

4 Development of Ex-Post-Facto Checking Rules

[Awareness of the Issues]

The basic philosophy of regulatory reform calls for shifting from “ex-ante regulations” to “ex-post-facto monitoring and checking” (hereinafter referred to as “ex-post-facto checks”).

The development of ex-post-facto check rules has two following meanings:

Firstly, they have the effect of promoting the relaxation of ex-ante regulations. Many social regulations are basically designed to avoid risks that are expected to affect consumers and workers. In order to eliminate concern over risks emerging from the relaxation of ex-ante regulations and promote deregulation, we must take some measures to ease risks as the *raison d'être* of ex-ante regulations or specify measures to deal with the risks by ex-post-facto checks. The development of ex-post-facto check rules can play that role.

Secondly, the development of ex-post-facto check rules can ensure the enhancement of consumer benefits accompanying the relaxation of ex-ante regulations. Deregulation can expand the range of goods and services available to consumers. In order to allow consumers to make appropriate choices, the asymmetry of information that exists between producers and consumers must be corrected. Therefore, information disclosure is a key point of the ex-post-facto checks.

There may be four ways of combining ex-ante regulations and ex-post-facto checks (see the attached table). In Japan's case, ex-ante regulations have been strong with ex-post-facto checks remaining less strict in many areas (Type B in the attached table). However, Japan should move in the direction of developing ex-post-facto check rules to relax ex-ante regulations (Type D in the attached table) in principle. In areas where the relaxation of both ex-ante regulations and ex-post-facto checks poses no problem, the relaxation should be promoted (Type C in the attached table).

As for areas that are directly linked to human lives and safety (food safety, medicine safety, labor safety and health, etc.), ex-ante regulations may have to be maintained with ex-post-facto regulations being conducted appropriately (Type A in the attached table).

Those implementing ex-post-facto checks may include the administrative branch, the private sector (including nonprofit organizations) and the judiciary branch. While the private sector's voluntary undertakings should be respected as much as possible, the government should develop ex-post-facto check rules with the burden of

checks being appropriately shared by parties based on their respective characteristics.

1 Information Disclosure

(1) Significance of information disclosure in ex-post-facto checks

Appropriate information can allow consumers and users to make appropriate choices. Therefore, information disclosure is an indispensable factor for establishing self-responsibility principles as the base for accurate choices by consumers and users, as well as their freedom of choice. On the other hand, effective ex-post-facto monitoring can help maintain and enhance market discipline to improve the quality of services given to consumers and users. Information disclosure can play a key role in this respect.

In order to allow information disclosure to fulfill its functions, (a) the information should be provided as widely as possible (quantitative aspect), (b) the information should be useful and its accuracy should be ensured (qualitative aspect), and (c) consumers and users should be able to easily acquire the information they want (easiness).

In addition to general public information that has the above functions, arrangements should be made for individual people to be able to request and acquire necessary information, before concluding contracts for example, in order to protect consumers and users and prevent trouble.

(2) Information disclosure details

Information should be disclosed in principle about service details and procedures, service providers (organizations, their financial conditions and their management), assessments (including self-assessments, third-party assessments, accident information and claim information). Specific disclosure information may differ depending on the details and characteristics of the goods and services to be provided. For facility-based services, for example, facility-managing entities' basic financial and management information (income, spending and other business condition data, facility and equipment performance data, user numbers, number of users per employee, etc.) should be disclosed. Specific mechanisms should be considered for service receivers to request and acquire necessary information on service results (medical treatment information in medical care, examination results, etc.).

As for accident and claim information owned by administrative agencies, and claim and dispute settlement organizations expected to prevent and forestall claims

and disputes, the government, while taking into account the possibility of relevant companies being affected by the disclosure of such information, should positively publish such information if required to help prevent and forestall similar accidents and claims. Particularly, the government should consider publishing serious violations subject to punishment in principle in order to contribute to the public interest, unless protection of private information or any other rational reason exists for keeping them secret.

On the other hand, the truth of provided information may be ensured not only through market assessments and selections, but also through the development and diffusion of third-party assessments that would allow people to compare company-provided information and third-party assessment information.

(3) Information disclosure method

Basically, service providers themselves must disclose information about their services actively and positively. On the other hand, the systematic provision of information by administrative agencies, third-party assessment organizations and the like can allow consumers and users to compare and select from multiple options and should be promoted positively.

