

Report by a Study Group regarding Competition Law Compliance
- Anti-cartel Measures by Japanese Corporations and Trade Associations in Light of
Enhanced Global Enforcement of Competition Law -

Outline

January 2010

Ministry of Economy, Trade and Industry

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I Objectives

1. Awareness of Issues

Enhanced Enforcement of Competition Laws around the World and the Effects

In recent years, competition authorities around the world such as the EU and the United States are moving toward enhanced enforcement of competition laws. There are cases where Japanese corporations accused of forming cartels incurred substantial penalties and fines and those executives and employees involved were sentenced to imprisonment.

When corporations or trade associations are fined or penalized for anti-competition violations or sued for damages, such corporations or trade associations not only suffer a financial loss but damage to their reputation they have made efforts to build over many years.

Establishment of Competition Law Compliance Regime for Japanese Corporations in Light of Competition Laws around the World

It goes without saying that globally-expanding corporations will need to establish a competition compliance regime required to meet competition laws overseas. Moreover, it is important to recognize that existing Japanese business practice relating to cartels may not be acceptable in other countries which may use different criteria for finding cartels and different fact-finding methods.

Even corporations that operate mainly in Japan will need to consider the possibility that overseas competition laws may apply to themselves, depending on the type of their business, and to establish a competition law compliance regime that takes into account these overseas competition laws.

In light of an advancement of the Japan Fair Trade Commission (JFTC) enforcement system, marked by the recent introduction of a surcharge reduction and exemption system and other measures into the Japanese Antimonopoly Act, every corporation will need to establish a competition law compliance regime in response to a greater need for compliance of the Japanese Antimonopoly Act.

Establishment of Competition Law Compliance Regime for Trade Associations

Despite robust activities of trade associations in Japan, it is difficult to conclude at the present time that there is a sufficient competition law compliance regime in place for Japanese trade associations.

Activities of trade associations, where competitors are in contact with one another, are high-risk activities from the perspective of competition law as they not only include formal discussions at trade associations' meetings but also informal contacts before and/or after these meetings.

Trade associations need to establish a competition law compliance regime meeting their own risks in order to allow themselves to continue their socially productive activities without raising suspicion of anti-competition and to allow their members to participate in these activities at ease.

It is vital for each Japanese corporation and trade association to establish a competition law compliance regime, having examined the risks associated with anti-competition violations in any particular country it is involved in, the priority of such risks against other risks and the limitations of human and financial resources.

2. Purpose of this Report

- With this background, in June 2008 we published “The Interim Research Group Report Relating to International Competition Law Enforcement” in order to call attention to overseas competition laws and to show key measures to be taken by Japanese corporations.
- After the publication of the interim report, while the substance of the report propagated in various industries, it was brought to our attention that the public demanded us to explain specific competition law compliance measures in an organized way. In the meantime, even after the publication of the report, incidents of competition law violations related to cartels continued to occur. Moreover, the report did not include measures to be taken by trade associations which are at similar risk as corporations.

With the goal of inducing Japanese corporations and trade associations reduce their anti-competition risks and attain their healthy growth through establishment of their competition law compliance regimes, this Report organizes and highlights measures and examples in order to assist Japanese corporations and trade associations establish their competition law compliance regime.

When reading this Report, please keep in mind the following with regard to the measures and sample cases outlined in the Report.

- Even if a Japanese corporation or trade association implements a regime in line with the measures and sample cases outlined in this Report, that does not automatically guarantee that it is deemed that no anti-competition violations exist. (A decision is made based on an overall assessment whether competition law has been violated, including that of other evidence.)
- The measures and sample cases outlined in this Report are not aimed at avoiding furtherance of cartels or creating quick-fix measures such as avoiding detection of cartels that are actually taking place, minimizing the damage of cartel after detection even though no anti-cartel measure is undertaken. Rather, the goal is to prevent any anti-competition suspicion about a Japanese corporation or trade association which is not engaged in any cartel from the perspective of anti-cartel compliance and anti-cartel defenses.

Moreover, the focus of this Report is compliance relating to agreements on pricing, quantity, facilities and business transaction parties (also known as, “hard-core cartels”), which Japanese corporations may find themselves easier to become involved in and are considered violations in many other countries, compared to other types of anti-competition violations.

Further, although small and medium size corporations are also subject to penalties as with large corporations, it is difficult for them to establish the same kind of compliance regimes as those of large corporations. Therefore, as mentioned above, they need to establish compliance regimes, based on their assessment of their anti-competition risks, the prioritization of such risks compared to other risks and the limitations of human and financial resources.

3. Summary of Competition Law Compliance Regime

Japanese Corporations

It is recommended that in establishing a competition law compliance regime relating to cartels, Japanese corporations should keep in mind not only “not to commit violations” but also “to avoid circumstances which could lead to suspicion of violations”.

In particular, the following measures are critical:

- Establishment and implementation of rules concerning contacts with competitors, including through trade association activities.
- Establishment and implementation of rules concerning the sharing and use of statistical data.
- Training for executives and employees to induce awareness of anti-competition risks.

Japanese Trade Associations

Japanese trade associations need to be aware that there is a great anti-competition risk in trade associations where competitors are in contact with one another.

