through the First Amendment, the JFTC is now able to issue an elimination order even when antitrust violation acts have ceased up to 3 years earlier, whereas before the amendment no order could be issued when relevant parties had discontinued their activities more than a year before. Before the amendment, it happened sometimes that, in international cartel cases, more than a year passed since relevant parties had ceased their violations by the time that the JFTC tried to initiate its investigation. Since members of international cartels often discontinued violations when the antitrust agencies of the U.S. or European Commission exposed them, and the JFTC only tried to take action long afterwards, there have been many cases in which the JFTC could do nothing at the Japanese end. It had been pointed out that, since it is necessary to eradicate international cartels by issuing an elimination order, the Japanese Antimonopoly Law needed to be amended so as to broaden the scope of the order. The First Amendment has dealt with this problem in order to help crack down on international cartels.

The third significant reform is that the maximum criminal penalty for a breach of an elimination order for corporations was increased from three million Japanese yen to three hundred million Japanese yen by the Second Amendment.

The fourth significant reform is that procedural rules regarding the issuance of elimination orders were revised drastically. Before the amendment, in order to issue elimination orders, the JFTC had to issue recommendations first and, if accepted, could then render judgments as elimination orders, which were equivalent to consent orders in the U.S. Through the Second Amendment, the JFTC is now able to issue elimination orders after notice and hearing without issuing recommendations, upon which formal hearings may be initiated. In addition, before the amendment, if the relevant parties rejected the recommendations, then in order to issue elimination orders the JFTC was forced to commence formal hearings, taking two or three years in most cases before conclusion. During this period, competitors of violators could suffer substantial damage due to the ongoing antitrust violations. After the Second Amendment, since the JFTC can now issue elimination orders before the formal hearings, it is able to suspend violations without waiting for the final outcome of the hearings.

(C) The Reinforcement of the Surcharge[21]

As explained earlier in this article, the JFTC will issue surcharge orders when finding violations of the Cartel Regulation. Both substantial and procedural aspects of the surcharge have been revised drastically through the Second Amendment. The procedural aspects of the revision are in connection with the introduction of the Leniency Program, explained below in (D).

The first significant reform with regard to the substantive aspect of the surcharge is that the principal percentage to calculate the amount of the surcharge was increased from six percent to ten percent. This takes into the consideration the criticism that six percent is not enough to deter antitrust violations.[22] The increase in the principal percentage to ten percent is based upon data showing that the average profit that members of cartels have enjoyed for the last ten years is more than eight percent. As a further penalty, the principal percentage shall be fifteen percent in the case where violators have been issued with another surcharge order over the past ten years. On the other hand, relevant parties that obtained a surcharge order can still enjoy twenty percent reduction of amount payable when three conditions have been satisfied: first, they ceased their violations within two years from commencement; second, they ceased their violation more than a month before an inspection by the JFTC; and third, they have not been issued with a surcharge order for the last ten years.

The second significant reform is that the scope of a surcharge order was broadened. Cartels that have the purpose of restricting the counter parties that cartel members may transact with or of defining the market share of each cartel member, or private monopolies which aim to achieve the same result as the above said cartels, may now be issued with surcharge orders. Before the amendment a surcharge order was issued only when finding cartels concerning price or limiting the volume of products or services to affect the price.

The third significant reform is that, through the Second Amendment, a surcharge order remains enforceable even when the relevant parties do not accept it and the JFTC is compelled to initiate a formal hearing. It should be noted, however, that prior to getting a judgment, as a matter of policy the JFTC will voluntarily prohibit the enforcement of a surcharge order. However, once a surcharge order is admitted in a judgment, the relevant parties have to pay the surcharge in addition to the interest yielded during the period between the issuance of the surcharge order and the rendering of the judgment.

(D) The Introduction of the Leniency Program

(i) The Overview of the Leniency Program

Through the Second Amendment, the Leniency Program was introduced for the first time in the history of Japanese Antimonopoly Law. Under the program, violators of the Cartel Regulation may be able to enjoy a reduction or exemption of the surcharge when they voluntarily report their violations and submit relevant documents. A reduction or exemption will be made as follows: The cartel member which first reports its violation prior to an inspection by the JFTC can enjoy an exemption from the surcharge; the second cartel member to report its violation prior to an inspection by the JFTC can enjoy fifty percent reduction of the surcharge; the third cartel member to report its violation prior to an inspection can enjoy a thirty percent reduction of the surcharge; and a business which reports its violation after an inspection by the JFTC may enjoy a thirty percent reduction of the surcharge. It is expected in Japan that the Leniency Program will not only increase the number of successful exposures of cartel cases, but also give cartel members enough incentive to cease their violation voluntarily.

Before the amendment, it was very hard to pull out of cartels because of the double risk - that is, the risk of losing much of their business opportunities, and the risk of facing a large surcharge order. Under the Leniency Program, it has become possible to pull out of cartels without paying any surcharge. However the following cartel members are not qualified to enjoy the benefit provided by the Program: cartel members who make false reports to the JFTC; cartel members who, after informing the JFTC of their violations, refuse to cooperate with the JFTC or making a false report; and cartel members who compel other members to participate in their cartels, or prevent other members from reporting their violations.

