



# DEPARTMENT OF JUSTICE

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## ANTITRUST DETERRENCE IN THE UNITED STATES AND JAPAN

Remarks by

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In recent years, there has been a remarkable convergence of thinking internationally on the evils of price-fixing, bid rigging and market allocation agreements among competitors and on the need to eliminate and deter such hard core cartels. We need look no further than the 1998 OECD Council Recommendation Concerning Hard Core Cartels<sup>1</sup> for confirmation of this fact. The OECD concluded that hard core cartels “are the most egregious violations of competition law” and went on to urge member countries to “ensure that their competition laws effectively halt and deter hard core cartels” particularly through “sanctions of a kind and at a level adequate to deter both firms and individuals from participating in such cartels.”

Both the United States and Japan, of course, are members of the OECD Council and were strong proponents of the 1998 Recommendation. The antitrust laws of both countries share a number of common characteristics with respect to the treatment of hard core cartel activities, subjecting participating enterprises to the possibility of criminal prosecution and high monetary fines and subjecting responsible individuals to the possibility of criminal fines and incarceration. Both systems also permit private damage suits against cartel participants (although only the United States provides for treble damages awards.) These similarities should not be at all surprising given that the Antimonopoly Act (“AMA”) was modeled on U.S. antitrust laws and drafted during the days of the allied occupation of Japan.

While the Sherman Act and Antimonopoly Act have many similarities, for many years the enforcement policies of the U.S. Department of Justice and the Japan Fair Trade Commission (“JFTC”) with respect to cartels were very different, with the JFTC only infrequently taking

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<sup>1</sup> Recommendation of the Council Concerning Effective Action against Hard Core Cartels, OECD Document No. C(98)35/Final.

formal action against hard core restraints. However, over the past decade, the enforcement policies of the two agencies in the area of cartels have been converging, and it is now fair to say that both the Antitrust Division and the JFTC give high priority to the investigation and elimination of cartel practices and are among the most active enforcement agencies globally in this area.

Nonetheless, from the perspective of deterrence of hard-core anticompetitive conduct, the two systems have fundamentally different approaches, with the United States stressing punishment and deterrence and Japan focused more on the elimination of the illegal conduct once it is uncovered, rather than on the elimination of the economic incentives for engaging in those activities.

#### U.S. Approach to Deterrence

One of the most notable characteristics of U.S. antitrust enforcement policy has been the emphasis on rooting out and prosecuting hard-core anticompetitive behavior, specifically price-fixing, bid rigging and horizontal market allocation agreements. In recent years, the Antitrust Division has been particularly successful in uncovering and prosecuting world-wide cartels involving a broad range of consumer and industrial products, including vitamins, animal feed additives, graphite electrodes, marine construction services and facsimile paper.

The Antitrust Division's core enforcement policy goal with respect to hard-core horizontal restraints has been the deterrence of these pernicious activities through active enforcement and heavy penalties on offenders. As a consequence, the Antitrust Division has sought to maximize their deterrence by adopting a policy of criminal prosecution of hard-core restraints of trade,

devoting significant resources to the investigation and prosecution of those activities, prosecuting individual participants as well as corporate offenders, and seeking heavy fines on corporate offenders and actual jail time on individuals acting on their behalf. More recently, with the success in uncovering international cartels aimed at the U.S. market, the Division has increasingly sought to enlist the assistance and active enforcement of foreign antitrust authorities against the participants of these cartels.

The law and economics field has contributed significantly to our understanding of the economic incentives and social harm of price-fixing and other horizontal restraints, and to our understanding of how best to deter these crimes.<sup>2</sup> Starting from the proposition that most corporate crimes are motivated by the desire for pecuniary gain, it is an easy step to conclude that to deter those crimes effectively, the expected penalty must at least equal, if not exceed, the expected gain. The expected penalty is best thought of as a function of the criminal fines and other economic costs imposed on the company, if caught, and the probability that the conspiracy will be uncovered and the participants successfully prosecuted.<sup>3</sup> Since cartels are essentially covert conspiracies, their detection and prosecution will always be difficult, and so the probability of getting caught will not be very high. It is apparent, based on this way of thinking about deterrence, that simply taking away the illegal profits will not suffice to deter antitrust violations by corporate conspirators, since a firm, even if caught, would be no worse off than before it

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<sup>2</sup> See, for example, R. Posner, *Economic Analysis of Law*, 2d ed., Little, Brown and Company, Boston (1977); G.S. Becker, "Crime and Punishment: An Economic Analysis," 76 *Journal of Political Economy* 169 (1968).

