

Study Group on International Enforcement of Competition Law Points of Report

June 2008

Ministry of Economy, Trade and Industry

0 . Introduction

In recent years, competition authorities worldwide have been actively engaged in the detection of illegal activities. Based on this situation, the Ministry of Economy, Trade and Industry established the “Study Group on International Enforcement of Competition Law” in January this year.

The Study Group has interviewed the companies which had experience of competition law enforcement by the EU or US authorities and has heard from them the issues which they found questionable in the law enforcement of foreign competition authorities. In their interviews the companies raised the four problem points; “Procedures of law enforcement”, “Calculation method for fines”, “Required facts and admissible evidence of illegal conducts”, and “Reaction to mergers and acquisitions leading to oligopoly in the world market”.

Cases where the government is required to take actions are limited to those where law enforcement of foreign competition authorities may cause concern with respect to international law. The four points mentioned above are not considered to cause any concern with respect to international law and the government is not required to take any actions for the four points at present.

As the foreign authorities are actively enforcing their competition laws and sanctions are becoming severe, Japanese companies should realize that it may cause misjudgment if they rely on their “conventional ideas” and should therefore review their compliance system fundamentally. Through reviewing their compliance system, they should establish internal systems that ensure their compliance with the competition laws even in light of the severest legal requirements in the world.

1. Issues to be addressed

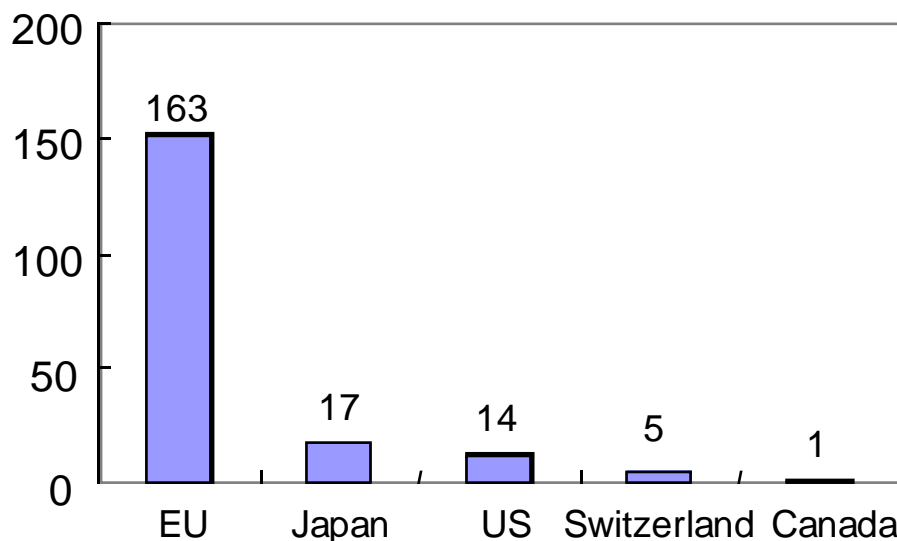
In recent years, the competition authorities in the world, especially in the EU and US, have been actively detecting cases of illegal activities. There is a clear tendency where competition law enforcement against cartels is very strict and that sanctions against cartels are tightened. Cases are rapidly increasing where Japanese companies are involved and sometimes have imposed huge amount of fines.

Most of Japanese companies are not well aware of foreign competition laws. The seriousness of sanctions and impacts on business are often met with surprise by Japanese companies in the process of investigation and execution of the law. They face different regulatory systems and suffer from language and geographic barriers. They are not prepared for the risk.

Some Japanese companies raise the issue that law enforcement of foreign competition authorities is unreasonable in light of international law and international practices. On the other hand, it is considered necessary that issues are acknowledged in relation to the application of national competition law to activities carried out in foreign countries.