In particular, the following measures are critical:

- Establishment and implementation of rules on management of meetings.
- Establishment and implementation of rules on collection, management and sharing of statistical data.

II Enforcement Status of Competition Laws in Other Countries

1. Enforcement Status of Competition Law in European Union

The European Commission (EC), the competition authority of the European Union (EU), is intensifying enforcement of competition law. In particular, a recent increase of crackdowns on cartels is noteworthy.

As for our review of imposition of fines by case and by corporation, we note that there has been a recent increase of fines related to cartel cases. There is also a trend where fines for cases other than cartels, such as abuse of dominance position, are becoming substantial. There are cases where substantial fines were imposed on Japanese corporations.

EC may apply EU competition law to and impose administrative sanctions in cases where even if the acts were conducted outside EU, they affect the EU market.

Fines imposed by the European Commission
Top ten corporations around the world (2003- 2009)

Ranking	Corporations	Fines (Unit: one hundred million €)
1	Intel (U.S) (abuse of dominant position) (2009)	10.6
2	Non-compliance by Microsoft (U.S.) (disposition by the regulating authorities (March 2004) (second time)) (2009)	9.0 (8.99)
3	Saint-Gobain (France) (car glass cartel) (2008)	9.0 (8.96)
4	E.ON (Germany)/GDF-Suez (France) (natural gas import cartel) (2009)	5.5 each
5	Microsoft (U.S.) (abuse of dominant position) (2004)	5.0
6	ThyssenKrupp (Germany) (elevator cartel) (2007)	4.8
7	La Roche (Switzerland) (vitamin cartel) (2001)	4.6
8	Siemens AG (Germany) (gas insulated switchgear cartel)(2007)	4.0
9	Pilkington (UK) Note : Nippon Sheet Glass overseas affiliated company) (car glass cartel) (2008)	3.7
10	Sasol (Germany) (South Africa) (candle wax cartel) (2008)	3.2

Source: Compiled by the Ministry of Economy, Trade and Industry (METI) based on information on the European Commission website

Cartel fines imposed by the European Commission
Top five Japanese corporations (2003 – 2009)

Ranking	Corporations	Fines (Unit: one hundred million €)
1	YKK (fasteners cartel) (2007)	1.5
2	Mitsubishi Electric (gas insulated switchgear cartel) (2007)	1.2
3	Asahi Glass (car glass cartel) (2008)	1.1
4	Toshiba (gas insulated switchgear cartel) (2007)	0.9
5	Asahi Glass (construction sheet glass cartel) (2007)	0.7

Source: Compiled by METI based on information on the European Commission website

2. Enforcement Status of Competition Law in the United States

The United States is continuously putting tremendous efforts into detection of cartels, including international cases. The number of cartels detected by the Antitrust Division of the Department of Justice (DOJ), one of the U.S. competition authorities, and the fines imposed on corporations vary from year to year depending on whether there was a major case that year, but a recent trend is that penalties are substantial, some of which exceeding \$100 million, imposed on corporations, including Japanese corporations.

Moreover, sanctions against individuals are also reinforced in recent years with the term of imprisonment of violators, including foreign nationals, been lengthened.

In addition, in the U.S., private suits (for example, treble damages suits) are actively pursued.

Fines imposed on cartels by the Department of Justice
Top ten corporations around the world (up to October 2009)

Ranking	Corporation	Fines (Unit: one hundred million \$)
1	La Roche (Switzerland) (vitamin cartel) (1999)	5.0
2	LG Display Company Limited (South Korea) (liquid crystal display panel cartel) (2009)	4.0
3	Air France (France) KLM Royal Dutch Airlines (Netherlands) (air cargo cartel) (2008)	3.5
4	Korean Air (South Korea) (passenger/air cargo cartel) (2007)	3.0
5	British Airways (UK) (passenger/air cargo cartel) (2007)	3.0
6	Samsung Electronics Samsung Semiconductors (South Korea) (DRAM cartel) (2006)	3.0
7	BASF (Germany) (vitamin cartel) (1999)	2.3
8	Hynix Semiconductors (South Korea) (DRAM cartel) (2005)	1.9
9	Infineon Technologies (Germany) (DRAM cartel)	1.6
10	SGL Carbon (Germany) (graphite electrode cartel) (1999)	1.4

Source: Compiled by METI based on information on DOJ website

Fines imposed on cartels by the Department of Justice
Top five Japanese corporations (up to October 2009)

Ranking	Corporation	Fines (Unit: one hundred million \$)
1	Mitsubishi Corporation (graphite electrode cartel) (2001)	1.3
2	Sharp (liquid crystal display panel cartel) (2009)	1.2
3	Japan Airlines (air cargo cartel) (2008)	1.1
4	Elpida Memory (DRAM cartel) (2006)	0.8
5	Takeda Pharmaceutical Company Limited (vitamin cartel) (1999)	0.7

