



COUNTRY STUDIES

Japan - The Role of Competition Policy in Regulatory Reform 1999

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Japan. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

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Regulatory Reform in the Japan

**The Role of Competition Policy in Regulatory
Reform**



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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Japan. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in the Japan* published in 1999. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Japan. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

TABLE OF CONTENTS

| | | |
|-------------|--|----|
| 1. | The concepts of competition policy in Japan: foundations and context | 6 |
| 2. | The substantive toolkit: content of the competition law | 10 |
| 2.1 | Horizontal agreements: rules to prevent anti-competition co-ordination, including that fostered by regulation | 11 |
| 2.2 | Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution, including those fostered by regulation | 15 |
| 2.3 | Abuse of dominance: rules to prevent or remedy market power, especially arising from reform-related restructuring | 17 |
| 2.4 | Mergers: rules to prevent competition problems arising from corporate restructuring, including responses to regulatory change | 18 |
| 2.5 | Competitor protection: relationship to rules of “unfair competition” | 21 |
| 2.6 | Consumer protection: consistency with competition law and policy | 22 |
| 3. | Institutional tools: enforcement in support of regulatory reform | 22 |
| 3.1 | Competition policy institutions | 22 |
| 3.2 | Competition law enforcement | 24 |
| 3.3 | Other enforcement methods | 26 |
| 3.4 | International trade issues in competition policy and enforcement | 29 |
| 3.5 | Agency resources, actions, and implied priorities | 30 |
| 4. | The limits of competition policy for regulatory reform | 31 |
| 4.1 | Economy-wide exemptions or special treatments | 31 |
| 4.2 | Sector-specific exclusions, rules and exemptions | 32 |
| 5. | Competition advocacy for regulatory reform | 39 |
| 6. | Conclusions and policy options for reform | 41 |
| 6.1 | General assessment of current strengths and weaknesses | 41 |
| 6.2 | The dynamic view: the pace and direction of change | 42 |
| 6.3 | Potential benefits and costs of further regulatory reform | 42 |
| 6.4 | Policy options for consideration | 42 |
| 6.5 | Managing regulatory reform | 45 |
| Notes | | 46 |

Executive Summary

Background Report on The Role of Competition Policy in Regulatory Reform

Competition policy should be integrated into the general policy framework for regulation. Its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition itself. Competition ideas are central to Japan's newest reform plans. Yet competition has historically played a subordinate role in Japan's regulatory policies, and aspects of Japan's traditional interventionist approach to regulation, such as controlling and guiding investment and permitting cartels, contradicted principles of modern competition policy. The attitude toward competition policy in Japan is changing. Reform steps and programs Japan has undertaken or announced would erode anti-competitive regulatory habits. Efficiency, investment, and innovation in the economy—as well as consumer welfare—will be boosted by measures such as eliminating supply-demand balancing as a justification for controlling entry, eliminating statutory exemptions from the general competition law, and eliminating implied exemptions accomplished by administrative guidance.

The need for strong competition policy in Japan will be even greater in future. As regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. Japan's Fair Trade Commission, one of the oldest and largest competition law agencies in the world, wields a wide array of substantive and procedural tools. But the FTC was relatively inactive for much of the period before the 1990s, although it was quite active in the 1970s. It was unable to prevent a generation of anti-competitive regulation that at one time explicitly exempted over a thousand cartel agreements from its jurisdiction. That situation has been changing since 1990, in part because concerns raised by trading partners have reduced resistance to the FTC's efforts. The FTC's resources have increased and competition enforcement has intensified, especially in traditional industrial and distribution sectors. In sectors that have been more directly regulated, such as transport and utilities, the FTC has employed study groups to develop policy ideas and recommendations. A test of the seriousness of competition policy will be whether the FTC can move into these areas, which have long been the preserve of specialised sectoral ministries, with effective law enforcement.

The conception of competition that the FTC is increasingly using to apply Japan's basic competition law is a radical change from the conception of managed, orderly accommodation that characterises much of Japanese business and the traditional government-business relationship in Japan. That dissonance implies that reform based on modern competition principles will be difficult. The FTC has adequate legal power, but at times it has been less than aggressive in using that power.

The success and sustainability of the current regulatory reform efforts depend strongly on better integration of broad-based competition principles into regulatory policies and on stronger application of competition principles through public and private enforcement action. FTC remedies should be supplemented by more effective and credible means for injured parties to obtain judicial relief directly. The FTC should be further strengthened, especially in legal and economic resources necessary to increase its enforcement activity, and other enforcement methods, including criminal sanctions against practices such as bid-rigging, should be pursued vigorously. Sectoral ministries should be responsible for helping to establish conditions for effective competition in the industries under their purview (perhaps through revision of the foundation laws), and for co-ordinating with the FTC to ensure effective enforcement (rather than protecting industries against enforcement action). And the government must follow through to eliminate exemptions from the general competition law, to eliminate administrative guidance that tolerates cartels, and to eliminate supply-demand balancing as an acceptable justification for controlling entry.

1. The concepts of competition policy in Japan: foundations and context

For most of the post-war era, the principal goal of Japan's economic policy has been development and growth, and free competition has sometimes been seen as inconsistent with that goal.¹ Competition policy has been treated as a species of regulation, not an organising principle for the economy. Relative priorities are reflected in the prestige of the institutions responsible. Competition policy was assigned to a separate agency, independent of the government but politically not strong enough to promote its policies effectively, while the ministries that regulate industry and investment, and that have historically encouraged non-competitive practices, were more powerful. Japan's economic success now makes it possible, indeed imperative, to shift policy goals from "catch-up" development to consumer welfare. The competition agency is responding to this change by redirecting its own efforts, to concentrate on practices that impair efficient markets. The rest of the regulatory apparatus needs to follow that course too, as it is presented in the current deregulation programme, which recognises that growth can no longer come through direction from the centre, but must result from the self-reliant risk-taking of competitive enterprises.

The goals of the principal competition statute could serve as statements of purpose for regulations and policies about competition generally. The competition law's stated goals are "to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general."² Six goals or objects can be identified: free competitive processes, fair market outcomes, private innovation, economic growth (including business expansion, greater employment and higher incomes), political democracy, and consumer welfare. The statute itself offers little basis for balancing among them, but a leading judicial authority has said that the last two goals are the "ultimate purpose" of the law, implying that the others are subsidiary or supplemental.³

Box 1. Competition policy's roles in regulatory reform

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Rules and regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

The formal deregulation program links competition policy to regulatory reform, without narrowing the selection of potential goals for competition policy. The 1998 Programme announces an overall purpose “to create a free and fair socio-economic system which is fully open to the world and based on the rules of accountability and market principles.” Although the Programme’s opening summary does not use the term “competition,” the actual elements of the Programme include many that implement or rely on competition policies.

In Japan’s traditional approach to market competition, fair treatment has been as important as free processes. In all settings, the term “competition” is typically accompanied by both “free” and “fair.” The competition agency has considered fair competition to be as indispensable as free competition. Widespread public concern to protect the value of fairness thus supports this aspect of the competition agency’s actions. The statutory definition of “competition” concentrates on process and immediate effects on particular businesses. “Competition,” for most purposes, is a state in which firms can sell similar goods or services to the same consumers, or get similar products from the same supplier, “without undertaking any significant change in their business facilities or kinds of business activities.”⁴ Such a definition would encourage assessing competition in terms of how conduct diverges from “business as usual,” rather than in terms of economic concepts such as excess profits, allocative efficiency, or innovation.

Preserving competitive industry structures by preventing high concentration has been a concern of competition policy, although the statutory purposes do not include it in those terms. At an operational level, many rules for assessing the competitive effects of conduct are structure-based. Until recently, the approach to mergers appeared to be basically structural. The most striking structural preoccupation was the ban on holding companies, which was only recently repealed. That ban, which followed the steps to break up the wartime *zaibatsu*, was probably also considered consistent with the goal of promoting “democratic and wholesome” development.

The goal of protecting consumer welfare appears increasingly. This goal may explain one aspect of traditional enforcement practice. Cartels that protect firms against losses in downturns have been tolerated, while cartels that have tried to raise prices (or raise them too much) have been targeted, and not just by the FTC.⁵ The FTC’s efforts against resale price maintenance are also motivated by concerns about high consumer prices.

Economic growth has not, until recently, been recognised as a principal goal of competition policy, despite the statutory instruction. Instead, competition and growth were treated as inconsistent through much of the post-war period.⁶ Principally because of concerns about growth, and secondarily because of concerns about fairness of market outcomes, other policies and interests have often trumped competition policy. This effect has not been confined to situations in which other social interests and values justify controls on business behaviour. Rather, competition policy has yielded to interests in ensuring stable supply or even protecting or promoting specific industries. The statute identifies developing the national economy and benefiting consumers as separate goals, implying that there might be trade-offs between them and that they might not always lead to the same policy decisions.⁷ Promoting economic development is listed first.

Ambivalent views about the effects of competition are found in many countries. In Japan, scepticism may be reinforced by aspects of the culture and society. There is little reason to think that basic business incentives differ fundamentally between Japan and other market economies. Businesses everywhere need to make some profit (though the profit levels demanded in Japan may be lower than elsewhere), and businesses generally recognise that profits can be increased by collusion or exclusion.⁸ But in Japan, cultural features such as emphasis on group cohesion, suspicion of individual difference, and concern to avoid personal embarrassment may further encourage collective action and help explain why the government has done so much to manage risk and suppress supposedly “excessive” competition

throughout the economy.⁹ Concerns about business and market stability, that more competition and less regulation will lead to job losses, are also commonly encountered in other market economies, but they seem unusually deep in Japan. Not only Japanese businesses, but Japanese consumers, are reportedly willing to pay higher prices, believing that the non-competitive system that produces them is somehow more stable, secure, and fair than a competitive market would be. Recognising Japanese cultural attitudes toward competition policy is important in assessing what direction policy and reform may take, because most of the formal structures implementing competition policy, as well as many proposals to reform those structures, were borrowed from, or imposed by, others. In the Japanese setting, those borrowed or imported forms may perform differently.

The idea of using cartels to manage investment, and to alleviate the pain of economic contraction, took hold in Japan during the post-war recession in 1905. Cartels had first appeared in the 1880s. There was no law against them, but they did not proliferate. The few formal cartels did include large export industries, though, such as spinning. When the Japanese government encouraged formal cartels in the 1920s, it followed the model of Germany. From 1920s through WWII, cartels were not only tolerated but officially sponsored and even required. Although there were some objections, most officials, businesses, and academics approved the idea of central direction. No foundation was laid for an anti-cartel competition policy.¹⁰

In the post-war US occupation, cartel policy reversed. The new antimonopoly act and the new legal structure against cartels, like the old laws that had promoted cartels, were largely imports from elsewhere. The substantive law was modelled closely on the US Sherman and Clayton Acts. The enforcement structure was modelled on the US FTC. The imported policy did not enjoy support in the business community, and it was politically vulnerable. When the occupation ended, the AMA was cut back in 1953, by eliminating the separate law controlling trade associations, eliminating the *per se* violations, and authorising relaxation of enforcement by permitting resale price maintenance and recession or rationalisation cartels. Aspects of that cutback followed a foreign model, too, namely a then-current proposal to allow depression cartels in the German competition law. But a further effort to vitiate the AMA almost completely in 1958 was defeated. Business and ministry interests in non-competitive solutions were countered then by support for the FTC from consumer, labour and agricultural groups.¹¹

Although it did escape complete repeal, competition enforcement slept through most of the 1950s and 1960s, when the competition law went essentially unenforced.¹² “Competition” policy in many sectors became centrally guided investment and a proliferation of explicit exemptions and implicit guidance. Rivalry was controlled and focused on lowering costs and improving productivity in ways that stimulated export trade. Entry was subject to government supervision, as the government, not the market, took on the task of assessing the likely balance of supply and demand.

But the FTC continued to hold out the idea of promoting the competitive process. By the early 1960s, the law and the agency had enough of a record to begin to be taken more seriously as a Japanese institution, not an imported foreign one.¹³ The FTC opposed some proposals to increase government direction and permit very large mergers, for example. But it was not until the end of the 1960s that the FTC tried to block a merger that another ministry promoted. It was not until the 1970s that the FTC used the law’s criminal sanctions against price fixing, in response to the oil shocks. The FTC followed this increased enforcement effort with proposals for major amendments to strengthen the law. Most of these were adopted in 1977: surcharges from cartels, countermeasures against “monopolistic situations,” reports on parallel pricing in oligopolies, stronger controls on aggregate concentration, and stronger remedies and fines generally. But other ministries also received new powers to guide industries through restructuring, and in the early 1980s the FTC’s efforts to attack cartels were blunted by political pressures.¹⁴ Despite the strengthened competition law, FTC enforcement retreated again. In the 1970s, the FTC took an average of 34 formal actions per year; in the 1980s, the average was 11. (Some observers believe that the stronger remedies actually led to the lower enforcement statistics, because businesses responded to the greater risk by destroying documents and thus making it harder for the FTC to prove violations.)¹⁵

Competition enforcement has revived again in the 1990s. The revival, like the original competition law itself, can be traced to pressure from abroad. This time, it was claims, in trade disputes with the US, that lax competition law enforcement gave Japanese firms unfair trading advantages while tolerating restraints on competitive imports. Whatever the merit of those claims, the response from Japan was a number of explicit commitments to increase the resources and the visibility of competition enforcement. Many of these represented changes that the FTC had long been advocating. The FTC was an object and active participant in the negotiations. At their conclusion, the Japanese government committed to increasing enforcement against exclusionary cartels, to greater reliance on more formal, public methods of enforcement and prosecutions, and to increasing attention to competition issues in the distribution system and in inter-corporate *keiretsu* groups. The FTC has increased its formal enforcement activity, strengthened its guidelines about horizontal and vertical issues, modernised its merger standards, added to its staff and budget, and raised its profile in advising about competition issues at other ministries.

Despite the recent successes, competition policy remains an awkward import into Japan's business and government culture, and its long-term status remains uncertain. A recent analysis by Japanese and British scholars describes the FTC as "a unique and vulnerable agency administering deeply unpopular laws based on a widely rejected model of market competition," playing an "ambiguous and difficult" role, with a "huge gap" between its theoretical powers and its actual practice. The gap is closing, but "the renaissance of competition policy in Japan is recent, partial, and far from fully secure."¹⁶

The evolution of Japan's notions about competition policy, the variations in the intensity and content of that policy, and even the uncertainty about the present level of commitment are paralleled in other OECD countries' experiences, of course. In the Netherlands, for example, a corporatist tradition encourages mutual support and co-operation, and for a long time maintaining small and medium sized businesses inhibited the development of strong competition policy, especially clear rules against cartels. There, too, cartels were not just tolerated, but encouraged, until recently when a major step in the regulatory reform process reversed that course. And the new emphasis on competition law enforcement there has yet to face the test of economic downturn and reaction. The US's history shows the same kind of alternations as Japan's, even though the US social and political culture supports the value of competition more strongly. In the US, too, the adoption of the original basic laws from 1890 to 1914 was followed by backlash and retreat in the 1920s. In the Great Depression, the first response of US competition policy was to emphasise competition as fairness, including co-ordination through industry-specific trade practice conferences and guides. These strategies, and regulatory structures with similar goals, overstayed into the post-war era, and their obsolescence helped spark the major regulatory reform movement of the 1970s. Now Japan too may be facing up to the obsolescence of its traditional conception of the relative roles of regulatory direction and competition policy.

The terms of the current debate about regulatory reform in Japan show the continued difficulty in accepting a conception of competition as self-generated rivalry, rather than something that is controlled and even created from the centre. The 1998 deregulation programme mixes competition and control. One of its general goals is creating conditions for effective, fair competition. The programme calls for abolishing rationalisation and recession cartels, and it implies that competition policy will now be included among the responsibilities of industry ministries. Entry restrictions, and particularly the concept of regulatory supply-demand balancing, are to be reviewed, and the programme states that the eventual goal is to ease and even abolish them. But the programme also includes sectoral emphasis and directed investment toward sectors that are believed likely to be the growth industries of the future or otherwise have feedback effects on economic performance generally. While more exemptions from the competition law will be eliminated, ministries will still have the power to help industries respond collectively to economic shocks and to guide restructuring. If the review is delayed or weakened, some of the controls on entry will remain in place, either indefinitely or on a timetable that will take another 15 years to complete.

