

## **Chapter 2 Specific Fields**

### **1. Competition Policy**

#### **[Awareness of the Issues]**

In order to revitalize the Japanese economy and realize an affluent society, it is essential to review economic and social structures and aggressively promote fair and free market competition. To this end, it is also necessary to strengthen the enforcement of the Antimonopoly Act, which is the basic set of rules for the market economy. The Fair Trade Commission, the body which has this power, needs to ensure its neutrality and independence as well as the promptness and transparency of its investigations, while heeding the opinions of market participants and taking into account the necessity of maintaining secrets of business operators in the investigation of violations. Rules and their enforcement are inseparable and it is essential to construct a market monitoring system to make the Japanese economy and society truly competitive by reforming both. This also applies to market supervision of certain specialized fields, such as securities, telecommunications, and energy, and therefore it is essential to promote appropriate cooperation with the Fair Trade Commission in monitoring specialized markets.

In order to further introduce fair and free competition into economic activities in Japan, the government itself must set an example. With regard to government procurement, the government should carry out necessary reforms from the standpoints of shifting from the equality of results to the equality of opportunity and securing further transparency and efficiency.

Moreover, with regard to regulations, such as stock holding restrictions by holding companies and large-scale companies and restrictions of relations between parent companies and subcontractors, the government should continue to take appropriate measures in response to changes in the economic environment so that corporations of various types and sizes can engage in energetic business activities.

#### **[Specific Measures]**

- 1 Review and strengthening of Antimonopoly Act enforcement [To be implemented in FY2003]

In the field of antimonopoly policies, measures have already been taken to

strengthen the deterrence of violations, such as the introduction and strengthening of a system to impose a surcharge, which is an administrative measure. However, considering the fact that the value of legal interest of maintaining competitive order has increased, the enforcement of the Act against violations needs to be further strengthened. In such a case, the surcharge system should be revised and a system to ensure due process in administrative investigation and inspection procedures should be devised. Moreover, since the importance of materially clarifying the value of “free competition” that may be infringed upon by violation will increase in such a case, it is necessary to clarify the “heinousness” and “seriousness” of illegal acts. In addition, it is necessary to study the rights and wrongs of imposing both a surcharge and criminal penalty on a business operator who took part in a single cartel, while keeping in mind that criminal penalties have been playing an important function in deterring illegal acts.

#### **(1) Review of criminal prosecution procedures**

Under the existing laws, the Fair Trade Commission, when conducting evidence collection activities, only has the power to conduct administrative investigations through indirect enforcement aimed at an administrative order. It is not allowed to conduct investigations aimed at collecting evidence for a criminal case (Item 4, Article 46 of the Antimonopoly Act). However, since the Commission’s policy is to aggressively make accusations of grave cases, seeking criminal dispositions, it is necessary to make procedures consistent with the policy. Therefore, a study should be undertaken to include search and investigative procedures to administrative investigation procedures aimed at criminal accusations.

Also, under the current law, accusation procedures are strictly prescribed in a way not seen in other laws and ordinances, such as filing accusations to the Public Prosecutor General and reporting to the Prime Minister. A study should be undertaken to review the fairness of the provisions.

#### **(2) Review of the surcharge system**

From the standpoint of strengthening deterrence against violations of the Antimonopoly Act, the current surcharge system should be reviewed. Specifically, based on the current situation where cartels and bid-riggings remain deeply rooted, as can be seen from repeated violations of the Act by business operators, and on the level and effect of surcharges in other major countries, as well as by taking into account how the surcharge system was established in Japan, a study should be done in order to

implement an effective system with comprehensive deterrents, including a review of the nature of the current surcharge system.

In reviewing the system, securing due process and means of administrative protest should also be studied.

### **(3) Introduction of surcharge reduction/exemption program**

Along with the surcharge system review, a program should be introduced to exempt or reduce surcharges for those who personally notified the Fair Trade Commission of their involvement in violations of the Antimonopoly Act and who cooperated fully in subsequent investigations, from the standpoint of increasing the detection rate and enhancing the efficiency of law enforcement.