With regard to "false reports", this refers to the situation where it is obvious that cartel members have purposely concealed or distorted the facts so as to evade responsibilities arising from their violations. [23] Therefore, it should be noted that a mere mistake of information will not prevent the party from taking advantage of the Program.

With regard to the third condition, it has been confirmed through discussion at the upper house of the Japanese Parliament that this refers to the use of intimidations or physical force to make other businesses join cartels, or to prevent them from seceding. [24] Thus, it should be noted that even when a member of a cartel organizes or coordinates meetings, it may still be able to apply for the Lenient Program.

Before the introduction of the Leniency Program it was pointed out that if cartel members who enjoy the benefit of the Leniency Program still potentially face criminal charges, there is little incentive to discontinue their cartels. Consequently the JFTC announced that it would not recommend that criminal charges be brought by the prosecutor's office against those who violate the Cartel Regulation if a violator first reports the violation to the JFTC prior to an inspection. As discussions in Japanese Parliament make clear, the public prosecutor's office will respect the decision of the JFTC, so that criminal charges will not be brought against violators of the Cartel Regulation if the JFTC does not recommend such action. This is to ensure that the Leniency Program can function properly.[25] Therefore, in order to avoid criminal charges being brought against them, it is expected that members of cartels will have enough incentive to apply for the Leniency Policy.

(ii) How to Apply for the Leniency Program

When applying for the Leniency Policy, the first thing to do is to contact the JFTC to see if there are other cartel members that have already made an application for the policy. At this stage, anonymous contact will suffice, meaning that the JFTC can be contacted through legal counsel. Should there be less than three members who have already applied for the policy, the next thing to do is to reveal the company's name and submit a report regarding the violation via fax to secure the company's provisional position regarding the order in which each company reports its violation for the purpose of the Leniency Policy. Once the JFTC receives this fax, the provisional order is secured, and the JFTC will request the business to submit a more detailed report. Finally, pursuant to the request by the JFTC, the business should submit a detailed report regarding the violation.

IV. THE RECENT AMENDMENT TO GUIDELINES CONCERNING MERGERS AND ACQUISITIONS

(A) Overview of the Guidelines

First of all, the Examination Concerning M&A defines the scope of transactions that are screened by the JFTC, and covers an acquisition or holding of stock, holding several directors' office concurrently, mergers and acquisitions, splitting corporations, and transferring businesses. Second, the guidelines explain how to delineate both a geographic and a product market under the Japanese Antimonopoly Law, which is explained below in (B). Third, the guidelines detail the threshold of the SRC test, discussed below in (C). Fourth, the guidelines provide several factors to be considered in deciding whether or not the SRC test shall apply. In this regard, the guidelines classify the types of transactions into four categories, that is - horizontal mergers which would cause anti-competitive effects by themselves ("Horizontal Mergers with a Unilateral Act"), horizontal mergers which would cause anti-competitive effects through collusion or conscious parellelism ("Horizontal Mergers with a Bilateral Act"), vertical and conglomerate mergers which would cause anti-competitive effects by themselves ("Vertical Mergers with a Unilateral Act"), and vertical and conglomerate mergers which would cause anti-competitive effects through collusion or conscious parellelism ("Vertical Mergers with a Bilateral Act"). For each type of transaction mentioned above, the guidelines introduce several factors for examination. Also, the Examination Concerning M&A created a safety zone, in which the SRC test shall not apply in all four categories mentioned above. The first situation is where a market is not oligopolized and market share of a merged entity is less than twenty five percent. In measuring the concentration of a market, a Herfindahl-Hirschman Index ("HHI") of concentration test is used. The HHI is calculated by summing the squares of the individual market shares of all the participants. The guideline defines markets under 1800 HHI as not highly oligoplized markets and ones under 1000 HHI as not oligopolized. The second situation is where the market share of the merged entity is less than ten percent. If either of aforementioned situations should be met, the SRC test will not apply. Fifth, the guidelines explain measures to lessen anti-competitive effects to be caused by the proposed merger, which is explained below in (D).

(B) The Definition of a Particular Field of Trade

(i) The Basic Concept Concerning a Particular Field of Trade [26]

With regard to the "particular field of trade" ("PFT"), it has been pointed out that the PFT should be construed as the place where the transactions between suppliers and purchasers are conducted, or, economically speaking, the "market place."[27]

Examination Concerning M&A says that the PFT should be delineated by taking into consideration such factors as products or services traded by parties, and places, steps, and counter parties of the trades. In addition, the guidelines state that it is necessary to enumerate all the products and services provided by the relevant parties and define the PFT for each product or service. Further, it adds that the place where counter parties are located and products and services are provided should be considered as the principal factor in defining the PFT.

(ii) The PFT Concerning Products and Services [28]

According to the Examination Concerning M&A, the rule of thumb is that products or services which have the same function from a consumers' view point will form the same PFT. If relevant parties were suppliers of products or services, in order to define the PFT concerning the products and services, it is necessary to examine whether or not the functions and effects of their products or services can be substituted by competitor's products or services, and what choices customers would have but for the relevant parties' products and services.

(iii) The PFT Concerning Geographic Areas [29]

According to the Examination Concerning M&A, the threshold to determine whether particular geographic areas are in the same PFT is to consider whether or not consumers in one geographic area will switch to products or services provided by suppliers in another area if prices are raised. In examining consumers' responses, the guidelines says that factors that

should be taken into consideration include the business activities of the relevant parties and their counter parties, characteristics of products and services, transportation methods and costs, maximum quantity of products that can be produced, and whether the geographic areas are sufficiently proximate such that consumers will move between the areas when deciding which products or services to purchase.