Among the major information disclosure methods, Internet homepages can be accessed by a great number of people at any time and any place and are the most effective for information diffusion, given the recent rapid development of information. For those who don't have easy access to the Internet, information providers such as local consumer centers should be opened and enhanced. Furthermore, service providers and relevant organizations must respond to individual requests for information disclosure that is unavailable on Internet homepages. They should develop request-receiving channels and procedures and provide information as required unless they have rational reasons for refusing to do so.

In addition, consumers and users should be allowed to easily and quickly establish the location of information they want. Administrative agencies should collect information on providers of each service and develop information source links.

2 Third-Party Assessment

In areas where it is difficult for consumers and users to make accurate assessment of goods and services on the basis of information disclosed by their

providers alone, experts' and other third parties' continuous assessment results should be published and offered as food for thought.

Such areas include those where the asymmetry of information between goods and services providers, and consumers and users is conspicuous. Among them are medical services, higher education and other areas where goods and services are highly specialized making it difficult for consumers and users to make appropriate decisions, and nursing care, used houses and other areas where third-party assessments are expected to help consumers make choices.

Even in areas where goods and services providers have disclosed information, third-party assessments are important for ensuring the truth of the information.

Furthermore, third-party assessments can become means for goods and services providers to improve their business management.

In reality, third-party assessments are limited and poor in Japan. Therefore, based on the following recommendations, the government should develop an environment and take measures for creating the necessary mechanisms for third-party assessment and providing information.

(1) Matters subject to assessment

Matters subject to assessment and analysis should cover the details and actual performance of goods and services, and their effects. In facility-based services and other areas where the quality of goods and services depends heavily on facilities and equipment of their providers, organizations, financial conditions, facilities and equipment of these providers should be accurately assessed.

(2) Assessment organizations

Various assessors should compete in third-party assessment to ensure the adequateness and neutrality of assessments. Administrative agencies should refrain from limiting assessment organizations. At the same time, third-party assessment organizations themselves should have market accountability. In this respect, these organizations should voluntarily specify assessment standards, assessors and rules for dealing with claims and complaints against assessments.

(3) How to handle assessment information

If assessments are to contribute to allowing consumers and users to make appropriate choices, these assessments excluding business secrets should be published in principle. From the viewpoint of comparison and selection by consumers and users,

it is important to publish third-party assessments as well as goods and services providers' assessments. Publication by assessment organizations may be conditioned on the approval of goods and services providers in most cases. If no such approval is given, it should be made known to consumers and users. This may become a step to promote information disclosure.

Publication information should include not only assessment results (acceptable or unacceptable, etc.) but also details of assessment processes (criterion-by-criterion assessment results, etc.) that would become criteria for decisions by consumers and users. Specific recommendations by assessment organizations may also be helpful for consumers and users.

If goods and services providers that have yet to undergo third-party assessment are disadvantaged, they may be expected to voluntarily undergo assessment, as discussed earlier. At a time when the importance of third-party assessment has yet to be recognized in the initial stage of the assessment system, however, goods and services providers may not necessarily be encouraged to undergo third-party assessment. In order to further encourage them to do so, administrative agencies, industry groups and the like should develop the necessary environment by increasing their awareness of the importance of third-party assessment and enlightening them about the importance.

(4) Assessment forms

In medical services and other specialized areas, peers may undertake assessment (peer review). In such cases, an appropriate assessment should be ensured through consideration given to the assessors and increased data transparency.

Assessment of the quality of services may be based on assessments by users and consumers (including students' assessments of universities and teachers, and parents' assessments of child-care centers).

3 Development of Claim and Dispute Settlement Systems

Settlements of claims and disputes through out-of-court systems are simpler, quicker and cheaper than those at court. They are also more flexible, based on agreements, taking advantage of the characteristics and independence of stakeholders, and the realities of claims and disputes. Depending on the types of claims and disputes, and settlement organizations, out-of-court systems can not only settle claims and disputes but also forestall similar claims and disputes and enhance goods and services

providers' awareness of consumer protection and compliance with the law.

Organizations for out-of-court settlements of claims and disputes have been gradually expanded in recent years. However, because they are not made known well to the public, they fail to cooperate with relevant agencies and do not have legal powers such as enforcement and interruption of prescription. Therefore, most of them have failed to be utilized or work fully. Taking this problem into account in developing claim and dispute settlement systems, the government and private sector should enhance the functions of claim and dispute settlement organizations and vitalize these organizations, based on appropriate burden-sharing.

