

Unclassified

DAF/COMP(2005)32/21



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

05-Oct-2005

English text only

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

DAF/COMP(2005)32/21  
Unclassified

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN**

-- 2004 --

*This report is submitted by the Delegation of Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2005.*

JT00190937

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format

English text only

**TABLE OF CONTENTS**

I.	Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislations .....	4
1.	Amendment of the Antimonopoly Act.....	4
1)	Deliberation process of the act at the Diet.....	4
2)	Outline of the amendment of the Antimonopoly Act .....	4
2.	Bilateral Cooperation Agreements.....	5
1)	Signing for “Agreement between Japan and the United Mexican States for the strengthening of the economic partnership” .....	5
2)	Other moves toward agreements.....	5
II.	Enforcement of competition laws and policies.....	6
1.	Measures against violations .....	6
1)	Measures taken in 2004 .....	6
2)	Summary of main cases .....	8
3)	Litigation.....	12
2.	Mergers and acquisitions .....	13
1)	Publication of “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination” .....	13
2)	Statistics relating to mergers and acquisitions .....	13
3)	Main mergers and acquisitions cases.....	14
III.	The role of a competition authority in the formulation and implementation of other policies .....	16
1.	Coordination between the Antimonopoly Act and other economic laws and ordinances .....	16
2.	Administrative coordination .....	16
3.	Opinions on joint operations of express buses based on the Antimonopoly Act.....	16
4.	Partial revision of guidelines for promotion of competition in the telecommunications business field.....	17
5.	Partial revision of guidelines for proper gas trade .....	17
6.	Opinions on number portability of cellular phones based on the Antimonopoly Act.....	17
7.	Guidelines for unfair trade practices associated with relaxation of controls over classification of business categories and expansion of scope of business for financial institutions.....	18
IV.	Japan Fair Trade Commission resources (FY2004) .....	18
1.	Budget .....	18
2.	Number of officials.....	18
3.	Activities of the Competition Policy Research Center .....	19
1)	Reports .....	20
2)	Discussion papers .....	20
3)	Hosting of an Open Seminar .....	20

4) Hosting of International Symposiums .....	20
5) Implementation of Specialised Training in Economics .....	21
V. Main surveys related to competition policy .....	21
1. Survey report on trade between retailers and suppliers accompanying implementation of total price indication method, including consumption tax.....	21
2. Survey report concerning the actual conditions of competition in broadband services, etc .....	21
3. Survey report on conditions surrounding biddings and contracts of local public organisations .....	21
1) Purpose of survey.....	21
2) Outline of survey results .....	22
4. Survey report on actual conditions of circulation of gas.....	22
1) Difference in the wholesale price of primary distributor .....	22
2) Restrictions imposed on “keiretsu” special agents, etc. to handle “gyotengyoku” .....	23
5. Survey report on actual conditions of circulation of consumer electrical appliances.....	23
1) Method of setting transaction prices .....	23
2) Payment of rebate .....	24

**I. Changes regarding competition laws and policies – Outline of new regulations in competition laws and related legislations**

**1. Amendment of the Antimonopoly Act**

**1) Deliberation process of the act at the Diet**

1. The bill to amend the Antimonopoly Act was submitted to the 161<sup>st</sup> extraordinary Diet session on October 15, 2004. Remaining under deliberation, the bill was carried over to the next 162<sup>nd</sup> ordinary Diet session and passed on April 20, 2005. The amended act will be put into practice in January 2006.

**2) Outline of the amendment of the Antimonopoly Act**

2. The outline of the amendment of the Antimonopoly Act is as follows.

**A) Revision of the surcharge system**

- The rate of surcharge which is ordered and paid by an enterprise engaged in unreasonable restraint of trade was increased as follows:

Manufactures, etc.	Large-sized enterprises: 6% → 10% Small and Medium-sized enterprises (SMEs): 3% → 4%
Wholesalers	Large-sized enterprises: 1% → 2% SMEs: 1% (no change)
Retailers	Large-sized enterprises: 2% → 3% SMEs: 1% → 1.2%

- Reducing a surcharge rate by 20% on those enterprises whose duration of violation is less than 2 years and which have ceased the unlawful conduct more than one month before the Japan Fair Trade Commission (JFTC) initiates an investigation.
- Increasing a surcharge rate by 50% on those enterprises which were ordered another surcharge payment order within 10 years.
- Expanding the scope of conduct subject to the surcharge system and imposing a surcharge on those enterprises engaged in Private Monopolization (only in the case of enterprises which control the business activities of other enterprises) that restrains the price of their goods or services or that may affect the price of their goods or services by substantially restraining the volume of their supply, market share or customers.

**B) Introduction of a leniency program**

3. In order to give an incentive to withdraw from cartel and pursue early restoration of competitive order, we introduced a leniency program and shall apply immunity from or reduction in surcharge payments to enterprises that meet statutory conditions (e.g., enterprises committing unreasonable restraints of trade shall voluntarily disclose the existence of violations and provide related information to the JFTC):

- 1<sup>st</sup> applicant before initiation of investigation = total immunity

- 2<sup>nd</sup> applicant before initiation of investigation = 50% deducted
- 3<sup>rd</sup> applicant before initiation of investigation = 30% deducted
- Any applicant after initiation of investigation = 30% deducted

Note: The total number of enterprises which may be applied under the leniency program is less than or equal to 3.

C) Introduction of compulsory measures for criminal investigations

4. For aggressive criminal accusations regarding vicious and serious cases, the enhancement of the ability for collecting evidence is necessary for fact-finding by the JFTC. Therefore, the provisions relating to compulsory measures for criminal investigations were developed for cases where officers of the JFTC may inspect, search and seize based on court-issued warrants.

D) Revision of hearing procedures

5. Regarding the fast-changing and globalised economy, the enhancement of the effective processing of cases and the speedy restoration of competition is necessary. Therefore, we abolished the current recommendation system where we issue a recommendation to an entrepreneur and then make a decision as an administrative measure. We introduced a system where the JFTC issues orders for elimination measures after having provided the respondent a preliminary opportunity to submit his/her opinion. We also provided the related provisions for the hearing procedures.

**2. *Bilateral Cooperation Agreements***

1) *Signing for "Agreement between Japan and the United Mexican States for the strengthening of the economic partnership"*

6. The Governments of Japan and Mexico signed the "Agreement between Japan and the United Mexican States for the strengthening of the economic partnership" on September 17, 2004, which then came into effect on April 1, 2005. The competition chapter of that agreement prescribes taking appropriate measures against anticompetitive activities by each party, notification to the other party regarding enforcement activities, cooperation, coordination, requests for enforcement activities and consideration of the other party's important interests between competition authorities.

2) *Other moves toward agreements*

7. The Government of Japan was continuing activities such as TV conferences, aimed at concluding an agreement with the Government of Canada regarding cooperation in competition matters. Negotiating parties from both of the governments largely agreed on the main features of the agreement in January 2005. After making efforts for the final settlement of the provisions of the agreement, the Governments of Japan and Canada signed the agreement on September 6, 2005 in Ottawa, Canada. The Government of Japan is preparing for the initiation of negotiation aimed at conclusion of the same kind of bilateral cooperation agreement with the Government of Australia. The Government of Japan is also conducting discussions concerning the text regarding competition policy matters as it pursues examinations aimed at reaching economic partnership agreements with the Governments of Korea, Thailand, Malaysia and the Philippines. Furthermore, the Government of Japan initiated negotiations for economic partnership agreements with Indonesia and ASEAN in 2005.