(C) The Standard of the SRC Test [30]

In order to satisfy the SRC test, the Examination Concerning M&A adopts the analysis provided by the Tokyo High Court Judgment of the TOHO case.[31] The gist of factual background of this case is as follows:

Tohoh Co. ("TOHOH") concluded a lease agreement with Subaru Co. ("Subaru") to rent the two theaters located at Yurakucho, Thiyodaku in Tokyo on January 26, 1950. The JFTC decided that the lease agreement would cause substantial restraint of trade because, through the agreement, TOHOH would come to operate eight out of the ten theatres located in the Yurakucho and Marunouchi area. The total seating capacity of the ten theaters was 10,787, and the eight theaters operated by TOHOH had seating capacity of 9,742 , accounting for 90.4% of the total number of seats in that area.

As TOHOH refused to accept the recommendation prohibiting the conclusion of the lease agreement, the JFTC initiated a formal hearing and judgment was rendered. TOHOH appealed the decision to the Tokyo High Court on the ground that judgment was rendered without sufficient evidence to prove that competition in that area would be substantially restrained through entering the lease agreement. The Tokyo High Court, however, dismissed TOHOH's appeal, and defined the standard of the SRC test as follows:

> A substantial restraint of competition stipulated in the Japanese Antimonopoly Law, art. 15, para. 1. does not mean each business activities as the plaintiff argued, but means the situation where in fact the competition in the market has been reduced substantially and a business or a body of businesses has the power to control the market by changing price, quality and quantity of goods and so on, at its will, or is about to have such a power...Although the number of seats increased through the transaction by the plaintiff was small, considering the location of both theaters, their high reputation, and the fact that they have been used to show a lot of foreign movies, should the plaintiff come to have a substantial control over two theaters, in addition to the fact that the plaintiff has already had the majority of seats in that area, the plaintiff will have a great influence in deciding the price and number of movies shown in that area. Therefore, we conclude that the competition in the aforementioned area will be substantially restrained if the plaintiff concludes the agreement. Tohoh Co. v. Fair Trade Commission, 4 MINSHU 497 (Tokyo Hi. Ct. Sep. 19, 1951).[32]

After the judgment at the Tokyo High Court, although TOHOH appealed to the Supreme Court of Japan, the judgment at the Tokyo High Court was affirmed.[33]

It should be noted that, from 1994, the JFTC started to release a summary of factual backgrounds and the rationale of M&A cases in its annual report. One of the cases in which the JFTC mentioned the standard of the SRC test is the M&A case regarding Ouji Seishi Co. and Kamisaki Seishi Co., which was introduced in the 1993 annual report.[34] The JFTC made it clear that it maintained the standard of the SRC test articulated in the TOHOH case but that it did not adopt the theory established in the YAHATASEITETU case that the SRC test was not fulfilled when there were competitors of relevant parties which could affect the determination of prices or exercise market power.[35]

(C) The Several Factors with regard to the Application of the SCR Test

(i) Horizontal Mergers with a Unilateral Act Case

(a) The Status of the Relevant Parties and Competitors[36]

The Examination Concerning M&A says that the market share of the relevant parties is the principal factor to consider when determining their market power and status in a market. The guideline analyzes that, if the relevant parties possess a high percentage of market share, the market share of the participants in a market will change drastically through a proposed merger, or that there will be a large discrepancy in the market share between a merged entity and its competitors, competition in the market will be affected significantly. Further, it is noted that if the market share ranking of relevant parties is high, or the market share of the merged entity will become high through the merger, competition in the market is likely to be affected significantly. It should be noted that, in calculating market share, if relevant parties have transferred a part of their business to another entity established jointly with competitors, their market share should be calculated by including that of the jointly established entity.

In addition, according to the Examination Concerning M&A, if vigorous competition among relevant parties meant that the quality of products was higher and prices were lower before the proposed merger then , even if the market share of relevant parties is not so high, competition in the market will have been affected significantly through the merger.

Moreover, the Examination Concerning M&A indicates that if competitors do not have enough productive capacities and relevant parties should raise the price, it is difficult for competitors to expand their sales without raising their price, thus likely causing anti-competitive effects. Also, should there be no substitutes of the products or services supplied by relevant parties, it would be easier for them to exercise market power even if there is only small differences in terms of market share among market participants.

In relation to market share, the Examination Concerning M&A created the safety zone, in which the SRC test will not likely apply on the condition that anticompetitive effect will not be caused judging from competitive situation between relevant parties and competitors' competencies to supply goods when reductions of supply should take place. The first situation is where a market is not highly oligopolized and market share of a merged entity is less than twenty five percent. The second situation is where a market is not highly oligopolized, market share of the merged entity is less than thirty five percent and there are two competitors whose market share is more than ten percent. The third situation is where the market share of the merged entity will increase slightly and there are competitors whose market share is more than ten percent.

(b) Imported Goods and Services[37]

The Examination Concerning M&A points out that it is necessary to examine whether or not there are imported goods and services equivalent to the ones supplied by the relevant parties because, given that the merged entity will have to compete with imported products and services, competition in a relevant market will not likely be affected through the merger.