Claim and dispute settlements for consumer services have lagged behind those for products (manufactured goods). Since future regulatory reform is designed to promote private sector entities' participation in such settlements, the government should promptly develop and expand claim and dispute settlement organizations for services.

[Specific Measures]

1 Information Disclosure Promotion, Etc.

The Council's argued about information disclosure in social regulations and the means to ensure the transparency of accounting standards and came to the conclusion described in the following. Relevant government agencies should promote specific measures in line with the following recommendations.

Of the information disclosure matters listed in "the Three-Year Regulatory Reform Promotion Plan (revised)," relevant government agencies should accelerate specific measures and conclusions in order to promote ex-post-facto administration, and should specify target years for the prompt implementation of measures subject to consecutive implementation.

As for areas other than those covered by the plan, relevant government agencies should consider the scope of information to be provided to consumers and users, the methods and other details of desirable information disclosure and develop disclosure rules in cooperation with goods and services providers and relevant organizations **[Consecutive implementation]**

(1) Accounting standards [Consideration within FY 2002 (consideration and conclusion within FY 2003 for school corporations)]

As for an accounting standards review of public-interest corporations, a

research group at the Ministry of Public Management, Home Affairs, Posts and Telecommunications compiled an interim report in FY 2001 based on substantial revisions to corporate accounting standards, and plans to work out new standards. School and medical corporations, dedicated to public interests, should promptly consider introducing new corporate accounting procedures that should contribute to their efficient management.

Corporate accounting standards, which are undergoing various revisions, are growing even more important for ensuring the transparency of companies as economic transactions and corporate activities are upgraded and as globalization is making progress. Therefore, corporate accounting standards should be continuously developed, based on international trends. <**Relevant discussions on accounting standards for school corporations in “Education and Research” 2 (1)**>

(2) Education

Schools’ self-check assessment and information provision [Measures to be taken in FY 2002]

Standards for the establishment of kindergartens, elementary schools, and junior and senior high schools now include self-check assessment and information disclosure requirements. Each school should appropriately set the subjects for assessment and information disclosure contents for positive self-check assessment and information provision. Furthermore, the government should promote school assessments with the publication of outside assessments in mind.

In this respect, the government should encourage schools to aggressively tackle self-check assessments and information provision and should prompt education boards and the like to ensure the adequateness of the subjects and methods for assessment, and methods and other contents for information provision. The government should also encourage education boards and the like to promote outside and other school assessments. <**Discussed again in “Education and Research” 2 (3)**>

Promoting information disclosure at universities [Measures to be taken within FY 2002]

While the university management environment is expected to grow more severe due to factors such as the falling birthrate, further information disclosure is required to contribute to the decision-making of students, their parents and industry.

In this respect, as for private universities, government should promptly reach a conclusion on the methods and other contents of financial information disclosure that have been under consideration since FY 2001 and should promote the disclosure. In doing this, the methods and the contents which are easy to be understood by students should be considered.

Universities in general should aggressively provide information, including not only financial but also education conditions (education policy, details of education, the number of students per teacher, etc.), research activities, graduate conditions (job placements, employment rates, etc.) through Internet homepages and other means. <Discussed again in “Education and Research” 2 (2)>

Welfare [Measures to be taken within FY 2002]

In the welfare field, service receivers are mostly aged people and babies who are in weaker positions than services providers. Service forms are diversified, and the number of service providers, in particular small firms, has been substantially increasing. Therefore, administrative and other surveillances must be implemented appropriately to ensure user protection.

As for the administrative sector’s inspections of nursing-care service providers, some local governments have initiated disclosure of relevant information in accordance with provider agreements. The sector should continue to promote this kind of information disclosure that contributes to users’ selection and the maintenance of provider discipline. As for social welfare corporations, the administrative sector should enhance information disclosure standards through the introduction of certified public accountants’ auditing as adopted for private stock companies. “The (revised) Three-Year Regulatory Reform Plan” states, “In consideration of social welfare corporations’ public utility, the government should encourage them to disclose balance sheets, business reports, written opinions of auditors and the like on the Internet.” In this respect, the government should continuously encourage more social welfare corporations to increase accounting information disclosure. <Relevant discussions in “Welfare, Etc.” 1 (5), 3>

2 Third-Party Assessment

Of the third-party assessment reform measures listed in the “the Three-Year Regulatory Reform Promotion Plan (revised),” those subject to implementation with specified deadlines should be front-loaded as much as possible in view of the

importance of third-party assessment, and measures subject to consecutive implementation should be implemented as early as possible with specified deadlines. At the same time, consideration should be given to the enhancement of third-party assessment including an expansion of the scope and matters subject to assessment.