## II. Enforcement of competition laws and policies

### 1. Measures against violations

#### 1) Measures taken in 2004

8. The JFTC conducts necessary investigations based on Section 46 of the Antimonopoly Act, and when the JFTC finds that there exists any fact of violation, it makes recommendations to take measures to eliminate a violation (Section 48 (1) and (2) of the Antimonopoly Act), or initiates hearing procedures (Section 49 (1) of the Antimonopoly Act). If it is unable to make recommendations because over one year has passed since the termination of misconduct, but it can still issue surcharge payment orders, it does so in this case (Section 48-2 of the Antimonopoly Act). Even if it doesn't have enough evidence to take legal measures, when the JFTC identifies suspicions of violations of the Antimonopoly Act, it issues warnings and instructs the parties concerned to take measures. In addition, the JFTC issues cautions from the standpoint of preventing such violations when it doesn't have enough evidence to identify the suspicions of the conduct of violation of the Antimonopoly Act, but it finds the conduct which could lead to violations of the Antimonopoly Act.

9. Out of 122 examinations concluded by the JFTC in 2004, the JFTC took legal measures in 36 cases ordering actions such as cease and desist orders for violations. The JFTC also issued warnings in 10 cases in which it identified suspicions of violations of the Antimonopoly Act, issued cautions in 61 cases, and terminated examinations in 15 cases in which it did not uncover evidence of illegal conduct.

#### A) Legal measures

10. The JFTC has been especially engaged in continuous efforts to eliminate bid rigging. In 2004, 23 of the JFTC's formal measures were against bid rigging.

• Private monopolisation	1
• Bid rigging	23
• Price cartels, etc. (excluding bid rigging)	2
• Unfair trade practices	9
• Unjustly restricting the functioning and activities of the constituent entrepreneurs by trade association	1

#### B) Surcharge payment orders

11. The Antimonopoly Act states that when enterprises or trade associations form cartels, a surcharge will be levied in the following cases:

- a) Cases related to the price of goods or services;
- b) Cases that affect the price of goods or services by effectively restricting the volume of supply.

12. The amount of the surcharge payment is calculated by multiplying the amount of sales of concerned goods or services during the period of the cartel by a certain percentage. In the case of trade associations, the surcharge payment is levied on the enterprises constituting the association. In 2004, the

JFTC issued surcharge payment orders to 350 enterprises amounting to 7,329.36 million yen. (Except for enterprises ordered surcharge payments before 2004 and ordered as decisions via hearing procedures in 2004.) In addition, the JFTC issued 24 orders to enterprises totalling 421.98 million yen following decisions in 2004 on a case for which a hearing procedure concerning a surcharge payment order before 2004 was conducted.

13. Of the 350 entrepreneurs ordered to pay surcharges (except for enterprises ordered to make surcharge payments before 2004 and given this order through decisions via hearing procedures in 2004), 12 enterprises requested hearings in 2004. The JFTC initiated hearings on all of the cases, and surcharge payment orders totalling 4,310.65 million yen were nullified. (With two enterprises' surcharge payment orders totalling 2.63 million yen as decisions via hearing procedures in 2004.)

C) Criminal accusations

14. The JFTC has adopted an active policy to apply criminal penalties to violations that (a) substantially restrict competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid rigging and boycotts, which constitute serious cases that are likely to have a widespread influence on the national economy; or (b) involve firms or industries that are repeat offenders or which do not take appropriate measures to eliminate a violation, and where the administrative measures of the JFTC are not considered sufficient to meet the aims of the Antimonopoly Act.

15. There was no criminal accusation in 2004. In 2005, the JFTC filed accusations regarding two cases which the JFTC had begun to investigate in 2004.

- a) The JFTC found that companies of steel bridge construction had colluded to designate in advance the winner of a tender for a steel bridge construction project ordered for competitive bids by the Kanto Regional Development Bureau, Tohoku Regional Development Bureau and Hokuriku Regional Development Bureau of the Ministry of Land, Infrastructure and Transport (MLIT) and effectively allowed them to receive the orders. The JFTC filed an accusation with the Public Prosecutor General against the enterprises and individuals on May 23 and June 15, 2005.
- b) The JFTC found that companies of steel bridge construction had colluded to designate in advance the winner of a bid for steel bridge construction projects ordered for competitive bids by the Japan Highway Public Cooperation and effectively allowed them to receive the orders. The JFTC filed an accusation with the Public Prosecutor General against the enterprises and individuals on June 29, August 1 and 15, 2005.

D) Hearing procedures

16. The JFTC initiated hearing procedures on 29 cases in 2004. As of December 2004, the JFTC was conducting pending hearing procedures for 141 cases, of which 24 concerned allegations of violations of the Antimonopoly Act and 117 concerned surcharge payment orders. The JFTC issued decisions on 35 cases in 2004 after hearing procedures, including bid rigging cases in which the JFTC found that contractors of paving works had colluded to designate in advance the winners of bids and effectively to allow them to receive the works ordered by Kyoto City through designated competitive bidding.

E) Implementation of the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc.

17. The JFTC can demand improvement measures to the heads of ministries and agencies, etc., when it finds their officers involved in bid rigging as the result of its investigation of bid rigging cases. Heads of ministries and agencies, etc., must perform a necessary investigation and take improvement measures on the basis of the result of the investigation. They must also investigate the reasons for disciplinary actions to take disciplinary measures against employees and perform a necessary investigation if there is any damage to the government, etc., due to the said involvement in bid rigging, etc. The administrative institutions concerned are called on to coordinate and cooperate among them regarding elimination and prevention of involvement in bid ridding. The JFTC demanded the mayor of Niigata City to file a report on improvement measures based on this law in 2004 (mentioned below in 2) J).

2) *Summary of main cases*

A) Case against Tokyu Parking Systems Corporation

18. Tokyu Parking Systems Corporation (Tokyu Parking Systems) is engaged in the distribution and maintenance service of car-parking garages and the supply service of replacement parts for these garages. In supplying replacement parts for multilevel mechanical parking garages (including double-deck type and multi-deck type) to independent maintenance companies engaged in the maintenance service of parking garages as assigned by the management companies or owners of multilevel mechanical parking garages manufactured by Tokyu Car Corporation, Tokyu Parking Systems unjustly interfered with transactions for maintenance service between independent maintenance companies and management companies or owners as follows:

- a) Although Tokyu Parking Systems stored the replacement parts and could ship them without delay, Tokyu Parking Systems significantly delayed the timing of shipment under the pretext of so-called “shipment after order to a manufacturer,” that is, Tokyu Parking Systems sold replacement parts only after ordering new parts from a manufacturer.
- b) Without justification, Tokyu Parking Systems sold replacement parts to independent maintenance companies at much higher prices than those for management companies and owners of parking garages who made maintenance contracts with Tokyu Parking Systems or Tokyu Car Corporation. Tokyu Parking Systems also sold replacement parts to independent maintenance companies only by the unit with a certain quantity as much as a minimum order quantity of Tokyu Parking Systems for replacement part manufactures.