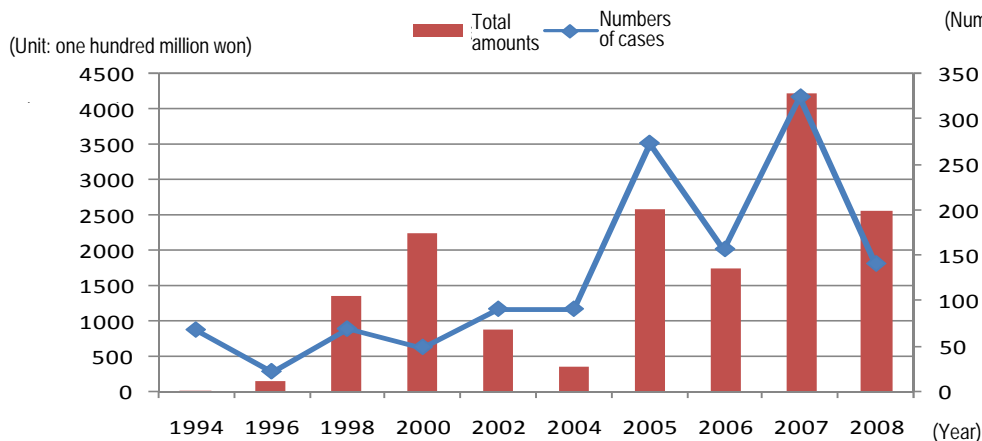
Source: Compiled by METI based on information on DOJ website

3. Enforcement Status of Competition Law in South Korea

With regard to enforcement status of South Korean competition law penalties and the numbers of cases vary from year to year but are on the rise long-term. A similar trend is seen regards to the numbers of detected cartels, and it appears that stricter enforcement is carried out against cartels.

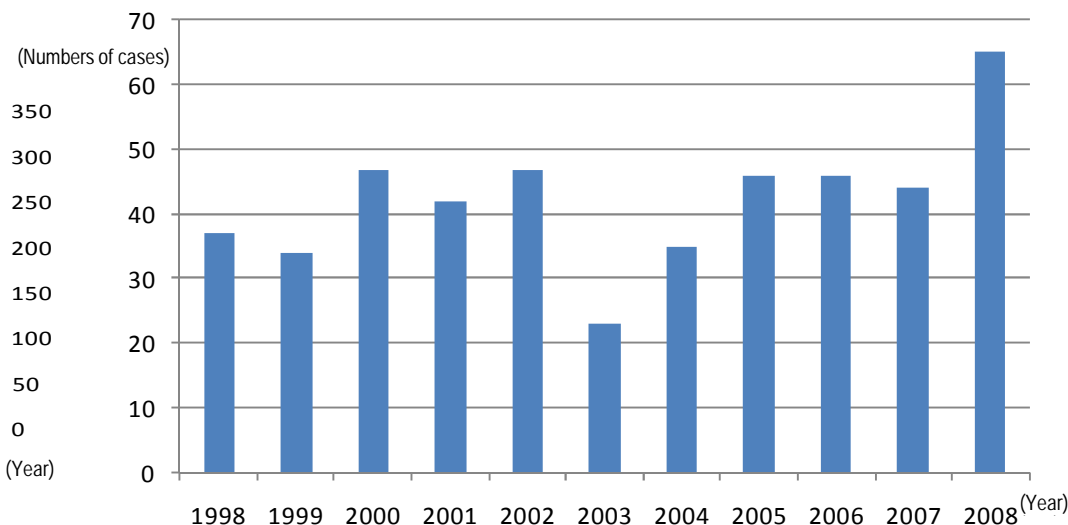
The Korea Fair Trade Commission (KFTC) formed the “Survey and Enforcement Policy Against Foreign Violators of the Fair Trade Law” in 2000, outlining the policy for application of competition law to overseas corporations. Starting with the 2002 graphite electrode cartel, followed by the 2003 vitamin cartel and the 2009 marine hose cartel, surcharges were imposed on overseas corporations, including Japanese corporations. KFTC has shown its determination to aggressively crack down on international cartels.

Changes in surcharges imposed by KFTC Commission and numbers of cases



Source: Compiled by METI based on the Annual Report of KFTC

Changes in the numbers of cartels detected by KFTC



Source: Compiled by METI based on the Annual Report of KFTC

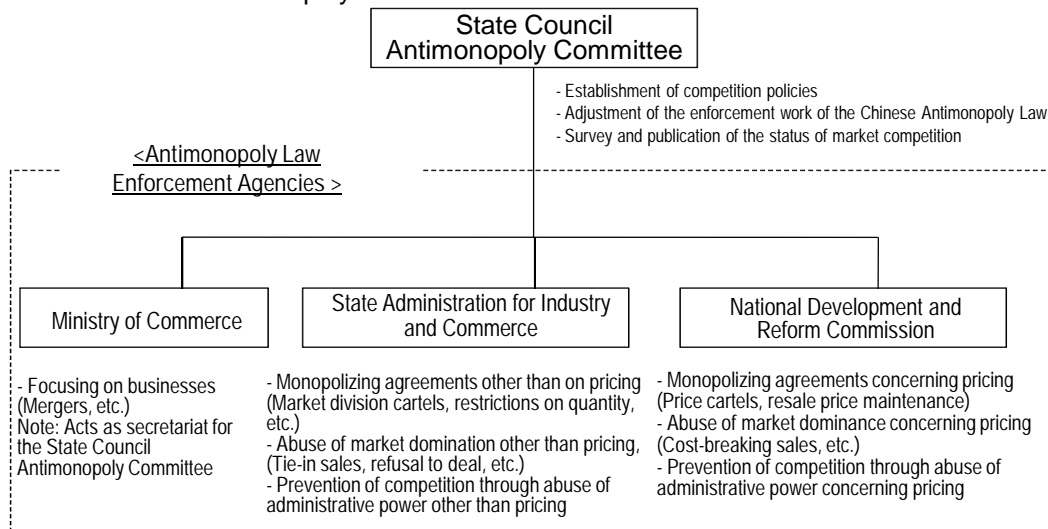
4. Enactment of Chinese Antimonopoly Law and Likelihood of Application in International Cases