<sup>3</sup> R. Posner, *supra*. note 2 at 164.

started, while if it were able to avoid detection, it could profit handsomely. Instead, penalties must be significantly greater than the expected rewards of cartel participation.

Congressional recognition of the need to take away the pecuniary incentives of corporations to engage in cartel activities was reflected in the 1974 amendments to the Sherman Act.<sup>4</sup> Those amendments created for the first time a two-tier fine structure for antitrust crimes — maximum fines against individuals were set at \$100,000, while maximum fines for organizations were set 10-times higher at \$1 million.

However, it was the issuance of the Sentencing Guidelines in 1987, with subsequent amendments in 1989 and 1991, that marked the true coming-of-age of an economically-based deterrence approach to antitrust crimes in the United States. The Sentencing Guidelines include a special section on antitrust offenses, setting out appropriate ranges for organizational fines, as well as levels of fines and prison sentences for convicted individuals. In drafting this section, the Sentencing Commission relied on estimates that the average gain from price-fixing is 10% of the selling price.<sup>5</sup> Since the Sentencing Commission believed that the loss to society caused by price-fixing and other hard-core antitrust violations is larger than the excess profits gained by the participating organizations, 20% of the volume of commerce is usually used as the base fine level

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<sup>4</sup> Antitrust Procedures and Penalties Act of 1974 §3, Pub. L No. 93-528, 88 Stat. 1706.

<sup>5</sup> Federal Sentencing Guidelines Manual (1999 Edition), § 2R1.1, Application Note 3 at 231. This figure likely had its origin in information compiled from the series of road building bid rigging cases brought by the Antitrust Division in the 1980s that suggested that the conspiracies increased price by at least 10%. See G. Werden and M. Simon, “Why Price Fixers Should Go to Prison,” *The Antitrust Bulletin*, Winter 1987 at 917, 925, note 24. See also L. Froeb, R. Koyak & G. Werden, “What Is the Effect of Bid-Rigging on Prices?”, 42 *Economics Letters* 419 (1993).

for convicted organizations under the Guidelines.<sup>6</sup> Depending on the culpability factors for the organization and other circumstances, the Guidelines allow for a fine of up to 80% of the volume of commerce in antitrust cases;<sup>7</sup> In other words, criminal fines can be up to 8 times the assumed illegal profit of 10%. Unique to the Antitrust Offenses section, the Sentencing Guidelines set out a minimum fine for antitrust offenses equal to 15% of the volume of commerce.<sup>8</sup> This provision reflects the Sentencing Commission's desire to ensure an effective deterrent to antitrust offenses.<sup>9</sup>

The Sentencing Guidelines also address a particular problem that arises in bid rigging cases -- how to deal with complementary bidders, that is, conspirators who agree not to bid or to bid unreasonably high so that another conspirator will win the contract. The Guidelines recognize that the volume of commerce attributable to complementary bidders is zero and thus the normal fine range might understate the seriousness of the violation. To remedy this situation, the Guidelines provide that the volume of commerce to be used to set the fine for complementary bidders should be the greater of the volume of commerce of the firm in the products affected by the violation or the value of the largest contract on which the firm submitted a complementary bid.<sup>10</sup> This approach ensures that complementary bidders will be subject to substantial fines and

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<sup>6</sup> Id.

<sup>7</sup> §8C2.6 of the Federal Sentencing Guidelines allows for a base fine multiplier of up to 4.00.

<sup>8</sup> Federal Sentencing Guidelines Manual (1999 ed.), § 2R1.1(d)(2).

<sup>9</sup> See, Federal Sentencing Guidelines Manual (1999 ed.), § 2R1.1, Background at 233.