A notable case in Japan is one where the JFTC admitted the merger between Mitsui Sekiyu Co. and Mitsuitoatsu Kagaku Co despite the merged entity having a market share of approximately 60%, primarily because of the availability of imported goods .[38] Despite the expected market share, the JFTC determined that the merged entity was not likely to exercise its market power. The JFTC stressed that because its competitors had been importing the same kind of products, even if the merged entity decreased its production level, its competitors would be able to substitute them easily. Also, the JFTC found that competitor's importing goods had affected prices of that kind of products. Although the proportion of imported goods in the market just before the merger was only 1.7%, the JFTC noted that the proportion of imported goods had been greater when the production level of Japanese manufactures had not been as large. Based upon this finding, the JFTC found that it would not be too difficult for competitors to expand their importation levels if prices were raised. The JFTC also determined that imported goods were not inferior to domestic goods in terms of price and quality, despite representing only 1.7% of the market. Based upon these examinations, the JFTC concluded that the proposed merger would not cause a substantial restraint of competition.

(c) The Entry Barrier[39]

The Examination Concerning M&A points out that it is easier for a merged entity to dominate a market if market entry barriers are sufficiently high such that the merged entity can profitably maintain a price increase above the pre-merger level. Thus, it is necessary to examine whether or not an entry into a market is easy. In doing so, factors that should be taken into consideration include the minimum cost of establishing a business, the regulations to enter into the market, necessary conditions concerning geography, technology, procurement of raw materials and the possibilities that there are potential entries from foreign nations.

(d) The Competitive Pressures from Neighboring Markets[40]

According to the Examination Concerning M&A, given that there are other markets geographically adjacent to the one in question, or markets in which functionally substitutable products or services are traded, competition in those markets should be considered when applying the SRC test. The competition in those markets would make it difficult for the merged entity to exercise market power.

(e) Overall Business Competency[41]

In addition to the above, the Examination Concerning M&A notes that proper attention should be paid to changes of the overall competencies of competitors and relevant parties, including but not limited to, available technology, the ability to raise finance, and enhancement of brand image. If certain technology is available only to a merged entity, or the merger would enhance the confidence of financial institutions in the entity, or the improve the brand image of the entity to consumers, then it would be more easy for the merged entity to exercise market power.

(f) Efficiencies Achieved Through Mergers [42]

Further, the Examination Concerning M&A points out that any efficiencies, such as lowered prices, improved quality of good and services, and the introduction of new products generated through the proposed merger, should be considered as well. However, as far as publicized cases are concerned, there have been no cases in which the JFTC admitted proposed mergers because of such efficiencies if it was expected that the merged entity would have a large market share and high market concentration.

(g) The Business Situation[43]

The Examination Concerning M&A says that a merger is not likely to create or enhance market power or to facilitate its exercise if one of the merging firms faces imminent failure causing it to exit the relevant market without the merger. Based upon this recognition, the guidelines created a safety zone, in which the SRC test shall not apply. The first situation is where the market share of a merged entity is less than fifty percent, and one of the relevant parties would be unable to meet its financial obligation in the near future absent the merger, and would therefore exit the relevant market. The second situation is where the market share of a merged entity is less than fifty percent, part of the business of a relevant party is failing and, absent the merger, the failing business would exit the relevant market.

(ii) Horizontal Mergers with a Bilateral Act Case

A merger may diminish competition by increasing the extent to which a merged entity may engage in coordinated interaction that, with no doubt, harms consumers. Coordinated interaction is created by actions of a group of firms that are profitable only because of the accommodating reactions of the other firms in the group. Since a merger would create the situation where coordination among competitors is more likely, this is also relevant when determining an application of the SRC test.

(a) The Status of the Relevant Parties and Competitors[44]

The Examination Concerning M&A says that if the number of participants in a market is small, competition would be affected substantially through a proposed merger. The guidelines especially notes the situation where the number of competitors decrease to the extent that it could lead to an oligopolized market where conscious parallelism among participants of the market is rather easy. In addition, the guidelines say that if vigorous competition among relevant parties prior to the merger meant that the quality of products would be higher and prices would be lower before the proposed merger, then even when the market share of the relevant parties is not so high, competition will be affected significantly. Further it indicates that if merged entities do not have enough productive capacities, because it is difficult to expand its market share by lowering its price, it may have an incentive to cooperate with competitors.

It should be noted that, according to the Examination Concerning M&A, if relevant parties transferred part of their business to another entity established jointly with competitors, it is necessary to examine not only whether the jointly established entity would conspire with its competitors, but also whether or not the transferring entities are likely to collude with their competitors.

(b) The Competitive Situation[45]

The Examination Concerning M&A says that the extent of information available to firms in a market is relevant to both the ability to reach terms of coordination and to detect or punish deviations from those terms. The guidelines also note that if there are huge changes of demand, or frequent innovations of products, because it is possible to increase profit by lowering price unilaterally, a merged entity is not likely to collude with competitors.

In addition to the above, the Examination Concerning M&A says that, in determining whether the SRC test is satisfied, it is necessary to consider the past market share of relevant parties and changes in prices. The guidelines indicate that if there were huge changes in market share or prices in the past, then it is difficult to predict competitors' behavior, and thus the danger of collusion with competitors is decreased.