In August 2008, a comprehensive Antimonopoly Law was enacted in China. The key provisions of the law include: 1) monopolizing agreements, 2) abuse of market dominance and 3) corporate combinations. The law also adds as its Chinese local rule 4) the abuse of administrative power.

Although the draft bills regarding cartel regulations were made public, specific enforcement standards such as the scope of illegal profits subject to confiscation, concrete methods for calculating fines and leniency policies, are unknown.

Article 2 of the Chinese Antimonopoly Law provides that the Chinese Antimonopoly Law may apply to acts committed outside the country. Therefore, there is a very great likelihood that the Chinese Antimonopoly Law may be applied even in cartels which include overseas corporations.

Conceptual diagram of the enforcement regime of the Chinese Antimonopoly Law



Source: Compiled by METI based on a number of documents

Outline of the penalty system of the Chinese Antimonopoly Law

Monopolizing agreements	Abuse of market dominance	Corporate combination
(Implementation of a monopolizing agreement) - Suspension of illegal acts - Confiscation of illegal profits - Fine of 1-10% of revenue of the previous fiscal year (Non-implementation of a monopolizing agreement) - Fine of no more than 500,000 yuan Note: In cases of a trade association concluding a monopolizing agreement, aside from the fine of no more than 500,000 yuan, if the circumstances are serious, revocation of the registration of the social organization.	- Suspension of illegal acts - Confiscation of illegal profits - Fine of 1-10% of the revenue of the previous fiscal year	- Suspension of combination - Necessary measures to return to the state before the combination (Disposal of stocks or assets, assignment of operations) - Fine of no more than 500,000 yuan

Source: Compiled by METI based on a number of documents

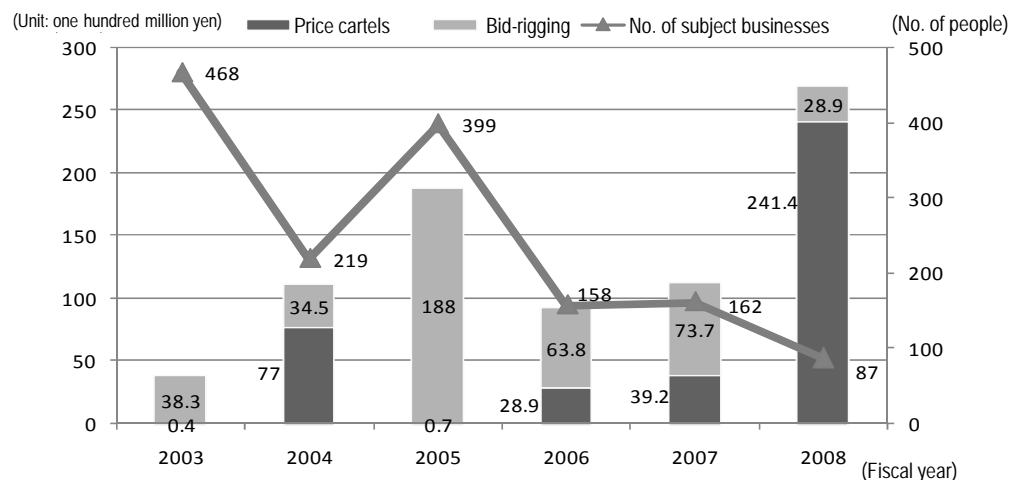
5. Enforcement Status of Japanese Antimonopoly Act

Following the introduction of the surcharge reduction and exemption system (leniency system) in 2005, it appears that there is a greater opportunity for the JFTC to obtain information on cartels with such collection process made easier.

The total amount of surcharge orders in the last fiscal year came out to be 27 billion yen, the highest amount ever recorded. There is a trend of increasing surcharges. Also, the numbers of legal measures taken against cartels appears to be on the rise.