However, when introducing such a system, measures should be devised so as to not give too much discretionary power to the authorities from the standpoint of securing transparency and predictability, through methods such as publishing the requirements for sanction exemption and its effect in the form of clearly defined notifications or guidelines.

### **(4) Expansion of the scope of surcharge application**

From the standpoint of further strengthening deterrence against violation of the Antimonopoly Act, the scope of surcharge application should be expanded to include private monopoly and other flagrant violations of the Act in general.

### **(5) Review of trial system**

When strengthening enforcement such as above, a study should be undertaken to review the trial system from the standpoint of further ensuring independence and due process.

### **(6) Review of effective period of measures against violations**

With regard to existing elimination measures, the Commission can order measures to secure the violation elimination for one year even after the violations ceased. In order to fully cope with international cartels, a study should be undertaken to extend the effective period of measures. A study should also be conducted to extend the effective period of surcharge payment orders, which is currently set at three years.

### **(7) Review of the civil liability system and the injunction system under the Antimonopoly Act**

With regard to the injunction system under the Antimonopoly Act, after closely watching the implementation situation of the system and accumulating cases, if necessary, a study should be commenced on enhancing the civil remedy system in such ways as reviewing the range of acts under which an individual can require an injunction.

## **2 Review and strengthening of the investigation function and system of the Fair Trade Commission [Implementation in successive steps from FY2003]**

### **(1) Review and strengthening of the investigation function and system concerning violations of the Antimonopoly Act**

The number of Antimonopoly Act violations that were investigated by the Fair Trade Commission (excluding anti-dumping violations that were promptly disposed of) in FY2001 came to 124. Of them, only 38 cases (about 30%) resulted in legal action, including recommendations. Since most of the recommendations involved bid riggings (including price cartels) and there are few recommendations in the fields of communication and energy, in which the Commission is expected to play a big role, some point out that the Commission's handling of unfair trade practices and private monopoly is not sufficient. Therefore, it is necessary to study measures to enhance information gathering capability, including collecting information directly from the private sector on cases that need to be investigated, and to focus on such cases.

As for the length of investigations, the average investigation period of a legal case in FY2001 (the time from on-the-spot investigation to legal action (excluding holidays)) was 286 days (about nine and a half months). Since this is quite a long period, given the speed of changes in the Japanese economy and society and in the competitive environment of individual markets, the Commission should strive to shorten the length of time it requires for investigation.

Moreover, of the 770 violations reported in FY2001, only 87 cases (about 10%) were investigated and disposed of. With regard to procedures for accepting reports or discontinuing investigations, some people point out that the Commission does not offer sufficient explanation as to how it treated the cases. There is criticism from industrial circles and other sectors leveled at the lack of transparency as well as the length of investigations.

In order to realize a sound, competitive society in Japan, it is extremely important for the Commission to perform its function as the central organization in competition policy, or as the "market watchdog." However, the number of personnel at the Commission is 607 and only half of them, or 294 people, are assigned to the

investigation division. The number of lawyers and other outside personnel is only 25.

Judging from the current situation, it is difficult for the Commission to cover all industries and transactions, expose violations of the Antimonopoly Act, and promptly dispose of them. Therefore, it is necessary to drastically increase staff numbers at the Commission and to promptly and radically beef up the Commission's investigation function by taking far more various steps than before.

#### Positive acceptance of outside personnel

In light of the Fair Trade Commission's investigation performance as described above, especially in fields where the Commission is expected to play a major role, the Commission should enhance the contents of its training programs and positively study accepting outside personnel in order to beef up its investigation division. For example, the Commission should study accepting private sector experts, such as lawyers and economists, and loaning officials from other ministries and agencies and utilize their expertise not only in the investigation division but also in non-law enforcement divisions. In addition, the Commission should further promote personnel interchanges with the outside parties in order to increase the expertise of officials engaged in investigation.