19. On March 18, 2004, the JFTC issued a recommendation to Tokyu Parking Systems for elimination of the conduct, as it violates Section 19 of the Antimonopoly Act (corresponding to Subsection 15, Interference with a Competitor’s Transaction, the Designation of Unfair Trade Practices). (Decision issued on April 12, 2004.)

B) Case against POSFUL Corporation

20. The JFTC found that POSFUL Corporation, which is engaged in the business of clothing, food and grocery retail, etc. (general merchandising store), in a business transaction of delivery of clothing by the suppliers, paid the suppliers the price for clothing which was after subtraction of a certain amount from the prices agreed between POSFUL and the suppliers of clothing in advance, even though these suppliers had no liabilities for the subtraction of the price. These suppliers had an inferior bargaining position to POSFUL. Accordingly, on March 25, 2004, the JFTC issued a recommendation for elimination of such

conduct to POSFUL Corporation for violation of Section 19 of the Antimonopoly Act (corresponding to Subsection 2, Designation of Specific Unfair Trade Practices in the Department Store Business). (Decision issued on April 14, 2004.)

C) Case against bidders for sewage pump installation work ordered by the Tokyo Metropolitan Government

21. The JFTC found that 14 companies, which are engaged in the construction work of pump installation, substantially restricted competition regarding the sewage pump installation work ordered by the Sewerage and Sewage Bureau of the Tokyo Metropolitan Government through a general competitive bid, a designated competitive bid through public offering, or a designated competitive bid on a desired basis. Accordingly, on March 30, 2004, the JFTC issued a recommendation for elimination of the conduct for violation of Section 3 (Unreasonable Restraint of Trade) of the Antimonopoly Act. (Hearing Procedure initiated on May 12, 2004.)

D) Case against bidders of estimated prices for paving works ordered by Osaka City

22. The JFTC found that the 39 (42, as the cumulative total) bidders of estimated prices for paving works ordered by Osaka City were engaged in the conduct below.

- a) Participants of bids of estimated prices for repair work of water supply facilities ordered by the Department of Water Service of Osaka City colluded to determine in advance the winner of the bid and enabled the winner to receive the order. The Department divided the City into several areas and designated bidders to each area. The bid rigging took place in two areas. (Accordingly, 2 recommendations were issued concerning this work.)
- b) Bid participants of estimated prices for paving works for restoration after plumbing work ordered by the Department of Water Service of Osaka City colluded to designate in advance the winner of the bid and enabled the winner to receive the order. The Department divided the City into several areas and designated bidders to each area. The bid rigging took place in eight areas. (Accordingly, 8 recommendations were issued concerning this work.)

23. The JFTC issued 10 recommendations to cease such conduct on April 16, 2004, as those companies violated Section 3 (Unreasonable Restraint of Trade) of the Antimonopoly Act. (Decision issued on May 18, 2004. Hearing Procedure against 3 (4, as the cumulative total) out of 39 (42, as the cumulative total) companies initiated on May 25, 2004.)

E) Case against bidders for surveying and civil engineering consultant works ordered by Yamagata Prefecture

24. Regarding the surveying works, civil engineering consultancy works, compensation consultancy works and other works ordered by Yamagata Prefecture at the Construction Department of the Okitama General Municipal Office through a designated competitive bid and comparison estimates, designating only parties with their head office, sales office or main business premises in the area under the authority of Okitama General Municipal Office, the JFTC found that 22 bidders for surveying works, civil engineering consultancy works, compensation consultancy works and others ordered by Yamagata Prefecture had colluded to designate in advance the winner of the bid and to effectively enable the winner to receive the order. Accordingly, on May 13, 2004, the JFTC issued a recommendation for elimination of the conduct for violation of Section 3 (Unreasonable Restraint of Trade) of the Antimonopoly Act. (Decision issued on June 7, 2004.)

F) Case against Green Group Co., Ltd.

25. The JFTC found that the Green Group, which is engaged in the business of production and sale of mineral water, has itself or via its wholesalers sold “Hita Tenryosui” to retailers on the condition of having them maintain the recommended retail price fixed by the Green Group without proper justification. On May 21, 2004, the JFTC issued a recommendation for elimination of the conduct for violation of Section 19 of the Antimonopoly Act (corresponding to Subsection 12(1) and (2), Resale Price Restriction, the Designation of Unfair Trade Practices). (Decision issued on June 14, 2004.)

G) Case against Yokkaichi City Medical Association

26. The JFTC found Yokkaichi City Medical Association involved in the following misconduct:

- a) At a meeting of its board of directors held around October 15, 2002, Yokkaichi City Medical Association decided to set the fee for flu shots by its members to persons aged less than 65 at 3800 yen or more per shot in or after October 2002, which substantially restricted competition in the market of the flu shot within the area of Yokkaichi City.
- b) The said medical association also restricted the opening of a medical institution by its members, any increase in the number of types of diagnosis and treatment, and any increase in the number of sickbeds based on an internal code of the consultation committee on the opening medical institution, which unjustly restricted the functions and activities of members.

27. Accordingly, on June 21, 2004, the JFTC issued a recommendation for elimination of the conduct for violation of Section 8-1(1) (Substantial Restriction of Competition by Trade Association) and (4) (Unjust restriction of Functions or Activities of Members by Trade Association) of the Antimonopoly Act. (Decision issued on July 27, 2004.)

H) Case against financial institutions in Kagawa Prefecture

28. The JFTC found that six financial institutions in Kagawa Prefecture had colluded to collect from kindergartens, elementary schools, junior high schools, etc., fees involved in the account transfer of various school expenses including meal charges, fees for educational materials, and PTA membership fees, that they had not collected up to that time in principle, and that they had decided to collect account transfer fees involved in the school expense system. Accordingly, on June 23, 2004, the JFTC issued a recommendation for elimination of such conduct for violation of Section 3 (Unreasonable Restraint of Trade) of the Antimonopoly Act. (Decision issued on July 27, 2004.)

I) Case against Microsoft Corporation

29. The JFTC found that Microsoft, when licensing Windows OS to personal computer manufactures (PC manufactures), concluded agreements with PC manufacturers containing certain provisions that a licensee shall covenant not to sue, bring, prosecute, assist or participate in any judicial, administrative or other proceedings of any kind against Microsoft, its subsidiaries, or other licensees for infringement of the licensee’s patent. Accordingly, on July 13, 2004, the JFTC issued a recommendation for elimination of the conduct, which shall be construed as dealing with PC manufacturers on conditions which unjustly restrict their business activities, for violation of Section 19 of the Antimonopoly Act (corresponding to Subsection 13, Dealing on Restrictive Terms, the Designation of Unfair Trade Practices). (Hearing Procedure initiated on September 1, 2004.)