Despite this transition difficulty, Japan's institutions and traditions can support stronger competition policy as a modern, internationally-endorsed alternative to inefficient and ultimately destructive coddling of non-competitive firms and industries. To do so, it is necessary, and fruitful, to expand the institutional basis for competition policy, by enabling private parties to take more effective independent actions and by giving other authorities in the government additional responsibilities to protect and promote competition. Regulatory practices reflect cultures, so they will not change quickly. But a broader and deeper commitment to competition policy could lead bodies that were once responsible for directing investment and avoiding failure to take on the new task of invigorating market institutions and enabling more efficient ways to cope with change.

2. The substantive toolkit: content of the competition law

If regulatory reform is to yield its full benefits, the competition law must be effective in protecting the public interest in markets where regulatory reform enhances the scope for competition. Japan's general competition law provides a generally adequate substantive foundation for reform based on market principles. The complexity of the substantive law and the institutional relationships with other ministries afford many resources, but also many complications, for the reform process. The principal problem is not the content of the law, but its application, and especially the multitude of ways, official and covert, in which competition can be evaded.

The basic source of substantive Japanese competition law is the Antimonopoly Act of 1947, as amended. The AMA prohibits unreasonable restraints of trade, "private monopolisation," and "monopolist situations," as well as unfair practices and anti-competitive mergers. It is supplemented by numerous regulations and guidelines, as well as other laws dealing with aspects of unfair competition, notably concerning contracting and misleading marketing methods.¹⁷ But competition policy in the broader sense has been fundamentally affected by a myriad of special laws and exemptions, formal and informal, that have encouraged or tolerated cartels, mergers, and distribution controls that would have contradicted the spirit, if not the letter, of the basic AMA prohibitions. In the last few years, steps have been taken to clear these away in order to move toward a generally applicable, consistent policy of competition as the rule for business behaviour.

Box 2. The competition policy toolkit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1 *Horizontal agreements: rules to prevent anti-competition co-ordination, including that fostered by regulation*

Anti-competitive agreements among competitors are treated as “unreasonable restraints of trade,” prohibited by Section 3 of the AMA. The statutory definition includes all forms of horizontal contract, agreement, or concerted action that control price or limit production, technology, products, facilities, or customers or suppliers.¹⁸ The basic sanction is an order to cease the offending conduct or to take corrective action.

For violations related to prices, including those that affect prices by restricting output, the most important measure is a “surcharge.” Conceived as a confiscation of the violators' improper profits, the surcharge is a percentage of the sales during the period of the agreement. The basic rate is six per cent. Lower amounts are assessed against cartels in wholesale or retail trade or those involving small firms. The rate is fixed by statute and must be assessed, regardless of any other factors in the case or of the actual excess profits, whenever the FTC finds a price-related violation. The rate was increased in the early 1990s, from 1.5 per cent, to bring it more in line with the rates applied in similar circumstances in the EU and the US. It is still somewhat below the basic rates applied in other jurisdictions, though; moreover, those jurisdictions also consider the actual level of excess profits in a particular case. The FTC's lack of discretion, both in collecting the surcharge and in setting the rate, is thought by some to be an advantage in the Japanese context, because it makes the process less controversial.

Criminal penalties are also available. Under the AMA, fines and imprisonment may be ordered against restraints of trade generally.¹⁹ In addition, the Criminal Code includes a sanction against bid-rigging involving public projects.²⁰ The FTC has announced a policy of applying criminal sanctions in the most egregious cases, of price or output cartels, market allocation agreements, bid-rigging and boycotts, that are likely to have a widespread influence on society or that involve repeat offenders or firms that have not adequately remedied past violations. The public prosecutor handles criminal cases. Criminal actions under the AMA require a prior referral by the FTC. The prosecutor may bring an action against bid-rigging under the Criminal Code independently, without such a referral.

The balance between anti-competitive and pro-competitive effects is at issue, at least to some extent, in all cases under the AMA. At first, the law included *per se* violations, but those provisions were repealed in 1953. To find a violation of Section 3, the FTC must show that the conduct substantially restrained competition in a particular field and that it was contrary to the public interest. The “public interest” test is defined narrowly, though, in terms of consistency with the purposes of the AMA. And the implicit requirement to define a market and assess effects has not prevented the FTC from applying a presumption that agreements affecting price have the requisite effects. For example, in its Guidelines, such as those for trade associations, agreements that affect price or restrict entry are described as violations “in principle,” implying that they violate the law even if, in a particular case, they are not shown to have substantially restrained competition in a particular market. . These violations “in principle” are contrasted with other kinds of conduct, which might be defended on the grounds that, in the particular case, there is no anti-competitive effect. The FTC evidently uses a market share test to estimate competitive effects. Restraints that affect less than half of the market are not likely to be found illegal; those that affect more than 80 per cent are presumed to be illegal; those in between depend on other factors.²¹ (One horizontal practice, boycotts, is also treated as an unfair trade practice under a different section of the law, where effects on competition need not be shown in particular cases.) The potential for balance in particular cases should make the law sensitive to economically important factors and avoid perverse applications. On the other hand, an enforcement agency’s burden is greater where it is necessary to show effects and meet a public interest test, and this greater burden may make it more difficult to apply the law to non-competitive arrangements that have enjoyed tacit or explicit support from other parts of the government.

The widespread attention to fairness among competitors complicates developing clear rules against anti-competitive co-operation in an industry. It can seem natural to set a standard of fairness based on common industry practice. Indeed, guiding an industry to that consensus has long been perceived as a legitimate government role. Thus, a pervasive competition policy problem has been government sponsorship or toleration of horizontal industry co-ordination, either by promoting and defending explicit cartels and market divisions, or by less direct means, from using trade associations as surrogates or tools for government regulation, to encouraging tacit co-ordination in oligopolistic industries, to administrative guidance that confirms and polices non-competitive consensus.

Bid rigging, now an enforcement priority, is a prime example of government-tolerated collusion. Bid rigging often enjoyed the tacit or even explicit support of government agencies soliciting the bids. Most cases have been brought as standard administrative actions, but criminal actions are increasing. A 1997 AMA criminal case against the 25 designated vendors of water supply meters, for rigging bids to the Tokyo Metropolitan Government, led to convictions of 25 companies and 34 employees. Fines totalled ¥155 million, and the employees received prison sentences of six to nine months, suspended for two years.²² A 1995 FTC criminal accusation led to a 1996 conviction against nine electrical equipment manufacturers for rigging bids to the Japan Sewage Works Agency, with fines totalling ¥460 million and (suspended) prison sentences. In addition, the FTC assessed surcharges of ¥1 036 million.²³

Development of more vigorous enforcement against bid rigging in the construction industry, which has exposed the FTC to considerable domestic political risk,²⁴ was aided by prodding and example. In the late 1980s, complaints about bid rigging for projects at US military installations led to comparatively minor penalties under the AMA. The FTC, which may have been constrained by statutory technicalities, ended up sharing some of its investigatory material with the complainant.²⁵ The threats of independent lawsuits that followed led to settlements that were substantially larger. In the Yokosuka Naval Base case, the size of the settlement—¥4700 million—implied that the conspiracy was twice as large as the FTC had found and the actual anti-competitive effect was 20 times greater. Since then, the sanctions have been stiffened and the FTC has been more aggressive.

Bid rigging exemplifies the difficult position that the FTC has had to work in.²⁶ For a century, it was common for a ministry to designate which firms it would accept bids from, and for those firms then to agree among themselves which one would win it. Consumer groups have protested the high taxes that pay for this system, but the high profits have also underwritten support from powerful politicians. Actions against construction industry problems, even generic ones, could be construed as attacks on leading politicians. In 1984, political maneuvering forced the FTC to issue guidelines about the construction industry that allowed information exchanges to continue, even though they declared that bid-rigging practices were illegal.²⁷ But a consensus for reform, which developed after the Shin Kanemaru scandals in the early 1990s brought down the LDP government, now supports the FTC's concentration on this problem. A measure of the FTC's revival is that the 1984 guidelines were replaced in 1994.

Under the current guidelines, agreements about who will win a bid, what the minimum bid will be, or how to divide bids all violate Section 3 “in principle,” that is, the parties cannot defend by claiming their conduct did not impair competition. Other kinds of conduct, including exchanges of information, are considered “highly suspect” if they appear to be elements of an explicit or tacit agreement to rig a bid. The guidelines educate as well as expound. They include detailed discussions of the basic laws and explanations of what kinds of conduct are likely to be permissible as well as illegal, along with summaries of the FTC decisions on the points discussed. Not only has the FTC been educating the industry about its potential liability, but it has also been educating the agencies that solicit bids about what they can do to protect themselves. Some successes are reported: the city of Zama adopted a policy to discipline suspected bid-riggers, and applied that policy in its latest tender to save ¥700 million on a road project.²⁸

Trade associations are a common source of competition problems, in Japan as everywhere else. There are about 15,000 registered national and regional trade associations. In retail trade alone, there are about 4000, many of them organised by product. Trade associations have facilitated long-standing anti-competitive relationships, both within and among industries. Associations of firms in related industries have reached and policed complex exclusive-dealing agreements to prevent new entry and stabilise customer relationships.²⁹ Correcting their anti-competitive behaviour is made more difficult where, as in Japan, associations have close relationships with related ministries, which use the associations to achieve administrative objectives. Thus an association may try to defend its action by claiming that it was doing what another ministry told it to do. The FTC has found that a high proportion of violations by trade associations have some connection with government regulations or administrative actions.³⁰ A 1998 FTC survey of non-profit entities, many of them trade associations under the statutory definition found cause for concern about preventing innovation or excluding competitors at five out of the 32 entities that were involved in setting and enforcing product standards and certifications (for water treatment, medical services, power plant equipment, LP gas equipment, and batteries).

A separate section of the AMA deals specifically with violations by trade associations. It prohibits a trade association from substantially restraining competition, limiting the number of firms in a field of business, “unjustly” restricting how member firms can do business, or causing firms, including those that are not members, to engage in unfair practices.³¹ Trade associations must report to the FTC when they are formed and when there are important changes in their organisation. The special trade association provisions are potentially broader and more general than the AMA's other prohibitions, but the remedies

available are narrower. At one time, enforcement against horizontal violations emphasised the special trade association provisions, with the result that individual companies avoided sanctions and publicity about their violations. The introduction of surcharges changed that treatment, because surcharges against a trade association are levied on its members. And trade association cases are now being brought more under the AMA's general sections, in order to attach liability to the member companies and their officers.

Here, too, the FTC has relied strongly on guidelines and education as well as enforcement. The 1995 guidelines on the activities of trade associations set out the law and applicable penalties in detail. The guidelines also set out a procedure for trade associations to consult with the FTC in advance about whether their plans comply with the law. Much of the FTC's trade association-related work is advice in response to these applications. Even though it is thus regulatory guidance, rather than enforcement, it may be effective in heading off problems. About 30 per cent of these applications disclose potential violations. Because this advice does not appear in formal case statistics, the FTC may not be getting enough credit for its work on these issues.³² Still, there is no doubt that the problems remain substantial.

Ministries' reliance on administrative guidance to help industries control or prevent competition has been a contentious and difficult problem. Informal guidance is officially banned. The 1993 Administrative Procedures Act specifies the formalities that are necessary for administrative action. Ministry instructions and advice are supposed to be developed and issued formally and publicly. And the FTC has announced, in its 1994 guideline about the treatment of administrative guidance, that even formal administrative guidance may not be a defence to conduct that otherwise violates the AMA. Under the guideline, a firm's compliance with an administrative instruction that is issued properly and pursuant to a specific law authorising it will not expose the firm to AMA liability. But the firm's agreement with its competitors to facilitate compliance could nonetheless violate the law. Following guidance that is not based on specific law or regulation exposes a firm to liability that depends on the purpose, content and method of the guidance. In determining the risk of liability from following this kind of administrative guidance, the criterion is whether the guidance has a direct impact on market mechanisms.

Some of the purposes of administrative guidance, such as protecting public health, safety, and the environment, are not very likely to affect the market mechanism directly in ways that could lead to violation of the AMA. Other purposes are more problematic, such as stabilising prices, ensuring fairness and transparency in business transactions, and protecting small business. And guidance for the purpose of preventing excessive competition, adjusting supply and demand, compensating for advantages or disadvantages among firms, maintaining order in an industry, or preventing prices from falling would obviously meet the "direct impact" criterion. Concerning content, guidance about business techniques, quality, standards, advertising, and representations may not necessarily have a direct impact on the market, even though these subjects are important means of competition. But guidance that could restrain firms' choices about entry, price, output, and investment is likely to have a direct and potentially problematic effect. Both concerning purposes and content, the FTC's guidelines about administrative guidance tolerate a good deal, perhaps to signal the agency's reasonableness and to emphasise its seriousness about the hard-core topics it wants to target. As for methods, these guidelines echo those about trade associations, in holding that guidance whose effectiveness depends on a trade association co-ordination or even on recognised tacit interdependence is also likely to have an impermissible effect. Significantly, a large proportion of the illustrative examples in these guidelines too are about trade associations.

Efforts to control anti-competitive administrative guidance point in the right direction, but it is not clear how much effect they are having. The FTC's guideline was issued in 1994, but there have only been two cases since then in which the FTC has found violations of the AMA where firms were evidently following informal administrative guidance. The 1998 deregulation programme instructs ministries to consult with the FTC in advance to ensure that removal of anti-competitive regulations is not thwarted by their replacement with the equivalent in the form of administrative guidance. This instruction would only

deal with guidance achieved through explicit, overt regulation and decision. Covert, implicit guidance is also a serious concern. Despite the FTC's pronouncement that co-ordination sanctioned by informal instructions and advice violates the AMA, parties may be reluctant to call in enforcement action against it, for fear not only of their own exposure to liability, but more importantly of antagonising competitors, suppliers, or ministries with which they must maintain ongoing relationships. Covert, implicit guidance is more difficult to address than conduct pursuant to formal guidance. It is much more difficult to prove, and the relevant conduct may be difficult to attack legally. Anti-competitive effects might be achieved without culpable private action and without much ministry instruction. Relaxing a regulation in order to permit entry may be ineffective in promoting competition, if all potential entrants heed the informal warning of a powerful ministry to stay out. That appears to have happened in some transport and finance sectors. The result is equivalent to a boycott, yet there is no one to sue.

Despite these difficulties and complications, the fifty years of experience under the AMA has produced complex, flexible doctrines that appear capable of handling post-reform competition problems adequately. The absence of statutory authority for a strong presumptive rule against price fixing and bid rigging might make enforcement more difficult. The FTC has compensated, though, by developing and announcing such a rule *de facto* in its guidelines. This approach seems to enjoy judicial support, perhaps because of the locution, describing the forbidden conduct as anti-competitive "in principle" rather than illegal *per se*. In any event, enforcement actions proceed against bid rigging with evident success. Where the application of the law is mainly administrative, and administrative assessment of surcharges is the main remedy, the statute's requirement to show effect can be met without great procedural burden or cost.

The law is adequate, and the supplementary guidelines issued in the last few years are highly useful additions and supplements. The FTC has demonstrated it can do serious analysis of modern competition issues. But a good basic law and capacity for good analysis will not, by themselves, establish a good competition policy. Competition policy in Japan suffered from the appearance of political weakness, reflected in reluctance to take on such major and obvious competition problems as long-standing cartels in basic materials. There are very encouraging signs that this reluctance is being overcome. The FTC's renaissance was launched by extracting enormous financial sanctions from the cement industry in 1991, followed by challenging the cartels' enforcement mechanism of interlocking exclusive dealing agreements in 1995. But there is more to be done, for not every industry has received the message that the FTC is serious. A foreign academic reports that steel industry executives tell him that they are fixing prices, but that the industry does not expect the FTC to stop it.³³ The FTC has announced a policy of stronger action against the most serious cartel problems, but it has made only a few criminal referrals. What is needed now is more energy and focus on enforcement.

2.2 Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution, including those fostered by regulation

Japan's distribution sector is widely considered to be inefficient and non-competitive,³⁴ and anti-competitive distribution constraints have inhibited market access.³⁵ The body of laws and regulations governing distribution relationships are more than adequate to deal with competition problems. Again, the issue is not the quality of the competition law and regulations, but the strength of enforcement and of regulations or other practices that contradict them.