#### Increasing personnel of investigation division

In order to further reinforce the investigation division, it is necessary to make focused distribution of personnel to the investigation division promptly and systematically. In particular, in order to cope with large violation cases and an increase in the number of appeal cases, it is necessary to drastically increase personnel numbers in the investigation division from the standpoint of beefing up supervision of violations and promptly disposing of violation cases. To this end, the Commission should promptly study specific measures for the enhancement and focused distribution of personnel as well as accepting outside personnel. The function and setup of the investigation division should also be studied in order to speed up investigations and enhance investigation performance.

#### Setting and publishing new goal and implementing objective evaluation for speedier investigation

Given the speed of changes taking place in the economy and industry, the Fair Trade Commission's average investigation length (286 days) in FY2001 is long.

Therefore, the Commission should enhance its expertise by increasing

personnel numbers and utilizing task forces and strive to dispose of violation cases promptly and effectively by setting and publishing publicly acceptable goals for standard investigation periods mainly on new entry cases in public utility fields, such as communications and energy, while keeping in mind its difference in nature from dispute settlement organizations in various business fields. In such cases, however, it is necessary to make clear that such a period is just a goal and that even if the investigation exceeds the period, it does not mean that the person involved is immune to possible administrative measures.

In order to dramatically enhance the investigation performance of the Commission through prompt and effective disposal of violations, the Commission should set and publish goals concerning investigations and strive to carry out objective evaluations on the basis of policy evaluations to be implemented on a regular basis.

When doing so, the Commission should strive to evaluate from qualitative and quantitative aspects as to how the investigation results actually led to the promotion of new market entry and competition, especially in the field of public service industries, such as communications and energy.

#### Improvement in the handling of warnings

Warnings and notices issued by the Fair Trade Commission on possible violations of the Antimonopoly Act (41 cases in FY2001) are a unilateral notification from the administration and business operators cannot legally contest them. These measures are approved as being necessary to a certain degree in order to remove competition-restricting acts promptly. While, in principle, dealing with possible violations of the Act by legal measures, such as recommendations, the Commission should minimize the use of warnings and notices that are virtual administrative guidances or reminders and strive to improve them if possible.

#### Publication of investigation discontinuation outline

Some point out that the Fair Trade Commission often does not fully explain the reasons for investigation discontinuation (8 cases in FY2001) to declarers. Therefore, when those involved want publication, the Commission should publish a general outline of the discontinued case from the standpoint of fulfilling accountability.

## **(2) Review and strengthening of investigation functions and systems concerning business combination**

Positive acceptance of outside personnel and review and strengthening of the

internal setup

In FY2001, there were 1,254 notifications of business combination cases and the Fair Trade Commission investigated them with only 22 staff. Many people have pointed out that the investigations are inadequate and the investigation period is too long. Therefore, in order to enhance its investigative capability and expertise, the Fair Trade Commission should increase the number of investigators and accept experts from the private sector and ban officials from other ministries and agencies and positively utilize their expertise not only in the investigation division but also in non-law enforcement divisions. In addition, the Commission should strengthen its function and setup by distributing personnel to the business combination investigation division.

Setting and publishing goals to speed up investigation

Since it is pointed out that many of the cases of business combination require lengthy investigations, the Fair Trade Commission should set publicly acceptable goals for a standard investigation period and publish them.

In order to enhance the efficiency of business combination investigations, the Fair Trade Commission should further prioritize investigations and, from the standpoint of enhancing predictability in the market, improve publication of investigation cases. The Commission should also study formulating and publishing clear standards for prioritization under the present guidelines on the basis of previous cases.

Enhancing transparency concerning cases of business combination

In order to enhance investigative transparency, the contents of publication with regard to mergers approved and not approved should be increased as much as possible, including the reasons for approval or disapproval but excluding sections concerning the secrets of business operators.

In making publication, from the standpoint of enhancing predictability, the Commission should reveal what market (business area) it defined based on what standard (goods and services traded, geographical scope). It should also reveal the contents of investigation results, standards upon which the Commission based its judgment, such as market share, ranking, and competitive position (the number and concentration ratio of competitors in the market), and the standards on which the Commission based its evaluation of the impact of each merger on market competition. With regard to cases which the Commission approved based on problem-solution

measures presented by the companies in question, the Commission should reveal how it evaluated the problem-solution measures.