<sup>10</sup> Federal Sentencing Guidelines Manual (1999 ed.), § 2R1.1(d)(3).

therefore hopefully will be deterred from engaging in these activities.

The Guidelines' sentencing range is, of course, subject to the Sherman Act's statutory maximum fine, which in 1987 was \$1 million for organizations.<sup>11</sup> Since, the \$1 million maximum was inconsistent with the Sentencing Guidelines emphasis on eliminating the economic incentives of antitrust crimes, Congress, in 1990 increased the maximum organization fine to \$10 million.<sup>12</sup> Although the alternative fine statute<sup>13</sup> did allow for an alternative maximum fine of twice the gain to the offender or twice the loss to the victims, an alternative that could have exceeded the \$1 million cap, this provision was, up to that time, rarely, if ever, used for antitrust corporate sentencing because of the difficulty of proving the gain or loss.

The Sentencing Guidelines, in combination with the \$10 million maximum fine and, in more recent years, in combination with the alternative fine statute, have proven to be very effective in allowing for the imposition of very high fines on corporate cartel offenders. Between 1995-1999, the Antitrust Division succeeded in obtaining fines of \$10 million or greater against

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<sup>11</sup> See note 4, *supra*..

<sup>12</sup> Antitrust Amendments Act of 1990 §4, Pub. L. No. 101-588, 104 Stat. 2879.

Congress could not have been clearer about their intent in increasing the maximum fine:

“The committee believes that increasing the maximum fines for criminal violations of section 1 is necessary and appropriate to deter the most flagrant and abusive forms of antitrust crimes....Particularly with respect to corporate offenders, fine levels are simply too low to deter effectively antitrust conspiracies and courts have been reluctant to impose maximum fines even for willful violations.”

Senate Report to the Antitrust Amendments Act of 1990, Senate Report No. 101-287, 1990 U.S. Code Congress. and Admin. News at 4111.

<sup>13</sup> 18 U.S.C. §3571(d).

27 companies. In the last three years, criminal fine levels have hit new heights, including a \$500 million fine against F. Hoffmann-La Roche, Ltd., a Swiss company, for its participation in the nine year international vitamin cartel. Notwithstanding the marked success of the Antitrust Division's anticartel efforts, in 1997 the Division proposed that the maximum organizational fine under the Sherman Act be increased to \$100 million.<sup>14</sup> This proposal was suggested in order to strengthen even further deterrence against cartels by allowing the imposition of large fines called for by the Sentencing Guidelines without having to undertake the difficult task of proving the gain or loss under the alternative fine statute,

U.S. efforts at antitrust deterrence do not stop with the imposition of large fines on corporate offenders. An integral part of antitrust enforcement policy is the prosecution of culpable individuals as well as their firms. Ultimately, it is individuals that commit antitrust crimes, and it is felt that those responsible for a firm's participation in hard core anticompetitive behavior must be held personally accountable if this behavior is to be prevented. During the 1990s, the Antitrust Division successfully prosecuted an average of more than 35 individuals each year. The Sentencing Commission clearly believed that "the most effective method to deter individual's from committing [antitrust] crime is through imposing short prison sentences coupled with large fines."<sup>15</sup> During 1990-1999, the average fine on convicted individuals was almost

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<sup>14</sup> See, Statement of Assistant Attorney General Joel I. Klein before the House Committee on the Judiciary, November 5, 1997.

<sup>15</sup> Federal Sentencing Guidelines Manual (1999 ed.), § 2R1.1, Background.



\$90,000.<sup>16</sup> At the same time, 132 individuals were sentenced to actual prison terms averaging almost 9 months, and 154 persons were sentenced to confinement in a halfway house or community treatment center averaging 4 months.

In addition to focusing on strengthening the penalties for convicted antitrust offenders, the Department of Justice has also taken measures to improve the other key factor in the deterrence equation -- increasing the likelihood of detection. The most noteworthy measure was the revision of the Antitrust Division's Corporate Leniency Program in August 1993. That program promises amnesty from prosecution for a company and its employees where the company is the first to provide the Division with evidence of cartel activities and meets certain other conditions. The revised Corporate Leniency Program has been particularly successful in attracting applicants into the program and has had a major impact on the Division's ability to uncover and prosecute domestic and international cartels.