Several parts of the statute address distribution issues. The principal statutory foundation is the ban on unfair trade practices in Section 19. This provision is separate from the ban of unreasonable restraints on competition in Section 3, which has been limited almost entirely to horizontal relationships. (The FTC has taken the position that exclusionary group boycotts can be unreasonable restraints, as well as unfair practices). The principal differences in the treatment of unfair practices, compared to unreasonable restraints, are that for unfair practices there is no "effects" test in particular cases, and the available sanctions do not include criminal penalties or surcharges. (Some vertical relationships might also be covered by Section 3's ban on "private monopolisation," if the party imposing a vertical restraint has

market power; that would make criminal penalties available, but would require showing effects and meeting the “public interest” test.) The law about unfair practices is regulatory, set out in lists of specific practices in Section 2(9) of the AMA and a General Designation issued in 1982, as well as some industry-specific rules. These are supplemented by an extensive guideline about distribution systems and business practices issued in 1991. One practice, resale price maintenance, is considered an unfair practice and is also treated by a separate section of the law. The special provision serves mostly as a device under which the FTC may permit resale price maintenance for certain commodities. For all violations except those few that might be treated under Section 3 of the Act, the principal sanction is a cease and desist order.

The substantive standard for identifying a violation of section 19 is that the practice is “unjust,” and that in turn is measured by its tendency to affect competition adversely. The FTC has tried to give the general term some content by distinguishing among different kinds of injustice and effects on different aspects of competition. The AMA describes six basic classes of unfair trade practice, each defined in terms of dealings between businesses: discrimination, pricing, inducing or coercing other businesses’ customers, dealing on terms that restrict the others’ business activities, using bargaining power, or interfering in another business’s transactions or management. Some practices are presumptively illegal. To others, a broad rule of reason analysis applies. And for others, whether they are “unjust” is evaluated in the light of the industry’s normal practices. Competition is said to be “fair” when three conditions are met. One is a free competitive process among competitors. Another, described as fairness of competitive method, is that competition is centred on price, quality and service. This condition is potentially problematic, for although it could be used to stop deception, it could also be used to stop innovation. Finally, the “basis” for free competition must be maintained, meaning that transactions are based on free and voluntary decisions.

These principles have been elaborated through complex rules—16 in the basic 1982 General Designation, supplemented by dozens more in the 1991 distribution system guidelines that followed the SII negotiations. Treated most severely are collective refusals to deal, “unjust low price sales,” and resale price maintenance, which are all considered presumptively unfair. Practices subject to a wider-ranging rule of reason analysis include individual refusals to deal, discrimination in price or terms, exclusion from a trade association, cornering a market (by paying too high a price), deception, tying, exclusive dealing, and inducing breach of contract or otherwise interfering with competitors’ transactions or corporate governance. And practices whose fairness, and hence legality, is determined in light of normal business practice in the industry include inducing customers by offering benefits and using unequal bargaining power to compel favours from long-term suppliers or customers.

The FTC has tried to prevent distribution constraints from diminishing gains from reform. For example, the FTC took action against mobile phone companies’ efforts to maintain retail prices through trademark-based marketing restrictions. The restraints included requiring agencies to sell trademarked phones at the same price that the supplier’s own outlets charged, or simply at pre-set retail prices, and to include those pre-set retail prices in their advertisements and store displays.³⁶ These constraints may have been intended to prevent resellers from bundling the price of the phone in a service contract. Not only would that bundling make it more difficult to enforce a horizontal agreement about the price of the phones themselves, but also keeping the price of mobile phone service high would have made it the technology a less effective competitor to the traditional wire-line monopoly.

And the FTC has taken some actions to keep import markets open. In products from ice cream to pianos, distributors trying to control parallel imports of trademarked products have found themselves guilty of unfair practices under the AMA. Actions such as these have the short term effect of reducing the brand premium for some consumer products and reducing the effect of global price discrimination. But if they undermine efficient exclusive dealing arrangements that were entered to bring new products into a market, the long term effect may be to reduce, not expand, market openness. At least, these actions call for sensitivity to market effects, not formalism.

One aspect of the law about vertical relationships is being re-examined. The FTC continues to limit the exemptions from the ban on resale price maintenance. A few years ago, these included such things as non-prescription medicine for general use and 14 items of cosmetics with a price of lower than ¥1,030. Under the last deregulation plan, the FTC moved to abolish the exemptions on all of these items. As in other OECD countries, Japan confronts a particularly thorny problem in the treatment of resale price maintenance for copyrighted works. The FTC has held public meetings, collected comments from interested parties, and commissioned a report from a study group. The study group found few reasons supporting the continued exemption and recommended moving toward repealing this exemption, too.³⁷ The move to replace pervasive *ad hoc* exemptions with generally applicable rules is welcome. It may reinforce the move to eliminate similar *ad hoc* exemptions affecting horizontal conduct, where the anti-competitive effect is more serious. Some other OECD countries are re-examining the wisdom of *per se* treatment for vertical practices, and thus may be moving toward the kind of treatment Japan normally gives most such practices. As for resale price maintenance, in Japan's situation retaining a strong rule may be a necessary concomitant of strengthening horizontal competition and discouraging exclusionary boycotts.

2.3 Abuse of dominance: rules to prevent or remedy market power, especially arising from reform-related restructuring

The AMA contains three tools that can be applied to the problem of dominance, but they have not been applied effectively to restructuring network monopolies, nor to other commonly encountered competition problems that arise in the course of that restructuring. Along with unreasonable restraints, the law prohibits "private monopolisation."³⁸ This term refers to substantial restraints of competition accomplished by a single firm (or by firms acting together) through overtly exclusionary or controlling conduct. But the provision has almost never been used. More often, the FTC has taken action against abusive tactics and exclusionary practices by treating them as unfair practices, probably because the standards of proof are less demanding. Many unfair practices could also be treated as private monopolisation if dominance or market power were present. Indeed, for many unfair practices, liability depends on a rule of reason analysis. Finally, the law empowers the FTC to break up monopolies, without regard to whether they have engaged in monopolising practices.³⁹ In theory, this power might have been used to restructure network monopolies. But the process is subject to demanding requirements. The FTC must find that divestiture would not increase costs too much by undoing economies of scale, nor undermine the monopoly's financial position and thus impair its international competitiveness. And there must be no alternative sufficient to restore competition. The divestiture power was added in the 1970s, but it has never been used.

The FTC has not tried to apply the AMA's rules to the conduct of deregulating monopolies. The unfair practices rules about discriminatory pricing and refusal to deal might, in principle, address access problems that typically appear in the wake of deregulating network infrastructure industries. The FTC believes those rules would be applicable and vows that it will take necessary measures against private monopolising and unfair trade practices in deregulated sectors. But the FTC has not done so yet, and its view of the law's potential may be too sanguine. In utilities, sector regulators typically have competition-type powers, limiting the role of the AMA. These industry specific regulators will continue to supervise anti-competitive behaviour, especially concerning claims of discrimination and access. The FTC is likely to play a role only in the wholly deregulated parts, such as mobile telephones, and perhaps a limited, supplemental role about infringement of access rules that are set by others.

No use has been made of the AMA's existing tools to restructure monopolies in the course of deregulation. The AMA sets demanding hurdles, both to justify the use of structural remedies and to support a finding of a "monopolistic situation." One condition of the statutory definition is a market share over 50 per cent "in Japan."⁴⁰ The Guidelines applying this definition have interpreted it to provide only

for national markets.⁴¹ For purposes of the AMA, the Guidelines thus do not consider the possibility of monopolies at local scales. By contrast, the proposed guidelines for mergers, interpreting similar but not identical statutory language,⁴² clearly recognise that markets can be local. In addition to the problems of doctrinal complications, though, political support for applying the AMA to restructuring is evidently lacking. As for dealing with access problems, some observers believe that the AMA will not be useful in network industries unless an explicit “essential facilities” rule is added to it, as Germany has recently done.

2.4 Mergers: rules to prevent competition problems arising from corporate restructuring, including responses to regulatory change

If cartel co-operation is prohibited more effectively, then even more mergers are likely. Thus, it is of highest importance that the substantive rules applied to mergers be up-to-date and transparent, and that they be applied sensitively yet firmly. The FTC has taken steps over the last few years to make more complete public explanations of the decisions it reaches and to bring its analytic methods up to date. Until recently, there were few cases or public explanations of how decisions have been reached, encouraging the conclusion that merger policy concentrated on structural issues. The law prohibits mergers whose effect may be substantially to restrain competition in any particular field of trade. (A merger could also be illegal, if unfair methods were used in effecting it). The law covers complete and partial acquisitions of businesses and assets and other kinds of structural combination. Now, all such transactions are subject to pre-notification requirements, regardless of size. That will soon change, though. The FTC has also received annual reports on share ownership from all Japanese businesses with assets over ¥2 billion; that, too, is changing. Historically, the most important law about structure was the prohibition against holding companies. This complete ban has been eliminated as of the end of 1997.⁴³

Merger enforcement procedures are unusual. Companies normally consult with FTC before even making a pre-merger filing. If the FTC advises, informally and non-publicly, that it has concerns, then the parties either correct the problem or abandon their plans. So the FTC has virtually never challenged a merger that was the subject of an actual filing. The FTC contends that problems are always resolved before the filing is even received.⁴⁴ There has been only one contested case in the FTC’s history. In such a process, the FTC acts more like one of the sectoral ministries, as a regulator rather than a law enforcement body, exercising power through its discretion to grant or withhold permission according to standards that are matters for its own judgement.

The standards applied to merger decisions have emphasised structure, though they also include other factors for consideration. The 1980 guidelines identify the kinds of transactions that would get “closer examination.” Under those guidelines, special scrutiny applied to a transaction if the merged firms would have a market share over 25 per cent or become the largest firm and have a market share over 15 per cent (or larger by more than a quarter of the market share of the second or third largest firm), or if it involved a top-three firm in an industry in which those top three firms had a share together over 50 per cent; or if there were only seven or fewer other competitors in the industry.⁴⁵ Reportedly, the FTC has typically examined closely transactions that would lead to firms with market shares much greater than 20 per cent. Much depends on how the markets are actually defined and on the application of more sensitive analysis of market conditions. The 1980 guidelines, which concentrate on market share, rank, and concentration, include no protocol for defining markets. They do list other factors to be considered when the FTC investigates more closely. But it has been difficult to understand how these criteria are applied in practice, because of the lack of public decisions.

New guidelines are being developed. The FTC requested public comments on proposed guidelines in 1998. These would move toward the position that the FTC has actually taken in some recent matters. Virtually all of the detailed structure-based criteria would be eliminated, except for some to

characterise safe-harbours. Transactions would not be challenged if the resulting firm will rank below first in the market and its share would remain below 25 per cent, provided that the market is not oligopolistic (the guidelines' illustration is an industry where the top three firms' combined share remains below 70 per cent) and entry is easy.⁴⁶ And the revised guideline would explain analytic methods used to define markets or assess entry, tying them to descriptions of how the FTC has treated other merger cases. The new guidelines would also make clear that the FTC will be concerned about vertical effects such as foreclosure through exclusive or closed trading relationships.

The amended holding company law and the FTC's guidelines for applying it also now take a more modern approach to structural issues. A holding company can still be illegal if it is too large, if it combines large financial and non-financial enterprises, or if it includes large, highly interrelated firms in several industries. The rules for the first two types are based on total assets, and apply to combinations with assets over ¥15 trillion. Only the last type, which could apply to smaller groups, includes a criterion based on market definition or share (sales share over 10 per cent, or among top three in industry). But the legal standards include a test related to competitive effects, because a condition of "excessive concentration" is interference with the promotion of free and fair competition.⁴⁷

The FTC has tried to respond to criticism, that its merger decisions offer no guidance, both through its proposed new guidelines and by issuing public statements describing its decisions. A recent description of a merger decision based principally on the potential competitive effects of imports shows the FTC's current approach. (This transaction is also used as an illustration in the new guidelines). The FTC did not challenge a petrochemical merger that produced market-leading shares in seven basic products. For most, the FTC found there was sufficient potential for import competition, although little actual imports, to dismiss the possibility of domestic effects. The FTC's summary of the case does not indicate what the FTC thought the world market shares or entry conditions were, but the "domestic" shares ranged as high as nearly 60 per cent. The reasons for finding no competitive concern varied for the different products, and included substitution potential, excess domestic production capacity, technological displacement, declining sales, internal consumption, and existence of another large firm as a competitive counterweight. The FTC concluded that overall, the proposed merger would not substantially restrain competition. Somewhat inconsistently, though, the FTC found that the potential for imports would discipline the market against competition problems, yet also called for a reduction in import duties to ensure a competitive environment.⁴⁸

In banking, the FTC found that a merger would not impair competition, although it exceeded the 1980 guidelines' structural thresholds. In paper, a combination of a leading manufacturers and was approved, despite high market shares in some products, such as medium grade non-coated printing papers (about 35 per cent) and leading shareholdings in the top two distributors. The FTC accepted a settlement in which the parties agreed to shift capacity to other products to reduce their share of the paper market, and to reduce the shareholding in the distributors (leaving the combination as the largest shareholders, but with holdings equal to the next-largest one).⁴⁹

The FTC's summaries do not describe any mergers or acquisitions in deregulated industries. Industry specific regulators still have power over transfers of licenses, and so *de facto* merger control authority. It would probably be difficult for the FTC to block an anti-competitive merger that a regulator wants to permit.

Economically sensitive merger policy could facilitate larger-scale reforms. One of the weaknesses of Japan's historic competition policy has been the tolerance of cartels as responses to depression or the need for rationalisation. Permitting mergers rather than cartels, especially when they involve financially weak firms, might be a faster and more efficient way to shift assets to more productive uses as economic and technical conditions change. Of course, these mergers, which are harder to undo than cartels, must not be allowed to create monopolies or erect barriers to new entry after conditions improve.

Until recently, lack of transparency has impaired the credibility and effectiveness of FTC merger enforcement. The process has not produced public explanations of how the law is being applied. Without that information, it is difficult to assess how well the FTC is doing it. Communications and decisions happen during purely informal contacts and negotiations. At that stage, there is no public, official proceeding of any kind, not even a pre-merger filing. Companies advise about their plans on the understanding that their communications are confidential. In those circumstances, the FTC would need their permission to disclose its action. The new guidelines, and the FTC's new practice of publishing summaries of some leading matters, should help. At least, companies are now on notice that their pre-filing contacts may eventually lead to some public disclosure. That might reduce the number of prior consultations and perhaps increase the number of filings that are publicly challenged. That could mean committing more resources to merger matters, but it could also lead to more public discussion of merger standards and perhaps even to judicial treatment of them. Those could both be significant benefits.

Several issues that arise in regulatory contexts would particularly benefit from clearer rules. One is the treatment of failing firms. The 1980 guidelines say that financial health and prospects will be taken into account, although they do not say how. A good explanation would encourage substituting sensitive merger control for the soon-to-be-eliminated recession cartels. The new guidelines would state that competition problems are likely to be limited, if the debt burden of one of the companies is too great, so that it can no longer finance operations and there is a high probability of bankruptcy and exit in the near future. Another issue where more explanation would be valuable is the treatment of efficiencies. The new guidelines would consider the positive impact on competition from improvements in efficiency, but they imply that these considerations will be given more weight when they help a lower-ranked company compete more effectively with a top-ranked one. And a third issue is the relationship between competition analysis and the policies and decisions of other, sectoral regulators. Some of those regulatory ministries have effective power to authorise or veto mergers in their industries, so the FTC's authority over those transactions under the AMA may not be practically significant. The FTC has evidently not used its consultation process to require changes in proposed mergers in regulated, or recently deregulated, sectors.

Some reforms of the AMA's other structural provisions have already been adopted or are underway. The change in the holding company law is perceived as a major reform. In addition, the investment and merger reporting systems are being revised. A 1998 bill, based on a 1997 FTC study group report, would change the scope of the obligation to report stockholdings, by raising the asset threshold from ¥2 billion to ¥10 billion (these thresholds, and those below, combine parents and subsidiaries), limiting the need to report changes, and eliminating reports about interlocking directorates and non-company holders. A modern merger notification system is also being adopted. Now, all mergers, regardless of size, must be notified. Under the new system, the requirement would apply only to mergers and acquisitions in which one party's total assets exceed ¥10 billion and another's exceed ¥1 billion. Other procedures would be spelled out, concerning deadlines and FTC requests for additional information. The merger reporting requirements could apply to transactions in foreign countries, but only if there is a subsidiary or business office in Japan with annual sales over ¥1 billion. The amendments, which also extend substantive jurisdiction to mergers involving foreign firms, became effective 1 January 1999.⁵⁰

These reforms have been promoted as necessary for Japanese corporations to be able to restructure themselves flexibly and quickly and move into new businesses. These changes thus are seen as "deregulation" in the AMA itself. The holding company law was a symbolic battlefield for many years. The FTC endorsed the change after decades of bitter resistance. Now that the battle is over, it is difficult to understand what was really at stake. Changing the AMA may not have been the most critical factor in enabling holding company restructuring, as businesses are concerned about solving taxation and corporate law issues. The Ministry of Justice is working on amendments to the Commercial Code, to make holding company restructuring efficient. But the FTC's support signalled that it was no longer resisting the business community on this issue, and that it was itself willing to make accommodations of its traditional positions, in the interest of reform.