#### Making prior consultation clear and transparent

The fact that the Fair Trade Commission accepts prior consultation before accepting formal applications contributes to the enhancement of convenience for corporations. At the same time, however, some point out that the process is uncertain and sometimes unfair and that, due to a decline in predictability on the part of corporations, the number of prior consultations has increased. In order to cope with this, the Commission should make the system of prior consultation clear and transparent.

Specifically, the Commission should clearly what kind of cases are to be published, specify and publish a list of materials to be submitted to the Commission and state the investigation period.

### **3 Strengthening Enforcement in Specialized Fields**

#### **(1) Strengthening market monitoring functions in the field of securities transactions [To be studied and concluded by the end of FY 2003]**

For the revival and development of the Japanese economy, it is a pressing issue to establish a financial system centering on market functions. It is also important to broaden the scope of market participants, including general investors. As things stand now, however, it cannot be said that the securities market has won the trust of the people. Moreover, the rules in the field of financial and securities transactions are shifting from advanced-type to ex-post-facto-type rules and legal interest in ex-post-facto rules has been increasing. Therefore, in order to build general investors' confidence in the market, it is at the very least necessary to further improve rules and penalize those who violate rules. In view of increasing legal interest, it is also necessary to reinforce penalties. Based on these points and from the standpoint of strengthening the monitoring of securities markets, it is necessary to strengthen and expand enforcement means, take a double-track approach, and review punitive provisions. In order to further ensure soundness and fairness in the capital market, it is necessary to secure sufficient personnel numbers and a budget sufficient for market supervision and control. As for administrative penalties and stipulation of regulations necessary for supervision and control of the capital market concerning unfair trading and disclosure, it is vital that the Securities and Exchange Surveillance Commission, which is closer to the market, play more important roles. In relation to this, a study should be undertaken

and a conclusion reached with regard to an ideal system to supervise and control markets, including the necessity of enhancing the commission's independence.

#### Study concerning systems to impose civil/administrative punitive burdens

In order to cope with illegal acts committed in the sufficiently flexible market, a study should be undertaken concerning the introduction of a system to impose civil and administrative punitive burdens as an administrative sanction on violations of the securities transaction law, such as unfair trading and disclosure of false matters, by using examples from civil fines and surcharge systems under the antitrust laws of the United States, the United Kingdom and other countries, after examining the effectiveness of enforcement means of criminal penalties that require strict constituent elements and of administrative penalties that mainly cover market intermediaries. In such cases, a study should also be done on ensuring due process of law.

From the standpoint of promptly protecting investors, such as early prevention of damage expansion caused by fraudulent acts under the securities transaction law, a study should be undertaken concerning utilizing injunction and correction orders issued by courts against violators based on a petition filed by the administration. A study should also be done on similar injunction/correction orders in the U.S. after examining in detail the actual state of their enforcement in the U.S. and the U.K., the difference in legal systems between Japan and the U.S., and the actual situation of illegal acts in Japan.

#### Review of act restrictions imposed on securities companies

As for act restrictions imposed on securities companies, whether they are sufficiently effective as violation deterrents should be examined, and if necessary, appropriate measures should be taken.

#### Strengthening punishment on concealment of books and records and false entry

Although statutory books have no bearing on customers' investment judgment, it is pointed out that making a false entry is equal in its "heinousness" and "seriousness" to making a false entry in financial statements. Therefore, necessary studies should be commenced on the effectiveness of the deterrent of existing laws while paying attention to consistency with treatment of statutory books under other laws and with other punishment under the securities transaction law.

#### Review of civil liability provisions

Since civil liability provisions concerning violations of disclosure regulations have not been fully utilized, a study should be undertaken on reviewing provisions from the standpoint of enhancing their effectiveness while paying attention to the current status of the employment of the disclosure system. As for unfair trading, there are no provisions on civil liability except for provisions on market manipulation and on refunding short swing profits. Therefore, from the standpoint of ensuring enforcement of rules in this field, the advisability of introducing specific provisions on civil liability should be studied while paying attention to how such provisions should be related to civil remedy and how we should deal with the fact that acts other than market manipulation are not necessarily premised on acts on the market.