(c) Imported Goods, Entry, and Competitive Pressures from Neighboring Markets[46]

The Examination Concerning M&A indicates that if there are imported goods or a lot of competitive pressures from neighboring markets, or entry into a market is not difficult, it is less likely that a merged entity will collude with competitors.

(d) Efficiencies Achieved Through the Merger and The Business Situation[47]

The Examination Concerning M&A says that the same attention explained in (i) (f) and (g) should be made in examining the possibilities that a merged entity would likely collude with its competitors.

(iii) Vertical and Conglomerate Mergers Case[48]

The Examination Concerning M&A does not consider in general that Vertical and Conglomerate Mergers will cause a substantial restraint of competition because they do not decrease the number of market participants. The guidelines, however, recognize that there could be situations where competition in relevant markets will be affected significantly. Consequently it provides several factors in applying the SRC test.

With regard to the Vertical Mergers with a Unilateral Act case, the Examination Concerning M&A provides several factors, such as the status of the relevant parties and competitors, imported goods, barriers of entry, overall competencies, efficiencies achieved through the mergers, and the business situation, about which the guidelines indicate that the same consideration should be taken as in the Horizontal Mergers with a Unilateral Act case. In relation to market share, the Examination Concerning M&A created the safety zone, in which the SRC test will not likely apply on the condition that anticompetitive effects will not be caused judging from competitive situation between relevant parties and competitors' competencies to supply goods when reductions of supply should take place. The first situation is where a market is not highly oligopolized and market share of a merged entity is less than twenty five percent. The second situation is where a market is not highly oligopolized, market share of the merged entity is less than thirty five percent and there are two competitors whose market share is more than ten percent.

With regard to the Vertical Mergers with a Bilateral Act case, the Examination Concerning M&A provides several factors such as the status of the relevant parties and competitors, the competitive situation, imported goods, barriers of entry, competitive pressure from neighboring markets, the efficiencies achieved through the mergers, and the business situation, about which the guidelines indicate that the same consideration should be taken as for the Horizontal Mergers with a Bilateral Act case.

(D)The Measures to Lessen Anticompetitive Effects[49]

Even when the JFTC decides that the proposed Enterprise Combination meets the SRC test and thus should be enjoined, it is still possible to reverse the decision by introducing several measures to eliminate the anti-competitive effects of the transaction. The Examination Concerning M&A states that it could be useful for a merged entity to transfer part of its business to a third party so that competition in the market is increased. The guidelines also suggest that competition could also be effectively maintained if the relevant parties facilitate the new entry or import of goods so that the merged entity would not acquire excessive market power.

V. CONCLUDING REMARKS

This article provides an overview of the recent amendments to the Japanese Antimonopoly Law and its guidelines. As analyzed, as the Japanese Antimonopoly Law has tightened its belt significantly with regard to the Cartel Regulation, the practical enforcement will also change drastically after enactment. Also, after the publication of the Examination Concerning M&A, as the regulation of M&A by the JFTC will become more like that of the U.S., it is expected that the regulation will be more rigid. The author would hope that this article might help those doing business in relation to Japan to consider several antitrust risks which will be realized through the amendments of the Japanese Antimonopoly Law and its guidelines.

1 *See e.g.*, TOYOKI WATANABE, SIN DOKUSENKINSHIHOU NO JITUMU [THE NEW PRACTICE OF THE JAPANESE ANTIMONOPOLY LAW] 10-14 (Shojihomukenkyukai 1981).

2 The Japanese Fair Trade Commission, *Dokusenkinshihoujouno Kigyoketugosinsa Nikansuru Unyohshisin [The Guideline Concerning the Examination on Merger and Acquisition under the Antimonopoly Law in Japan]*, (2004), *available at* http://www2.jftc.go.jp/pressrelease/04.may/04053101.pdf (last visited Feb. 28, 2005).

3 The U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (1992), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html (last visited Feb. 28, 2005).