2.5 *Competitor protection: relationship to rules of “unfair competition”*

Much of Japanese’s substantive competition law appears in the detailed rules about unfair trade practices. Some of the rules set out conventional competition law applications, while others, about deception, abuse of bargaining power, and interference with contract or other business relationships, are classic unfair competition issues. Here, as elsewhere, “free” is conjoined with “fair.” All of the rules are, literally, about protecting competitors. The FTC contends that these rules protect the free competitive process and they are not applied to protect competitors, and its current applications appear consistent with sound competition analysis. The most common type of case appears to be against resale price maintenance, followed by refusals to deal in boycott situations.

The treatment of unfair practices represents a regulatory approach to competition policy, as contrasted to the law enforcement approach for restraints of trade and private monopolisation. When rules can be applied without a showing of economic or competitive harm in particular circumstances, then application can diverge from sound policy. Some old cases about “unfair” pricing suggest that happened at one time. The guidelines about unfair price cutting date from 1984. They prohibit pricing too far below cost for too long, if it might have a negative effect on other businesses. But actual effect need not be shown; the potential is enough and is nearly presumed. The relevant cost is the reseller’s actual purchase price.

The fact that rules about practices in a specific industry must be adopted in consultation with the industry involved⁵¹ implies that the process might be used to help industry co-ordinate, as well as to require it to compete. It reinforces the implication that the industry-specific rules are aimed first at achieving fairness among businesses, and second at preserving the competitive process for the benefit of the larger public. The FTC has tried in recent years to rely more on the general designations, but old “specific designations” still survive. Over the years, these have dealt with such topics as premium offers, labelling, wholesale-retail contract terms, newspaper pricing, textbook sales practices, competition and commercial terms in ocean shipping, and excessive lotteries.⁵²

The “fair trade” tradition persists in the activities of the over 100 industry-based fair trade promotion associations. On the one hand, they serve to publicise the AMA and FTC policies. But they also provide forums for industry leaders and their legal experts to discuss guidelines about fair trade that some observers feel are not consistent with free trade. Discounters have complained that association activity has concentrated on preventing discounting and promotion, including violations of the special law about premiums that the FTC enforces.⁵³ Many of these organisations date from period in the 1950s and 1960s when the FTC was issuing industry-specific rules about fair competition.

In this area, the FTC itself is the principal regulator. The AMA’s prohibition of unfair practices can be applied efficiently, for many of the rules do not require showing of particular effects, and businesses are less likely to resist enforcement because the sanction is limited to an order. This part of the law probably enjoys the strongest, widest support in the business community. It is thus unsurprising that the FTC has channelled most of its enforcement doctrine through this device (and the similarly efficient special provision about trade associations). And the efficiency and acceptance make it a plausible vehicle for consolidating the FTC’s legitimacy and public image. Over the last several years the FTC has taken steps to reform its regulations about unfair practices. Its 1991 explanation of the rules covering distribution amounted to an effort to bring the regulations up to date and recognise how they should apply more sensitively to modern conditions, particularly market openness concerns that were raised in the SII negotiations. In 1996, the FTC revised the regulations applying the special law about the use of premiums and prizes as promotional devices, which is an instance of the “unfair practices” jurisdiction. The amendments permitted the use of somewhat larger prizes or lotteries, and eliminated some notification and administrative requirements.⁵⁴

The FTC has not paid particular attention to unfair competition issues arising in deregulated sectors, except as these arise under more general competition rules. Business associations do not seem to be claiming any more that violations of their “codes of ethics” amount to unfair competition that the AMA should condemn.

2.6 *Consumer protection: consistency with competition law and policy*

Policy linkages between competition and consumer protection, although consistent and appropriate, are not institutionalised and hence are less effective than they could be as tools for reform. The FTC considers the AMA to be aimed at protecting consumer interests. And the basic consumer protection law, enacted in 1968, also mentions competition, calling for “necessary measures for regulating activities that unreasonably restrict fair and free competition concerning the prices of goods and services that are particularly important to the consumer life of the people.”⁵⁵ In describing desirable competition as both free and fair, even the consumer protection law echoes the concern about fair play between businesses. The law goes on to provide for regulations indicating product quality and characteristics and for regulating “false and exaggerated indications.” These dovetail well with the AMA’s prohibitions of unfair practices, for one concern about misrepresentation is that it harms the honest seller as well as the misled buyer.

Institutional protections for consumers are weak, though. Consumer protection is under the aegis of the Economic Planning Agency, which is more of an advisory than an enforcement body. Consumer laws are being strengthened some. A new Product Liability Law took effect in 1995, and more protection for consumer contracts may be adopted. The “Consumer Protection Council,” collecting many agencies with interests in these issues, has endorsed strict and impartial AMA enforcement as a means of creating conditions for helping consumers. Although this endorsement is certainly welcome, performance is more important. There seems to be no systematic co-ordination between consumer and competition issues and policies. The lack of clear co-ordination and mutual support mechanisms may represent a missed opportunity to promote an effective reform agenda. Consumer groups, although sometimes wary about how businesses might take advantage of consumer ignorance, and thus in some ways wary of regulatory reform, nonetheless recognise the benefits of greater choice and lower prices that come from more competition and market openness.

3. *Institutional tools: enforcement in support of regulatory reform*

Reform of economic regulation can be less beneficial or even harmful if the competition authority does not act vigorously to prevent abuses in developing markets. In the 1990s, the FTC has re-emerged as an ambitious enforcer of competition-based policies. Whether it can maintain this role is the important question, and the timing is critical. On the one hand, the FTC can now show a record of vigorous enforcement as a tool for reform, to help the country emerge from its economic slump. On the other hand, the period of the FTC’s revival corresponds to that same slump, and the FTC and the liberalising process may, fairly or not, end up being blamed for it.

3.1 *Competition policy institutions*

The FTC is a group of five commissioners, appointed by the Prime Minister subject to confirmation by the legislature. Administratively, it is attached to the Prime Minister’s office. The FTC’s work is done by a General Secretariat (upgraded from an Executive Office as part of a 1996 reorganisation), two staff bureaux and two departments.

The FTC was designed to act independently of the government or any ministry. Independence is reinforced by the Commissioners' tenure protections. They serve for five-year terms and may not be removed on the basis of policy disagreement. Independence is thus assured formally; however, the commissioners are not completely outside the political and government process. For one thing, commissioners and top staff are not outsiders. Rather, the choice of personnel shows that the FTC maintains long-term ties to the rest of the government. The Commissioners have traditionally been former officials from the Ministry of Finance (which was almost always the source of the Chairman), the central bank, MITI, and the Ministry of Justice, with one position also reserved for a senior career FTC official. These ministries, especially the Ministry of Finance, also supplied many of the senior staff, which has been the principal source of policy and enforcement initiative. Because of ties such as these, some observers believe that the FTC has not always been as independent in fact as it could be in principle.⁵⁶ These personnel patterns are changing, though, and these changes may portend greater independence and activity. The most recently appointed Chair was a prosecutor, not a MOF veteran.

Although the FTC need not consult any ministry before reaching a decision in an enforcement matter, ministries have not hesitated to give the FTC their views about how particular cases should be decided. In one well-publicised incident, in which the FTC did not take action in a construction industry case, the FTC denied that it declined to act because the construction ministry instructed it what to do. The FTC did not deny that the construction ministry had offered its views.⁵⁷

Transparency supports independence. Conversely, the absence of public explanation may cast doubt on claims that decisions are reached independently. The FTC's tradition of acting informally has tended to undermine its ostensible independence. To be sure, informal methods can be efficient, and avoiding formal confrontation and public controversy is evidently an important cultural value. The FTC has responded to criticism about lack of transparency and over-reliance on informal methods. It has issued up-to-date, detailed guidelines, usually developed through a public consultation process. And it has begun to publicise regularly reports of its consultations and actions. These help to explain its approach to merger matters, for example, where the lack of formal decisions has left business in the dark about what the law means. Some observers credit the FTC with being both more transparent than before, and more transparent than most other parts of the Japanese government.

One reason advanced for maintaining independence is to separate competition policy under the AMA from industrial and trade policy. The final report of the Administrative Reform Committee in December 1997, which proposed to make the FTC an external bureau of a newly-created Ministry of General Affairs, emphasised the importance of maintaining its investigational and decisional independence, noting that because competition policy under the AMA sometimes works at cross purposes to industrial policy, the two should be kept clearly separate.⁵⁸ This recommendation is about keeping competition policy decisions under the AMA visibly distinct from industrial policy decisions. Whether competition enforcement decisions must be made by a body that is organically outside the government is a different issue. Independence from arbitrary political influence and clear separation of policy considerations can also be achieved by subjecting decisions to the discipline of a politically independent judiciary. And even a formally independent body can respond to implicit or explicit pressure to reach decisions that are consistent with other ministries' industrial and trade policy interests. Some observers believe that the FTC's studies about distribution practices are best explained as assistance to other ministries' arguments in trade negotiations.⁵⁹ On the other hand, the FTC has on occasion faced down another ministry in public, most famously in opposing the major steel merger that MITI had promoted in 1969. And some observers see the increase in FTC activity as a product of compromise with other forces.⁶⁰

The FTC is the only independent agency in the Japanese government structure to survive from the occupation era. Other independent agencies were also created at that time, but all the rest were disbanded on the grounds that they were inefficient. That the FTC remains implies either that it alone was efficient, or that an inefficient agency was an acceptable tool for promoting an unpopular policy. Now, as controversy grows over past government economic policies, the FTC's separation from other government structures, which was once seen as a sign of weakness, may be seen as a strength. The model of independence is being tested again elsewhere, in the newly-created Financial Supervisory Agency.

A problem of institutional independence is that it tends to cut off access to the policy process within the government. The FTC has statutory responsibilities⁶¹ for co-ordinating laws and orders that relate to the substantive concerns of the AMA. These consultation requirements give it the potential to become a core economic policy agency. Notice or consultation with other ministries are required if the FTC is going to take action under the AMA's special provision about "monopolistic situations,"⁶² or for approval of proposed exemptions, either under the AMA or particular ministry laws. The FTC has no authorization to participate in other ministries' regulatory processes, but some of the informal policy advice it has generated through study groups has earned it "increasing respect" in those ministries.⁶³ The consultations are typically relatively informal. In general, the FTC can affect the legislative process indirectly, by conveying its views through the Cabinet Secretary. It has reportedly done so only rarely, except for matters that directly affect its AMA responsibilities. The FTC in theory can exercise a veto over proposals for legislation that contradict the AMA, but in practice it has never done so. Instead, compromises have been reached. But FTC views have sometimes been effective. For example, on several occasions MITI has withheld administrative guidance at the FTC's request, particularly concerning the formation of joint sales agencies.

3.2 *Competition law enforcement*

Although policy is technically applied through law enforcement, the FTC's methods are more administrative and regulatory than litigious. Informal admonition has been more important than public prosecution. The FTC has been criticised for concluding too many cases with statements of "caution" or "warning," which carry little risk and cannot serve as predicate for private action. In 1990s, the FTC has greatly increased its reliance on stronger, more formal measures.

The FTC has complete power to initiate an investigation on its own authority. The FTC's principal investigative tools are powers to require testimony and to enter premises and inspect documents. An order to produce documents may follow the inspection. Testimony often takes the form of answers to an interrogatory questionnaire. The FTC exercises these powers on its own initiative, but it must go to court to obtain sanctions in the event of non-compliance. Those sanctions may not be serious enough to ensure full compliance: the maximum penalty for failure to respond to investigational process is a fine of ¥200 000.⁶⁴ Some other agencies, notably the tax authorities and the public prosecutor, have greater powers to obtain evidence. The most important kind of formal action at the FTC is a "recommendation" decision. After the investigation, the FTC may announce a recommended order. If the respondent accepts the recommendation, that becomes the final order, without a complaint or further proceedings. If the respondent rejects the recommendation, the FTC issues a complaint and the matter proceeds to an adversarial hearing and public record decision.

The AMA authorises the FTC to issue orders to cease and desist, to forbear from future violations, and to correct the effects of past violations. In practical terms, though, the most important administrative remedy is the assessment of surcharges against cartels and output constraints that affect price. The surcharge remedy was added to the law in 1977, as it became clear that non-pecuniary sanctions had no deterrent effect. The surcharge level was raised after experience showed that the initial level was

still too low to deter. The amounts assessed in recent years are substantial, and in the aggregate they are roughly comparable with financial penalties assessed by EU and US enforcers. The total surcharges assessed in the most recent year were ¥5.9 billion.

Criminal enforcement has revived in the 1990s, but it is still rare. The context in which criminal enforcement is likely to be most significant is reform in public procurement, where prosecution may be the most effective weapon against pervasive bid-rigging. The FTC has announced a policy of increasing reliance on referrals for criminal prosecution in the most serious cartel cases. Despite the call for increased action, though, FTC referrals for prosecution average only about one cartel case per year.⁶⁵ Courts have assessed fines and imposed prison sentences, but no one has actually served any prison time yet as a result of a competition law conviction because the sentences have been suspended. The maximum criminal fine available under the AMA has been increased by a factor of 20, to ¥100 million.⁶⁶ Prosecutors are reportedly bringing Criminal Code actions against bid rigging on public projects, which do not require FTC referrals.⁶⁷ (The Criminal Code provision, which applies only to individuals and not to corporations, was originally interpreted narrowly, to prohibit only bid rigging that raised prices above a fair level. As late as 1968, courts ruled that bid rigging to prevent losses was legal.⁶⁸) A liaison arrangement has been set up with the ministry of Justice to coordinate criminal actions. Now that the FTC and the prosecutor have brought exemplary actions to establish the principle, and the FTC leadership is better connected to the prosecutor's office, the use of criminal sanctions might increase.

The FTC's administrative law enforcement actions are subject to correction in court. Parties can appeal adverse decisions to the Tokyo High Court, and from there to the Supreme Court. On the one hand, the courts generally support the FTC's understanding of the law and policy. But on the other hand, practical outcomes show a tendency to split the difference. In the famous oil cartel case, the court ruled that adherence to administrative guidance did not make price-fixing legal, but then declined to find liability because the individuals probably felt justified in following the administrative guidance. In criminal cases, convictions have resulted in fines, but prison sentences have always been suspended. This decision pattern probably reflects accurately the legal culture's general tolerance of anti-competitive conditions and practices.

Recognising perhaps that hard-nosed enforcement would be resisted strongly, the FTC relies heavily on guidelines and its own administrative guidance, that is, prior consultations and informal negative clearances and negotiated compliance. Guidelines are taken seriously and have become a major policy instrument.⁶⁹ Since its increased activism in the 1990s, the FTC has strengthened many of its old guidelines and issued some new ones. The subjects of AMA guidelines include trade association activities (1979, revised in 1994), mergers (1980, revised in 1994 and 1998), retail mergers (1981), stockholdings (1981, revised in 1994), unfair price-cutting (1984), unjust return of unsold goods (1987), patent and know-how licensing (1989), distribution systems and business practices (1991), joint research and development (1993), stockholding by financial companies (1994), administrative guidance (1981, revised in 1994), public bidding (1994), and holding companies (1997).

Box 3. Enforcement powers

Does the agency have the power to take investigative action on its own initiative? Japan's FTC, like most Member country agencies (19), has some power to issue prohibitory orders on its own initiative. In one-quarter of the countries, even such "cease and desist" orders can only be issued by a court or separate decision-maker. About half of Member country agencies can impose financial penalties directly. Mandatory orders or criminal penalties can only be imposed by courts in most Member countries.

