



## ACCJ's Comments on Competition Policy

November 9, 2006

The American Chamber of Commerce in Japan (ACCJ)

### Competition Policy:

Fostering a sound competitive environment for companies requires a robust, transparent, fair, predictable, and accountable competition policy regime to promote competition, smooth functioning of market mechanisms, and consumer welfare. In recent years, Japan has made initial progress towards improving its competition policy enforcement regime. For example, Japan amended its Antimonopoly Act (AMA) in 2005 ("2005 Amendment Act"). The 2005 Amendment Act contains certain changes to enhance the effective implementation of competition policy by the Japan Fair Trade Commission (JFTC), including introduction of a leniency program and powers of compulsory investigations and review of the surcharge system and hearing procedures. The ACCJ in general strongly supports the amendments, but believes a number of issues require further attention.

Pursuant to the 2005 Amendment Act, a private discussion body of the Chief Cabinet Secretary called "the Antimonopoly Act Study Group" was established to examine the state of enforcement of the 2005 Amendment Act, the surcharge system, and hearing procedures. The Study Group will also take necessary measures based on the results of its examination within two years of implementation of the 2005 Amendment Act. On July 21, 2006, the advisory council released a document titled, "Points at Issue Concerning the System for Deterring Undertakings from Engaging in Violations Against the Antimonopoly Act" ("Points at Issue").

### Recommendations

Based on the review of the Antimonopoly Study Group and the Points at Issue, the ACCJ recommends the following:

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- *Ensure consistency with global best practices.* Any measures to expand the scope of criminal sanctions should be consistent with global best practices and must be accompanied by strict measures to ensure the highest levels of due process, transparency, and predictability.
- *Make better use of the AMA's core provision prohibiting private monopolization.* The JFTC relies heavily on the AMA's prohibition of the lesser offense of unfair trade practices, for which the standards for fact-finding and illegal behavior are substantially lower and less clear and has less resource intensive requirements to define the market. Competition policy should promote fair and free competition by providing an appropriate framework and environment. It should not be used to protect existing market participants.
- *Stronger use of criminal sanctions.* Stronger use of criminal sanctions would enhance the deterrent effects of Japan's competition policy laws. However, any move to change the nature of the criminal sanctions available or to step up their use would have to take into account how such sanctions would fit in with the current surcharge system. Such punishments should be strictly limited to hard-core offenses (e.g., price-fixing cartels, bid rigging, etc.), not in the area of "unfair trade practices," which has long been criticized as being too heavily relied upon by the JFTC because of its easier fact-finding standards.
- *Surcharges.* Although the level of surcharges was increased substantially under the 2005 AMA amendments, to have a deterrent effect they need to be raised closer to those in Europe and the United States. At the same time, there should be a system to reduce penalties for companies convicted of legal violations, but who have in place and make substantial efforts to implement effective corporate programs to prevent and detect violations of law.
- *Leniency system.* The Government of Japan should take measures consistent with global best practices that will further strengthen the effectiveness of the leniency program.
- *Strengthen the role of other ministries and private parties.* The Government of Japan should implement measures to facilitate the filing of complaints in court by government agencies other than the JFTC; such as the Ministry of Justice (MOJ), National Police Agency

and Ministry of Economy, Trade, and Industry (METI), as well as private parties.

- *Abolish or dramatically scale back the Premiums and Representations Law.* The ACCJ has commented extensively for more than 20 years on the detrimental impact of this law and its enforcement by the JFTC on new market entry by foreign companies. The law has been “liberalized” in small steps over the past 20 years, but the Japanese market and consumers would be far better served by either a major overhaul to modernize the law or its complete abolition as it relates to the use of premiums as a competitive tool.
- *Role of fair trade councils.* The role of fair trade councils should be reviewed to ensure they are not abused in an anticompetitive fashion.
- *Ensure Due Process.* Implement clear and transparent measures concerning Cautions and Warnings in dealing with alleged AMA violations. Parties subject to these publicly announced sanctions are not being provided with basic legal due process, including standards of proof or a neutral arbiter of law and fact to assure the target of the investigation has an opportunity to hear the charges and present its own facts and interpretations of the applicable rules; nor is there a right to legal representation or judicial review. When Cautions and Warnings are issued, the alleged acts and the names of the parties are released with severe public and market consequences.
- *Focus on “fair” trade to benefit consumers and limit the use of domestic dumping measures.* Giving the JFTC authority and responsibility for consumer welfare could help focus its competition law enforcement efforts more concretely on consumer interests that would be enhanced by improved market competition, instead of focusing on protection of vested manufacturer interests as has been true in the past under numerous actions against domestic dumping and “unfair” premiums.
- *Merger analysis and regulation.* The JFTC should make its analysis guidelines and processes for mergers more transparent and in line with global best practices. The current procedure where an asset acquisition is subject to prior notification and a waiting period before implementation - whereas a stock purchase is only subject to ex post notification - should be corrected. Since there are

significant legal and commercial risks if the JFTC were ever to find an acquisition through stock purchases to have been in violation of the AMA ex post facto, parties to a prospective stock acquisition transaction often engage in informal prior consultation with the JFTC. But since this informal consultation is not subject to any specific procedural rules or disclosures, there are no specific time frames for responses and no detailed disclosure requirements.

- *Review of the Subcontractor Law.* Conduct a thorough review of the relatively new Subcontractor Law, which has proven to be very impractical and often unnecessary in real commercial business between contractors and many substantial subcontractors.

(The above comments are extracts from the "ACCJ Business White Paper: 'Working Together, Winning Together' " which will be released at 3:30 p.m. on November 9, 2006)