Number of companies by country or region that have been imposed fines by the European Commission (2003 to May 2008)

Number of companies



(Source) Prepared by METI on the basis of information on the European Commission's website

Top 5 fines imposed by the European Commission on Japanese companies (2003 to May 2008)

1	YKK	150M Euro (hard haberdashery : fastener)
2	Mitsubishi Electric	120M Euro (gas insulated switchgear)
3	Toshiba	90M Euro (gas insulated switchgear)
4	Asahi Glass	70M Euro (flat glass for building)
5	Hitachi	50M Euro (gas insulated switchgear)

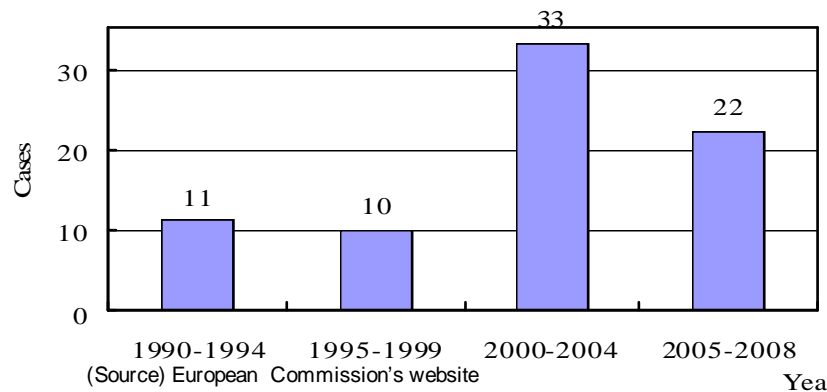
(Source) Prepared by METI on the basis of information on the European Commission's website

2. Development of Competition Law in the EU and US

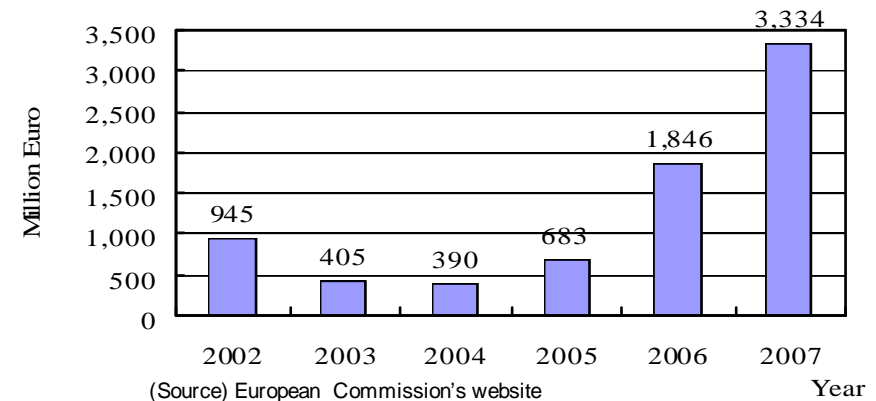
The European Commission (EC) positions the competition policy as an important tool for completing a single market. The EC acknowledges that “the fights against cartels is one of the top priority issues.” On the basis of these ideas, the competition law enforcement has been very active since Ms. Kroes was appointed as the Competition Commissioner in 2004. The number of uncovered cartels and the amounts of fines have been drastically increased.

The US has been active in revealing cartels, especially international cartels. Cases in which a fine of more than 100 million dollars is imposed have been increasing since the vitamin cartel in 1999. Severe criminal sanctions are imposed on individuals in these days including prison sentences for foreigners which are also increasing.