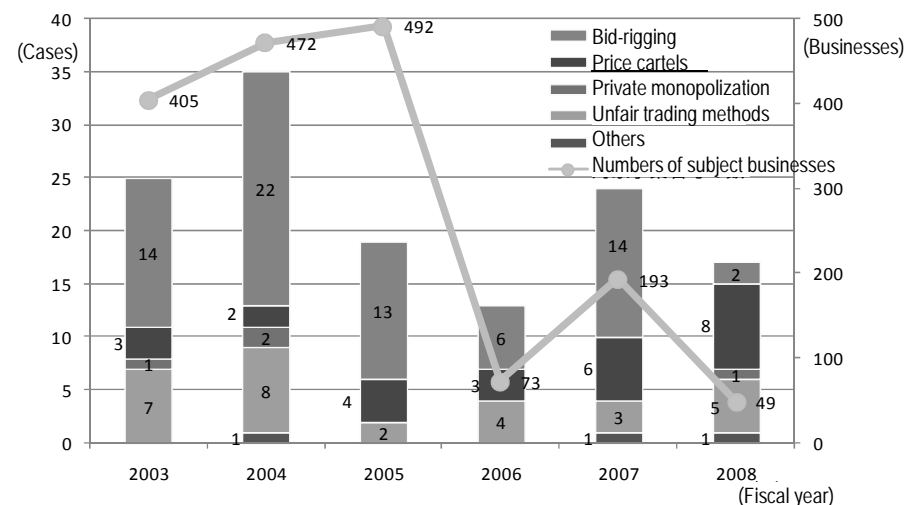
- Marine hose cartel: In February 2008, in connection with a certain international marine hose cartel, the JFTC issued cease and desist orders against five corporations comprised of corporations from the UK, France, Italy and Japan, of which, a surcharge payment order was issued to against a Japanese corporation. This was the first case in which JFTC took a legal measure against overseas corporations in relation to an international cartel.
- Cathode ray tube cartel: In October 2009, the JFTC issued cease and desist orders and surcharge payment orders against several Asian corporations including a Japanese corporation in relation to an international cartel of cathode ray tube manufacturers. Even though the international cartel did not have any direct domestic revenue from sales of the cathode ray tubes, the JFTC imposed surcharges on an overseas corporation for the very first time.

Changes in the surcharges imposed by the JFTC (FY 2003-2008)



Source: Compiled by METI based on information on JFTC website

Changes in the legal measures taken by the JFTC (FY 2003-2008)



Source: Compiled by METI based on information on JFTC website

III Status of Corporate Compliance of Cartel Competition Law

Need for Compliance Measures

If competition law violations are found, corporations not only suffer financial losses as a result of imposition of fines and penalties but also damage to their reputation established over the years, which may also damage the corporations' competitiveness.

Therefore, it is necessary for each corporation to assess its risks of anti-competition in each country that it is involved in and to establish a competition law compliance regime in line with the risks.

For the purpose of assisting corporations establish their regime, we set out in this Report measures and example cases based on the survey data from hearings at METI from the following three perspectives.

Three perspectives for organizing a competition law compliance regime for corporations in connection with cartels

Prevention:

Broad restrictions on contacts with competitors to not only prevent cartel formations but also to avoid suspicion of cartel formations

Detection of Violations:

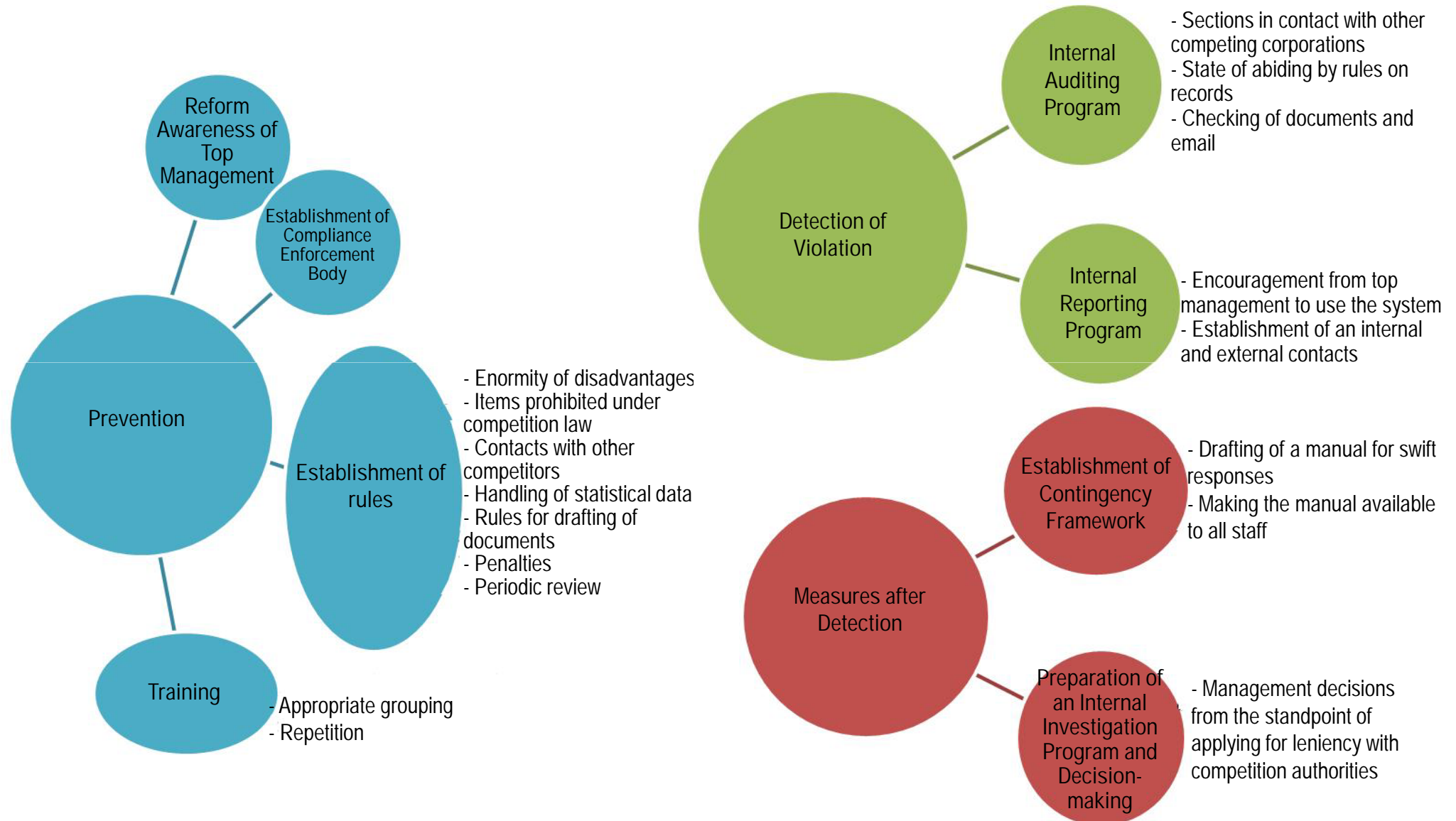
While being aware that it is impossible to remove all risks of competition law violations, allow detection of violations at the earliest possible opportunity

