The Great Step Forward: The Reform to the Japanese Antimonopoly Act

The Japanese Antimonopoly Act was amended significantly in several aspects to clamp down on cartels. Strong enforcement of the Act as well as criminal prosecution against cartel violations are now likely.

Introduction

The Law Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No 54 of 1947) ('Japanese Antimonopoly Act') is an important law which aims to promote free and fair competition in markets, thereby stimulating the creative initiative of entrepreneurs and assuring consumers of their interests. The Japanese Antimonopoly Act is modelled after the American antitrust laws – the Sherman Act, the Clayton Act and the Federal Trade Commission Act. The Japanese Antimonopoly Act was expected to develop and be applied in the same way as the American antitrust laws. However, it was not compatible with the real operation of the Japanese economy and the dire economic situation just after World War II, and had to be amended significantly in 1953 to introduce several exceptions to the prohibition of cartels, and to allow some collaboration among competitors with regard 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 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, cartels have come to be established as general business practices beyond the boundaries of the regulations, which are clearly illegal under the Act.

The amendment to the Japanese Antimonopoly Act which was proclaimed on 27 April 2005 and came into effect on 4 January 2006 ('Amendment in 2005') aimed primarily to strengthen the regulation of cartels. Antitrust regulations of cartels were made considerably stricter, and the Japanese Fair Trade Commission ('JFTC') is expected to exercise its authority to crack down on cartels more aggressively. This article discusses the effect of the Amendment in 2005 on business activities as well as the areas to be cautioned about when conducting business transactions in the Japanese market.

The second part of this article provides an overview of the Japanese Antimonopoly Act and focuses especially on its regulation of cartels, besides presenting a big-picture view of Japanese competition regulations with regard to the amended areas.

The third part of this article explains the Amendment in 2005. It discusses three points of the amendment. First, the JFTC is now able to carry out compulsory measures to investigate antitrust violation cases. Second, the amount of a surcharge (kachoukin) – an administrative penalty calculated by multiplying the amount that businesses have earned through their cartels by a certain percentage – has been increased. Third, a leniency programme has been introduced. This aims to reduce the amount of surcharge imposed on violators of the Act when they voluntarily inform the JFTC of their violations.

The Overview of the Japanese Antimonopoly Act

The regulation of anti-competitive conduct in general

The Japanese Antimonopoly Act prohibits a business from: (a) preventing 'free and fair competition' by consulting with other entrepreneurs ('Cartel Regulation'); (b) unjustly maintaining its monopolistic position or unjustly excluding other competitors ('Monopoly Regulation'); or (c) distorting competition by using any of the 16 types of unfair trade practices ('Unfair Trade Practice Regulation') discussed below.

The conduct dealt with by the Cartel Regulation is also described as 'unreasonable restraint of trade', which means a mutual restriction on business activities by making cooperative decisions 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 '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 known as 'private monopolisation', which refers to the exclusion of or control on the business activities of other entrepreneurs, thereby causing, contrary to public interest, a substantial restraint of competition in any particular field of trade.[2] Specifically, this covers any conduct by a company with a large market share which is aimed at excluding new entrants or restraining the business activities of other competitors through unjust means (not limited to means that violate the Act) in order to increase or maintain its market share.

The Unfair Trade Practice Regulation includes 16 types of prohibited conduct designated by the JFTC as a hindrance to effective competition. These are: (a) concerted refusal to deal; (b) other refusal to deal; (c) discriminatory pricing; (d) discriminatory treatment of transaction terms etc; (e) discriminatory treatment in a trade association; (f) unjustly low-price sales; (g) unjustly high-price purchasing; (h) deceptive customer inducement; (i) customer inducement by unjust benefits; (j) tie-in sales etc; (k) dealing on exclusive terms; (l) resale price maintenance; (m) dealing on restrictive terms; (n) abuse of dominant bargaining position; (o) interference with a competitor's transaction; and (p) interference with the internal operation of a competitor's company.

In the next section, this article explains in detail the Cartel Regulation. The amendment of the Japanese Antimonopoly Act purports to make the Cartel Regulation stricter; thus an understanding of the overview of the regulation is indispensable to figuring out its effects on doing business in Japan.

The regulation of cartels under the Japanese Antimonopoly Act

Application of the Cartel Regulations

Under the Japanese Antimonopoly Act, the formation of cartels is a violation of the Cartel Regulation.