4 Japanese Antimonopoly Law, art. 2, para. 5.

5 Japanese Antimonopoly Law, art. 2, para. 6.

6 MASAHIRO MURAKAMI, DOKUSENKINSHIHOH [THE JAPANESE ANTIMONOPOLY LAW] 69 (Hirobundou 2000) (1996).

7 *See* Japanese Government v. Idemitu Co., 33 KEISHU 1287 (Sup. Ct. Feb. 24, 1984). The facts of this case are as follows: After the price increase of crude oil by OPEC in late 1970, it was feared in Japan that the price of commodities made of oil would increase dramatically. In fact, in late 1973, social disorder arose because of the sharp increase in the price of oil-related products. In 1971, the Ministry of Industry issued a large amount of administrative guidance, including a direction requiring the wholesalers in the oil industry to bear 10 cents per barrel of the price increase of OPEC at that time. In addition, the Ministry of Industry required that the wholesalers inform it when they would raise the price of oil, and sometimes directed them as to how much to raise the price. After 1971, pursuant to the directions of the Ministry of Industry, the wholesalers raised the price several times. Neither the JFTC nor the Prosecutor's Office raised antitrust concerns about these practices.
In 1973, before consultation with the Ministry of Industry, the people in charge of each wholesaler company frequently met to discuss and decide on when and by how much to raise the price of oil. Following these meetings, and after obtaining permission from the Ministry of Industry, the wholesalers did in fact raise the price five times. At that time, the Ministry of Industry also directed them not to raise the price due to the new pact concluded among the nations of the OPEC, and requested them to report the Ministry of Industry prior to their price raises.
In this case, the defendants argued that their agreement and subsequent price raises did not constitute a violation of the Japanese Antimonopoly Law because they were just following the directions of the Ministry of Industry and they had obtained permission before their price raises. The Tokyo High Court held that all the defendants were guilty, rejecting their arguments. On appeal, the Japanese Supreme Court found that 20 out of 23 of the defendants were guilty. In handing down its judgment, with regard to the justification defense, the Supreme Court stated that "judging from the purpose, the keystone and the progresses of the Japanese Antimonopoly Law, "against public interest," stipulated in the law, art. 2, para. 6, in principle means an establishment of free competition which the law seeks to accomplish. However, even if a certain action should appear to be against the public interest formally, such an action should not be regarded as "against the public interest" when it is not substantially against the ultimate purpose of the law stipulated in art. 1, which says that the law "aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general," which requires a comparison of the principal purpose of the law and the interests protected by such a business activity...when businesses agreed to restrict each other by fixing the prices through mutual consultation, provided that it should be found that the competition in the given market place has been restrained substantially against the public interest by their agreement, it would become immediately a violation of the law and there is no need to examine an actual implementation of the agreement."

8 The Japanese Fair Trade Commission, *Dokusenkinshihou Kaiseino Youten [The Gist of the Amendment of the Japanese Antimonopoly Law]*, 320 KOUSEITORIHIKI 15 (1977).

9 The overall trend of fact findings at the JFTC is said to have become more careful after the introduction of the surcharge in 1977. Several recommendation (*Sinketu*) cases occurring after its introduction clearly demonstrate this trend. See e.g., Mitsubishibiltechnoservice, 41 SINKETUSHU 46 (FTC, July 28, 1994). In this case, six companies, including Mitsubishi Building Maintenance Co. ("Mitsubishi"), attended several meetings named "*Tohkakai*" to exchange information regarding their business from August 31, 1982. The JFTC issued its recommendation to the participants of the meetings after its careful investigation of the claim that they agreed to fix the price at the meeting on March 9, 1984. As six companies refused to accept the recommendation, the JFTC commenced a formal hearing.
The referees, in their judgment, found that there were no agreements concluded as to price among the parties. They found that there were several discussions as to the price among the parties at the meeting held on August 31, 1982. They said, however, that had the six companies actually agreed to raise the price at that meeting, Mitsubishi would have distributed documents reflecting such a price increase before or after the meeting, and informed the five other companies by how much to raise the price based on their agreement. In addition, the six companies would have reviewed such documentation thoroughly. However the referees found no evidence to prove this had occurred. Further, they concluded that there was not enough time to examine the price raise schedule at the meeting, considering the number of topics discussed and the total meeting time.
What is notable in this case is that the referees denied finding an agreement among the parties, even though they found evidence of several communications as to price at that meeting. In Japan, this case is well known as the very first case where the JFTC initiated a hearing but the referees did not find any violations of the Japanese Antimonopoly Law, and it demonstrated that the formal hearing at the JFTCJ was not just a formality.

10 It should be noted that in Japan an administrative warning by the JFTC, which is sometimes used to terminate a formal proceeding after commencement of an investigation, is a completely different administrative measure from an elimination order. An administrative warning will be issued when an investigation has been initiated but sufficient evidence has not been found to establish the case, and the JFTC has made successfully suspected parties correct their business activities voluntarily. In Japan, administrative warnings have been criticized in that they are used frequently so that the JFTC settled cases even when it found a violation of the Cartel Regulation. *See e.g.*, TADASHI SHIRAISHI, DOKUKINHOH KOUGI [THE LECTURE OF JAPANESE ANTIMONOPOLY LAW] 169 (3d ed. 2005)

11 *See e.g.*, MURAKAMI, supra note 6, at 339.

12 MURAKAMI, *supra* note 6, at 385-392.

13 Tohoh Co. v. Fair Trade Commission, 4 MINSHU 497 (Tokyo Hi. Ct. Sep. 19, 1951).

14 Yahataseitetsu, 16 SINKETUSHU 50 (FTC, Oct. 30, 1969).

15 *See e.g.*, The Japanese Fair Trade Commission, *Kouseitorihikiiinnkai Nenjihoukoku 1993 [The Annual Report 1993 by the Fair Trade Commission]*, (1994), *available at* http://snk.jftc.go.jp/cgibin/NKensakuFrameset.cgi (last visited Mar. 5, 2005).

16 The Japanese Fair Trade Commission, *Kigyoketugokeikaku Nikansuru Zizensodanhenotaooh Nitsuite [About the Response to a Prior Consultation regard with Combination of Enterprise]*, (2002), *available at* http://www.jftc.go.jp/ma/021211.pdf (last visited Sep. 19, 2005).

17 *See e.g.*, SADAAKI SUWAZONO, SHIRANAKATTADEWA SUMANAI KAISEIDOKUKINHOU [NOT FORGIVEN TO SAY NOT YET LEARNED THE AMENDMENT OF THE JAPANESE ANTIMONOPOLY LAW] 32-34 (Toyokeizaishinposha 2005).