Measures after Detection:

If violations are detected, act promptly.

Visualization of Corporate Cartel Competition Law Compliance

— Three Perspectives: 1) Prevention 2) Detection of Violations 3) Measures after Detection —



Prevention

1. Reformation of Top Management's Awareness and Permeation of Compliance Awareness throughout Corporation

In order to prevent executives and employees from forming cartels with the mindset of this being for the “benefit of the corporation,” top management must take the initiative in repeating to their executives and employees over and over on many different occasions that “there is no need to seek profits in violation of competition law”.

Along with indicating that top management means what it says, in order to give the “stamp of approval” of the top management with regard to measures for competition law compliance, it is also thought to be effective to appoint high-ranking executives out of the executives, as executives in charge of compliance.

2. Establishment of Compliance Enforcement Body

In organizing and operating a competition law compliance regime, it is essential to establish a compliance enforcement body and to make clear that this section is responsible for organization of such system.

In addition, it is desirable that an executive is appointed head of the compliance enforcement body, and along with making clear the responsibilities of the top management, a route should be made clear by which information tracked by the compliance enforcement body can swiftly reach top management.

Reference case

- The essence of the president's message is, “Abiding by the law is the premise for corporate existence. Strict action will be taken against violations of laws and regulations and internal rules”. The latest version of this message is also the opening statement of the Guidelines for Abiding by the Antimonopoly Act. (Corporation J, Japanese corporation)

3. Establishment of Competition Law Compliance Regime

(1) Size of detriment in cases of violation

It is important to make executives and employees realize that the detriment caused to the corporation and to individuals by violating the competition law is more severe than what they imagine. In this regard, it is desirable to specifically spell out the detriment suffered by the corporation itself and by individuals, such as enormous fines imposed by the EU, and the possibility of imprisonment in the U.S.

(2) Matters prohibited under competition law

In order to gain the attention of salespersons, etc., the compliance rules should not simply list matters which are prohibited. Instead it is effective to make adjustments such as using a Q&A format with hypothetical situations likely to occur in the corporation, or a straightforward list of what can and cannot be done (called dos and don'ts).

Reference cases

- Prices, present and future sales plans, production costs, production quantities are detailed in the corporation guidelines on information exchange as matters for which information exchange is not permitted, and an additional operation policy was drawn up explaining in detail what kind of matters in the corporation also fall under the above information. (Corporation I, Japanese corporation)
- An explanation booklet on the overall rules concerning compliance, complete with illustrations and giving examples of situations which employees are likely to face through their work, has been made and distributed. (Corporation K, Corporation M, Corporation Q, Japanese corporations)

3. Establishment of Competition Law Compliance Regime

(3) Contact with competitors

1) Necessity of establishing rules concerning contact with competitors

Since cartels are determined not just through direct evidence but through indirect evidence (circumstantial evidence) of contact with competitors, it is desirable to establish rules restricting unnecessary or careless contact with competing corporations as much as possible.

Contact with competitors includes informal contact (informal social gatherings before or after trade association conferences or rounds of golf). One idea is to establish separate provisions in the rules for matters which require particular attention.

2) Assessment and review of the substance of conferences for participation and contact opportunities

Upon recognition of the risks of activities of trade associations under competition law, it is desirable for the corporation to assess trade associations in which the corporation participates and verify the necessity of attending trade associations or conferences (in other words, ensuring that participation is not simply for “social reasons” or “to maintain friendly relations”), and only participate in associations and conferences that are recognized as necessary.