Does the agency publish its decisions and the reasons for them? Virtually all Member country enforcement agencies, including the FTC, publish their decisions and reasoning in some form. Where agencies do not do so themselves, effective decisions are made by courts that do.

Are the agency's decisions subject to substantive review and correction by a court? All Member country competition agencies must defend their actions in court if necessary.

Can private parties also bring their own suits about competition issues? Some kind of privately initiated suit about competition issues is possible in all but two or three jurisdictions. In a majority of countries, agencies explain the reasons why they do not take action in a particular case, and a party who is disappointed by the competition agency's inaction can challenge the agency in court.

3.3 *Other enforcement methods*

Private parties who believe they have been victims of anti-competitive practices have some recourse to the FTC's process, but it is limited. The FTC receives many complaints. If the FTC receives a written complaint that specifies facts, the FTC is obligated to notify the complainant of its disposition of the matter.⁷⁰ But a disappointed complainant cannot take legal action to compel the FTC to act, or to appeal its refusal to pursue a case or finding of no violation.

Two kinds of private action are possible. Both are aimed at the recovery of damages for past violation; neither provides for supplementary or punitive damages or additional kinds of relief. Both types are used increasingly, but still infrequently. The private action provided in the AMA itself depends on a prior decision by the FTC. After the FTC finds that a party has violated the law, injured parties can sue to recover their damages. Defendants cannot defend on the grounds that they did not intend to cause damage; to that extent, collecting damages in a private action is supposed to be routine. In practice, it is not. The courts have not taken the FTC's "recommendation" decision as conclusive proof even of the underlying violation, but instead have re-examined the entire matter. In a few cases, plaintiffs have collected damages in actions under the AMA, but virtually always through settlements; the first successful damages action under the AMA, that is, a final judicial decision requiring indemnification, did not appear until 1993. In general, experience under the provision for private actions under the AMA has been disappointing. Moreover, because these actions depend on a prior FTC finding, if the FTC does not pursue a case, the complainant cannot go to court under the AMA. Private actions under the AMA must be filed in the Tokyo High Court, which sits in a special panel to hear competition cases.

The second possibility, which does not depend on the FTC, is to seek damages under the Civil Code.⁷¹ This is the only kind of action available to a disappointed complainant to the FTC. (Note that it is not necessary to go to the FTC first before filing suit). Suits can be filed in local courts. The disadvantage of taking action under the Civil Code is that in actions under the Civil Code the complainant cannot usually obtain an injunction to stop harmful conduct. (This applies to Civil Code actions on nearly all kinds of legal theory, not just competition). Although a prior FTC action would not by itself establish the basic violation in a Civil Code suit, the FTC's decision, or the evidence that supported it, can be filed with the court for its information, and it may help the plaintiff establish its case. And the substantive rules applied in these cases would be based on the FTC's AMA doctrines, such as the characterisation of price-fixing as a violation "in principle."

Stronger and more effective private relief has been a focus of trade negotiations and of study by the FTC and others. US and EU negotiators have urged that Japanese law and procedure be changed to make it easier for alleged victims to challenge anti-competitive conduct in court, without having to rely first on the FTC. The demands have concentrated on two issues: authorizing private parties to obtain injunctions under the AMA's substantive rules, and changing rules about proof of damages so plaintiffs could win more easily. A recent report by a MITI-sponsored study group on a related subject encouraged making some changes like these. The FTC's own views on this are guarded, neither endorsing nor rejecting the expansion of private rights of action. An FTC study group is reviewing whether new legislation should be introduced.

The FTC is concerned to be sure that the many related, complex issues are adequately addressed, so that remedies are consistent with other aspects of the civil justice system. In addition, the FTC's studied neutrality may reflect some concern that increased reliance on the courts will decrease the FTC's influence on competition policy. If parties could go directly to court to obtain orders about competition issues, then the courts would become alternative, and potentially more powerful, sources of competition policy. That, of course, is what some observers evidently want. Their concern is not that the FTC is overworked, but that it is not showing enough initiative in its choice of targets. Third party injunction powers could be most useful for the kinds of constraints that impair market openness. Thus, trading partners have focused on this concern. The possibility of real relief from a court would mean that these problems would be taken to judicial decision makers instead of trade negotiators. The problems might thus be resolved more quickly and at a lower profile, and hence lower cost, as they could be treated simply as disputes between companies rather than between countries. Other laws provide potentially useful parallels; private parties can obtain injunctions in patent cases, for example. Although final rulings in such cases can take two years, it is possible to seek and obtain the equivalent of a preliminary injunction for immediate relief.

The problem of proving damages is a general one. In the heating oil cartel case, a consumer organisation sued for damages after the FTC found there was indeed a cartel, but the courts said the consumer organisation had to prove what the prices would have been without the cartel. The problem is not limited to competition cases, though. The usual rule in Japan's civil cases is that the claimant must prove causation and the amount of economic damages precisely. The FTC has promised to help plaintiffs develop their proof of this issue. (The AMA instructs that the courts are to ask for the FTC's opinion about damages, and the FTC is to respond. Since 1990, the FTC has responded to one request for advice about damages in a private case under the AMA,⁷² and 14 requests about the existence of violations and damages in taxpayer cases concerning bid-rigging.) And the Code of Civil Procedure has recently been amended to permit the use of estimates. It is unclear whether this change would also apply to cases under the AMA. If the different treatment remains, that could encourage greater resort to the Civil Code alternative.

To rely on the courts very much, though, some other problems need attention. The court system is relatively small, so there are too few judges. And a judicial system in which the judge's principal role is analysing statutes may not be up to the task of deciding economically complex matters such as competition cases. Some have suggested creating an alternative institution for these kinds of cases, which could employ a wider range of expertise. Although the Tokyo High Court already specialises to some extent, in that it has exclusive jurisdiction over matters under the AMA, this court may be inconvenient for many claimants, and it may not have the capacity to handle these matters if they become numerous.

But the even greater practical impediment to expanded, effective independent private relief is that there are not enough lawyers, either. The reason is related to competition policy: the legal profession is, in practical terms, equivalent to a cartel that has effectively protected itself against competitive new entry. The number of new lawyers permitted to enter practice each year is tightly controlled. The bar exam passing grade is determined by the number of lawyers who will be admitted, rather than the other way around. The justification for this constraint is said to be the lack of sufficient opportunities for necessary on-the-job supervised training for new lawyers after they are formally admitted. This is, obviously, a

“chicken and egg” problem. The three year programme calls for expanding the number of new lawyers. Proposals under consideration would increase the number from the current 700 per year to at least 1000, if not 2000. Even at the higher rate, it would take 10 years for the number of lawyers in Japan to double, and 50 years for the number of lawyers per capita to equal that in the EU. Another proposal under consideration is to permit people with several years of administrative legal experience to act as legal advisors, though not as barristers qualified to represent clients in court.

With too few judges and too few lawyers, litigation takes too long and costs too much. These hurdles would be of particular concern to private actions on behalf of ultimate consumers. In the pioneering, and ultimately unsuccessful, consumer action against the oil cartel, the time between filing and judgement was ten years. That experience has not been duplicated in any of the handful of later consumer actions, but it still affects the perceptions of how time-consuming the process can be. Even successful complainants have to pay their own attorneys’ fees and costs. In the heating oil case, the consumer group relied on volunteer academic lawyers. These private actions on behalf of consumers have been policy-oriented, and the plaintiffs probably did not expect to collect substantial damages. Such low expectations have not been disappointed. Even if a suit succeeds, it would be difficult to organise to collect in the typical consumer-injury case, where individual damage is likely to be small even though aggregate damage is huge.

An option would be to establish procedures for consumer class recoveries. Class action procedures for aggregating small claims efficiently could make consumer actions a more effective tool. In the SII talks, the US suggested this approach. The FTC responded by changing its previous policy of neutrality and promising to “affirmatively support” private actions as a policy device to supplement AMA enforcement, by providing plaintiffs with detailed opinions and allowing access to evidentiary materials. A side effect of this change in position was a change in the treatment of information companies had claimed was confidential. The FTC has made it clear that material will be disclosed if it would be useful and necessary to support the private suit. It will not be protected from disclosure simply because the company wants to protect it.

Although actions by consumers have been rare, actions by customers have increased and some have even succeeded. As might be expected, most of these have been brought over refusals to deal. Firms that are already parties to ongoing business relationships are probably reluctant to jeopardize them by suing. Toshiba paid damages for refusing to supply elevator repair parts, and discounters have won lower court rulings against brand name cosmetic and soap firms for refusals to deal. Cases like these “may offer up a wholly new and effective avenue in antitrust enforcement, not only through court action but also by obliging the JFTC to become more activist.”⁷³

One reason private actions have not been very successful may simply be their novelty and complexity. Time and trial are needed to identify and answer new substantive and procedural questions. But another reason for the lack of success, at least until recently, could be that the courts did not find a reason to accord priority to competition policy. Adding more formal and technical requirements and tools may not change outcomes, until there is also a change in the judges’ priorities.

Despite the practical problems (and the likely objections from those in the business community who are most likely to be targets of lawsuits), expanding rights of private action could be valuable. It would bring in additional resources to competition policy enforcement. It would offer the prospect of tangible recoveries for victims of illegal practices. It would galvanise the FTC, too, by indirectly pressuring it to continue producing a high-quality product, namely effective, independent law enforcement. For if it did not, “customers” could shift their business to the competitive alternative.

3.4 *International trade issues in competition policy and enforcement*

The FTC's record concerning market openness issues is unclear. The FTC says it will deal fairly and strictly with problems of market access, applying the principle of non-discrimination, but it is difficult to identify law enforcement efforts with that focus. The adequacy of competition enforcement, including actions against impediments to market access, was major issue in SII talks with US, and has also been an issue in controversies with the EU. In response to claims that distribution restraints anti-competitively prevented trade, the FTC has done studies. The results of those studies tend to underscore the FTC's institutional ambivalence and to reinforce the impression of weakness in relation to other ministries. For although these studies appear to have found suspected practices that violated the law, they did not lead to law enforcement action, but only to admonitions, as the FTC concluded that a violation of the law was not proved. The 1997 report about distribution of photo film and paper concluded there was no evidence of possible violations, but the FTC made four specific "suggestions" about how the industry should improve competitively problematic aspects of its conduct and promised to apply the law in the future. Two other reports, on distribution practices and price disparities for medical supplies, produced similarly ambivalent results. Where manufacturer-supported closed trade relationships prevented entry and raised prices, the FTC's response was to ask the health ministry and other agencies to admonish buyers to do better. No action was recommended or taken against the suppliers who maintained the exclusive system, even though the FTC pointed out that their practice of controlling their wholesalers' sales and prices, to police the exclusive arrangements, could be in violation of the AMA. The FTC simply requested that the manufacturers comply with the law. In contact lenses, manufacturers were trying to control retail prices, and practitioners were trying to reach agreements about discounts and pressuring large-volume competitors. Here, the FTC asked that all concerned familiarise themselves with the relevant distribution guidelines.⁷⁴

The FTC's treatment of transnational effects appears tentative and perhaps inconsistent. In July, 1998, an FTC action against a Canadian company represented the first time it had asserted jurisdiction over a foreign firm based on a claim that its conduct had anti-competitive effects in Japan. This was a very small step, for the conduct at issue apparently took place in Japan. The FTC's delay in taking the step is probably due to uncertainty about its legal power, and not to uncertainty about the economic effects. On the issue of competitive effects from import trade, the petrochemical merger case described above shows some analytic inconsistency. The FTC permitted the merger because the threat of import competition would discipline market power, even while calling for reduced duties to ensure a competitive environment.

The business community is interested in greater international harmonisation in trade and competition issues, particularly concerning antidumping and merger decisions. The FTC's move to modernise the merger reporting rules and amend the guidelines may be seen as moves in the same direction. The FTC has long worked within organisations such as the OECD, but it has no special procedures for dealing with foreign entities or getting information from abroad. To make its rules and processes more comprehensible to foreign firms and governments, the FTC's International Affairs division has recently arranged for publication of a single-volume English translation of all the basic laws, guidelines, and reporting forms. The FTC has taken some advantage of informal agreements for the exchange of information and notifications with other OECD countries. Japan's Ministry of Justice has assisted foreign agencies in implementing international evidence-gathering processes. So far, the FTC is not a party to any formal enforcement or information sharing agreements, but in September, 1998 it announced the beginning of negotiations toward such an agreement with the US enforcement agencies.

Box 4. International co-operation agreements

Eight Member countries have entered one or more formal agreements to co-operate in competition enforcement matters: Australia, Canada, Czech Republic, Hungary, Korea, New Zealand, Poland, and the US. And the EC has done so as well.

3.5 Agency resources, actions, and implied priorities

The higher priority now being given to competition policy is reflected in the resources devoted to it. The FTC one of the largest competition enforcement agencies in the OECD. And it has been growing, both in staff and in budget, despite the belt-tightening of the Japanese government. In FY1998, when overall government expenditures declined 1.3 per cent, the FTC's budget increased 1.1 per cent and 10 positions were added. Budget increases have generally kept pace with GDP, and personnel has increased at a faster rate than population or government employment generally.

Table 1. Trends in the FTC budget

| Fiscal year | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|--|------|------|------|------|------|-------------------|------|------|------|------|
| FTC budget (¥100 million) | 35.2 | 37.6 | 40.8 | 44.1 | 46.2 | 52.4 ¹ | 52.4 | 53.8 | 55.6 | 56.2 |
| Annual change (%) | 8.4 | 6.7 | 8.6 | 7.9 | 4.9 | 13.4 | -0.1 | 2.7 | 3.3 | 1.1 |
| General budget ² change (%) | 3.3 | 3.8 | 4.7 | 4.5 | 3.1 | 2.3 | 3.1 | 2.4 | 1.5 | -1.3 |

1. The FTC budget for FY1994 includes office relocation costs (¥230 million).
2. The total expenditure budget of the Japanese government, namely general account budget expenditures less national debt service and local allocation tax grants.

Source: FTC annual reports, questionnaire response

Table 2. Trends in the FTC General Secretariat¹ staff

| Fiscal year | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 |
|----------------------------|------|------|------|------|------|------|------|------|------|------|
| Total number of officials | 461 | 474 | 478 | 484 | 493 | 506 | 520 | 534 | 545 | 552 |
| Enforcement ² | 129 | 154 | 165 | 178 | 186 | 203 | 220 | 236 | 248 | 254 |
| Merger review ³ | 18 | 18 | 19 | 18 | 19 | 18 | 18 | 18 | 18 | 19 |
| Advocacy ⁴ | 16 | 16 | 15 | 15 | 15 | 15 | 14 | 23 | 23 | 23 |

1. Until FY 1995, the Secretariat office was the Executive Office.
2. Investigation Bureau (Investigation Department until FY1995) and Investigation Divisions of local offices.
3. Merger and Acquisitions Division (Enterprise Division until FY1995).
4. General Affairs Division of the Economics Affairs Bureau (Co-ordination Division until FY1995) and the Co-ordination Division.

Source: FTC annual reports, questionnaire response

As measured by the number of actions and decisions, the FTC is now placing the highest priority on horizontal violations, particularly bid rigging. In the most recent complete year (1997), the FTC took up 161 new matters, on top of the 66 that were carried over from before, and completed 136 of them, leaving 91 to be carried over into 1998. Those matters produced 27 final actions, of which 13 addressed bid-rigging. Other matters were concluded by administrative guidance measures, warnings of which are made public. The dispositions included 26 recommendation decisions, one surcharge order without a recommendation decision, 13 warnings and 92 "cautions" (where violations were suspected but not substantiated). Over the last five years, horizontal violations have predominated, accounting for from two-thirds to nine-tenths of the orders issued each year. In 1997, about 19 of the orders involved either bid rigging or other horizontal practices, seven involved vertical agreements, and the others involved abuse of dominance or other unfair practices. Four involved trade associations. In 1997, the JFTC issued surcharge payment orders to 170 firms involved in 16 cases of price cartels and bid-rigging. The total amount of surcharges was ¥5.9 billion.⁷⁵

Only about 30 staff are devoted to mergers and acquisitions. In 1997, when all such transactions had to be reported regardless of size, the JFTC received notifications for 3,596 planned mergers or acquisitions. This number was actually down slightly from previous years.⁷⁶ The FTC thus makes about the same resource commitment to this subject as the new Netherlands agency does, yet that agency is dealing with an economy one-tenth the size of Japan's, shares enforcement responsibility with the EU, and has already undertaken several major merger investigations. The FTC's extraordinarily low resource commitment⁷⁷ will have to change if the FTC is to play a significant role in ensuring post-reform competition as industries respond to changes in rules by trying to change their structures.