As a final point on U.S. approaches to antitrust deterrence, it is worth noting that, in addition to the substantial criminal penalties faced by corporate offenders, these firms also face the prospect of being subject to private antitrust litigation, with its treble damages remedies. Such lawsuits are likely after a successful criminal prosecution, since a criminal conviction acts as *prima facie* evidence that the defendant violated the antitrust laws in any subsequent civil litigation.<sup>17</sup>

With all of these formidable costs of being caught, one would think that hard core antitrust

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<sup>16</sup> Excluding 1999, a year in which individual fines were unusually high because of some very large cases, the average fine over the 1990-1998 period was about \$59,000.

<sup>17</sup> Clayton Act §5(a), 15 U.S.C. §16(a).

crimes would be completely deterred and would have disappeared by now. In truth, the Antitrust Division is beginning to see the fruits of its deterrence policies in the increased participation of companies in its Corporate Leniency Program. Firms are now voluntarily dropping out of cartels and running to the Justice Department to report illegal conspiracies and to cooperate in the prosecution of the very conspiracies in which they had participated in order to be admitted into the Leniency Program and avoid prosecution. In the last few years, the Antitrust Division has been receiving approximately one application per month for acceptance into the Leniency Program. If this doesn't constitute actual deterrence, then I'm not sure what does!

### Japan's Approach to Deterrence

Let's now turn to the Japanese antimonopoly system and Japan's approach to deterrence. As mentioned earlier, the AMA provides a full range of sanctions against cartel participants -- heavy administrative surcharges as well as criminal fines against firms, imprisonment and criminal fines against individuals and private damage remedies. And yet, Japan's system cannot really be said to be effectively focused on deterrence.

#### A. Surcharge system

The primary mechanism for imposing sanctions under the AMA is the surcharge system. Enterprises found to have engaged in hard-core restraints of trade that relate to, or affect prices, are automatically subject to the imposition of a non-discretionary administrative fine -- called a surcharge. Surcharges are not imposed on individuals. The surcharge is equal to a statutorily-fixed percentage (1%-6%) of the firm's sales involved in the cartel, with the rate varying depending on the sector and on whether the firm is considered to be a small or medium-sized

enterprise (SME).<sup>18</sup>

The surcharge system is a relatively recent addition to Japan's AMA, having been introduced in 1977. As originally introduced, the surcharge rates varied from 0.5% to 2% depending on the sector. It is important to understand that surcharges were never intended to be punitive. Since only criminal sanctions can be punitive under Japan's legal system, surcharges must have a different, non-punitive role, if they are to withstand challenge in the courts. Instead, surcharges are considered to be administrative measures aimed at requiring simple disgorgement of illegal overcharges, without any punitive component.

The surcharge levels were originally set based on the long-term average profit rates in each sector. The surcharge rates were derived by dividing these profit rates in half, on the assumption that only half of long-term profits came from illegal cartel activities.<sup>19</sup> This was a somewhat odd approach for deciding on the appropriate surcharge rates, since it seemed to assume that all industries were already cartelized!

Since 1978, the JFTC, as required by the AMA, has imposed surcharges on the participants of every price-related cartel that it has determined to violate the AMA -- a total of 4,753 companies in 242 cases through FY1999. However, the maximum surcharge rate of 2% did not seem nearly adequate to have a deterrent effect on cartel activities in Japan, or even to effect anywhere near complete disgorgement. As mentioned earlier, experience with price-fixing

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<sup>18</sup> All retailers are subject to a rate of 1%; wholesalers to a rate of 2% (1% for SMEs) and manufacturers and all others to a rate of 6% (3% for SMEs).