J) Case against bidders for construction works ordered by Niigata City

30. The JFTC found the following misconduct of bidders for construction works ordered by Niigata City:

- a) Regarding sewage pipe drain works and sewage pipe installation works using jacking method or shield tunnelling method ordered by Niigata City, 55 companies, who participated in bids through limited general competitive bidding, designated competitive bidding of the public offering type or designated competitive bidding, determined a winner of the bid and enabled the winner to receive the order.
- b) Regarding sewage pipe drain works and sewage pipe installation works using open cut method ordered by Niigata City, 48 companies, who participated in bids through designated competitive bidding of the public offering type or designated competitive bidding by companies only graded A, determined a winner of the bid and enabled the winner to receive the order.
- c) Regarding the complete set of construction works ordered by Niigata City, 56 companies, who participated in bids through limited general competitive bidding, designated competitive bidding of the public offering type or designated competitive bidding by companies only graded A (including joint ventures with a representative with A grade), determined a winner of the bid and enabled the winner to receive the order.

31. On July 28, 2004, the JFTC issued a recommendation for elimination of the conduct to the said companies as they violated Section 3 (Unreasonable Restraint of Trade) of the Antimonopoly Act. (Decision issued against 27 (30, as the cumulative total) companies on September 17, 2004. Hearing Procedure against 86 (130, as the cumulative total) companies also initiated on September 17, 2004 and then Consent Decision issued on December 14, 2004, against 1 out of 86 companies as the JFTC accepted the application for Consent Decision from that company.)

32. In addition, the JFTC found that several officers engaged in order placement of the Niigata City Government had continuously disclosed the planned prices for work which should have remained secret prior to the bids, in response to requests from a company which was selected by the bidders concerned as the designated winner of a competitive bid for the said works ordered by Niigata City. The JFTC also found that a copy of the explanatory materials of proposals submitted to the contractor designation committee, which should have remained secret, had continuously been leaked to certain bidders who tendered for the order for jacking method works or open cut method works placed by the Niigata City Government.

33. Therefore, the JFTC requested the mayor of Niigata City to take necessary measures in order to promptly ensure elimination of any involvement of officers in bid rigging for construction works ordered by Niigata City, for prevention of such conduct in the future, in accordance with Section 3, Subsection 2 of the Act concerning Elimination and Prevention of Involvement in Bid Rigging, etc.

K) Case against Usen Corporation and Nippon Network Corporation

34. The JFTC found that Usen Corporation, which is engaged in music broadcasting business, and Nippon Network Vision Corporation, which is an agency for business and contracts related to the provision of music broadcasts by Usen Corporation, conducted a campaign by which they offered only the customers of CANSYSTEM Co., Ltd. a monthly listening fee of less than 3675 yen or a charge-free period of more than 3 months including a month in which a tuner was installed, as conditions for switching over a contract, in order to deprive CANSYSTEM of its customers intensively in and after August 2004. Through

this conduct, these two companies conspired and substantially restrained competition in the market of music broadcasting to the service stores in Japan. On September 14, 2004, the JFTC issued a recommendation for elimination of the conduct for violation of Section 3 (Private Monopolisation) of the Antimonopoly Act. (Decision issued on October 13, 2004.)

3) *Litigation*

A) Lawsuits seeking to overturn a JFTC decision

35. Regarding lawsuits seeking to overturn JFTC decisions, the Tokyo High Court made two decisions in 2004, accepting the plaintiff's whole claim in one case and part of the plaintiff's claim in another case. For both of the cases, the JFTC submitted the statements of reason for appeal to the Supreme Court. Meanwhile, one lawsuit was newly brought to the Tokyo High Court but the plaintiff turned down the claim and terminated the lawsuit. As of the end of December 2004, three lawsuits including two said cases appealed to the Supreme Court were pending.

a) Lawsuit brought by Tsuchiya Kigyo Co., Ltd. seeking to overturn a JFTC decision

36. After a series of hearing procedures, on June 13, 2003, the JFTC issued a surcharge payment order against Tsuchiya Kigyo Co., Ltd. on the grounds it had violated Section 3 of the Antimonopoly Act (Unreasonable Restraint of Trade) by colluding to decide in advance the winners of bids for specific engineering works ordered by Machida City through designated competitive bidding. In response, Tsuchiya Kigyo Co., Ltd. filed a lawsuit with the Tokyo High Court seeking to overturn the decision on July 12, 2003.

37. The Tokyo High Court accepted part of the plaintiff's claim and decided that 1 out of 4 cases which were the basis for calculation of surcharge by the JFTC should not be included for the object of surcharge on February 20, 2004. Regarding this decision, the JFTC submitted the statement of reason for appeal to the Supreme Court on March 5, 2004.

b) Lawsuit brought by Toshiba Corporation and another plaintiff seeking to overturn a JFTC decision

38. On June 27, 2003, the JFTC issued a resulting decision against Toshiba Corporation and one other company to cease conduct in the market of automatic letter sorting machines ordered by the Ministry of Post and Telecommunications, at that time, in the method of general competitive bidding. Toshiba Corporation and another company appealed to the Tokyo High Court on July 25, 2003, seeking to overturn the JFTC decision for the reason of lack of substantial evidence which was the basis for the JFTC decision, in accordance with Section 82(1) of the Antimonopoly Act.

39. The Tokyo High Court overturned the JFTC decision on April 23, 2004 because of the lack of reasons for the necessity of a cease and desist order by the JFTC. Regarding this decision, the JFTC submitted the statement of reason for appeal to the Supreme Court on May 7, 2004.

B) Lawsuits seeking compensation for damages based on Section 25 of the Antimonopoly Act

40. As of the end of December 2004, there were four pending lawsuits seeking compensation for damages based on Section 25 of the Antimonopoly Act.

C) Lawsuits seeking injunction based on Section 24 of the Antimonopoly Act

41. During 2004, nine new lawsuits were initiated based on Section 24 of the Antimonopoly Act. As of the end of December 2004, there were 22 pending lawsuits.

D) Other claims for compensation for damages related to the Antimonopoly Act

42. In accordance with the provisions of the Civil Law, local governments that issued purchase orders have initiated lawsuits seeking compensation for damages suffered as a result of violation of the Antimonopoly Act. Furthermore, following enactment of the revised Local Autonomy Law in September 2002, residents living in local government districts may file a lawsuit against a municipality for bringing a case before the court seeking compensation for damages by itself. Following this reform, the system of resident subrogation lawsuit, where residents living in local government districts subrogate the local government and seek compensation for damages, was abolished.

Main pending lawsuits brought by ordering party – plumbing work of water supply main pipe ordered by Takatsuki City

43. On November 7, 2001, the JFTC issued a resulting decision against respondents with regard to the bid rigging of plumbing works of the water supply main pipe ordered by Takatsuki City. Takatsuki City brought a lawsuit to the Osaka District Court, seeking compensation for damages from respondents. This lawsuit is still pending.

## 2. *Mergers and acquisitions*

### 1) *Publication of "Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination"*

44. The JFTC has been making efforts to ensure transparency and clearness of merger reviews through issuing guidelines and making public results of the views on the important cases with reasoned explanation from the standpoint of the Antimonopoly Act. There has been recently increasing requests for the JFTC to further enhance transparency and predictability regarding how to delineate a "particular field of trade" (a relevant market) or how to assess effects of mergers on competition in the relevant market whether they may pose problems in view of the Antimonopoly Act. With a view to responding such requests, the JFTC published the new merger guidelines in May 2004.