18 *Id.*

19 *See e.g.*, Nihonyuhsen, 19 SINKETUSHU 57 (FTC, Aug. 18, 1972). The referee of this case implied that the Japanese Antimonopoly Law should not apply to cartel agreements concluded outside of the Japanese jurisdiction. In addition, the referee made it clear that even when the cartel agreement was concluded in Japan, if cartel members were situated in foreign nations there was no way that the JFTC could deliver documentations to commence proceedings. It should be noted, however, that the referee expressed its view that, concerning agreements concluded in Japan, inasmuch as the service of delivery was completed to the place of business or office in Japan, the Japanese Antimonopoly Law should apply, but that the delivery to agencies and outlets in Japan should not be admitted. Also, the referee added that if the JFTC proved that the agencies or outlets

were authorized to receive delivery of documents by their head office or that such action had been ratified, the delivery to those agencies or outlets should become effective.

20 *See e.g.*, SUWAZONO, *supra* note 17, at 36.

21 In Japan, it has been held that this system is not against the double jeopardy rule because administrative sanctions are different from criminal offenses. *See e.g.*, MURAKAMI, *supra* note 6, at 470.

22 The percentage to calculate the amount of the surcharge was raised to six percent in 1991 due to sever criticism from the U.S. that, in Japanese market, cartels, bid riggings, and group boycotts were rampant partly because the penalties imposed on them were so low that they could not deter antitrust violations.

23 *See e.g.*, SUWAZONO, supra note 17, at 50.

24 *Id.*

25 *Id.*

26 *Examination Concerning M&A*, *supra* note 2, at 9-10.

27 *See e.g.*, MURAKAMI, *supra* note 6, at 70.

28 *Examination Concerning M&A*, *supra* note 2, at 10-11.

29 *Id.* at 12-13.

30 *Id.* at 13-14. One of the antitrust scholars in Japan defines the threshold of the SRC test as the point where the competitive function of the market is substantially restrained, or where an important function of the market is lost. *See* Murakami, *supra* note 6, at 69.

31 *Tohoh Co.*, 4 MINSHU 497.

32 The underlined languages of the rationale are the direct standard of the SRC test. After the TOHOH case, the SRC standard had been relaxed, exemplified in the YAHATASEITETU case. *See Yahataseitetsu*, 16 SINKETUSHU 50. However, it is commented that the JFTC no longer adopts the SRC standard outlined by the YAHATASEITETU case. *See* Murakami, *supra* note 6, at 359. In YAHATASEITETU case, the JFTC commenced the formal hearing on May 19, 1969. After both parties' proposal for settlement, the consent order was issued on Oct. 30, 1969. In this consent order, the referee of the case articulated the SRC test as follows: 1. The SRC test delineates the situation where specific businesses would come to dominate a market due to changes in the market structure making it less competitive; 2. Should certain businesses dominate a market or their competitors find it difficult to exercise their independent business judgment because such businesses are able to influence price, quality, quantity and other terms and conditions of their products or services, it can be said that they have come to establish a dominant position in the market; 3. Whether or not such businesses have formed a dominant position in a market should be determined by taking into consideration such factors as a situation of a market where relevant parties have transacted, market share of the relevant parties, imported goods, substitutes and market barriers for entrance; and 4. Even when relevant parties possess high market share in a market, should there be competitors that could affect the determination of prices or could exercise market power, the SRC test is not fulfilled.
After this consent order, the forth element of the test outlined above has been particularly criticized. Other three elements have been sustained by the JFTC. See Murakami, supra note 6, at 359. After this case, except for one case settled as a consent order, no judgments have been rendered by the JFTC or Japanese courts with regard to the SRC test. This is partly because, as explained earlier in this article, most of cases concerning M&A have been settled though an informal consultation, whereby both the JFTC and Japanese court had no opportunity to articulate the SRC test.

33 Tohoh Co. v. Fair Trade Commission, 8 MINSHU 950 (Sup. Ct. May 25, 1954).

34 The Japan Fair Trade Commission, *Kouseitorihikiinnkai Nenjihoukoku 1993* [*The Annual Report 1993 by the Fair Trade Commission*], (1994), available at http://snk.jftc.go.jp/cgibin/NKensakuFrameset.cgi (last visited Mar. 5, 2005).

35 In this case, if Ouji and Kamisaki merged into one entity, it was expected that its market share in the Japanese filature industry would become 19.9%, and that it would acquire around 60% of the market share in two of the submarkets with regard to individual filature items actually sold to consumers. The JFTC focused on the expected market share in the two submarkets. After informal consultation, the JFTC determined that, given the expected market share in the Japanese filature industry and the existence of several competitors which could hinder the merged entity's exercise of market power, the proposed merger was not likely to affect the market. On the other hand, with regard to the submarkets, the JFTC stressed the expected market share of the merged entity and concluded that a substantial restraint of competition would result. Based upon these outcomes, both Ouji and Kamisaki voluntarily proposed that the merged entity would transfer part of its business, and its equity in the companies that distributed the final products, to a third party, so that it might not acquire an excessive market power in the submarkets. The JFTC decided that, given the proposal, the proposed merger would not cause a substantial restraint of competition in the Japanese filature industry or its submarkets.

36 *Examination Concerning M&A*, *supra* note 2, at 18-21.

37 *Id.* at 21-22.