Article 3 of the Japanese Antimonopoly Act provides that no entrepreneur shall effect private monopolisation or unreasonable restraint of trade. 'Unreasonable restraint of trade' is defined in the Japanese Antimonopoly Act as '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'.[3] It should be noted that in Japan, 'in any particular field of trade' is always construed together with 'substantial restraint of competition' and has no independent significance.[4]

Therefore, the JFTC and Japanese courts dealing with Cartel Regulation violation cases will primarily consider whether the following three conditions have been satisfied: (a) whether there is a substantial restraint of competition in any particular field of trade; (b) whether the businesses mutually restrict or conduct their businesses; and (c) whether this is against public interest.

In analysing these three elements, the Japanese Supreme Court has adopted a principle similar to the American per se rule.[5] Applying this principle, Japanese courts considered the constituent elements to be satisfied when evidence supports the existence of cartel agreements; and upon such satisfaction, the cartel agreements are presumed to be illegal. There is, however, one difference in that the Japanese Supreme Court held that parties of the cartel may justify their cartel agreement as not being against public interest by discharging their burden of proof.

The effect of violations of the Cartel Regulation

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

Criminal sanctions will be imposed on violators of the Cartel Regulation under the Japanese Antimonopoly Act. Article 89 provides 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. Article 95 of the Act also 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, a surcharge will be imposed on violators of the Cartel Regulation pursuant to art 7-2 of the Japanese Antimonopoly Act. Except for a reduction or exemption under the leniency programme and coordination with criminal penalties, the basic method of calculating 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 has provided during the period by a certain percentage provided by the Act. When cartel agreements are found, the JFTC is bound to order a surcharge – there is no discretion.[6] Although Japanese industries have criticised the surcharge as a mere criminal sanction against the formation of cartels under the guise of an administrative order, the surcharge has helped deter further violation of the Cartel Regulation. It has also helped to change the prevailing attitudes of industry. After its introduction, there was a clear decrease in the number of cartel cases brought by the JFTC; this is also due in part to the careful fact-finding practice adopted by the JFTC.[7]

The procedural aspect of the Cartel Regulation

The JFTC will, when it believes that a violation of the Cartel Regulation has occurred, appoint auditors to investigate the case. After a preliminary investigation, if the JFTC finds reasonable grounds for believing that a violation exists, it may initiate a formal investigation. The JFTC then appoints several staff members as investigators and confers on them the authority to conduct the investigation.

It should be noted that through the Amendment in 2005, the JFTC is now able to carry out compulsory measures in its investigation of suspected antitrust violation cases.

After a formal investigation, if the JFTC does not find a violation, it closes the case. On the other hand, if the JFTC finds a violation, it will issue elimination orders and/or surcharge orders after having provided the firm an opportunity to submit its opinions etc;[8] it will also initiate formal hearings upon the filing of the complaint when these orders are objected to by the firm, as the recommendation system is abolished in the Amendment in 2005.[9] If the parties

suspected of forming cartels accept the order, it becomes final, meaning it is non-appealable by any means.

In a formal proceeding, the adversary system is adopted and independent referees will ultimately hand down the judgment. During the formal hearing, the respondent firm may, in accordance to the finding of facts and application of law in the complaint, make a proposal for corrective measures. If the JFTC finds the proposal for corrective measures appropriate, it will drop the case and order the respondent firm to carry out the corrective measures based on the original orders.

If the JFTC finds that a violation exists at the end of the formal proceedings, the JFTC will issue a formal decision ordering the respondent firm to execute the corrective measures.

If discontented with the judgment of the JFTC, the parties may file for litigation at the Tokyo High Court, which has exclusive jurisdiction over 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 the basis that the JFTC has failed to adopt the evidence without good cause, or that it was impossible to adduce evidence at the hearing of the JFTC, besides showing that there was no gross negligence on the part of the party in failing to adduce such evidence.

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

The Amendments to the Japanese Antimonopoly Act in 2005

The introduction of the compulsory measures

Through the Amendment in 2005, the JFTC is now able to carry out compulsory measures to investigate suspected antitrust violation cases.

Before the amendment, the JFTC was permitted to investigate antitrust cases only with the voluntary cooperation of the relevant parties. If suspected parties refused to hand in the relevant documents, the JFTC would be forced to spend a great deal of time persuading the parties to do so, during which time important evidence might have been destroyed. Through the amendment, upon getting a writ from the courts, the JFTC can, without consent from the relevant parties, search for and seize evidence. Further, written statements obtained by the JFTC can now be used in court proceedings; before the amendment, they could not be admitted as evidence.