### 2) *Statistics relating to mergers and acquisitions*

45. Based on the provisions of Section 10, Section 15, Section 15-2 and Section 16 of the Antimonopoly Act, stockholdings, company mergers, divisions and business acquisitions of a particular size in Japan must be reported to the JFTC. The JFTC conducts an examination of reported cases, and when it determines that a transaction may substantially restrict competition in a relevant market, the JFTC has power to take measures, including the prohibition of said transaction. During 2004, 745 stockholdings are reported to the JFTC based on the provisions of section 10 of the Antimonopoly Act, 80 company mergers were reported based on the provisions of Section 15, 25 company divisions were reported based on the provisions of Section 15-2, 170 cases of business acquisitions were reported based on the provisions of Section 16. None of the stockholding, merger, division or business acquisition cases reported in 2004 were cases in which the JFTC took any legal measures.

**Number of reports concerning stockholdings, company mergers, divisions and business acquisitions**

	2002	2003	2004
Stockholdings	715	1,126	745
Mergers	110	118	80
Divisions	24	19	25
Business acquisitions	215	168	170
Total	1,064	1,431	1,020

3) *Main mergers and acquisitions cases*

Integration of biaxial oriented polystyrene sheet business between Dainippon Ink & Chemicals, Inc. and Asahi Kasei Life & Living Co., Ltd.

46. In this case, Dainippon Ink & Chemicals, Inc. and Asahi Kasei Life & Living Co., Ltd. planned to establish a joint company by transferring their departments involved in the manufacture and sales of biaxially oriented polystyrene sheets (OPS sheets) and integrate their business. The JFTC replied to the companies concerned that the proposed action was unlikely to violate the provisions under the Antimonopoly Act, judging from the materials, etc. submitted by the companies concerned and the remedies they proposed under prior consultation, and subsequently the JFTC announced the result of the consultation in July 2004.

## A) Market conditions

- Domestic demand for OPS sheets, although it has been expanding, is unlikely to continue to grow. The market scale in 2002 was about 27 billion yen. This integration would bring their combined shares to about 50% and would thus be top ranked (HHI after the integration: about 3,400 and increase of HHI: about 1,200).
- Demand for OPS sheets is tending to increase a little or to level off. Competitors have insufficient excess supply capacity, and new capital investment or entry of new companies in this market is not expected.
- Imports account for a very small share of total domestic sales. Imported goods have limited use due to their inferior quality etc. compared with domestic products, (due to surface treatment technology, uneven thickness, contamination with foreign substance, etc.) and there is insufficient import pressure at present.

## B) Trade situation

- Direct users of OPS sheets are manufacturers of molded products. Since OPS sheets of different manufacturers have no difference in quality and users also have no problems with which products are used, it is easy for users to change supplier. Manufacturers of molded products therefore purchase from more than one supplier, focusing on cheaper procurement.
- The price of OPS sheets is declining, and the difference in price of OPS sheets with the price of the PS (raw materials of OPS sheets) continues to diminish.

## C) Competing products, downstream market and upstream market

- Since the A-PET sheet, another transparent packing sheet for foods, has a similar function and efficacy for transparent packing but has different properties, such as thermal resistance,

manufacturers of molded products use the two raw materials for different purposes, according to the functions required for molded products. Since moreover, the price fluctuations of the two materials are considered to be unrelated, A-PET sheets and OPS sheets would not constitute a single commodity market. However, as for A-PET sheets, which can substitute the use of OPS sheets, the former could act as competitive pressure on the latter.

- There is active competition among manufacturers of molded products who are direct users of OPS sheets. The users of manufactures of molded products, including general merchandising stores and convenience stores, have powerful price negotiating power. The manufacturers of molded products therefore purchase from multiple suppliers to procure OPS sheets at a cheaper price, but the manufacturers of molded products cannot necessarily negotiate prices with OPS sheet manufacturers advantageously. However, for the manufacturers of OPS sheets which are mainly used only for transparent food packing materials, it is difficult to negotiate prices the way the companies lose their customers. Therefore, this factor could deter manufacturers of OPS sheets from arbitrarily raising prices.
- PS accounts for a significant part of the cost of manufacturing OPS sheets. Looking at transactional relationships between PS manufacturers as the upstream market and OPS sheet manufacturers, the integration may stimulate the convergence of production costs.

#### D) Remedies proposed by the companies

##### 47. The companies aim to do the following:

- to take measures to transfer a part of the production facilities to competitors. If this is not possible due to being unable to find recipients for their production facilities, etc., they will strive to create a long-term right of trading of the products at a price equivalent to production costs;
- to take measures to promote imports by providing technological and other support to upgrade the production quality of overseas manufacturers;
- to take measures to encourage the entry of users who decide to manufacture the products by themselves, by offering technical support, etc. and thereby eliminating technical barriers to entry for the users;
- to take measures to block information by prohibiting an executive of the PS department from holding an executive post concurrently in the new company, etc.;
- to make a report to the JFTC on how the above-mentioned remedies are being implemented, etc.

#### E) Conclusions

48. It is considered difficult for the companies concerned to conduct price negotiations that would lead to a loss of customers because: (1) there is no difference in quality among the products of OPS sheet manufacturers; (2) there is competitive pressure from A-PET sheet market, to the limited extent that OPS sheets may be replaced by A-PET sheets in some applications; and (3) the use of OPS sheets is limited to raw materials for transparent food packing sheet. In this situation, there is some competitive pressure,

though it is limited, from the downstream market, as active competition in the molded product market is generating demand to reduce prices. Based on such market conditions, if remedies such as the divestiture of facilities or the creation of a long-term right of trading are implemented, the excess supply capacity of other companies will increase, hindering the companies concerned from acting unilaterally to restrict competition.

49. Furthermore, concerning technical support to overseas manufacturers, the measures proposed include technical support for surface treatment, which is a matter of concern for users. The measure is expected to boost imports, as it will allow overseas manufacturers to supply products of the quality requested by Japanese users. Therefore, these circumstances make it difficult for the companies concerned to restrict competition either unilaterally or in coordination with competitors.

50. Regarding assistance to users for entering the business, this measure will not immediately help new users to enter due to the considerably high risks such as the enormous investment cost and the technical barriers. However, if technical barriers to entry become lower, new entrants may appear depending on market conditions and this measure may generate some competitive pressures.

51. In view of the above, including the remedies proposed by the companies concerned, it is estimated that the integration would not restrict competition in a relevant market, whether the companies act unilaterally or in coordination with other companies.

### **III. The role of a competition authority in the formulation and implementation of other policies**

#### ***1. Coordination between the Antimonopoly Act and other economic laws and ordinances***

52. When administrative bodies propose to enact or amend an economic law or ordinance from the standpoint of a specific policy requirement, the JFTC acts in consultation with these bodies to ensure coordination among the proposed provisions, the Antimonopoly Act and competition policy. In 2004, the JFTC acted in consultation with other administrative agencies and submitted the JFTC's opinions.