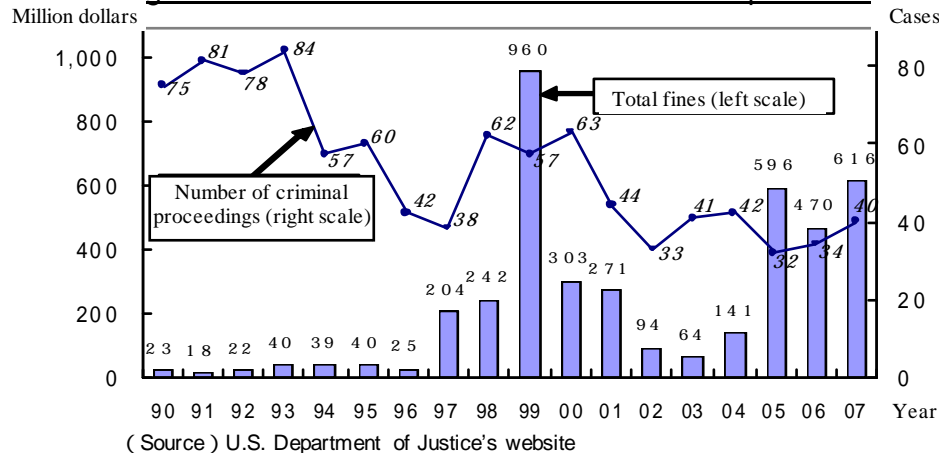
<Number of cartels uncovered by the EC>



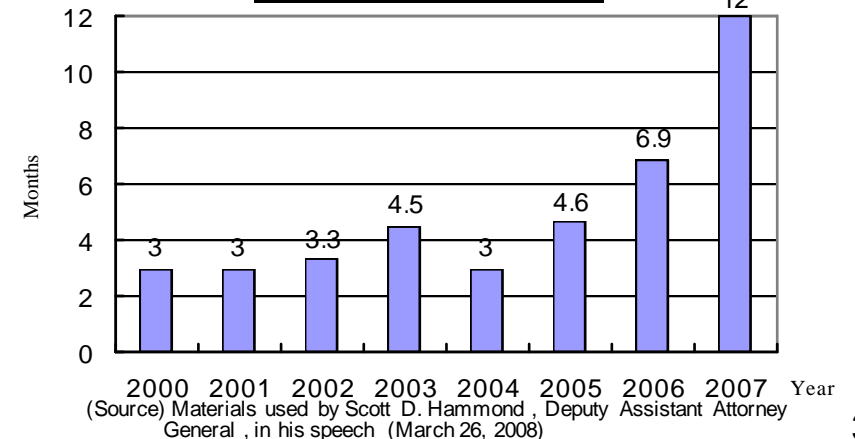
<Fines imposed by the EC against cartels>



<Number of criminal proceedings brought by the Department of Justice against cartels and the total amount of criminal penalties>



<Average period of foreigner imprisonment sentences in international cartel cases>



3. Issues in law enforcement of foreign competition authorities and study for possible reactions of the Japanese government

The Study Group has interviewed the companies prosecuted by competition authorities of the EU and US, and has heard from them the issues which they found problematic in law enforcement of foreign competition authorities.

The following four points are the issues with which the companies have problems. These issues should be analyzed in light of international law and the Japanese government will study possible reactions to them.

① Procedures of law enforcement (particularly in the EU)

Procedures of law enforcement by the EU competition authorities may involve problems in light of international law. For example, the EU competition authorities sent an official document, such as a request for information, to the head office located in Japan via a fax without any prior notice and sometimes to an inappropriate division (such as to the development department instead of to the legal department).

② Calculation method of fines (particularly in the EU)

While a huge amount of fines can be imposed, the calculation method of fines may be less transparent and less predictable (although the guideline exists).

③ Required facts and admissible evidence of illegal conducts (particularly in the EU)

The EU authorities may rule against companies with insufficient facts and evidence. For example, the authorities verify facts by giving much importance on the oral testimony of leniency applicants but sometimes do not produce physical evidence in detail.

④ Reaction to mergers & acquisitions leading to oligopoly in the world market

In recent years, a number of internationally influential and large-size mergers and acquisitions of enterprises have been succeeding one another, in particular, in the natural-resources sector and worldwide oligopolization has been advanced. Judgments on these mergers & acquisitions from the viewpoint of competition law should be made with due consideration of their possible impacts on the worldwide market.

<Analysis of each issue and immediate reactions of the government>

Cases where the government is required to take actions are limited to those where law enforcement of foreign competition authorities may cause concern with respect to international law (e.g. law enforcement is against the principle of international law concerning jurisdiction, or it is arbitrary or discriminatory.)