38 The Japanese Fair Trade Commission, *Kouseitorihikiinnkai Nenjihoukoku 1997* [*The Annual Report 1997 by the Fair Trade Commission*], (1997), available at http://snk.jftc.go.jp/cgi-bin/NKensakuFrameset.cgi (last visited Mar. 13, 2005).

39 *Id.* at 22.

40 *Id.* at 22-23.

41 *Id.* at 23-24.

42 *Id.* at 24. Under the Examination Concerning M&A, the efficiencies resulting from shifting production among facilities formally owned separately would be viewed more favorably because they are more likely to be susceptible to verification, merger specific, and substantial, and are less likely to result in an anti-competitive reduction in output. It should be noted that, under the Examination Concerning M&A, the rigid relationship between efficiencies attained through mergers and their being passed on to consumers has not been required, while from the merged entity's view point, it would be advisable to prove the direct relationship between efficiencies and consumer's benefit. In order for cost saving generated through mergers to be passed on to consumers, strong competition in a marker is not necessary. Based upon an economic analysis, when a merged entity faces a downward sloping curve, as virtually all real world firms do, some of the cost saving will inevitably be passed on to consumers, with the exact amount depending upon the shape of the demand curve. In connection with measuring pro-competitive effects of mergers on consumers, it is advocated to focus on the reduction of the marginal cost. *See e.g.*, *Joseph Kattan, Efficiencies and Merger Analysis*, 62 ANTITRUST L.J. 513, 528 (1994). With differentiated products and non-cooperative price setting, a reduction of short-run marginal cost of any product, all things being equal, causes a seller of that product to prefer selling the product at a lower price. With homogeneous products and non-cooperative quantity setting, a reduction in the short-run marginal cost of any seller, all other conditions being equal, causes sellers to increase the quality of their product.

43 *Id.*

44 *Id.* at 25-26.

45 *Id.* at 26-27.

46 *Id.* at 27.

47 *Id.* at 27-28.

48 *Id.* at 28-30

49 *Id.* at 30-32.

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Emissions Trading

THE FUTURE PATH OF EMISSIONS TRADING IN JAPAN

By Minoru Ohta, Partner of Nagashima Ohno & Tsunematsu

A legal infrastructure for emissions trading is in urgent need so that the government may help participants to an increasing number of transactions in emissions trading gain more certainty and predictability in respect to these activities and eventually help fulfill Japan's commitment under the Kyoto Protocol most efficiently.

I. PROLOGUE

Due to intense pressure from the manufacturing industry which faces fierce international price competition with other Asian countries not obligated to reduce their greenhouse gas emissions ("GHGs") under the Kyoto Protocol , Japan currently has no direct legal restrictions on GHGs, nor any domestic cap and trade system such as the EU Emissions Trading System ("EU ETS") nor any kind of carbon tax. The task of meeting Japan's Kyoto Protocol commitment, namely, a 6 percent reduction for the period 2008 to 2012, looms over the government, as the preliminary figures announced by the Ministry of Environment this past October showed that total GHGs in Japan (calculated on a carbon dioxide conversion basis) in 2004 increased by 7.4 percent compared with 1990 levels. The government of Japan, caught between industry and its Kyoto commitment, is struggling to come up with a structure in order to meet its commitment in a most cost efficient way.

On the other hand, despite numerous uncertainties due to the government's failure to implement any concrete and comprehensive measures for a domestic emissions trading market, many Japanese companies are already acquiring emissions credits, mostly as Certified Emissions Reductions ("CERs") generated under credit yielding projects which make use of the Clean Development Mechanism ("CDM") (as explained below), by entering into emissions credit purchase agreements with foreign companies under which an agreed amount of CERs are delivered to purchasers after the CERs are successfully generated through a relevant project. Some companies may wish to hedge their future potential risks by stockpiling a sufficient amount of emissions credits while they are available at relatively low prices in case the government shifts its reduction obligations under the Kyoto Protocol to the private sector. Others may wish to demonstrate from an investor relations perspective (in which "corporate social responsibility" has gained currency) that they are environmentally conscious.

Now that the first CERs with respect to two hydroelectric projects have been recorded with the CDM Registry, physical delivery of an emissions credit to a purchaser's holding account in a national registry will occur shortly. Thus it is high time that the government clarify how an emissions credit is handled when it is recorded in Japan's national registry regardless of a purchaser's intention, and further, the government needs to explain its legal nature (although EU and its member states do not necessarily explain the legal nature of an emission credit under the Kyoto Protocol or an allowance under the EU ETS). This article provides an overview of the current emissions trading situation in Japan and identifies some of the legal issues to be overcome for its further development.

II. EMISSIONS TRADING IN JAPAN

Japan's emissions trading is primarily based on the system envisioned under the Kyoto Protocol and further elaborated on in the Marrakech Accord (the "Kyoto Mechanism").

(i) Kyoto Mechanism

The Kyoto Protocol obligates all Annex I parties to the UNFCCC ("Annex I parties") to reduce their GHG emissions by 5% (6% for Japan) from their 1990 levels. Instead of actually reducing emissions, the Kyoto Protocol allows an Annex I party to use three supplemental measures to meet its commitment: joint implementation ("JI"); CDM; and emissions trading. An Annex I party may add emissions credits gained through any one of these measures to its originally assigned emissions allowances under the Kyoto Protocol.

Under a CDM project, the government of or a private sector