#### ***2. Administrative coordination***

53. As necessary, the JFTC also coordinates with administrative bodies when they take administrative measures based on specific policy requirements, in order to prevent such measures from causing problems concerning the Antimonopoly Act and competition policy. Considering the "Guidelines Concerning Administrative Guidance Under the Antimonopoly Act," the "Three Year Plan for Regulatory Reform and Opening to the Public-Private Partnership" (Cabinet Decision on March 19, 2004) states that ministries and agencies concerned are required to hold prior consultations with the JFTC to ensure that anticompetitive administrative guidance does not replace similar restrictive regulations. The JFTC ensures the necessary coordination with the ministries and agencies concerned.

#### ***3. Opinions on joint operations of express buses based on the Antimonopoly Act***

54. The JFTC published "Opinions on Joint Operations of Express Buses based on the Antimonopoly Act" on February 24, 2004. Control over the adjustment of supply and demand was abolished in February 2002 and since then the competitive environment has changed and certain new entries have been seen. In this environment, conduct with the potential of exclusion of new entrants was found in May 2003. Regarding this situation, the JFTC clarified its opinions for competition policy with respect to the joint operations of express buses.

#### **4. *Partial revision of guidelines for promotion of competition in the telecommunications business field***

55. The JFTC revised and published the “Guidelines for promotion of competition in the telecommunications business field” on June 18, 2004 in cooperation with the Ministry of Internal Affairs and Communications.

56. In this revision, based on past examples of application of the law, the JFTC added a practice constituting problems under the Antimonopoly Act: “The act to place restraints on dealers of terminal facilities concerning the price they indicate in the shop, advertisements, etc.” of telecommunications firms and revised the Guideline to secure compliance with the Telecommunications Business Law and “Guideline for Use of Poles, Ducts, Conduits and Similar Facilities Owned by Public Utilities” (prepared by the Ministry of Internal Affairs and Communications), in line with their revision in April 2004.

#### **5. *Partial revision of guidelines for proper gas trade***

57. In March 2000, the JFTC published, in cooperation with the Ministry of International Trade and Industry (the present Ministry of Economy, Trade and Industry), the “Guideline for Proper Gas Trade” which describes controversial acts, etc. in the gas business concerning the Antimonopoly Act or the Gas Business Law from the perspective of fair and effective competition.

58. In August 2004, the JFTC revised this Guideline in cooperation with the Ministry of Economy, Trade and Industry. This revision is based on the new provisions of the Revised Gas Business Law and examples of cases brought to the government for advice, taking into consideration enforcement of this revised Law of April 2004 and accumulated cases of requests for advice following the previous reform of gas business system more than four years ago.

59. In this revision, the JFTC added, as an act in the retail gas sector which may infringe upon the Antimonopoly Act, “The act of a general gas business having a monopolistic position in its supply area to hinder the business of a new entrant by doing certain acts illegitimately in combination” and “The act of a business that has a monopolistic position in other fields of business to make trades in the gas market advantageous to themselves by illegitimately providing benefit to customers, making use of their monopolistic power.” The JFTC also newly included a description on the use of LNG bases by a third party.

#### **6. *Opinions on number portability of cellular phones based on the Antimonopoly Act***

60. The JFTC published the “Opinions on number portability of cellular phones based on the Antimonopoly Act” on November 1, 2004. This Guideline explains the view of the Antimonopoly Act concerning acts of telecommunication businesses in and after introducing number portability in order to prevent violations of the Antimonopoly Act and to promote fair and free competition on the cellular phone market.

61. In this regard, the JFTC expresses the following opinion:

- Generally speaking, number portability is convenient for users and provides a common base for competition among cellular phone businesses. Therefore, the agreement reached among cellular phone businesses to introduce number portability in principle poses no problem with regard to the Antimonopoly Act.

- Discussions conducted and arrangements made among cellular phone businesses in introducing number portability on matters within the minimum limit required are, in principle, considered to pose no problem with regard to the Antimonopoly Act, provided that such actions do not unreasonably impair the benefits of cellular phone users, that such actions do not enforce compliance with the arrangements, or that such actions do not tend to treat specific telecommunication businesses in a discriminatory way.
- As the discussions and arrangements among cellular phone businesses in introducing number portability are conducted only among existing telecommunication businesses, monitoring is required to ensure arrangements do not disadvantage the other cellular phone businesses.

7. ***Guidelines for unfair trade practices associated with relaxation of controls over classification of business categories and expansion of scope of business for financial institutions***

62. Financial institutions have been extending their scope of business in recent years, associated with the relaxation of control over the classification of business categories that, for example, authorises them to establish holding companies. In addition to investment trusts and certain insurance products which they have been handling, they are now authorised to handle securities business since December 2004.

63. In view of this situation, the JFTC established and published, on December 1, 2004, “Guidelines for unfair trade practices associated with relaxation of controls over classification of business categories and expansion of scope of business for financial institutions,” to clarify its views on acts that are controversial concerning the Antimonopoly Act under such revision of the system and to prevent violations.

**IV. Japan Fair Trade Commission resources (FY2004)**

1. ***Budget***

Fiscal Year	1996	1997	1998	1999	2000	2001	2002	2003	2004
Budget amount (\ billion)	5.38	5.56	5.62	5.78	5.9	6.04	6.16	7.85	7.82
Change over previous year (%)	2.7	3.3	1.1	2.8	2.1	2.3	2.0	2.2	△0.4
General Expenditures Budget —change over previous year (%)	2.4	1.5	△1.3	5.3	2.6	1.2	△2.3	0.1	0.1

Notes:

1. The General Expenditures Budget refers to the total budget of the Japanese Government and is the amount of General Account Budget Expenditures less National Debt Service and Local Allocation Tax Grants.
2. The rate of increase for the JFTC budget of FY2003 is compared to the post-reclassification budget (7.69 billion yen) in order to avoid the effects of an increase in personnel expenses, which required independent calculation, in line with the JFTC’s transfer to the Cabinet Office.

