

# AKTUELLE RECHTSENTWICKLUNG RECENT LEGAL DEVELOPMENTS

## **Forthcoming Legislation**

*Hiroshi Oda*

### PROPOSED AMENDMENTS TO THE ANTI-MONOPOLY LAW (COMPETITION LAW)

The Japan Fair Trade Commission (JFTC) published the report of its study group on the review of the Anti-Monopoly Law (AML) and invited comments in October 2003.<sup>1</sup> Based upon the report and the comments, the JFTC published a document entitled “Basic Thoughts on the Amendment of the AML”. The JFTC is in the process of preparing the bill for the amendment.

The gist of the proposed amendments covers areas such as the review of the surcharge system, the introduction of the leniency system, the granting of the power of criminal investigation to the JFTC, and the review of regulations on monopoly and oligopoly.

#### *1. Review of the Surcharge System*

The current system of surcharges is intended to force companies involved in certain kinds of cartels to surrender the profits earned by the cartel. The maximum amount is six percent of the turnover. Compared with the sanctions available in other countries, this amount has been criticized as too low in relation to the EU, where the maximum amount of sanctions can reach € 20 million or ten percent of the turnover (*e.g.*, criticism by OECD). The amendment would change the nature of this system from the surrender of unlawful profit to a system of sanctions that would collect the amount regarded as the loss caused by the breach of law. This will accompany a higher amount of surcharges. The scope of application of surcharges will be expanded (at present, it covers price cartels and some cartels which affect the prices), and the amount will be aggravated for repeated violations. The Japan Federation of Economic Organizations is against this proposal, particularly on the grounds that this would comprise double jeopardy because, in addition to surcharges, a criminal penalty would be available.

---

1 Cf. <[www.ftc.go.jp](http://www.ftc.go.jp)>; see also *Nikkei*, October 29, 2003.

## 2. *Introduction of the Leniency System*

In order to enable the JFTC to deal with cartels that have become more sophisticated and difficult to expose, surcharges will be reduced or exempted if:

- 1) the entrepreneur provided information and materials to the JFTC before the commencement of the investigation;
- 2) the entrepreneur voluntarily ceased to participate in an act which is against the AML.

OECD has pointed out that the leniency system works only if the sanctions are effective enough.

## 3. *Granting of the Power of Criminal Investigation to the JFTC*

At present, the JFTC has only the power of administrative rather than criminal investigation. There have been proposals to equip the JFTC with the power of criminal investigation in order to expand the use of criminal sanctions. It should be added that the proposal includes the expansion of the availability of criminal sanctions to unfair trade practices. However, the right to prosecute will still remain with the public prosecutors' office.

## 4. *Review of the Regulations on Monopoly and Oligopoly*

The current regulations on the "monopolistic situation" are to be replaced with regulations aimed at the prevention of the exclusion of new entrants in using essential ties by designated entrepreneurs. Designated entrepreneurs denote those with a controlling share in the market that is important for the national economy and their own essential facilities. Refusal to use essential facilities without justifiable grounds, or discrimination in using them, are targeted by the regulations.

This is supported by consumer organizations, but public utilities are opposed because it is likely to discourage investment in essential facilities. It is also pointed out that the definition of essential facilities is not clear. It was reported in the press that the amendments to the AML proposed by the Japan Fair Trade Commission have been watered down because of resistance from the industry. The increase of surcharges will not reach the level proposed by the JFTC. Furthermore, the introduction of new regulations on essential facilities will have to be postponed.<sup>2</sup>

In addition to the above, a streamlining of the procedure is intended.

These changes are expected to be submitted to the Parliament in the financial year 2004.

---

2 Cf. *Nikkei*, March 5, 2004.