The JFTC had, in 1991, announced that it would positively denounce antitrust violations as criminal cases, and the policy adopted at that time was that criminal indictments should be made when appropriate. However, since the JFTC had insufficient means to investigate violations, criminal indictments were only made at a rate of one in two years. With the introduction of the compulsory measures, it is expected that the number of criminal indictments will increase.

The reinforcement of the surcharge[10]

As explained earlier in this article, the JFTC will issue surcharge orders when it finds violations of the Cartel Regulation. Both substantial and procedural aspects of the surcharge have been revised drastically through the amendment. The procedural aspects of the revision are in connection with the introduction of the leniency programme, explained below.

The first significant reform to the substantive aspect of the surcharge is that the principal percentage primarily applied to manufacturers (for calculating the amount of the surcharge) was increased from six per cent to 10 per cent. This was done with the intention of doubling the effect of the deterrence and to make the leniency programme more attractive to Cartel Regulation violators. It also takes into consideration the criticism that six per cent is not enough to deter antitrust violations.[11] The increase of the principal percentage to 10 per cent is based on data showing that the average profit that cartel members have enjoyed for the last 10 years is more than eight per cent.[12] Other than the principal percentage, percentages which are applied to small- and medium-sized manufacturers, wholesalers, and retailers have also been increased. (See chart below)

As a further penalty, the principal percentage where violators have been issued with a previous surcharge order within the past 10 years, is 15 per cent. On the other hand, parties issued a surcharge order can still enjoy a 20 per cent reduction on the amount payable when three conditions are satisfied: first, they must cease their violations within two years from commencement; second, they have ceased their violation for more than a month before an inspection by the JFTC; and third, they have not been issued with a surcharge order for the last 10 years.

The second significant reform is that the scope of a surcharge order was widened. Before the amendment, a surcharge order would only be issued to cartels because of prices or cartels limiting the volume of products or services to affect prices. Through the amendment, however, surcharge orders may now be issued to cartels for: (a) restricting third parties that cartel members may transact with; (b) defining the market share of each cartel member; or (c) certain kinds of private monopolisation which aim to achieve the same result as the above said cartels.

Manufacturers, etc	Large-sized enterprises	Small- and medium-sized enterprises
	6–10%	3–4%
Wholesalers	Large-sized enterprises	Small- and medium-sized enterprises
	1–2%	1% (no change)
Retailers	Large-sized enterprises	
	2–3%	

The third significant reform is that a surcharge order remains enforceable even when the relevant parties do not accept it and the JFTC is compelled to initiate a formal hearing. Also, the JFTC is empowered to charge an interest for the arrears (rate provided by the Cabinet order) if a party should fail to pay the surcharge by the designated deadline and the surcharge payment order is sustained by a decision after a hearing. The recommendation system was abolished through the amendment. 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 issued in a judgment, the relevant parties will 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.

The introduction of the leniency programme

The overview of the leniency programme

Through the Amendment in 2005, the leniency programme was introduced for the first time in the history of the Japanese Antimonopoly Act.

Under the programme, violators of the Cartel Regulation may be able to enjoy a reduction or exemption of the surcharge if they voluntarily report their violations and submit the 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 a 50 per cent reduction of the surcharge; the third cartel member to report its violation prior to an inspection can enjoy a 30 per cent reduction of the surcharge; and a business which reports its violation after an inspection by the JFTC may enjoy a 30 per cent reduction of the surcharge.

It is expected that the leniency programme will not only increase the number of successful exposures of cartel cases, but also give cartel members enough incentives to voluntarily cease their violation.

Before the amendment, it was very hard for businesses to pull out of cartels because of the double risk – the risk of losing much of their business opportunities and the risk of facing a large surcharge order. Under the leniency programme, it has become possible to pull out of cartels without paying any surcharge.

However, the following cartel members are not qualified to enjoy the benefits provided by the programme: 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 make a false report; and cartel members who

First applicant before initiation of investigation	Total immunity
Second applicant before initiation of investigation	50% reduction
Third applicant before initiation of investigation	30% reduction
An applicant after initiation of investigation	30% reduction

compel other members to participate in their cartels, or prevent other members from reporting their violations.

'False reports' refer to situations where it is obvious that cartel members have purposely concealed or distorted the facts so as to evade responsibilities arising from their violations. It should be noted, therefore, that a 'mere mistake of information' will not prevent the party from taking advantage of the programme.