As well as the following areas, some other areas are suitable for third-party assessment. Third-party assessment should be introduced in these areas, based on assessment methods and achievements in the following areas. **[Consecutive implementation]**

(1) Welfare

Promoting third-party assessment of child-care services [Measures to be taken within FY 2002]

- a. As for child-care centers, guidelines on third-party assessment were produced in April 2002. At present, however, only the Japan Nurse Training Council has implemented third-party assessment of accredited child-care centers. In order to develop the mechanism to further promote third-party assessment of child-care services, the government should take the following measures:
 - (a) As diverse entities implement third-party assessment, the administrative sector should launch information collection in a bid to consider revisions including the expansion of child-care centers for assessment to include non-accredited child-care facilities.
 - (b) Measures should be taken to enhance the objectivity of third-party assessments. For example, a mechanism should be developed to allow users to easily compare third-party assessments by various entities in the list of child-care centers on the “i-Childcare Net” run by the Foundation for the Future of Children (kodomomiraizaidan).
- b. Kindergarten establishment standards were revised in April 2002 to require kindergartens’ self-check assessment and positive information disclosure. In line with this, for example, local governments and relevant organizations should allow people to obtain kindergartens’ self-check assessments and other information on Internet homepages and the like.
<Discussed again in “Welfare, Etc.” 2 (7)>

Nursing Care

Since August 2002, checklists have been published for users and their families

to select providers of home nursing-care services. These checklists should be diffused to contribute to users' selection of nursing-care service providers. At the same time, the lists should be widely publicized to service providers for their better information disclosure. **[Measures to be taken within FY 2002]**

Third-party assessment was launched in FY 2002 for group homes for the senile elderly ahead of other nursing-care service providers since assessment of these homes is exceptionally important because of their users requiring special treatment. For special elderly nursing homes, charged elderly nursing homes and other nursing-care facilities, measures should be taken gradually for promoting third-party assessment. **[Consideration within FY 2003 (consecutive implementation)]** <Discussed again in "Welfare, Etc." 1 (5)>

(2) Education [Measures to be taken in FY 2002]

A system should be introduced for continuous accreditation assessment of universities by third parties. In order to achieve a highly objective accreditation assessment system reflecting social needs, assessors should include private sector researchers, foreign researchers and industry representatives. <Discussed again in "Education and Research" 2 (3)>

3 Claim and Conflict Settlement

(1) Enhancing functions

Developing legal system infrastructure

Since claim and dispute settlement organizations have not been given legal authority including enforcement power and prescription interruption, some claims and disputes that are suitable for resolutions through such organizations are brought to court. Therefore, the government should consider and take necessary measures including the enactment of a basic alternative dispute resolution (ADR) law that would give these organizations the legal power to enforce secure execution of out-of-court settlements and interrupt prescription to avoid the termination of prescription periods during the settlement process, and would enhance cooperation between claim and dispute settlement systems and court proceedings. **[Measures to be taken by the end of FY 2003 at the latest]**

In order to develop a legal infrastructure for arbitration, the government should submit necessary bills on settlement forms through arbitration, standard arbitration procedures, court proceedings for approval and execution of arbitration

decisions, and other matters, while watching international trends including deliberations at the United Nations Commission on International Trade Law, or UNCITRAL. **[Measures to be taken within FY 2002]**

Promoting information disclosure

Claim and dispute settlement organizations, which are expected to play a role in preventing and forestalling claims and disputes, should consider the prompt disclosure of settlement details contributing to preventing and forestalling claims and disputes from the viewpoint of protection of consumers and users, while taking into account the possibility of such disclosure having undue effects on the protection of personal information and on companies. Particularly, they should consider publishing claims and disputes (details including investigation results of the causes of troubles) that are directly linked to the lives and safety of the people, in a timely manner, taking into account their public value. As for serious violations subject to punishment, these organizations should consider naming violators in public from the viewpoint of contributing to the public interest, unless there is a personal information protection or any other rational reason to refuse to do so. **[Consideration from FY 2002]**