Among the four points in the previous slide, in the case of point ② (calculation method of fines) and point ③ (issues concerning admissible evidence, etc.), private companies should bring the case to the local court. They are not considered to cause any concern with respect to international law. It should be noted that the legal system and practice of foreign countries are partly different from those of Japan.

On the other hand, it should be analyzed and studied, concerning point ① (procedures of law enforcement) in cooperation with the Ministry of Foreign Affairs, whether there is any contradiction with the principle of international law concerning jurisdiction (i.e. a country is restrained against exercising its public authority in the territory of another country without obtaining such other country's consent). It may be advisable to create a channel through which the Ministry of Economy, Trade and Industry will consult with the Ministry of Foreign Affairs and the Fair Trade Commission on a case by case basis about the situation where law enforcement of foreign competition authorities may be questionable under international law or where the government may be able to request the other country to improve its law enforcement procedure even though such procedure is not entirely questionable under international law.

To the contrary, with respect to point ④ (reaction to mergers & acquisitions leading to oligopoly in the world market), it is necessary to study the issues that may arise in the case where Japanese competition authorities apply and execute Japanese competition law against companies located abroad, as there may be the possibility in the future that Japanese competition authorities will take such actions.

<Issues for the future>

As for point ④ (reaction to mergers & acquisitions leading to oligopoly in the world market), it is essential to make judgments and to enforce the competition laws from the viewpoint of promoting competition in the worldwide market. As it is a general tendency in the world that national competition law is applicable to companies' overseas activities, companies are required to deal with the law enforcement of multiple countries under the different legal systems. Therefore, concern exists over companies spending a huge amount of cost and time.

In order to cope with these issues, we should study the possibility of developing cooperation among competition authorities of relevant countries, to harmonize competition laws internationally, and ultimately to enact international competition law covering the world market and to establish an international institution that handles cases from the viewpoint of promotion of competition in the worldwide market.

4. How can companies deal with competition law issues in the era of globalization

As the foreign authorities are actively enforcing their competition laws and sanctions are becoming severe, Japanese companies should realize that it may cause misjudgment if they rely on their “conventional ideas,” and should therefore review their compliance system fundamentally. Particularly, it is pointed out that people who devote themselves to their business enthusiastically tend to be involved in cartel arrangements. It should be acknowledged that everyone is exposed to the risk of competition law infringement and that companies should take actions to increase their employees’ awareness of laws and to ensure compliance.

In order to take the actions mentioned above, it is important for companies to realize that each country’s competition law and its practice differ from each other and to ensure that the slightest suspicion of violation of competition law should not be caused by a company’s behaviors even in light of the severest standard in the world. It is also important to have companies well prepared for “emergency events” in order to enable companies to take quick and correct actions in the case where possible infringement of competition law arises.

Having recognized all that are mentioned above and on the basis of interviews and discussions in the Study Group, the following four points are picked up as actions to be taken by companies to avoid any risk for overseas competition law. Examples of activities of advanced companies are also listed below as the best practice.

Although these action points may have been known to people since a long time ago and have been properly recognized in Europe and the US, it is pointed out that they may not be understood well in Japan. Japanese companies should recognize that the potential risk of foreign competition law cannot be handled with knowledge they had obtained previously. They are required to strengthen their organizational structure to cope with the competition law risk.

<Four action points to cope with foreign competition law>

Point 1: It should be recognized that activities that have been considered legal in accordance with “conventional ideas” may not be lawful and may cause suspicions concerning cartels.

Point 2: Top management should take leadership in increasing employees’ awareness of competition law compliance throughout the company.

Point 3: Thorough investigation is to be made at the time of M&A to ensure that any other company to be acquired is not infringing competition law.

Point 4: Counteractions to the case where company may be suspected of illegal conduct by the authorities should be studied before it may occur. Quick decisions should be made “if such case actually occurs.”

<Point1>

It should be recognized that activities that have been considered legal in accordance with “conventional ideas” may not be lawful and may cause suspicions concerning cartels.