#### Review of the definition of securities

Securities that come under the Securities and Exchange Law are enumerated. From the standpoint of protecting investors, a study should be undertaken on establishing comprehensive definition regulations, including the problem of the precision of such definition regulations and the problem of whether such definition regulations can confine products only to those that are in line with the contents of restrictions of the Securities and Exchange Law.

### **(2) Strengthening enforcement in various business fields [Implementation in successive steps from FY2002]**

#### Strengthening enforcement in the telecommunications field

In the telecommunications field, dispute settlements are promptly dealt with thanks to the establishment of the Telecommunications Business Dispute Settlement Commission in FY2001. In order to further earn market participants' trust, efforts should be made to review competition rules in response to changes in the market environment and strengthen the enforcement of information collection, supervision, dispute settlement, and sanctions.

#### Strengthening enforcement in the energy field

In the fields of telecommunication business and gas business, various disputes are expected to break out as the opening of markets prompted competition. Therefore, efforts should be made to establish an organization for promptly resolving disputes with more independence, neutrality and transparency and to enhance market supervision functions from the standpoint of strengthening the enforcement of competition

promotion rules.

Promotion of cooperation between the Fair Trade Commission and other competent authorities

From the standpoint of promoting competition in the public utilities field, such as telecommunications and energy, the Fair Trade Commission and other competent authorities should cooperate to establish specific measures for further collaboration in order to further strengthen enforcement. In other words, in order to prevent duplicated enforcement from causing confusion in the market, the Commission and other competent authorities should clarify their specific application relationship, review them flexibly, and take necessary measures to facilitate their communication and information provisions.

#### **4 Other Matters to Revitalize Business Activities of Corporations**

##### **(1) Followup and review of general concentration regulation [To be implemented in FY2004]**

As for general concentration regulations, they were drastically improved in the law revision taken in FY2002 amid the rapidly changing environment surrounding corporations. The Commission should conduct follow-up studies on the situation of enforcement, based on changes in actual economic situations. Some point out that it is appropriate to abolish the regulations in question in the future and that sufficient care should be taken so that competition will not be hampered by excessive concentration of economic power. Therefore, the Commission should evaluate and review the regulations, keeping such opinions in mind.

##### **(2) Revision of the Premiums and Representations Law [Bill to be submitted in the next ordinary session of the Diet]**

When promoting regulatory reform and the transition to ex-post-facto monitoring-types of supervisory administration, it is essential to secure an environment where consumers can make correct product selection. For this reason, it is necessary to strengthen the enforcement of representation rules of the Law for Preventing Unjustifiable Extra or Unexpected Benefit and Misleading Representation (Premiums and Representations Law) (Law 134, 1962). Therefore, the enforcement and deterrence of rules should be strengthened and the types of representations that come under the regulation of the law should be reviewed in order to effectively control representations of effects and property

of goods or services without reasonable grounds.

**(3) Revision of the Subcontract Act [Bill to be submitted in the next ordinary session of the Diet. Other measures to be taken in FY2003]**

The current Law Against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Subcontract Law) (Law 120, 1956) covers only manufacturing commission and repair commission for articles and subcontracting transactions that come under this law have been conducted in an equitable manner. Due to environmental changes of the economy toward software, IT or other high-tech industries and service industries, the need for establishing an effective framework for equitable transaction with regard to the consignment trade of services has been increasing. Therefore, a study should be undertaken on expanding the scope of the Subcontract Law to cover certain types of consignment trade of services and to establish a cooperative setup among the ministries and agencies concerned to develop and expand the law enforcement system.

With regard to the consignment trade of services, the kind of transactions and acts that cannot be controlled by the Subcontract Law must be strictly dealt with by the Antimonopoly Act. To this end, a study should be undertaken on revising the guidelines of the Antimonopoly Act concerning service trade.