The FTC understands the importance of addressing AMA violations in those economic sectors where government regulations are still influential, because those violations could nullify the benefits of deregulation. It has taken some actions to that purpose. It probably could take even more. Some recent cases demonstrate this interest. One was against a trade group of insurers, whose premiums and conditions required approval from the Ministry of Finance. They acted together to decide on the rates and terms they would apply for, apparently prodded by informal guidance from the Ministry; the FTC successfully challenged this agreement as a violation of the AMA. Another case involved hospital food service. A public foundation designated by the government, which set standards, conspired with a major dealer about the content of those standards in order to exclude other firms from the food service business.⁷⁸ In telecommunications, when it became possible to buy (rather than rent) a cellular phone, some firms tried to control their distributors' resale prices and advertising; the FTC took action against this in 1997. And the FTC has taken action against efforts to return to price-fixing in trucking and taxis.

4. The limits of competition policy for regulatory reform

4.1 *Economy-wide exemptions or special treatments*

The problem of government-sponsored anti-competitive behaviour is unusually great in Japan. It is broader than the familiar controversy over administrative guidance, extending to a wide range of actions that have historically protected non-competitive arrangements. Although there is no general exemption from the competition law for action mandated by a government authority, the law in fact cannot reach it because the AMA only deals with voluntary action. A provision of the AMA does make explicit that, where a specific statute governs an industry, conduct in accordance with that statute or an order properly issued under it does not violate the AMA.⁷⁹ As part of the deregulatory housecleaning, that provision is to be repealed.

Even where national government regulation has been reformed to promote competition, local government levels have sometimes interfered. The AMA applies to entrepreneurs, not to government officials, and thus the only recourse under the competition law is for the FTC to try to persuade the local governments not to do it. For example, after much effort the national laws that restricted large-scale retail stores are being relaxed. But local laws and processes, concerning land use and environmental impact, were quickly adapted to the same purpose, of permitting existing firms to exercise substantial veto power over the entry of potentially strong competitors. In 1998, the FTC surveyed pharmacies and found that some prefectural governments required potential new entrants to consult with the pharmacy association or even obtain a recommendation from the association before applying to go into business or to fill prescriptions.⁸⁰ But the only action the FTC could take against this means of preventing competitive entry was to ask the Ministry of Health and Welfare to inform prefectural governments about the purpose of the Antimonopoly Act.

Public entities are not completely immune from the law, though. A public entity that engages in economic activities from which it obtains an economic benefit could meet the statutory definition of a covered “entrepreneur.”⁸¹ In 1989, the Supreme Court found that a municipal slaughterhouse competing with a private one could be reached by the AMA. And a district court found that government-printed postcards that carried pictures or lottery data competed with privately printed ones and hence lost an otherwise-applicable immunity. Suits against government as such under the AMA are probably not possible.

Several aspects of the AMA may benefit small and medium sized entrepreneurs, who are in principle fully subject to the AMA. Legally-authorized, voluntary co-operative organisations of small entrepreneurs may be exempt from the prohibition against restraints of trade, as long as they do not restrain competition substantially or raise prices unjustly. The co-operative exemption does not extend to unfair trade practices.⁸² Another benefit for small firms is that the surcharge rate applied to their price-related violations is generally half of what is applied to larger firms.

Box 5. Scope of competition policy

Is there an exemption from liability under the general competition law for conduct that is required or authorised by other government authority? Like about half of the Member countries (15 out of the 27 reporting), Japan provides for some degree of exemption from the general competition law, for conduct that is clearly required by other regulation or government authority.

Does the general competition law apply to public enterprises? Japan, like every Member country except Portugal and the US, applies its general competition law to public enterprises.

Is there an exemption, in law or enforcement policy, for small and medium sized enterprises? Four Member countries reported some kind of exemption or difference in treatment for small and medium sized enterprises: Belgium, France, Germany, and Japan.

4.2 *Sector-specific exclusions, rules and exemptions*

At one time, statutes and other decisions provided for more than a thousand explicit exemptions from the AMA. That number has been cut about 90 per cent, and steps are underway to reduce or eliminate still more. Those that remain are significant, although not remarkable. Many appear in areas where other OECD countries also have had some history of exemption or special treatment. The extraordinary number at the peak measures the historical lack of support for competition policy.

Exemptions came from several sources. Some were found in, or provided for in, the AMA itself. Many others are provided in the AMA Exemption Act. Most problematic are the multitude that were inserted into particular industrial laws. For several years, the FTC has been trying to get the number of exemptions down. After the SII talks, commitments were made to eliminate them by 1996; that target date has obviously been extended some. Plans are in place to eliminate nearly all of the exemptions that are still found in the AMA itself. An Omnibus Bill in 1997 eliminated many of the miscellaneous exemptions. The depression cartel system and the rationalisation cartel system based on the AMA, and the AMA Exemption Act itself, were set for repeal in the 1997 reform action plan.⁸³ Following up on that decision, the FTC held talks with the relevant ministries and agencies on the reform of all exemption systems. The three-year programme announced in 1998 included some fruits of those talks.

The table at the end of this section summarises the recent actions and plans for reducing the extent of exemptions. Of the approximately 90 listed there as of 1997, about one-third have been eliminated, there are plans to eliminate about another third, and about a third will be retained, in many cases with modifications to reduce their scope. The large number of individual items on the list does not necessarily correspond to economic or competitive importance, for some of the dozens that have already been removed appear to have been substantively minor. The fact that most items discussed in the 1998 plan will be retained indicates that the remaining exemptions will be harder to eliminate.

Eliminating a formal exemption will not always mean eliminating special competition-policy treatment for particular industries. Depression and rationalisation cartels will no longer be provided in the AMA itself, but other industry-specific laws should be monitored to ensure that they do not provide protection against competition law liability for firms that co-operate in restructuring under ministry guidance. Similarly, it appears that changing certain exemptions for co-operatives may still leave sectoral ministries with responsibilities that might be exercised inconsistently with the AMA. The AMA contains a provision that should permit co-operatives and trade associations to engage in legitimate activities. Despite this continuing general protection, plans evidently call for several industrial laws to continue to provide specially for co-operatives and associations in those industries. Those laws are to be made substantively consistent with the related parts of the AMA. A purpose of retaining separate laws may be to remove the subjects from FTC oversight, though. If so, whether this change will actually lead to a reduction in anti-competitive ministry action will depend on how particular judgements are actually made. At a minimum, some form of strong co-ordination needs to be established, if not a clear FTC veto.

The problem that the exemptions represent will not be resolved completely just by the proposed changes in the laws, although those changes are certainly welcome. Much will depend on the sensitivity with which the no-longer exempted conduct is treated under the AMA. Conduct that is now formally exempted may be “exempted” *de facto* if the FTC finds it does not have an unacceptable effect on competition. Thus the proposed abolition of the AMA exemption for depression and rationalisation cartels does not necessarily mean that they will never again be permitted. Decisions not to sue in those conditions could well be defensible, under sound competition policy. Yet there may be some cause for concern that, in order to achieve the visible, tangible goal of eliminating exemptions, the FTC will compromise more than necessary in its own enforcement, by showing indulgence to ease the transition to real competition. Such a result would be entirely consistent with the Japanese process of policy development and consensus decision. But it would slow down the reform process by another half-generation.

The extent of formal exemptions does not by itself measure the extent of anti-competitive conditions that are either directed or protected by government action. Government bodies are deeply involved in managing one of the most critical competitive strategy variables, entry, by using judgements about the appropriate supply-demand balance as a criterion for issuing licenses or other necessary permits, or for informal or even indirect administrative guidance to the same effect. The 1998 deregulation programme sets out some principles for the next stage of reform, which if implemented could help eliminate some of these sectoral problems. It calls for the FTC to survey and make proposals about fields where entry is restricted, by supply-demand balancing or other regulations. And the FTC is to study fields where there has already been some relaxation, to report on the results and recommend further steps. The programme states that the eventual goal is to ease or abolish such regulations. Reaching that goal is critical to the success of reform based on competition principles. Thus, it is unfortunate that the programme calls only for further study and does not set clear, specific targets for eliminating the most important and well-known constraints by a date certain.

Airlines: The Ministry of Transport still controls entry and limits price competition. As a result, domestic airfares are about 20 per cent higher than in US. Some think real deregulation could save consumers about \$2 billion per year. Even though new airlines are now permitted in theory, authorisation

takes two years (four times longer than in other major jurisdictions), and the ministry insists on the entrant proving that it will break even. Plans contemplate that demand and supply adjustment clauses will be phased out FY1999 and FY2001. But at least until 1999, and perhaps much longer, the ministry will retain power to determine who can operate and what prices they can charge on particular routes.

Coastal shipping: There have been changes in the methods for industry restructuring. Technically, the “scrap and build” method for authorising new ship construction was eliminated. But that does not mean that entry is now free of control. To construct a new ship, a firm must get permission and pay a fee to cover the old ship’s scrap value. According to some observers, the arrangements have the effect of limiting the tonnage available and increasing industry costs.⁸⁴ This “transition” measure will last until the funds balance; according to some observers, this could take 15 years.

Road transport: Entry costs are already lower in trucking, now that regulation has been relaxed some. But it has not been eliminated. The ministry imposes area control and requires a firm to have a minimum number of vehicles. Entry is thus still limited, despite the supposed repeal of the demand-supply adjustment clauses. Motor carriers must give advance notification of price changes, allegedly to prevent predation. This is likely to stifle effective price competition.⁸⁵

Insurance: Some deregulation has happened here. For example, life insurance firms may now acquire casualty insurance firms, and vice versa. None have done so. The FTC held a hearing but could find no “particular” anti-competitive administrative guidance from the Ministry of Finance discouraging mutual entry. It nonetheless asked the ministry to bear in mind the FTC’s Guidelines about Administrative Guidance and enforce the revised Insurance Act to fulfil its promise of greater competition through mutual entry. There has now been some entry between these two sectors through the formation of subsidiary companies. Plans for the “big bang” include eliminating what was effectively a premium-fixing requirement. Formal rate setting agreements are evidently being eliminated, as they have been for interest rates on deposits at financial institutions. But it is not clear whether informal co-ordination has been eliminated.

Natural monopolies: The AMA now affords an exemption for the proper business operations of railroads, electric power, and gas, and other such industries to the extent they are inherently monopolies.⁸⁶ This exemption applies to production, sale, or supply in those industries. It is not clear whether it applies to all aspects of network function, including those that may have an impact on other, competitive industries and markets. This exemption will be retained. Although these industries are named in particular, their exemption evidently depends on the understanding that they are natural monopolies. If that changes as a matter of fact (or policy, in other laws), then this exemption might shrink. But the AMA’s coverage of these network industries may still be displaced by sectoral regulation.

If, after abolition of supply-demand controls, utility regulation is redesigned on the basis of competition policy, the FTC’s role should be more important, but it may still be indirect. Although responsibility for competition policy might be assumed by the FTC, regulators may also be involved, and their decisions may be determinative, as a practical matter. In telecommunications, the Ministry of Post and Telecommunication will evidently apply competition principles indirectly. The FTC has tried to participate in decisions about reform in this sector, applying competition principles, but it is unclear that its contributions have had much influence. Technically, there is no formal exemption from the AMA, so the FTC and the ministry might share jurisdiction. But concerning mergers, for example, the ministry has statutory power to deny authorisation to acquisitions of major telecommunications businesses. The ministry thus has substantial influence concerning competition issues in this sector, although the FTC retains enforcement authority.

Similarly, important competition issues in electric power are likely to be decided by MITI, and in transport, by the Ministry of Transport. The ostensible reason is to take advantage of sectoral expertise, and to co-ordinate competition policy with legitimate elements of industrial policy. But this approach is also consistent with the traditional practice of vertically-segmented regulation.

Table 3. Summary of status of exemptions from Antimonopoly Act

| Description | Sector | Ministry | Legal basis | Status or plan |
|--|----------------------|-----------------------------------|--|---|
| Intellectual property | general | FTC | AMA Sec. 23 | to be retained |
| Cooperatives | general | FTC | AMA Sec. 24 | to be retained, amended |
| Natural monopolies | general | FTC | AMA Sec. 21 | under review |
| Government authorization | general | FTC | AMA Sec. 22 | to be repealed; bill in next session |
| Depression cartels | general | FTC | AMA Sec. 24-3 | to be repealed; bill in next session |
| Rationalization cartels | general | FTC | AMA Sec. 24-4 | to be repealed; bill in next session |
| Improvement projects | general | FTC | AMA Sec. 103 | to be repealed; bill in next session |
| Agricultural cooperatives | agriculture | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Agricultural Cooperative Association Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Agricultural disaster relief | agriculture | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Agricultural Disaster Indemnity Law | to be abolished; bill in next session |
| Agriculture credit insurance | agriculture | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Agriculture Credit Guarantee Insurance Law | to be abolished; bill in next session |
| Rural debt relief cooperatives | agriculture, finance | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Rural Debt Liquidation Cooperative Law | to be abolished; bill in next session |
| Cartels for material purchase | fishing | Agriculture, Forestry & Fisheries | Export Fisheries Development Law | abolished |
| Cartels to prevent export competition | fishing | Agriculture, Forestry & Fisheries | Export Fisheries Development Law | abolished |
| Certain activities by designated organizations | fishing | Agriculture, Forestry & Fisheries | Export Fisheries Development Law | abolished |
| Cartels to adjust hauls of fish | fishing | Agriculture, Forestry & Fisheries | Fisheries Production Adjustment Co-operatives Law | abolished |
| Fisheries co-operative associations | fishing | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Fisheries Co-operative Associations Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Plan to reduce number of fishing vessels | fishing | Agriculture, Forestry & Fisheries | Special Measures Law for Fisheries Reconstruction | exemption clause deleted |
| Compensation for fishing boat damage | fishing | Agriculture, Forestry & Fisheries | AMA Exemption Act, and AMA Sec. 8; Fisheries Vessel Damage Compensation Law | to be abolished; bill in next session |
| Fishing, vessel damage | fishing | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Fishing Vessel Damage Compensation Law | to be abolished; bill in next session |
| Fishing, loan guarantees for SMEs | fishing | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Small and Medium Fisheries Loan Guarantee Law | to be abolished; bill in next session |
| Forestry cooperatives | forestry | Agriculture, Forestry & Fisheries | AMA Exemption Act, AMA Sec. 8; Forest Cooperatives Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |

Table 3. Summary of status of exemptions from Antimonopoly Act

| Description | Sector | Ministry | Legal basis | Status or plan |
|--|--------------------------|---|---|---|
| Cartels in trading of materials for processed fruits | fruit | Agriculture, Forestry & Fisheries | Law of Production of Fruit Agriculture | abolished |
| Cartels to prevent excessive competition | pearls | Agriculture, Forestry & Fisheries | Pearl Aquaculture Adjustment Provisional Measures Law | abolished |
| Cartels to improve and maintain quality | pearls | Agriculture, Forestry & Fisheries | Pearl Aquaculture Adjustment Provisional Measures Law | abolished |
| Cartels to restrict production facilities | pearls | Agriculture, Forestry & Fisheries | Pearl Aquaculture Adjustment Provisional Measures Law | abolished |
| Price cartels for cocoons | silk | Agriculture, Forestry & Fisheries | Sericultural Industry Law | abolished |
| Designated cartels | sugar | Agriculture, Forestry & Fisheries | Law relating to Stabilization of Sugar Price | abolished |
| Mergers and acquisitions among wholesalers | wholesale | Agriculture, Forestry & Fisheries | Wholesale Market Law | abolished |
| Cartels to prevent excessive competition | wholesale | Agriculture, Forestry & Fisheries | Wholesale Market Law | abolished |
| Commodities exchanges | commodities, agriculture | Agriculture, Forestry & Fisheries; MITI | AMA Exemption Act, AMA Sec. 8; Commodities Exchange Act | review continues, aiming for abolition; bill in next session, perhaps |
| Cartels for fees for commercial usage of music records | recorded music | Education | Copyright Law | retained; procedures with FTC to be established; bill in next session |
| Credit associations | credit | Finance | AMA Exemption Act, AMA Sec. 8; Credit Associations Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Credit guarantee associations | credit | Finance | AMA Exemption Act, AMA Sec. 8; Credit Guarantee Association Law | to be abolished; bill in next session |
| Financial futures | finance | Finance | AMA Exemption Act, AMA Sec. 8; Financial Futures Law | review continues, aiming for abolition; bill in next session |
| Insurance cartels | insurance | Finance | Law Concerning Foreign Insurance Groups | abolished |
| Insurance cartels | insurance | Finance | Insurance Business Law | scope minimized, procedure with FTC |
| Rating organizations, non-life insurance | insurance | Finance | AMA Exemption Act, and AMA Sec. 8; Law re Non-life Insurance Rating Organizations | to be abolished in principle; continued exemption re auto, earthquake; bill in Diet |
| Ship mutual insurance | insurance, shipping | Finance | AMA Exemption Act, AMA Sec. 8; Shipowners' Mutual Insurance Association Law | to be abolished; bill in next session |
| Cartels to prevent excessive competition | liquor | Finance | Law Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax | abolished |
| Resale price maintenance contracts | liquor | Finance | Law Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax | abolished |