With regard to compelling and preventing, it has been confirmed through discussion at the upper house of the Japanese Parliament that these refer to the use of intimidations or physical force to compel other businesses to join cartels, or to prevent them from seceding. It should be noted that even when a member of a cartel is the organiser or coordinator of meetings, it may still be able to apply for the leniency programme.

Before the introduction of the leniency programme, it was pointed that if cartel members who enjoy the benefits under the leniency programme still potentially face criminal charges, there would be little incentive for them to discontinue their cartels. However, the leniency programme only purports to offer leniency with respect to the surcharge and does not offer express immunity from criminal prosecution. This aspect of the programme differs from that of the United States, whose primary aim is to offer violators a way to avoid criminal indictment. Subsequently, the JFTC announced that it would not recommend that criminal charges be brought by the Public Prosecutor's Office against a Cartel Regulation violator if the violator first reports the violation to the JFTC prior to an inspection. This is expected to be done on a case-by-case basis. In addition, as discussions in the Japanese Parliament have made clear, the Public Prosecutor's Office will respect the decision of the JFTC – criminal charges will not be brought against violators of the Cartel Regulation if the JFTC does not so recommend. The Japanese Ministry of Justice has also issued a statement that the Public Prosecutor's Office would give due consideration to decisions made by the JFTC, in order to ensure that the leniency programme is able to function properly. This opportunity to avoid criminal charges is an added incentive to apply for the leniency programme.

Private enforcements are not barred under the leniency programme although art 25 of the Japanese Antimonopoly Act states that private claims may not be initiated unless and until the JFTC renders the final and conclusive order. Thus, an applicant for the leniency programme enjoys immunity against private actions until the JFTC orders an elimination order; it would thereafter be exposed to the risk of subsequent private actions under art 25 of the Act. Also, private actions can be initiated under art 709 of the Japanese Civil Code, regardless of the JFTC's decisions. Nonetheless, in Japan, private enforcement actions are not considered a significant dis-incentive against applying for the leniency programme. First, the Japanese Antimonopoly Act does not allow for class actions or treble damage claims. In terms of the amount to be sought, the risk of being litigated in private actions is low. Second, the number of private actions in Japan is much less than that of the United States, because the courts in Japan adopt the strict approach of finding causation between antitrust violations and damages. This fact-finding trend has deterred the commencement of private actions in antitrust violation cases.

How to apply for the leniency programme

When applying for the leniency programme, 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 programme. At this stage, anonymous contact will suffice, meaning that the JFTC can be contacted through legal counsel who will not be bound to disclose the name of his or her client.

In a case where an inspection by the JFTC has not been initiated, should there be less than three members who have already applied for the programme, the next thing to do is to reveal the company's name and submit a simple format report ('Simple Report' in which each company reports its violation for the purpose of the leniency programme) via fax to secure the company's provisional position regarding the order. The only permitted way of submitting the Simple Report is by fax – this helps to confirm the precise date and time of each application, and avoids the problem of having to determine which company applied first.

Once the JFTC receives a Simple Report, the provisional order is secured. In other words, a Simple Report is used to give the applicant a marker position – the first company to submit the report is qualified as the first applicant, and is afforded roughly 15 business days before submitting the detailed report ('Detailed Report') as well as necessary materials and documents.

In cases where the JFTC has already initiated its investigation, another kind of report is used. This report is almost identical to the Detailed Report described above in its content and shall be submitted via fax.

The information obtained at the time of a leniency application under the report is used by the JFTC to start an investigation on a case. It is also used by the JFTC in considering whether the applicant shall be afforded a leniency status of immunity or reduction, and need not be sufficient for proving a violation. The JFTC can and will produce necessary evidence later in its investigation activities.

The reports must be submitted under the name of a company representative, or its attorney, and must be stamped with a company seal or attorney's seal to show their authenticity. After the officer-in-charge examines the Detailed Report, the JFTC will issue a notice or a letter to the company informing that the leniency application has properly processed and it is qualified as the first, second or third applicant. This status is guaranteed so long as the company does not fall under any one of the disqualifications stipulated under art 7-2, para 12 of the Japanese Antimonopoly Act. Article 7-2, para 12 includes situations where the applicant has submitted a report containing false information, has not submitted additional information even if so requested by the JFTC, or has forced other entrepreneurs to engage in cartels and bid riggings or tried to prevent other entrepreneurs from quitting such illegal conduct. The status of the second and the third applicants remain unchanged in the event that the first applicant falls under any one of the disqualifications in art 7-2 after he has acquired his immunity status.