Meeting with competitors, in particular, the mere fact that business persons of competitors have a meeting, may raise the suspicions of foreign competition authorities. Therefore, participation in such meeting of business persons who are directly involved in decisions on business conditions (such as price) should be strictly controlled. In this respect, Japanese companies, which are generally active in industry associations, should change their perspective.

A house rule should be established, where if a meeting with competitors is unavoidable, that participants of the meeting shall be obligated to notify to and be approved by the Legal Division before joining the meeting, to produce a report after the meeting, etc. Such rule should be applied so strictly that a penalty is imposed on any employee who acts against the rule.

Handling of internal documents should be regulated to avoid producing any misleading documents. For example, any expression which may indicate that the company follows another company's decision should be avoided. In-house rules should be established with respect to distribution and handling of internal documents which contain important information (such as prices).

<Examples of advanced activities>

- Employees are instructed that, when prices and other important business conditions are put forward in an industry association's meeting, they have to leave the meeting by saying that “we cannot discuss such kinds of subjects.” If such action may be regarded as too harsh, employees should accompany an external lawyer.
- An overseas subsidiary in a committee in which almost all companies in the same industry in the world participated was ordered to withdraw from the committee, and it was decided that only the head office attends the meetings of such committee. Employees in charge of business are restrained from joining such meetings, and only employees in charge of planning can join them. The same applies to the meetings of domestic industry associations.

<Point 2>

Top management should take leadership in increasing employees' awareness of competition law compliance throughout the company.

In order to prevent a company from infringing competition law, top management of the company's group should announce the importance of compliance and should establish a structure wherein such management's intention is known throughout the entire group.

A structure should be established, in which information on illegal conduct can be collected effectively and a specialized division should control such information. It is important that through such structure the information be quickly communicated to top management.

It is also important, for the purpose of ensuring competition law compliance, to prepare guidelines and textbooks and to provide training and lectures.

<Examples of advanced activities>

- In order to increase employees' awareness, all employees are required to sign and deliver a pledge to the president of the company once a year promising that they will comply with the company's code of conduct.
- Since more accurate information on illegal activities can be obtained from insiders, a contact window for whistleblowers is established. In the whistleblower system, anonymity of informants is secured and information is given to external legal counsel designated by the company. The company takes appropriate actions in response to the insiders' information.
- All managers and above of the group companies should deliver a written promise of compliance to the group's CEO. In addition, all managers and above in charge of sales and marketing should provide the chairman of the compliance committee of Anti-Monopoly Act with their written promise with respect to Anti-Monopoly Act. A compliance textbook is prepared for all employees, whose level of understanding is tested in order to enhance employees' awareness of legal compliance.

<Point 3>

Thorough investigation is to be made at the time of M&A to ensure that any other company to be acquired is not infringing competition law.

There is an example where a Japanese company which acquired another company was fined by the European Commission because such other company had committed a cartel violation before it was acquired by such Japanese company.

It is possible that the company suffers a huge loss because it has acquired an overseas company which was the member of a cartel. Careful attention should be paid, as the company may be fined jointly with the acquired company if it is not aware of the acquired company's infringement due to its negligence of managing responsibility.

Therefore, thorough investigation is to be made at the time of studying possible M&A not only through financial due diligence but also through legal due diligence, especially from the competition law viewpoint.

<Examples of advanced activities>

- In the case of acquisition or equity investment in an overseas company, a specialized third party is hired to conduct in-depth investigation in the target company. In addition, a written document is to be submitted by the target company confirming that it has never committed any illegal activities.

<Point 4>

Counteractions to the case where a company may be suspected of illegal conduct by the authorities should be studied before it may occur. Quick decisions should be made “if such case actually occurs.”

When information is obtained that a company may be involved in infringement of competition law, it is of crucial importance to swiftly conduct internal fact-finding and to make a quick decision. A quick reaction may effectively minimize the company's damage, especially in the case where the company applies for leniency.