Since highly public claims and disputes (those involving the health and safety of the people, environmental destruction, etc.) have to be made known promptly to the people for the purpose for preventing the expansion of and forestalling damage, the Cabinet Office should take necessary measures to create a system to prevent any disadvantage to whistle-blowers making such claims, based on considerations at the Social Policy Council. **[Measures to be taken by FY 2003]**

**Promoting information exchange to improve dispute settlement capacity
[Consideration and measures to be taken from FY 2002]**

In settling claims and disputes, arbitrators must listen to the parties in conflict of interest, grasp their characteristics and other details, and find points of agreement to produce realistic settlements. Therefore, settlements depend heavily on the capacity of arbitrators. In order to improve the dispute settlement capacity of arbitrators at claim and dispute settlement organizations, the Office for Promotion of Justice System Reform and relevant government agencies should consider measures to allow claim and dispute settlement organizations to share information on specific claims and disputes and find multi-faceted settlement methods. At the same time, they should take necessary measures to convene

regular liaison conferences between claim and dispute settlement organizations in order to promote cooperation.

(2) Vitalization of existing organizations [Measures to be taken by FY 2003]

Local governments' grievance committees undertake conciliation and arbitration regarding claims that local government heads select among those failing to be settled at local consumer centers. But these committees deal with only a few claims. Claims that consumer centers fail to settle are mostly brought to court. Therefore, it is important for local governments to further enhance cooperation between grievance committees and local consumer centers and increase the number of claims subject to handling at such committees. In this respect, the Cabinet Office should take necessary measures including notification of the importance of this issue to local governments.

(3) Developing comprehensive information windows for accurate selection [Consideration and measures to be taken from FY 2002]

As the presence and details of claim and dispute settlement organizations have yet to be widely publicized to the general public, claimants (users) have difficulties selecting claim and dispute settlement organizations appropriately. Therefore, the Office for Promotion of Justice System Reform and relevant government agencies should consider measures to allow users to access necessary information accurately. They should also take necessary measures to help prefectural governments develop comprehensive information windows (portal sites, etc.) on claim and dispute settlements that would be available on a nationwide basis. The information windows may be a database that covers information on claim and dispute settlement organizations (organizational features, details of undertakings, past achievements, etc.) and the procedures for such settlements.

(4) Developing a code of conduct for appropriate settlements

Needless to say officials in charge of claim and dispute settlements should undertake settlements equitably. However, a code of conduct has yet to be developed in written forms for many claim and dispute settlement organizations. In principle, these claim and dispute settlement organizations should establish and publish their code of conduct regarding organizational management, dispute settlement procedures and relevant officials' acts. Based on consideration regarding legal system infrastructure development as discussed in (1) , the Office for Promotion of Justice System Reform and relevant government agencies should consider and take necessary measures

including the preparation and notification of guidelines that would allow claim and dispute settlement organizations to develop codes of conduct appropriately in line with their respective realities. **[Consideration and measures to be taken from FY 2002]**

The International Organization for Standardization, known as ISO, is now considering the development of standard guidelines for fair, effective and efficient settlements of claims and disputes. Relevant government agencies should notify standards to claim and dispute settlement organizations promptly after the standards are developed. **[Consecutive implementation in and after FY 2003 when the standards are expected to be developed]**

(5) Enhancing labor area dispute settlements <Discussed again in “Employment and Labor” 4>

Enhancing responses to individual labor-management disputes [Measures to be taken within FY 2004 at the latest]

Since a scheme is required to promptly, cheaply and appropriately solve individual labor disputes, the government should promptly consider whether to develop a labor dispute arbitration system or exclusive judicial proceedings for labor-related incidents and should take necessary measures.

Social and labor insurance consultants representing parties to individual labor disputes [Timely implementation]

As for a dispute adjustment committee’s conciliation under the Law Regarding Promotion of Settlements to Individual Labor Disputes (Law 112, 2001), a Social and Labor Insurance Consultant Law amendment (Law 116, 2002) was promulgated on November 11, 2002 to allow such consultants to represent parties to labor disputes. The government should try to smoothly implement the amendment.

4 Others

(1) Diffusion, accurate operation and positive utilization of existing systems [Consecutive implementation]

In order to create a vitalized economic society through a shift from ex-ante regulations to ex-post-facto checks under the principle of self-responsibility, the government should diffuse and take advantage of public comments (“Procedures for Presentation of Comments on Creation, Revision and Elimination of Regulations” as

decided on by the Cabinet on March 23, 1999) to expand people's engagement with desirable regulations.