Concluding Remarks

This article has covered three essential amendments to the Japanese Antimonopoly Act in 2005. As highlighted, as the Japanese Antimonopoly Act has adjusted its position significantly with regard to the Cartel Regulation, a drastic change in its practical enforcement is also to be expected. It would now be necessary to change the business practice of looking at the penalty imposed on a violator of Japanese Antimonopoly Act as a necessary business cost. The author hopes that this article will help those doing businesses in/with Japan to be more aware of the antitrust risks under the amendments to the Japanese Antimonopoly Act.

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Notes:

1 See eg, Toyoki Watanabe, *Sin Dokusenkinshihou No Jitumu* [*The New Practice of the Japanese Antimonopoly Act*] 10–14 (Shojihomukenkyukai, 1981).

2 Japanese Antimonopoly Act art 2, para 5.

3 Japanese Antimonopoly Act art 2, para 6.

4 Masahiro Murakami, *Dokusenkinshihoh* [*The Japanese Antimonopoly Act*] 69 (Hirobundou, 2000) (1996).

5 See Japanese *Government v Idemitu Co* 33 KEISHU 1287 (Sup Ct 24 February 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 prices of oil-related commodities 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 an enormous 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 the ministry when they were going to 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, wholesaler companies frequently met to discuss and decide 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 because of the new pact concluded among the nations of the OPEC, and requested them to report to 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 Act because they were just following the directions of the Ministry of Industry and had obtained permission before their price raises. The Tokyo High Court rejected the argument and held that all the defendants were guilty. On appeal, the Japanese Supreme Court found that 20 out of the 23 defendants were guilty. In handing down its judgment, with regard to the justification defence, the Supreme Court stated that 'judging from the purpose, the keystone and

the progresses of the Japanese Antimonopoly Act, "against public interest," stipulated in the Act art 2 para 6, in principle means an establishment of free competition which the Act 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 Act stipulated in art 1, which says that the Act "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 Act 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 Act and there is no need to examine an actual implementation of the agreement.'

6 The Japanese Fair Trade Commission, *Dokusenkinshihou Kaiseino Youten* [*The Gist of the Amendment of the Japanese Antimonopoly Act*] 320 Kouseitorihiki 15 (1977).

7 The JFTC is said to have become more careful in its fact findings after the introduction of the surcharge in 1977. Several recommendation (sinketu) cases occurring after its introduction clearly demonstrate this trend. See eg *Mitsubishihibiltechnoservice*, 41 Sinketushu 46 (FTC, 28 July 1994). In this case, six companies, including Mitsubishi Building Maintenance Co ('Mitsubishi'), attended several meetings named 'tohkakai' to exchange information regarding their businesses from 31 August 1982. The JFTC issued its recommendation to the participants of the meetings after careful investigation of the claim that they have agreed to fix the price at the meeting on 9 March 1984. As six of the 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 31 August 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 any 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 Act. This case also demonstrated that the formal hearing at the JFTC was not just a formality.

8 It should be noted that in Japan, an administrative warning by the JFTC, which is sometimes used to terminate a formal proceeding after the 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 through this, the JFTC has made successfully suspected parties correct their business activities voluntarily. In Japan, administrative warnings have been criticised in that they are used frequently so that the JFTC settled cases even when it found a violation of the Cartel Regulation. See eg Tadashi Shiraishi, *Dokukinhoh Kougi* [*The Lecture of Japanese Antimonopoly Act*] 169 (3rd ed, 2005).

9 Before the amendment in 2005, the JFTC must first issue a recommendation which contains fact findings, allegation of violation and a cease and desist order or other corrective measures to the firm.

10 In Japan, it has been held that this system is not against the double jeopardy rule because administrative sanctions are different from criminal offences. See eg, Murakami, supra note 4, at 470. In the Amendment in 2005, in order to address the double jeopardy rule, it is provided that the applicable surcharge will be reduced by half the amount of the criminal fine if both sanctions are imposed.

11 The percentage to calculate the amount of the surcharge was raised to six per cent in 1991 due to severe criticism from the US that, in Japanese market, cartels, bid riggings, and group boycotts were rampant partly because the penalties imposed on them were so negligible that they could not deter antitrust violations.

12 From 1993 to 2003, it was reported that approximately 10 per cent of all companies that violated the Japanese Antimonopoly Act re-offended, as compared to a rate of approximately three per cent in the European Union over the same period. This statistic provided the ground to increase the percentage in calculating the surcharge.