<sup>19</sup> H. Iyori and A. Uesugi, *The Antimonopoly Laws and Policies of Japan*, Federal Legal Publications, Inc. New York (1994) at 258.

and bid rigging conspiracies in the United States has led to estimates that the average overcharge from cartels is at least 10%.<sup>20</sup> On the other hand, in two very large price-fixing cases in 1991 involving cement manufacturers, the 2% surcharge did result in the imposition of surcharges totaling 11.2 billion yen (\$ 83.3 million at 1991 exchange rates) on 17 companies, including a surcharge of 2.4 billion yen (\$17.8 million) on Nippon Cement Co, a record surcharge for a single-company even to this day.<sup>21</sup>

In 1991, at least partially in response to calls by the United States Government in the Structural Impediments Initiative discussions for Japan to increase the deterrent effect of the surcharge system, Japan increased the maximum surcharge level to 6% for manufacturers and other non-wholesalers or retailers, and doubled the rate for wholesalers and retailers to 1% and 2%, respectively.

However, there were two significant limitations added to the surcharge system as part of the 1991 amendments. First, surcharge orders were restricted to the last three years of a company's sales affected by the conspiracy, regardless of the actual duration of the cartel. At least one study has estimated the average life span of price-fixing cartels in the United States to be

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<sup>20</sup> See note 5, *supra*.

<sup>21</sup> In fact, in December 1999, the JFTC issued surcharge orders totaling 11.06 billion yen (about \$110 million) against the three companies participating in a bid rigging conspiracy involving ductile iron pipe, including a surcharge of 7.07 billion yen (about \$70 million) against Kubota Corp. and a surcharge of 2.93 billion yen (about \$29 million) against Kurimoto Tekkojo Ltd. However, the companies have not agreed to the surcharge orders and the matter is now before the JFTC hearing examiners. See, Surcharge Payment Order Concerning Three Ductile Iron Pipe Manufacturers, JFTC Press Release, December 24, 1999, [jftc.admix.go.jp/pressrelease/99.december/99122402.pdf](http://jftc.admix.go.jp/pressrelease/99.december/99122402.pdf) (in Japanese).

slightly more than 6 years.<sup>22</sup> Assuming that Japanese cartels have a similar longevity, the three year surcharge limitation significantly reduced the effectiveness of the surcharge system as a deterrent. To illustrate, last year the JFTC uncovered a conspiracy in which three firms had been rigging bids on ductile iron pipe, reportedly for 40 years.<sup>23</sup> Even if the JFTC were to impose surcharges on the last three years of the cartel, it would still leave intact as pure profit the prior 37 years of rigged bids.<sup>24</sup>

Ironically, the JFTC's success in imposing record surcharges in the 1991 cement cartel cases may have contributed to the addition of this 3-year limitation, since there was concern that if the already large surcharges in those cases were three times larger, it would likely bankrupt the companies. This concern arose because the JFTC has no discretion with respect to the imposition of surcharges. The full applicable surcharge must be imposed regardless of the financial health of the company or any other extenuating circumstances.

The second restriction included in the 1991 amendments was the introduction of special surcharge rates cutting in half (except for retailers) the surcharge rate applicable to cartel participants that are small and medium sized enterprises. Under these SME rates, small and medium sized retailers and wholesalers would be subject to a surcharge of just 1% of sales, and all

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<sup>22</sup> See G. Werden and M. Simon, *supra*. note 5 at 925, citing a study by J. Clabault & M. Block of price-fixing indictments between 1975-1980 that found the average life span of the price-fixing conspiracies to be 73.8 months..

<sup>23</sup> See Recommendation Concerning Three Ductile Iron Pipe Manufacturers, JFTC Press Release, March 26, 1999, [jftc.admix.go.jp/pressrelease/99.march/990326.html](http://jftc.admix.go.jp/pressrelease/99.march/990326.html) (in Japanese).