Moreover, one idea is for the corporation to change the participants from salespersons who have the authority to determine prices to persons who have no authority to determine prices, such as persons in charge of planning. Where issues are likely to arise which may be a problem under competition law, a third party such as a legal affairs officer or an attorney present may also be present.

Reference cases

- We have stopped associating with trade association which do not maintain a compliance program. Participation in informal gatherings before and after trade association conferences is prohibited. (Corporation C, European corporation)
- As a global policy to abide by antitrust laws, all conferences with competitors, including trade associations, have been thoroughly questioned for the legality of its purpose and have been restricted to the extent possible. In addition, we have established a policy of withdrawing membership from all unnecessary trade associations whether formal or informal . (Corporation N, Japanese corporation)

3. Establishment of Competition Law Compliance Regime

(3) Contact with competitors

3) Procedures to be taken in advance in cases of contact with competitors

In cases of attendance at trade association conferences or contact with competitors, it is desirable that an application be filed in advance to superiors or the compliance enforcement body, to look into the necessity of the contact.

4) Procedures to be taken after contact with competitors

In order for the compliance enforcement body to confirm whether the contact with the competitor was in accordance with the application submitted in advance, it is important to ask for a report afterwards. Moreover, in order to decrease the burden on the person submitting the application and to ensure that reports are submitted after the contact, one possibility is to draft a form such as a list of items that can be checked off.

Further, in cases where contact with competitors is frequent and is unrealistic to expect applications in advance to be submitted on every occasion, other possibilities are only to take the procedures after the contact or to examine the necessity of contact based on applications submitted several times a year.

Reference cases

- Each sales division draws up a list twice a year in advance of “formal conferences” and upon confirmation by the head of each division, submitted to the section in charge of audits. As a general rule, employees may only attend these conferences. (Corporation J, Japanese corporation)
- Contact with competitors is not in itself prohibited, but if participating continuously in conferences with competitors, an application for approval must be submitted in advance and the approval of the operating department or the section in charge of legal affairs in the subsidiary and the head of the affiliated operating department must be obtained. (Corporation Q, Japanese corporation)

3. Establishment of Competition Law Compliance Regime

(3) Contact with competitors

5) Rules in cases of problems arising from contact with competitors

If topics come up during a contact with a competitor that are problematic under competition law, it is desirable that rules require “a clear declaration of non-participation in such topic, a demand for an entry in the minutes, withdrawal, a report to the section in charge of compliance, and for the measures taken by the corporation to be put in writing”.

Because it is difficult in a real situation for an attendee to make a judgment on whether or not there is a problem under competition law, however, it is important to develop on-the-spot response capabilities through training. Further, it is important to emphasize that a report should be made without delay to the compliance enforcement body, if the attendee did not leave immediately but felt a topic was problematic.

6) Preservation of records

It is important for the corporation as a whole to clearly form a uniform policy for a preservation period of documents for each kind of document as well as a method for its disposal, and this policy should be made widely known so that arbitrary document management depending on content is not carried out in the corporation.

Reference cases

- In cases where the topic of pricing comes up at a conference, we ask that the discussions stop and demand that this request be put into the minutes of the conference. If the topic of pricing still continues, then we leave the conference and document the events and actions in writing. (Corporation G, Japanese corporation)
- With regard to document management, we believe there is a problem of arbitrary judgments for some documents to be kept and others not to be kept. Therefore, we have established a policy on document management and delete documents on a regular basis. Emails are deleted after three months, printed documents with legal preservation periods are disposed after such period, and other printed documents are disposed after two years. (Corporation G, Japanese corporation)

3. Establishment of Competition Law Compliance Regime

(4) Handling of statistical data

1) Necessity of establishing rules concerning the handling of statistical data

Corporations naturally want to know confidential information such as the production volumes of competitors and the prospects for supply and demand, but when exchanging confidential information with competitors, there is a possibility that an unspoken joint decision will be reached on cooperative action, which may be recognized as a cartel.

Therefore, there is a need to establish rules regarding the provision/use of statistical data. In particular, it is desirable that direct exchange of statistical data with competitors be prohibited since the risks are extremely high.

2) Contents of statistical data which may be provided/exchanged

Rules can be established on the contents of statistical data that can be provided/exchanged by the corporation, keeping in mind the following points: that the data is aggregate data from which individual information on separate corporations cannot be extracted, that there are a plural number of participants (to the extent that individual corporation information cannot be estimated), and that predicted information be only for non-specific future general prospects with past data as the general rule.

Reference cases

- Since future information based on predictions are at high risk under competition law, only past data is used as reference. Whether or not information falls under past data mentioned here differs depending on the market and the characteristics of the information, but we make judgments by referring to the stipulation in so-called “the maritime transport guidelines” that information for which one year has passed will be historical information. (Corporation B, European corporation)
- Although trade associations have social significance but pose a risk of being involved in a cartel, we have compiled a check list with regard to statistical/market prediction activities conducted especially by trade associations and only allow participation in statistical activities of associations which satisfy the requirements of the list. (Corporation Q, Japanese corporation)

3. Establishment of Competition Law Compliance Regime

(5) Rules for creating documents

1) Specification of the source of information

Corporation may establish rules on recording the sources of information when the corporation acquires confidential information of a competitor through legal means, such as in the course of price negotiation, so that suspicion will not arise under competition law.