Table 3. Summary of status of exemptions from Antimonopoly Act

| Description | Sector | Ministry | Legal basis | Status or plan |
|---|---|------------------|---|---|
| Rationalization cartels | liquor | Finance | Law Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax | reduced scope of exemption |
| Acquisition or possession of shares by companies with entrusted assets | securities | Finance | Securities Investment Trust Law | abolished |
| Securities associations | securities | Finance | AMA Exemption Act, AMA Sec. 8; Securities Exchange Act | review continues, aiming for abolition; bill in next session |
| Economic business by cooperatives | tobacco | Finance | Tobacco Cultivators' Union Law | Cooperatives exemption based on AMA Sec. 24 |
| Tobacco growers' union | tobacco (growing) | Finance | AMA Exemption Act, AMA Sec. 8; Tobacco Cultivators' Union Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Employees' pension insurance | pensions | Health & Welfare | AMA Exemption Act, AMA Sec. 8; Employees' Pension Insurance Law | to be abolished; bill in next session |
| Consumer cooperatives | general | Health & Welfare | AMA Exemption Act, AMA Sec. 8; Consumers' Livelihood Cooperative Association Law | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Health insurance | health care | Health & Welfare | AMA Exemption Act, AMA Sec. 8; Health Insurance Law | to be abolished; bill in next session |
| Health insurance | health care | Health & Welfare | AMA Exemption Act, AMA Sec. 8; National Health Insurance Law | to be abolished; bill in next session |
| Special contracts | barbers, beauticians, laundries, and others | Health & Welfare | Law Concerning Coordination and Improvement of Hygienically Regulated Business | abolished |
| Cartels to prevent excessive competition | barbers, beauticians, laundries, and others | Health & Welfare | Law Concerning Coordination and Improvement of Hygienically Regulated Business | exemption for unfair trade practices to be abolished; bill in next session. Cartels already abolished |
| Coal mining pension fund | mining, pensions | Health & Welfare | AMA Exemption Act, AMA Sec. 8; Coal Mining Industry Pension Fund Law | to be abolished; bill in next session |
| Public employees insurance | labor | Home Affairs | AMA Exemption Act, AMA Sec. 8; Local Public Service Personnel Mutual Aid Association law | to be abolished; bill in next session |
| Check clearinghouses | finance | Justice | AMA Exemption Act, AMA Sec. 8; Bills of Exchange and Promissory Notes Act, Cheques Law | to be abolished; bill in next session |
| Acquisition of shares of companies under reorganization | general | Justice | Cooperation Reorganization Law | retained |
| "Closed institutions" | | | AMA Exemption Act, AMA Sec. 8; Closed Institutions Ordinance | to be abolished; bill in next session |
| Workplace accidents | labor | Labor | AMA Exemption Act, AMA Sec. 8; Industrial Injury Prevention Organizations Law | to be abolished; bill in next session |
| Cartels in domestic trading of exports by exporters and exporters' trade associations | foreign trade | MITI | Export-Import Trading Law | abolished |

Table 3. Summary of status of exemptions from Antimonopoly Act

| Description | Sector | Ministry | Legal basis | Status or plan |
|--|---------------------------|--------------|--|---|
| Cartels in domestic trading of exports by producers and distributors | foreign trade | MITI | Export-Import Trading Law | abolished |
| Cartels in import by importers and importers' trade associations | foreign trade | MITI | Export-Import Trading Law | abolished |
| Cartels in domestic trading by importers and importers' trade associations | foreign trade | MITI | Export-Import Trading Law | abolished |
| Cartels for adjustment of export and import by exporters, importers and export-import trade associations | foreign trade | MITI | Export-Import Trading Law | abolished |
| Cartels in exports by exporters and exporter trade associations | foreign trade | MITI | Export-Import Trading Law | managed in accord with treaties and international agreements |
| SME associations | general | MITI | AMA Exemption Act, AMA Sec. 8; Cooperative Societies of Minor Enterprises Act | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Economic business by cooperatives | general | MITI | Laws Relating to Organization of Small and Medium-Sized Business Associations | limited the scope of exemptions |
| Business stability cartels | general | MITI | Laws Relating to Organization of Small and Medium-Sized Business Associations | partially abolished |
| Rationalization cartels | general | MITI | Laws Relating to Organization of Small and Medium-Sized Business Associations | partially abolished |
| Activities by designated organizations | | MITI | Export-Import Trading Law | abolished |
| Activities by trade unions | labor | MITI | Export-Import Trading Law | abolished |
| Economic business by cooperatives | retail | MITI | Law on Cooperatives for the Promotion of Shopping Areas | Cooperatives exemption based on AMA Sec. 24 |
| Small shopping district promoters | retail trade, real estate | MITI | AMA Exemption Act, AMA Sec. 8 | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Special contracts | SMEs | MITI | Laws Relating to Organization of Small and Medium-Sized Business Associations | abolished |
| Underwriting and possession of shares of small and medium-sized companies | SMEs | MITI | Law on Investment Companies for the Development of Small and Medium-Sized Companies | retained |
| SME Cooperatives | general | MITI; others | AMA Exemption Act, AMA Sec. 8; Cooperative Associations for Medium & Small-sized Enterprises | Cooperatives exemption to be based on AMA Sec. 24; bill in next session |
| Aviation cartels (international) | airlines | Transport | Civil Aeronautics Law | retained; procedures to be established; bill in next session |

Table 3. Summary of status of exemptions from Antimonopoly Act

| Description | Sector | Ministry | Legal basis | Status or plan |
|---|-----------------|-----------|--|--|
| Aviation cartels (domestic) | airlines | Transport | Civil Aeronautics Law | scope minimized, procedure with FTC |
| Transportation cartels | auto transport | Transport | Freight Automobile Transportation Business Law | abolished |
| Transportation cartels | auto transport | Transport | Automobile Terminal Law | abolished |
| Enterprise coordination | land transport | Transport | AMA Exemption Act; Land Transport Enterprise Coordination Law | to be abolished; bill in next session |
| Coastal shipping cartels | maritime | Transport | Coastal Shipping Association Law | existing agreements to be abolished, but new system to be established, with procedures involving FTC; bill in next session |
| Joint shipping businesses | maritime | Transport | Coastal Shipping Association Law | retained for SMEs only; bill in next session |
| Maritime transport cartels (ocean shipping) | maritime | Transport | Maritime Transportation Law | retained; procedures to be established; bill in next session |
| Seamen's accidents | maritime | Transport | AMA Exemption Act, AMA Sec. 8; Law re Promotion of Activities for Seamen's Accident Prevention | to be abolished; bill in next session |
| Coastal shipping cartels | maritime | Transport | Maritime Transportation Law | to be limited to certain joint transport managements |
| Port-related cartels | maritime, ports | Transport | Maritime Transportation Law | abolished |
| Port-related cartels | maritime, ports | Transport | Port Transportation Business Law | abolished |
| Transportation cartels | road transport | Transport | Road Transportation Law | scope minimized, procedure with FTC |
| Warehousing cartels | warehousing | Transport | Warehousing Business Law | abolished |
| Small entrepreneurs' mutual aid groups | general | | AMA Exemption Act, AMA Sec. 8 | to be abolished; bill in next session |
| Potsdam Declaration directives | | | AMA Exemption Act; directives based on Potsdam Declaration | to be abolished; bill in next session |

Box 6. Sectoral exemptions

What is the extent of sectoral exclusions and exemptions? In 1995, the FTC estimated that about 40 per cent of the Japanese economy was in regulated sectors, and about 20 per cent in sectors with entry, price and output controls.⁸⁷ That figure has probably declined, as some formal exemptions have been eliminated.

5. Competition advocacy for regulatory reform

The FTC has a statutory responsibility to advise about laws and regulations that could affect competition.⁸⁸ It has fulfilled this function principally through the products of academic study groups. Over the last decade, these efforts have helped support significant changes. Much more could be done, though. Most importantly, as several speakers pointed out during the December 1996 seminar in Tokyo about the role of competition agencies in regulatory processes, a stronger enforcement record will lend authority and significance to the FTC's advice about regulatory policy.

When administrative bodies propose economic laws and ordinances, the FTC may consult at the planning and drafting stage if there is concern that they will include exemptions from the AMA or provisions which may restrict competition. In 1997, the FTC took part in discussions and consultations about the telecommunications laws and others.⁸⁹ Because the FTC is not in the cabinet, its views must be submitted through the Prime Minister's office, limiting the FTC's direct involvement. Organisations ordinarily have no authority to propose legislation outside their own jurisdiction. That is one reason to rely on study groups of outside experts to develop recommendations.

The principal method for analysing policy problems and proposing solutions throughout the Japanese government is by appointing a study group. Study groups may include representatives from business, labour, media, and consumer groups. Producer interests reportedly dominate these groups, directly or by proxy. The study group process is frequently criticised. Most groups include representatives of the industry or issue under review. Ministries appoint the members, based on expectations that they will direct the process towards what the ministries want. To reach a consensus report, it may be necessary to make compromises and to refrain from clear recommendations. The groups may take a long time on an issue, perhaps because those with an interest in maintaining the status quo can delay the process to resist recommendations for change. And many groups operate virtually in secret. The problems with study groups affect the FTC's own advocacy opportunities. At other ministries, it may be the study group, not the ministry itself, that must be addressed. Yet access to the study group process may be difficult. When the Ministry of Finance recently convened a study group about financial regulations, the FTC sent a representative to one meeting; this was the first time even that limited degree of participation had been possible. The process is becoming more open, in response to public pressures for transparency and accountability. Proposals are sometimes publicised in advance over the internet. Some meetings are now open to the public, and documents and materials for committee members are also available to the public.

The FTC has sponsored study groups on regulatory issues since 1985. The FTC's study groups do not seek to co-ordinate interests, but instead to gather expert advice. The fifteen members of its current study group on regulatory issues are mostly professors. The group's research work is done by the FTC staff. The group's current projects include trucking, airlines, electricity, gas, telecommunications, broadcasting, and resale price maintenance of copyright works.

Recommendations and reports by FTC study groups are credited with helping accomplish several major goals already. The single most significant project is probably the overhaul and repeal of the AMA exemptions. And the group played a role in changing the policy and the law about large scale stores. Detailed FTC research about regional enforcement pointed out problems due to local administrative guidance.

In 1997, three FTC study group reports were published: one on the domestic airline industry in March, and the others on the electric power industry and the gas industry, both in April. In airlines, the report found there had been some progress in domestic air passenger transport, and some effects could be seen, such as increased discounting. But the oligopolistic structure, of only three major airline companies, had not changed under partial deregulation, and competition in regular fares for competing routes has been limited since the introduction of the fare band system. The report concluded that more deregulation was necessary. Issues to be examined were the elimination of the supply and demand adjustment clause; the establishment of rules for reallocation of existing departure and arrival slots; the elimination of floor prices in the fare bands and the reconsideration of standard prices; and the elimination of the notification system for fares discounted by company policy.⁹⁰

In the utility sectors, the report again emphasised the importance of eliminating the supply-demand balance power. Traditionally, utilities were categorised as concessions of public undertakings, for which balance of supply and demand were indispensable. Licensing, price control, and merger permission

were all based on balance of supply and demand. The study group pointed out how the balancing clause blocked new services and was used as a shield to protect vested interests, distorting both the market and the regulatory process. Alternatives could achieve the same objectives more openly and objectively.

In electric power, the report called for deregulation, fostering of competitive conditions, and strict enforcement of the AMA. To introduce more competition in generation and retailing, the report proposed a bidding system, expanded retail supply, and self-generation in direct competition with the power companies. Issues identified for future discussion include liberalisation of retail supply, a review of the efficiency of vertically integrated systems of power generation, transmission, and distribution, development of competition between energy sectors, and the examination of the correct role of regulation through specific business laws. The responsible ministry has begun to undertake a reform program, but it is unclear to what extent the FTC study group recommendations are playing a role in it. In particular, it does not appear that strict enforcement of the AMA is part of the planned program.

In the gas industry, the report proposed reducing dependence on large-scale supply in city gas operations with the aim of deregulating entry and fostering competitive conditions. It also proposed that the consignment of city gas operations be legalised and that licensed gas operators be permitted to form small-scale networks within supply districts. Issues for future discussion include uniform regulations for the city gas industry, the framework for supply districts of city gas operators, vertical integration, and crossover entry between the electric and gas industries.

Despite a history of problems such as lack of transparency, the study group process is deeply entrenched in Japanese government practice. The FTC is thus likely to continue to rely on this method for much of its advocacy. FTC study group work has reportedly been influential on some matters, leading other ministries to treat the FTC as a more significant source of policy. More could be done to demonstrate the FTC's seriousness. In the current deregulation programme, the FTC may have an important new avenue for access and advocacy as part of the Secretariat to the Deregulation Committee. And the FTC's views would be taken even more seriously if the study group work was connected clearly to the FTC's main law enforcement responsibilities. The FTC staff who are already doing the background research for the study group could be a natural nucleus of expertise for bringing enforcement actions in these industries under study, where permitted by the AMA's jurisdictional constraints and other sources of exemption.

6. Conclusions and policy options for reform

6.1 *General assessment of current strengths and weaknesses*

The substantive legal basis for competition policy in Japan is sound. The competition law is essentially adequate to the task. Resources applied to enforcement, in budget and personnel, are increasing despite belt-tightening elsewhere in the government. The FTC has a record of more vigorous action over the last several years, and a reputation of some success in many manufacturing and distribution areas. Supporting the further extension of competition policy, a growing number in the government recognise the need for reform of regulatory systems that affect business initiative, for more competitive, self-reliant industry, and for less central direction.

But the countervailing weaknesses are troubling. There is pervasive scepticism, in the public and the government, about the process and benefits of competition, which supports a long-standing habit of relying on central direction and control. Support for, or even interest in, competition policy has been rare at the highest levels of the government. (Former Prime Minister Hashimoto, whose father was a principal author of the original AMA, was an exception to this history of indifference.) Even those who accept the

need to move toward more competitive markets tend to see opportunities and needs for government direction, to facilitate the flow of capital and talent into new industries. That focus can obscure the more fundamental issue of ensuring that competitive decisions are made freely and independently by market actors as the basis for sustainable growth. Calls for stronger antitrust enforcement have traditionally come from labour and consumer groups, which are often somewhat suspicious of reform in other respects. Thus, it is not clear that the interests promoting reform understand the need for competition as part of that process. Meanwhile sectoral fiefdoms uniting industry and related ministries resist change and try to control competition, and the agency that represents competition policy has a reputation for weakness that it has not shaken. Because the recent strengthening of competition enforcement is a response to economic diplomacy, it is “more vulnerable, more superficial, and more eccentrically biased” than it would be if it sprang from a stronger domestic foundation.⁹¹

6.2 *The dynamic view: the pace and direction of change*

The present deregulation programme promises to continue in the right direction. But the pace has been slow, and the plans do not seem to call for speeding it up. Gradual introduction of competitive institutions permits inefficiency to survive for too long and thus delays potential gains in investment, innovation, and growth. Meanwhile, competition enforcement, though intensified, has not been strong enough to take a leading role. In other Member countries, antitrust challenge has opened up anti-competitive systems, such as exclusive distributorships that kept out new entrants. That is not happening yet in Japan. The objectives of the 1998 programme cannot be achieved without stronger competition policy enforcement, which can energise the process of regulatory reform by challenging existing structures that are no longer working. The programme implicitly recognises this by assigning an important role to the FTC.