**(4) Development of a cross-industry regulatory system for franchise systems**

**Developing environments concerning service franchises, such as expansion of scope of the information disclosure system to service fields [To be implemented early in FY2003]**

Franchise systems are systems that greatly contribute to the creation of new industries in the fields of retail, the food service industry and the service industry. In recent years, franchise systems have been spreading to a wide range of industries including not only the retail business but also the service industry. With a rise in the volume of franchise industries in fields other than retail, conglomerate associations in the fields of distribution and service have been increasing rapidly.

However, since the Law on the Promotion of Small and Medium Retail Business has as its purpose the promotion of small and medium sized retail business, disclosures and explanatory obligations at the time of contracting stipulated by the law do not apply to industries other than retail .

In order to develop business environments for service franchises, a fact-finding investigation was recently implemented on franchise headquarters (franchisers) and

participants (franchisees). In order to bring about the healthy development of small and medium companies and venture companies through the promotion and dissemination of franchise chain systems, the government should also undertake study on appropriate franchise systems including franchise contracting disclosures with regard to service business franchises other than retail business franchises and reach a conclusion at an early date.

## **5 Review of Government Procurement Systems**

### **(1) Ensuring transparency of “Contract Target with Small and Medium-sized Enterprises” based on the Public Order Law [To be implemented in FY2003]**

Based on the Law concerning Ensuring Public Order Receiving Opportunity for Small and Medium-sized Enterprises (Public Order Law), the government decides “a policy on contracts with SMEs” at a cabinet meeting each year in order to implement various measures for small and medium-sized enterprises. From the standpoint of ensuring transparency of the “Contract Target with Small and Medium-sized Enterprises,” when the government posts the contents of the cabinet decision on its homepage, it should seek opinions in order to use them when preparing the contract policy for the next fiscal year. The government should also publish procedures leading up to the cabinet decision, the “estimated contract amounts” and the “number of contracts concluded in the preceding year” by each ministry and agency, and their ratios to total public orders.

### **(2) Promotion of diversified bidding/contracting methods [Implementation in successive steps from FY2003]**

#### **Further promotion of VE (Value Engineering) method**

The Ministry of Land, Infrastructure and Transport, with the aim of reducing construction costs by aggressively utilizing private technology, has introduced a Bidding-time VE method and an After-contract VE method on a trial basis as methods for accepting technological proposals for engineering works directly under its control. The ministry has expanded the scope of proposal and now allows alternation of objects of engineering works. The ministry as well as other central government organizations and local public agencies should strive to further expand the use of this method by expanding the trial and introducing the method in earnest.

#### **Promotion of Overall Evaluation Bid-awarding method**

From the standpoint of ensuring the quality of those public works that attach

importance to factors other than price, such as maintaining the environmental protection, securing transportation, and special safety measures, central and local government organizations should positively promote placing orders under the Overall Evaluation Bid-awarding method that takes performance as well as price into account.

**(3) Promotion of appropriate local requirements [To be continuously studied in and after FY2002]**

As for the requirement of business location in relation to bidding qualifications for participation set by the head of local public agencies, specific measures should be studied so that such requirements would not lead to excessively reducing competition, along with a study on the ideal way of ensuring public order-receiving opportunity for small and medium-sized enterprises.

**(4) Further strengthening measures for suspending the designation for tenders [To be studied in FY2003]**

From the standpoint of strengthening deterrence against illegal acts and eliminating unsuitable contractors from public contracts, with regard to designation suspension for tenders against people who committed dishonest acts that are listed in the memorandum on measures for designation suspension for tenders for public construction contracts, such as offering bribes, violation of the Antimonopoly Act, and criminal bid rigging, a study should be undertaken on strengthening the measure, such as extending the suspension period, while paying attention to ensuring concrete employment of the measures and the due process of law.

**(5) Thorough compliance with Proper Tendering and Contracting Promotion Act [To be implemented in successive steps from FY2002]**

With regard to matters (such as the announcement of criteria for designated competitive bidding, and notification of bid rigging to the Fair Trade Commission) whose announcement or notification is mandatory under the Act for Promoting Proper Tendering and Contracting for Public Works (Proper Tendering and Contracting Promotion Act) (Law 127, 2000)), efforts for the promotion of proper implementation of the law should be continued so that it will be implemented completely by all local public entities at an early date.