<sup>24</sup> In fact, the JFTC is likely to impose surcharges only on sales during the last 2 years of the bid rigging conspiracy. See note 21 *supra*.

other small and medium sized firms would be assessed a surcharge of 3%. Therefore the top rate for SMEs was increased only from 2% of sales to 3%. This amendment was justified on the ground that the long-term profit rate of SMEs had been around half that of large companies. However, there is no reason to think that the supra-competitive profits gained from cartel activities are not shared proportionately based on the respective sales of the conspirators.<sup>25</sup>

Just last year, the Diet passed an amendment to the AMA submitted by the Government that enlarged the definition of small and medium sized enterprises for purposes of the surcharge provisions. The effect of this amendment was to increase the number of firms that will pay the lower surcharge rate for SMEs and hence to reduce the deterrent effect of the surcharge system on the participation by SME's in price-related cartels. This amendment was particularly surprising since it went counter to the international trend of strengthening deterrence against hard core anticompetitive practices and reaffirmed the Japanese Government's support for a two-tiered surcharge system whose justification was never very clear.

One additional implication of the surcharge system is that it does not impact on complementary bidding. Since the surcharge is a percentage of the actual sales made by the conspirators, bidders are not assessed any surcharges for contracts they did not win, even though they participated in the bid as complementary bidders. This is consistent with the philosophy

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<sup>25</sup> SMEs already benefit from another exception to the surcharge system. AMA §7-2(1) provides that surcharges of less than 500,000 yen shall not be imposed. This means that SME retailers and wholesalers can participate in cartels with sales of up to 50 million yen (about \$500,000) over three years without risk of any surcharges being imposed; other SMEs would be immune from surcharge orders for sales of less than 16.6 million yen (about \$166,000) over three years.

behind the surcharge system to take away only illegal profits and not to impose punitive measures, but the result is that the surcharge system has no deterrent effect on complementary bidding practices, activities that are often essential to the success of a bid rigging conspiracy. In the bid rigging conspiracy on construction contracts at the U.S. Naval Base in Yokosuka Japan, for example, although 140 firms participated in the conspiracy, only 70 firms actually won contracts and received surcharge orders. Although the other 70 companies presumably were compensated in some other way -- possibly in another bid rigging conspiracy -- they escaped any sanctions by the JFTC.<sup>26</sup>

B. Criminal penalties

Japan is one of the minority of countries that provides for criminal penalties against anticompetitive practices. Individuals may be prosecuted for engaging in hard-core antimonopoly violations, and sentenced to imprisonment for up to three years and a fine of up to 5 million yen (about \$50,000).<sup>27</sup> The Antimonopoly Act also provides for criminal fines against firms or trade associations when agents, employees or other representatives engage in illegal activities on behalf of their firm or association.<sup>28</sup> The maximum fine for firms was, until relatively recently, the same as for individuals, i.e. 5 million yen.

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<sup>26</sup> However, in response to the U.S. Government's stated intention to file a civil action to recover the damages it suffered as a result of the bid rigging conspiracy, most of the 140 companies settled the matter by agreeing to pay the United States a total of about \$35 million. See, Justice Department Announces Payment in Japanese Bid Rigging, Department of Justice Press Release, December 19, 1989.

<sup>27</sup> AMA §89.

<sup>28</sup> AMA §95

Although criminal penalties were included in the original Antimonopoly Act of 1947, both the JFTC and Public Prosecutors Office were reluctant to institute criminal prosecutions of Antimonopoly violations, and until 1990 only one cartel case was successfully prosecuted.<sup>29</sup>

In response to U.S. Government calls in the Structural Impediments Initiative discussions for renewed criminal antimonopoly enforcement to increase deterrence against hard-core violations, on June 20, 1990 the JFTC issued a policy statement indicating that it would begin to actively seek criminal penalties in two situations: (1) vicious and serious cases having a widespread influence on people's lives involving price-fixing, supply restraint cartels, market allocations, bid rigging and group boycotts; and (2) cases involving firms that are repeat offenders or that do not abide by JFTC cease and desist orders. Two years later, again responding to arguments in the SII negotiations that the maximum 5 million yen (\$39,500 at 1992 exchange rates) fine for corporations was essentially meaningless and had no deterrent effect, Japan increased the maximum criminal fine for corporations to 100 million yen (now about \$1 million).