6.3 *Potential benefits and costs of further regulatory reform*

The likely benefits of further competitive reform are incremental but significant. Consumer benefits, from lower prices, could be very large in many sectors. Synergies from increased competition and lower costs in business service sectors (such as telecommunications, transport, and finance) could be substantial and cross-cutting. Even if a major goal of Japan’s reform process is improving its international competitiveness, rather than aiding consumers, greater reliance on competition should yield substantial benefits. Cross-country comparisons show that high productivity is best explained by the strength of competition.⁹²

The costs due to transitional disruptions could also be large, though. The fear of those dislocations preserves the status quo and encourages rationalisations such as the belief that competitively efficient firms would not support local communities. There will certainly be tangible costs of restructuring, to move assets into more productive uses, and this risk should not be minimised. But a related cost, one that is difficult to quantify and address, will be psychological. Greater reliance on competitive processes will require changing expectations about the importance, and sources, of stability and security.

6.4 *Policy options for consideration*⁹³

- *Strengthen rights of private action by providing for injunctions in independent private suits, easing the proof of damages in competition cases, and facilitating consumer and customer recoveries in price-fixing cases. The quota on new lawyers should be eliminated.*

These steps would apply more resources to competition policy issues, expand the base of support for it, and enlist other institutions in developing important policy principles. Broader rights of private action, more effectively vindicated, would signify that competition policy creates basic legal rights for market actors and is not just a technical regulatory speciality. Other, related institutions may also need attention to make expanded private rights practically available. In addition to the obvious need to end the limit on the number of lawyers, it may also be necessary to add judges or establish a special court division, similar to the one that handles patent issues, to hear complex economic matters such as competition cases. Unless resources are added or streamlining procedures are developed, the promise of new avenues of relief may be disappointed by delays.

- *Increase the visibility and impact of FTC participation in policy-making.*

Establishing a forum for discussing and clearly deciding about matters that affect competition in the context of overall economic policy is critical for reform to succeed. The FTC should become in fact what it is in theory, the principal “horizontal” authority responsible for assessing as well as applying competition policy. This will require preserving the FTC’s independence from political direction while permitting it to take a more central role in policy formation. Both directions will help it overcome overcoming its image as a weak agency. The FTC already has a new opportunity for substantial input into government-wide issues, through its assignments under the 1998 deregulation programme and its role on the secretariat to the Deregulation Council. It already has statutory responsibilities and opportunities for consultation, which it could and should exercise more vigorously. The plan for a Ministry of General Affairs, to which the FTC will be attached, may also promote a more visible and central policy role.

- *Explicitly include in the mandates of sectoral ministries and regulators the responsibility to support competition principles and enforcement.*

Making other ministries responsible for eliminating constraints on competition within their own jurisdiction would also extend the scope of competition policy and emphasise its broad, horizontal importance. To maintain the FTC’s central responsibility, ministries should also be held responsible for co-ordinating with the FTC so that enforcement issues are referred there quickly. Major ministries might have antitrust bureaux (similar to MITI’s Industrial Organisation section), to work with the FTC and to advise industries about their compliance obligations. These steps could be elements of the revisions of the ministries’ foundation laws to clarify the relationship between the administration and the market, which are recommended in Chapter 2.

- *Establish a clear, public, effective relationship between consumer policy and competition policy.*

Another policy area to which competition policy should be better connected is consumer policy. A clearer institutional relationship should be developed between competition policy and consumer policy. This may require first the establishment of a stronger authority for consumer protection matters. Alternatively, the relationship might be underscored by assigning to the FTC the responsibility for implementing a market-oriented consumer protection policy complementary to the AMA. The FTC is already responsible for special statutes, such as those concerning premiums and representations, as well as provisions of the AMA that can be conceived in terms of consumer protection policy.

- *Complete the planned elimination and narrowing of sectoral and other exemptions from the AMA.*

These plans have been underway for several years, in several stages. It is imperative to follow through on the plans already announced for legislative action. For those items calling for further study, that process should be completed and legislation drafted to narrow any remaining exemptions as much as possible.

- *Improve the FTC's economic and legal resources, to enable it to undertake more sophisticated merger and monopoly enforcement, prepare more successful cartel cases and resolve market access problems.*

To demonstrate its seriousness and relevance, the FTC must not only maintain and even increase its attention to cartels and bid-rigging, but it should prepare to do more economically sophisticated cases as well, especially mergers, to deal with the restructurings that will inevitably follow more effective enforcement against cartels. This will call for continuing to deepen its expertise and improve the mix of skills, with greater emphasis on both economic analysis and on investigative and legal techniques. Continuing to bring in more persons with prosecutorial experience, in leadership positions, as permanent staff, and in personnel exchanges, should sharpen the FTC's enforcement capacities.

- *Target enforcement on practices that have been tolerated or promoted by informal administrative guidance, to reinforce the shift in regulatory philosophy away from central direction.*

Exemplary enforcement actions should vigorously implement the principles set out in the 1994 FTC guidelines about administrative guidance. Steps against co-ordination sponsored by other ministries are at the heart of the regulatory reform agenda. It will not be enough to consult with other ministries and ask them to stop encouraging or tolerating non-competitive behaviour. Rather, effective and visible sanctions must be applied to the private parties who use the cover of ministerial acceptance or instruction to prevent competition. The FTC faced up to some anti-competitive actions by other ministries even in the 1950s and 1960s. The FTC appears stronger now, and thus it should be able to do so with more confidence. FTC oversight of trade associations activities, where much of the impact of administrative guidance is felt, must be maintained and even intensified. The trend toward seeking stronger sanctions in trade association cases is right and should continue.

- *Publicise actions and reasoning, to educate the public and the business community about the effects and benefits of competition policy and law enforcement.*

The FTC has already taken many steps to correct historic problems of lack of transparency, by issuing detailed, updated guidelines based on its actual decisions, and by devising ways to explain to the public the cases it has disposed of without formal decisions, such as mergers. The FTC's efforts to explain its decisions and to open up its own regulatory process may be a model for other ministries to study. The FTC should continue to devise ways to explain its actions in as much detail as possible. This will not only assist business in understanding its obligations under the AMA, but it will develop public support for competition enforcement by demonstrating how it protects the public interest. And it will encourage the development of sound legal and economic policies, by making available more authoritative raw material for academic study and public debate.

- *Eliminate all "supply-demand balancing" aspects of permitting, licensing, and other forms of advice or intervention, formal or informal, within a fixed period, such as one year. Fix sunset dates of preferably less than two years on all such requirements that remain.*

The most important broad-ranging competition-based reform would be the elimination of all of these "supply-demand balancing" functions that serve to control and prevent pro-competitive entry. The current programme promises to move in the right direction, but the concrete content is disappointingly limited and the target dates are imprecise. Perhaps some further research would reveal obscure requirements that also deserve attention. But the major ones, such as those that still limit entry into transport sectors, are well known and need no further study. The action needed now is a firm, short deadline for their repeal.

- *Improve capacities to address international competition problems by reaching agreements with other countries on cooperation and enforcement*

The FTC should enter bilateral co-operation agreements with other major international competition agencies. As the scope of its international jurisdiction expands, and as the market in Japan continues to open to more foreign trade and investment, the proportion of enforcement matters with significant international dimensions will only increase. Without clear arrangements with the enforcement authorities of its major trading partners, the FTC will be at an increasing disadvantage in taking accurate, timely action in these matters.

6.5 *Managing regulatory reform*

Many of these recommendations have been proposed by others, or are already under serious study in Japan. Thus, few would likely be considered too controversial. Planning and co-ordinating action to be sure that the public understands how it can benefit consumers and taxpayers should help overcome traditional scepticism. The current crisis presents the FTC with a great challenge, and a great opportunity. The policies of openness and market-driven competition that the FTC promotes increasingly represent the international standard. The FTC may thus become a leader, not a follower, if Japan chooses to work its way out of the economic slump by harmonising its regulatory policies with those of its major trading partners.

NOTES

1. See Iyori, H. and Uesugi, A. (1994), *The Antimonopoly Laws and Policies of Japan*, New York, pp. 30-52.
2. Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (law No. 54 of 1947) (“AMA”), Sec. 1.
3. Oil cartel case, Supreme Court, 24 Feb. 1984. The Court said that the law’s most important objective was to guarantee that price is determined freely in the market, but it also justified administrative intervention affecting price as long as the intervention was done by appropriate means that were not substantially incompatible with the law’s “ultimate purpose” of promoting democratic and wholesome economic development and assuring the interest of consumers.
4. AMA, Sec. 2(4).
5. Tilton, M. (1996), *Restrained Trade: Cartels in Japan's Basic Materials Industries*, Ithaca, pp. 17-18.
6. See Iyori, H. and Uesugi, A. (1994), *The Antimonopoly Laws and Policies of Japan*, pp. 41-48, New York.
7. See First, H. (1995), “Antitrust Enforcement in Japan,” *Antitrust Law Journal*, Vol. 64, p. 144.
8. First (1995), pp. 138-140.
9. See also Chapter 2 for additional discussion of the general style and purpose of regulation in Japan.
10. Iyori and Uesugi (1994), pp. 1-11.
11. Iyori and Uesugi (1994), pp. 11-20, 30-39.
12. Sanekata, K. and Wilks, S. (1996), “The Fair Trade Commission and the Enforcement of Competition Policy in Japan,” in *Comparative Competition Policy: National Institutions in a Global Market*, G. B. Doern and S. Wilks, ed., pp. 102-138, Oxford.
13. See First (1995), p. 157.
14. Sanekata and Wilks (1996).
15. Iyori and Uesugi (1994), pp. 215-16.
16. Sanekata and Wilks (1996), p. 102.
17. Act Against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors (law no. 120 of 1956); Act Against Unjustifiable Premiums and Misleading Representations (law No. 134 of 1962).
18. AMA, Sec. 2(6).
19. AMA, Secs. 89-100.
20. Criminal Code, Art. 96-3.
21. Iyori and Uesugi (1994), p. 73.
22. Fair Trade Commission (1998), *Annual Report on Competition Policy in Japan, January–December 1997*.

23. Fair Trade Commission (1997), Annual Report on Competition Policy Developments in Japan, 1996.
24. Sanekata and Wilks (1996), pp. 111-13; First (1995), pp. 174-75.
25. Iyori and Uesugi (1994), p. 91-92.
26. Sanekata and Wilks (1996), refer to the FTC's political "tightrope," p. 112.
27. Sanekata and Wilks (1996), p. 113, argue that the permitted information exchanges "effectively perpetuated" the anti-competitive practices.
28. Asahi News (Internet), 9 September 1998.
29. Tilton (1996), pp. 13-14 and *passim*.
30. Fair Trade Commission (1997).
31. AMA, Sec. 8.
32. Sanekata and Wilks (1996), p. 133.
33. Tilton (1996); TILTON, M. (1998), "Regulatory Reform, Antitrust, and Market Opening in Japan," in *Is Japan Really Changing Its Ways? Regulatory Reform and the Japanese*, Lonny E. Carlile and Mark C. Tilton, ed., Washington.
34. See OECD (1997), *Report on Regulatory Reform*, vol. 2, pp. 108-109; Iyori and Uesugi (1994), p. 293.
35. See Tilton (1998).
36. Fair Trade Commission (1998).
37. Fair Trade Commission (1998).
38. AMA, Sec. 3.
39. AMA, Sec. 8-4(1).
40. AMA, Sec. 2(7)(I). The standard is also met by a combined share of the top two firms over 75 per cent.
41. Guidelines Concerning "Specific Business Fields" as Defined in the Provisions of "Monopolistic Situations," November 29, 1977 (last revised June 1, 1997).
42. The Guidelines about monopolistic practices apply the terms of Sec. 2 of the AMA, which refer to goods of the "same description" or those "having strikingly similar function and utility" supplied in Japan. The proposed Guidelines for mergers interpret the terms of Sec. 15 of the AMA, "particular field of trade," to embrace goods or services that have "similar functions and uses." The merger statute addresses combinations of firms "in Japan," while the Sec. 2 defines "monopolistic situation" in terms of the share of sales or supply "in Japan."
43. Fair Trade Commission (1998).
44. Fair Trade Commission (1998).

45. The FTC guidelines thus do not use the Herfindahl index (“HHI”), an estimate of industry concentration used in several other Member states. The HHI is the sum of the squares of the individual market shares of all the firms in the industry. When these are expressed as percentages, the index ranges from zero, for atomistic competition, to 10 000, for pure monopoly. For comparison, the first and fourth tests in the FTC’s guidelines would usually correspond to HHI levels of about 1 400 (although the first test could in theory be satisfied by an HHI as low as 700). The second and third tests do not clearly correspond to any particular HHI level; indeed, the second test could in theory be met at virtually any HHI level.
46. For purposes of comparison, this test of oligopoly structure implies an HHI of about 2 000. The lowest HHI that could theoretically meet this test is about 1 650.
47. Fair Trade Commission (1998).
48. Fair Trade Commission (1998).
49. Fair Trade Commission (1997).
50. Fair Trade Commission, 1998.
51. AMA, Sec. 71.
52. Iyori and Uesugi (1994), pp. 144-150.
53. Tilton (1998).
54. Fair Trade Commission (1997).
55. Consumer Protection Law, Art. 10.
56. Sanekata and Wilks (1996), pp. 123-24, contend that the FTC’s “actual independence has been ambivalent and ambiguous,” and its “denial that the Commissioners consider the interests of their parent ministries lacks plausibility. ... Thus, in practice, the constitution of the JFTC has been an actual impediment to the active enforcement of the Act. ”
57. First (1995), p. 175, citing news services and personal communications with FTC officials.
58. Fair Trade Commission (1998).
59. Sanekata and Wilks (1996), p. 106.
60. Sanekata and Wilks (1996), pp. 105-106; *cf.* (1995), p. 178.
61. AMA, Sec. 27-2.
62. AMA, Sec. 8-4.
63. Sanekata and Wilks (1996), p. 126-27.
64. AMA, Sec. 94-2.
65. First (1995), pp. 167-68; Fair Trade Commission (1998). The FTC’s “continuing hesitancy” to bring criminal actions “has led observers to suggest that criminal sanctions against individuals have become an inherited treasure sword—used only for decoration. ” Sanekata and Wilks (1996), p. 119.

66. That is much lower than the ¥500 million that the FTC wanted, though. Resistance from the LDP construction *zoku* led to the lower figure. The largest fine collected so far is ¥60 million. Sanekata and Wilks (1996), pp. 113-17.
67. First (1995), p. 174.
68. Iyori and Uesugi (1994), p. 87.
69. Sanekata and Wilks (1996), p. 132; Iyori and Uesugi (1994), p. 67.
70. AMA, Section 45.
71. Civil Code, Section 709.
72. AMA, Section 84.
73. Sanekata and Wilks (1996), pp. 120-23, 130.
74. Sanekata and Wilks conclude that studies like these have been done in conjunction with MITI in order to develop “defences to criticism from overseas.” Sanekata and Wilks (1996), pp. 106-7.
75. Fair Trade Commission (1998).
76. Fair Trade Commission (1998).
77. First (1995), p. 159.
78. Fair Trade Commission (1998).
79. AMA, Sec. 22. The specific statutes are listed in the Section 1 of the Act Concerning Exemptions from the Antimonopoly Act, which is to be repealed.
80. Cf. description of Kraft experience in Tilton (1998).
81. AMA, Sec. 2(1).
82. AMA, Sec. 24.
83. Fair Trade Commission (1998)
84. Prof. Ushio CHUJO, presentation to OECD mission seminar at EPA (July 1998).
85. Prof. Ushio CHUJO, presentation to OECD mission seminar at EPA (July 1998).
86. AMA, Sec. 21.
87. Fair Trade Commission, Annual report for FY1995, p. 132.
88. AMA, Sec. 27-2(v).
89. Fair Trade Commission (1998).
90. Fair Trade Commission (1998).

91. Sanekata and Wilks (1996), p. 134.

92. OECD (1997).

93. These options follow generally the relevant recommendations of OECD (1997):

- *Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.*
- •Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.
- •Enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform.
- Provide competition authorities with the authority and capacity to advocate reform.
- *Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.*
 - Review as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices and forms of business organisation.
 - Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: (i) separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to reduce the market power of incumbents; (ii) guarantee access to essential network facilities to all market entrants on a transparent and non-discriminatory basis; (iii) use price caps and other mechanisms to encourage efficiency gains when price controls are needed during the transition to competition.