2. ***Number of officials***

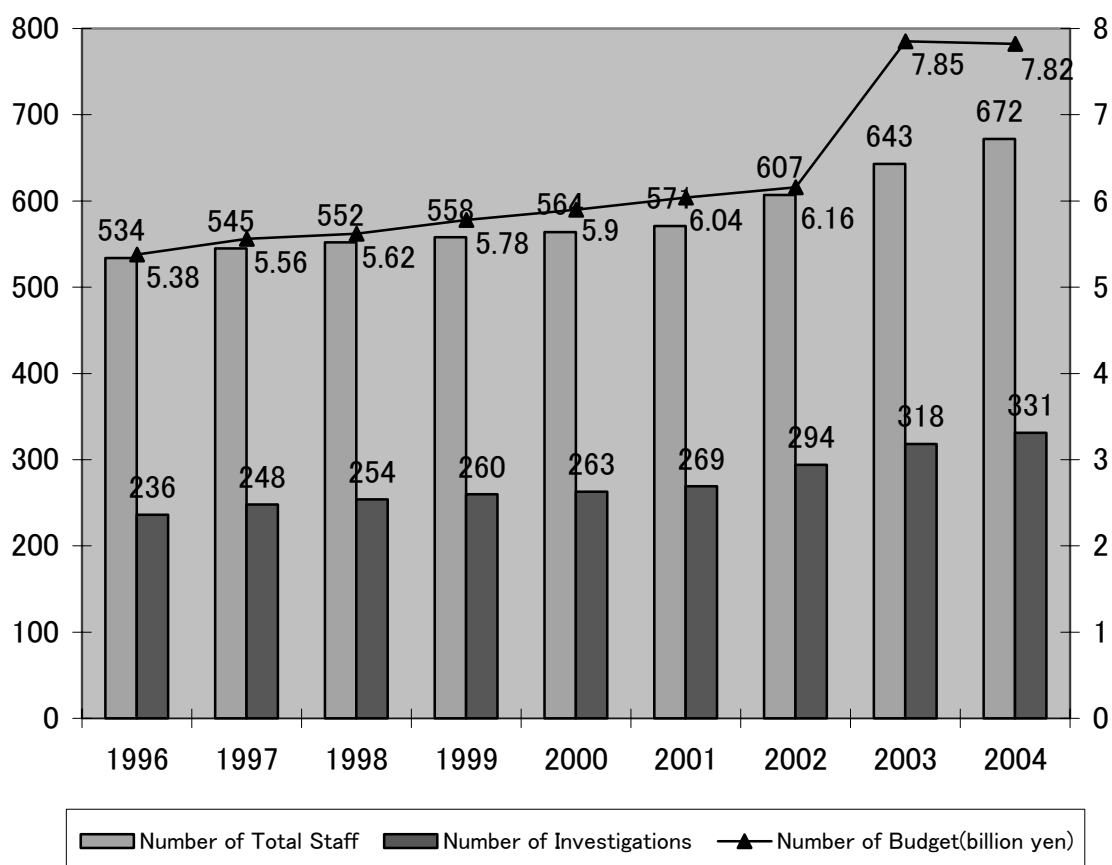
The number of officials in the General Secretariat of the Fair Trade Commission (unit: persons)

Fiscal Year	1996	1997	1998	1999	2000	2001	2002	2003	2004
Number of officials	534	545	552	558	564	571	607	643	672
Enforcement against anti-competitive practices	236	248	254	260	263	269	294	318	331
Merger review enforcement	18	18	19	19	22	22	28	30	32
Advocacy efforts	23	23	23	22	22	22	25	30	30

(Notes)

1. The number of officials engaged in enforcement against anti-competitive practices refers to the Investigation Bureau and Investigation Divisions of local offices.
2. The number of officials engaged in merger review enforcement refers to the Merger and Acquisitions Division.
3. The number of officials devoted to advocacy efforts refers to the General Affairs Division of the Economic Affairs Bureau and the Coordination Division.

### Staff and budget (FY 1996-2004)



### 3. *Activities of the Competition Policy Research Center*

64. The Competition Policy Research Center (CPRC) enhances research activities as a result of collaboration between visiting researchers (14 persons at the end of December 2004) who are specialists in the area of economics or law and JFTC staff in order to strengthen basic ideas on implementing the Antimonopoly Act, planning, and evaluating competition policies. In 2004, the CPRC published four joint research reports and four discussion papers.

65. The CPRC maintained its energetic activities, such as hosting an international symposium with high-level officials of the competition authorities in the United States, 11 workshops, two open seminars and also implementing a specialised training session in economics for the JFTC staff to improve their ability for economic analysis.

1) *Reports*

- a) *Research paper regarding competitive situation in the broad band service* (February 2004);
- b) *Research paper regarding adoption of Competition Law of the European Community against abuse of dominant position in the public utilities sector* (March 2004);
- c) *Research paper of economic analysis regarding relation between new market structural index and competitive marketplace* (April 2004);
- d) *Research paper regarding jurisprudential and economic perspective on regulation of vertical and mixed combination of enterprises* (August 2004).

2) *Discussion papers*

- a) *“Empirical analysis on the price effects of mergers and acquisitions – Case studied in Japan –”* (February 2004) Masanori Fukamachi, Mai Makino;
- b) *“Event studies on the competitive effects of mergers and acquisitions – Case studied in Japan –”* (May 2004) Masanori Fukamachi, Mai Makino;
- c) *“Verifying the accuracy of the prediction based on event studies –Issues in applying event studies to the actual merger investigations –”* (October 2004) Masanori Fukamachi, Mai Makino;
- d) *“Empirical studies regarding effects given by dynamic competition on profit ratio of companies”* (November 2004) Shigemi Izumida, Makoto Funakoshi, Yoshihisa Takahashi.

3) *Hosting of an Open Seminar*

66. The CPRC hosts open seminars to introduce the results of the joint research reports. This series of open seminars is also used as a venue for speeches by senior officers of the competition authorities and by academics abroad when visiting Japan.

67. On December 6, 2004, the CPRC hosted an open seminar on the theme “Competition Policy in the U.K. and its Implications for Japanese Competition Policy,” inviting Sir Robin Young, Former Permanent Secretary of the Department of Trade and Industry of the U.K. and Mr. Christopher Clark, Deputy-Chairman of the U.K. Competition Commission as speakers. Materials from this open seminar are available at <http://www.jftc.go.jp/cprc/english/2-report.html>.

4) *Hosting of International Symposiums*

68. In order to carry out its function of a base for international exchange for competition policy, the CPRC hosts international symposiums, inviting senior officers of the competition authorities and academics abroad. The symposiums include panel discussions with the participation of visiting researchers and senior officers of the JFTC, based on the topics of international competition policy as well as the results of academic research.

69. In September 2004, an international symposium was held under the joint sponsorship of the Tokyo American Center and the CPRC on the theme "Globalisation of Competition and New Design of Competition Policy," inviting Mr. R. Hewitt Pate, Former Director of the Antitrust Division of the U.S. Department of Justice and Mr. Alden F. Abbott, Assistant Director of the Bureau of Competition, the U.S. Federal Trade Commission as speakers. Materials from this symposium are available at <http://www.jftc.go.jp/cprc/english/symposium.html>.

5) *Implementation of Specialised Training in Economics*

70. The CPRC gives training in economics to enhance the economic analysis skills of JFTC's staff. In November 2004, it provided training that ranged from basics to applications of microeconomics, the theory of industrial organisation, econometrics, etc., inviting CPRC visiting researchers as lecturers.

**V. Main surveys related to competition policy**

**1. *Survey report on trade between retailers and suppliers accompanying implementation of total price indication method, including consumption tax***

71. The revised Consumption Tax Law will make it obligatory for retailers and suppliers to indicate the gross price payable, including the amount equivalent to the consumption tax, when indicating prices to consumers starting in April 2004. This caused concern that retailers might abuse their dominant bargaining position to suppliers and request them to illegitimately lower purchasing prices or dispatch their staff members. Therefore, the JFTC conducted a survey on retailers and suppliers to find out whether the Antimonopoly Act, etc. was being violated (published in March 2004).

72. In this survey, it was pointed out that some retailers requested suppliers to lower purchasing prices. Therefore, the JFTC individually conducted a hearing survey of questionable retailers to learn about their actual transactions and requested a person in charge of each company to make a report on the results of an in-house survey as well as improvements that would be made.