The JFTC has indeed reinstated criminal antimonopoly prosecutions since the 1990 policy statement. However, criminal enforcement is still the exception, rather than the rule for bid rigging and cartel activities. Since 1991, the JFTC has instituted criminal proceedings in six cases, once every two years, except for 1999 when the JFTC proceeding criminally against two hard

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<sup>29</sup> 1974 Petroleum Price-Fixing case (Sept. 26, 1980, 28-2 KTIS 299) (12 companies and 14 individuals convicted. On appeal the Supreme Court reversed the convictions of 2 companies and 1 individual. (Feb, 24, 1984, 30 KTIS 244).



core conspiracies.<sup>30</sup> In fact, the JFTC has proceeded criminally in only about 3% of hard-core violation cases since 1991.

Even after successful criminal prosecution, however, the sentences imposed by the Tokyo High Court<sup>31</sup> have not been particularly severe. Although all convicted individuals have received jail sentences, in all cases, with no exceptions, the court has suspended the sentence. As a consequence, convicted individuals have not been required either to pay fines or serve actual time in jail. By contrast, convicted corporations have been sentenced to pay fines; however, the largest fine imposed has been only 60 million yen (\$638,000 at 1995 exchange rates), and most have been in the 5-9 million yen range (about \$50,000-\$90,000 at current exchange rates).

The AMA contains some other penalties against firms convicted of engaging in hard core criminal activities. The court is empowered to revoke any patent or patent license that is related to the offense<sup>32</sup>, and to bar the offender for between six months and three years from entering into

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<sup>30</sup> The 6 criminal cases involved:

- Price-fixing on polyvinyl chloride stretch film (JFTC accusation:11/6/91);
- Bid rigging on seals ordered by the Social Insurance Agency (JFTC accusation:2/24/93);
- Bid rigging on Japan Sewage Agency electrical equipment contracts (JFTC accusation:3/6/95);
- Bid rigging on water meters procured by Tokyo Metropolitan Government (JFTC accusation: 2/4/97);
- Market share agreement on ductile iron pipe (JFTC accusation:2/4/99);
- Bid rigging on oil product procurements by Defense Agency (JFTC accusation: 10/14/99).

<sup>31</sup> Pursuant to AMA §85, the Tokyo High Court has original jurisdiction for all prosecutions under the Antimonopoly Act.

<sup>32</sup> AMA §100(1)(i).

any contract with the government.<sup>33</sup> However, these penalties have never been imposed by the court in AMA prosecutions. If it were to be used, court mandated debarment from government procurement would probably add a significant deterrent to criminal bid rigging activities in Japan.<sup>34</sup>

### C. Improvements in the Probability of Detection

With regard to improvements in the likelihood of detection, the JFTC has sharply increased the number of staff assigned to its Investigation Bureau, from 129 in 1990 to about 220 in 2000, an increase of about 70%. This has resulted in a 3-fold increase in the number of cases in which the JFTC issued surcharge orders against the participants of price-related cartels, from an average of 6 cases in the 1980s to almost 18 cases in the 1990s.

Unfortunately, the JFTC has, so far, been unable to adopt a corporate leniency program, such as that of the Antitrust Division. As explained earlier, the AMA's surcharge system provides virtually no discretion for the JFTC to forego all or part of the surcharge otherwise due from a company, even where the company is instrumental in providing key evidence of the conspiracy to the JFTC. Similarly, under Japan's criminal law there is no tradition of providing a firm with immunity from prosecution, or even for plea bargaining, in return for cooperation, although there is now some discussion going on in Japan about the possibility of adopting some form of this system. Until such time as the JFTC or Public Prosecutors Office is able to provide some real

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<sup>33</sup> AMA §100(1)(ii).

<sup>34</sup> In recent years some Japanese Government agencies, as well as some prefectural governments, have imposed administrative debarments of a relatively short duration and of limited scope on companies found to have engaged in bid rigging activities.

incentives for cooperation, there will continue to be serious limitations on the ability of the Japanese Government to increase substantially the likelihood of detection of otherwise secret hard core antimonopoly conspiracies.