In order to prevent necessary regulations from being implemented inappropriately to affect free economic activity, government agencies should continue to diffuse and appropriately implement the Administrative Procedure Law (Law 88, 1993) (including the prompt establishment of standard settlement periods and examination standards for permission and approvals with no such standards) and the no-action letter system ("Introduction of Procedures for Ex-Ante Confirmation of Law to Be Applied by Administrative Agencies" as decided on by the Cabinet on March 27, 2001).

(2) Reviewing standard authorization and qualification systems

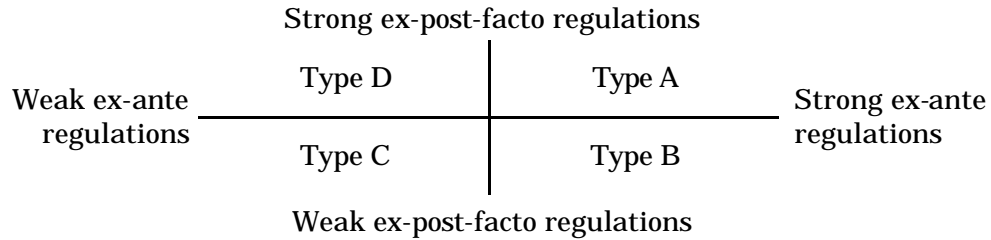
As for standard authorization, the government should continue to promote a shift to a system based on business entities' self-confirmation and voluntary security. In this respect, not only administrative agencies but also business entities should desirably provide consumers with relevant information. **[Consecutive implementation]**
<Relevant discussions in "Facilitation of Business Activities" 3>

Attached Table

Typification of Ex-Ante and Ex-post-facto Regulations

(Analysis by Prof. Yasuo Uwa of Hosei University)

Analyzing combinations of strong and weak ex-ante and ex-post-facto regulations, we can divide them into four types as follows that have advantages and disadvantages:



	Type	Advantages	Disadvantages
A	Ex-ante: strong Ex-post-facto: strong	- Thorough implementation of regulations can effectively deter prohibited acts.	- More thorough implementation can cost more. - Insufficient implementation can aggravate a feeling of inequality and affect public confidence in rules (law-abiding spirit). - Creative ingenuity of regulated parties can be affected.
B	Ex-ante: strong Ex-post-facto: weak	- Ex-ante regulations allow the code of conduct to be indicated. - Implementation costs can be held down under weak ex-post-facto regulations	- Regulations fail to be well organized. - As many people get around rules under weak ex-post-facto regulations and believe that honesty does not pay, rules are considered superficial. - If informal means (administrative guidance, etc.) are employed to prevent rules from being considered superficial, the implementation of rules loses transparency. - The presence of ex-ante regulations can affect the creative ingenuity of regulated parties.
C	Ex-ante: weak Ex-post-facto: weak	- Costs are lower. - Greater room exists for relevant people to demonstrate creative ingenuity. - Natural emergence of social rules balancing efficiency with fairness is promoted.	- Unless appropriate rules emerge, jungle rules can prevail. - Unless appropriate relief is given to victims, feelings of inequality and mistrust can grow to destabilize society. - Eventually, costs could increase for victims and society. - Administrative agencies could weaken.
D	Ex-ante: weak Ex-post-facto: strong	- Costs are saved for ex-ante regulations. - In the absence of regulations for most areas, people have greater room to demonstrate creative ingenuity. - Ex-post-facto regulations become the code of conduct.	- Ex-post-facto regulations frequently cost more. - Ex-post-facto regulations tend to be implemented less than ex-ante regulations. - If sanctions are toughened to increase the effect of punishment, it may result in a feeling of inequality and affect violator reform. - While judicial organizations are strengthened, administrative organizations may be weakened.

- The United States is usually described as a Type D society where ex-post-facto sanctions including punitive damages are well devised, while ex-ante regulations remain underdeveloped.
- Japan is a Type B society featuring strong ex-ante regulations and weak ex-post-facto checks in most areas. Judicial functions are weak, administrative punishment is easy and checks after permissions or approvals are insufficient. There is a problem of discretionary administration where Japan depends on uncertain administrative guidance for making up for shortcomings of ex-ante regulations. In addition, Japan reportedly has another problem where ex-ante regulations are discouraging people from demonstrating creative ingenuity.