73. The JFTC has decided to take the following measures based on the results of the current survey:

- a) To continue to follow up on large-scale retailers for whom problems were pointed out in the recent survey and to monitor the improvements to be made;
- b) To continue to collect information from suppliers, etc. and to take strict measures on any abuse of a dominant bargaining position that would violate the Antimonopoly Act, including the pending case under hearing;
- c) To make further requests to organisations of retailers, etc. to prevent any abuse of a dominant bargaining position;
- d) To monitor how supply is being provided after a certain period in survey of the actual conditions of transactions between large-scale retailers and suppliers, a survey that is regularly conducted by the JFTC.

**2. *Survey report concerning the actual conditions of competition in broadband services, etc***

74. In order to assist in the appropriate operation of competition policy in the telecommunication industry in the future in view of the rapidly changing competition situation surrounding ADSL and other broadband services, the JFTC conducted a survey on businesses by questionnaire and interview, and on users of broadband services mainly by interview, on the situation of competition in broadband services and an associated service, IP telephony. The JFTC published its "Report on survey concerning the actual conditions of competition in broadband services, etc" on April 27, 2004.

**3. *Survey report on conditions surrounding biddings and contracts of local public organisations***

**1) *Purpose of survey***

75. In the ongoing review of bidding and contracts of local public organisations against the background of increasing social criticism of recent bid riggings, various problems have been pointed out,

such as securing the competitiveness of bidding and contract methods based on the multiplicity of bidding and contract cases. The JFTC conducted the survey to grasp the current conditions of bidding and contracts, institutional issues, etc. in local public organisations based on the ongoing reform of the bidding and contract system (published in September 2004).

2) *Outline of survey results*

A) Securing effectiveness of competition

76. This questionnaire survey showed that, while general competitive bidding and designated competitive bidding of the public offering type are increasingly being adopted by public local organisations covering large populations such as prefectural governments, they are used less by public local organisations covering smaller populations. Territorial requirements for bidders are often set out in competitive bidding by designated bidders but many replies showed that the local organisations do not publish the reasons for setting out territorial requirements.

B) Bidding and contract method utilising the capabilities of the private sector

77. While public local organisations covering larger populations such as prefectural governments actively use the ordering method of the technological proposal type and contract awarding method based on general evaluation (the method by which the contractor is selected according to technology, capacity and other conditions in addition to price), many of the public local organisations covering smaller populations consider it difficult to introduce these methods due to evaluation difficulties and systematic problems.

C) Main issues in terms of competition policy

78. Smaller local governments and similar institutions have problems such as insufficient screening capability to evaluate the managerial and technological power of businesses. Therefore, to improve their business systems, measures are required for the Japanese Government and prefectural governments to supplement and support their systematic and technological aspects, such as improving their database and providing appropriate data to them. The JFTC also considers that reasons for setting out territorial requirements for bidders should be made public to secure transparency.

4. *Survey report on actual conditions of circulation of gas*

79. The JFTC surveyed the actual conditions of the issue of discriminatory pricing in the wholesale stage of gasoline and the impact of “gyotengyoku” (gasoline that a primary distributor sells without attaching its own brand, etc.) and announced an outline of possible cases where it may raise a problem concerning the Antimonopoly Act (published in September 2004). The main idea was as follows:

1) *Difference in the wholesale price of primary distributor*

80. A price difference of about 10 yen per litre was found in the wholesale price of “keiretsugyoku” (gasoline), which primary distributors sell to “keiretsu,” or special agents. The difference in wholesale prices of primary distributors does not present any problems with regard to the Antimonopoly Act so far as it is within reasonable limits, stemming, for example, from sales volume, market conditions of the sales area, settlement methods, and transportation expenses. However, if there is a remarkable difference in the material wholesaler prices offered to multiple dealers who have the same continuous trade relation with their primary distributor and who are, moreover, located in the same marketing area, and if this happens in spite of the same details of their transactions and this directly and seriously affects the competitive functioning of the gasoline dealers who are unfavourably treated and thereby adversely influences fair

competition, then a problem may emerge with regard to the Antimonopoly Act (Unjust Discriminatory Pricing and Discriminatory Treatment).

2) *Restrictions imposed on “keiretsu” special agents, etc. to handle “gyotengyoku”*

81. In their trademark license agreement that primary distributors exchange with “keiretsu” special agents, primary distributors prohibit the “keiretsu” special agents from selling products other than gasoline distributed by such primary distributors in service stations where the agents display the trademark of the primary distributors. Therefore, “keiretsu” service stations that conduct business under the brand of primary distributors can stock gasoline only from such primary distributors. The prohibition by primary distributors upon “keiretsu” agents to sell “gyotengyoku” in service stations that display their signposts is generally considered to be within a certain extent necessary for the primary distributors to maintain confidence in their trademark. It therefore is not problematic with regard to the Antimonopoly Act, taking into account the fact that gasoline is a product to which no trademark can be attached and which can only be sold under a trademark indicated on the signposts of service stations.

82. However, if primary distributors arbitrarily and discriminatorily exercise their trademark right as seen in certain cases where they never request particular keiretsu special agents not to handle “gyotengyoku” while requesting the same of other agents, and this conduct directly and seriously affects the competitive functioning of the keiretsu special agents thus unfavourably treated, the primary distributors are not appropriately exercising trademark rights for the reason that such an act deviates from the purpose of the trademark protection system and/or is in contravention of the purpose of the same system. As a result, this conduct may be problematic with regard to the Antimonopoly Act (Dealing on Exclusive Terms, Discriminatory Treatment, Dealing on Restrictive Terms, Abuse of Dominant Bargaining Position, etc.).

5. *Survey report on actual conditions of circulation of consumer electrical appliances*

83. The JFTC surveyed the sales policies adopted by electrical appliance manufacturers that have a particular impact on competition, such as the method of setting transaction prices, payment of rebate by the circulation route of mass consumer electrical appliance retailers, “keiretsu” shops, etc. and formed an outline of the cases that may be problematic in terms of the Antimonopoly Act (published in September 2004). The general idea of the outline is explained as follows:

1) *Method of setting transaction prices*

84. Manufacturers and sales companies make a price quotation for each commodity. In their bulk transactions with mass retailers of consumer electrical appliances, they present prices for each customer based on transaction conditions, including track record. They lower prices, for example, based on the transaction prices and thus determine real transaction prices.

85. Generally speaking, even if the sales price and other conditions of a transaction may differ for each customer, provided that such a difference is within the limit of economic rationality reflecting the transaction details, the relation between supply and demand, the market situation, etc., the difference does not pose a problem with regard to the Antimonopoly Act. However, for customers located within the same market area who are believed to have the same transaction details, if manufacturers and sales companies directly and seriously affect the competitive functioning of some customers by establishing a significant difference in real transaction prices of consumer electrical appliances of the same kind, and thereby adversely affect the order of fair competition, then this difference may be problematic (Unjust Discriminatory Pricing and Discriminatory Treatment).

2) *Payment of rebate*

86. Manufacturers and sales companies offer rebates to mass retailers of consumer electrical appliances to promote sales and to review transaction prices. Concerning the receipt of rebates, after major mass retailers of consumer electrical appliances have already agreed to a transaction price, if they request manufacturers who highly depend on delivering products to them and find it difficult to change customers to grant them a rebate in order to cover gross profits, this would lead to a problem with regard to the Antimonopoly Act (Abuse of Dominant Bargaining Position), depending on what they request and how they request it.