#### D. Private Damage Actions

The Antimonopoly Act permits private parties to bring a civil lawsuit for actual damages against companies determined by the JFTC to have violated the AMA.<sup>35</sup> In addition, any person injured by violation of the AMA can bring suit to recover damages under the general civil tort statute.<sup>36</sup> However, a variety of legal barriers -- such as high filing fees, limited discovery and difficult burdens of proof on the causal link between the antimonopoly violation and the damages and on proof of actual damages -- have limited the number of successful private lawsuits to just a handful. Even in those few successful cases, the amount of damages finally awarded has been very low. As a result, the risk of civil damages litigation is unlikely to have much of a deterring impact on would-be cartel participants.

#### Concluding Thoughts

Japan's approach to antimonopoly enforcement has traditionally emphasized the elimination of illegal practices after they have been uncovered and the discouragement of repeat violations by antimonopoly offenders. It has not emphasized the punishment of offenders in order to deter others from engaging in unlawful anticompetitive conduct. This can be seen most clearly in the first thirty years of Antimonopoly Act enforcement when the JFTC relied primarily on

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<sup>35</sup> AMA §§25-26.

<sup>36</sup> Japanese Civil Code, Article 709.

informal enforcement and occasional formal cease and desist orders to eliminate unlawful conduct, and there were virtually no sanctions against firms or individuals for participation in hard core cartels. Although the adoption of the surcharge system in 1977, the reinstatement of criminal antimonopoly enforcement in 1990 and the increase in surcharge rates in 1991 have succeeded in imposing some significant costs on cartel participants in Japan, it still cannot be reasonably argued that general deterrence of antimonopoly violations is a central goal of Japan's competition policy.

As discussed earlier, the surcharge system is clearly not intended to require the payment of the multiple of profits necessary to offset the low probability of detection inherent in antitrust conspiracies. Nor are the surcharge rates sufficient even to require full disgorgement of illegal overcharges. The adoption of the special surcharge rates for SMEs in 1991, and the recent expansion of the definition of SMEs in that regard, indicates that the Japanese Government places an even lower priority on discouraging smaller firms from engaging in anticompetitive collusive practices.

While criminal enforcement has the potential to improve deterrence markedly by introducing non-monetary costs into the equation -- namely imprisonment of individuals and the social stigma that results from criminal conviction -- the relative rarity of criminal antimonopoly prosecutions in Japan, combined with the failure of the courts to impose real sanctions on either convicted individuals or firms, ensures that as long as current trends continue, criminal enforcement will have a minimal effect on general antimonopoly deterrence in Japan. The same can be said for the deterrent effect of civil damage remedies -- the dearth of successful cases and the low level of damage awards results in little added deterrence from the threat of civil litigation.

On the other hand, it could be argued that the Japanese system is much more oriented toward specific deterrence -- in other words, the prevention of recidivism. The JFTC's 1990 criminal enforcement policy statement is explicit on this point: cases involving repeat offenders or those that do not obey JFTC cease and desist orders will be prosecuted criminally. And the general practice of suspension of prison sentences by the courts can be viewed as geared to ensuring that convicted individuals do not engage in future antimonopoly violations, since subsequent violations would result in actual incarceration. This is a practice seen commonly in Japan's criminal justice system, with judges suspending prison sentences in more than 50% of the cases in an effort to discourage recidivism.<sup>37</sup>

The implication of this policy in the antitrust area, however, is that participation in hard core anticompetitive activities will continue to be an economically-rational option for companies in Japan. The economic rewards of collusion still significantly outweigh the potential costs.

On the bright side, the JFTC is beginning to show an interest in enforcing the Antimonopoly Act against participants in international cartels. In March 1999 the JFTC issued a warning to the Japanese participants in the international graphite electrodes cartel and this past January there were press reports that the JFTC had raided the offices of participants in the international vitamin cartel. The JFTC's actions are in line with a growing interest among many antitrust agencies around the world in strengthening their own antitrust enforcement against international cartels and in cooperating in international enforcement efforts. The result will be a

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<sup>37</sup> See, John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford University Press, New York (1991) at 128.

significant increase both in the probability that international cartels will be uncovered and successfully prosecuted and in the fines and other economic costs that will be imposed on participants in these hard core conspiracies; in other words, a substantial improvement in the world community's ability to deter international cartels.