In order to enable the company to take quick actions, preparations should be made, e.g. an organization is established which involves employees and lawyers who are familiar with the legal systems and business practices in the countries where the company's overseas operation is located, an action guide is prepared and simulated drills are conducted to prepare for emergency events. However, it is more important to organize the company's structure where top management can directly be involved in fact-finding and decision-making.

<Examples of advanced activities>

- Effort is made to build confidence with local members in charge of local management and to understand local culture, business practices, etc. The in-house legal function is strengthened to have knowledge about the local situation.
- Thorough internal investigation was made after the on-spot investigation of competition authorities. As a result, it was decided that leniency should be applied as the case did not seem to be defensible. The company responded carefully and in detail to the authorities' requests for information and questionnaires. The company gained the authorities' confidence as the company's argument was supported by the information the authorities had. If due to insufficient internal investigation the company had made its argument inconsistent with the notes that the authorities obtained, it could have caused serious suspicion by the authorities that the company might hide facts, which might have caused serious damage to the relations with the authorities.
- In-house investigation was made quickly but taking the requisite period of time including interviews of all relevant individuals by top management of the administrative division or by a specialized lawyer. Adequate understanding of each employee about the seriousness of the case made thorough in-house investigation possible.

<Actions for strengthening competition law compliance (Example of Company A)>

Point	Before actions	After actions
Compliance system	Committee is established in the head office in Japan concerning observance of law and compliance. Committee meetings are held twice in a year, in which reporting and exchange of information are made.	System for observance of law and compliance is established in the entire group including overseas subsidiaries. Issues relevant to compliance within the entire group are immediately reported to top management.
Collection of information on illegal conduct, etc.	Help-line is provided where a contact window is opened to employees who have learned about any activities that are incompatible with the in-house code of conduct.	Effort is made to make such help-line known to all employees. As a result, the number of contacts to the help-line increases and collection of information of illegal conduct, etc. can be done quickly and securely.
Actions specifically addressed to prevention of competition law infringement	Although general warning is given to employees that they should not commit any infringement of competition law (such as cartels), a training program specifically addressed to compliance with competition law does not exist.	Having experience in accusation of competition law infringement, educational programs for competition law through e-learning system, etc. are introduced in the entire company group including overseas subsidiaries.
Submission of written promise for legal compliance	System is introduced in which a pledge is submitted by executive officers and managers to the board member in charge of legal compliance promising that they observe the in-house code of conduct.	Along with the development in society requiring stricter compliance, the scope of personnel who should submit a pledge is gradually expanded from executive officers and managers to include all employees.

5. Conclusion: Issues concerning competition law in global economy

Discussions in this Study Group have clarified that there are some crucial differences in the competition law systems between Japan and foreign countries and that the Japanese companies should change their mind and eliminate their “conventional ideas” as it may cause misjudgment in the situation where competition law has been actively enforced by the authorities and the consequences of infringement of competition law have become severe.

Japanese companies that are engaging in their economic activities globally should renew their awareness of risk associated with the violation of competition law. Companies are required to conduct thorough review of their activities by eliminating their conventional ideas and referencing advanced companies’ actions. It is also required for companies to establish internal systems to ensure their compliance even in light of the severest legal requirements in the world.

The government together with the Ministry of Foreign Affairs will analyze the appropriateness of law enforcement procedure wherein the services of legal documents are rendered via fax by the foreign competition authorities to the companies located in Japan. It should be studied, about possible request for improvement to the government of foreign countries, if such procedure may be questionable in light of international law. It may be advisable to create a channel through which the Ministry of Economy, Trade and Industry will consult with the Ministry of Foreign Affairs and Japan Fair Trade Commission on a case by case basis about the situation where law enforcement of foreign competition authorities may be questionable under international law or where the government may be able to request the other country to improve its law enforcement procedure even though such procedure is not entirely questionable under international law.

It is necessary that the government study possible issues that may arise when it applies and enforces national law with regard to activities conducted abroad.

It may also be necessary to consider, the international harmonization of competition law and its enforcement from the viewpoint of effective handling of competition law cases that may concern the world-wide market, such as large-scale mergers and acquisitions which may result in international oligopoly.