2) Use of expressions that do not give rise to suspicion under competition law

It is desirable that examples of expressions which may result in violations of competition law (“policy of the industry”, “price revision keeping in pace with market leaders,” etc.) when drafting documents or making verbal statements relating to work be listed, and provide warnings to not use such expressions. This is because there is a possibility that in cases where such documents or verbal statements become the subject of investigations by competition authorities, a mistaken impression could be given that some form of agreement was reached even if an agreement with competitors which would be a problem under competition laws do not exist.

Further, it is obvious that where some form of agreement exists which could be a problem under competition laws, calling for adjustment of the expression for the purpose of concealment is contrary to the objective of competition law compliance.

Reference cases

- Rules stipulate that obtaining information on competitors from independent dealers, consumers and other third parties is not a problem when obtained through lawful and ethical means, but it is necessary to clarify in writing from whom the information was obtained (for example, writing the date the document was obtained, from whom, and the means used) in order to always be able to show that information was obtained legally. (Corporation I, Japanese corporation)
- In recognition that all documents may be used as evidence by the competition authorities, introduced examples of wording which may not be used since they may give rise to a misunderstanding. (Corporation G, Corporation M, Japanese corporations)

3. Establishment of Competition Law Compliance Regime

(6) Internal disciplinary provisions concerning competition law violations

It is possible to show to employees the corporation's serious stance on abiding by the competition law by clearly presenting internal disciplinary provisions where the competition law is violated.

Further, it is possible to increase the deterrent effects of compliance rules by imposing appropriate action in cases of violation of competition law compliance rules, even if they are not deemed to be violations of competition law.

(7) Periodic review of competition law compliance rules

The competition law compliance rules are not complete by drafting it once, but require review in accordance with amendments to competition laws and related regulations of each country and after the public announcement of important court decisions.

Reference cases

- Clearly written in the rules that employees who violate competition law intentionally and employees who have not taken any measures despite knowing of violation of competition law by subordinates will be subject to disciplinary action, and employees who did not take action to comply with corporation competition law compliance programs will also be subject to disciplinary action. (Corporation G, Japanese corporation)
- Clearly written in the rules that violations not only of laws and regulations but violation of the rules on contact with competing corporations will also be subject to disciplinary action, and that not only the violators but the managing supervisors will also have to assume responsibility. (Corporation Q, Japanese corporation)

4 . Training

Importance of training for establishment of the competition law compliance program

In order to have executives and employees become aware of competition law compliance, the challenge is how to get the executives and employees to develop a sense of danger concerning the violation of competition law (that not only the corporation will suffer huge losses, but executives or employees may themselves become subject to criminal punishment and even face imprisonment, where the competition law is violated).

In addition, it is important that training emphasizes that the compliance enforcement body serves to protect executives and employees in the field from legal risks and that executives and employees are able to freely consult the compliance enforcement body if anything happens, making the compliance enforcement body in the corporation more approachable.

(1) Appropriate training suited to the position

In order to enhance the effectiveness of the training, it is important to assess the sections and situations in the corporation in which problems under the competition law are likely to occur and to group trainees appropriately following the assessment. In particular, with regard to trainee groups for whom problems under competition law will easily occur, providing pragmatic training is the key to making sure that the contents are thoroughly absorbed, while preventing staleness.

Reference cases

- We conduct training according to the position, including researchers. A requirement for promotion within the corporation is to complete training on competition law. (Corporation C, European corporation)
- With regard to rules concerning contact with competitors, we have stipulations on the necessity of attending the training. Specifically, we emphasize the necessity of correctly understanding conduct that violate the competition law and call on employees to periodically take part in the training which is organized by the compliance section. (Corporation M, Japanese corporation)

4. Training

(2) Repetition for the same participants

In order to prevent the substance learned in the training from getting diluted and in order to ensure the accurate handling of events that may arise on a daily basis, it is important to ensure a program where the same participants repeatedly take part in training relating to competition law.

5. Others

(1) Assessment of competition law compliance program for overseas group corporations

Where overseas local subsidiaries violate competition laws, the Japanese parent corporation may be fined. It is necessary to exert effort into assessing and establishing a program for competition law compliance of overseas local subsidiaries for corporations that do business overseas.

(2) Submission of written oaths

Since the signing of a written oath has the effect of heightening the awareness of executives and employees to comply with competition laws, one idea is to have executives and employees submit a written oath at the time of employment or promotion.

(3) Encouraging trade associations to establish competition law compliance programs

One idea is to encourage trade associations to maintain competition law compliance programs, with recognition that trade associations that maintain competition law compliance programs are better able to reduce the competition law risks for members.

Reference cases

- We maintain a compliance program for the whole corporate group, including overseas subsidiaries. The person in the U.S. in charge of ensuring group compliance with competition law is the head of all of the competition law compliance groups (including Japan). Each responsible person in each local legal affairs department is placed under such a person and each responsible person of the local legal affairs department for each country assists the person responsible for group compliance. (Corporation G, Japanese corporation)
- Employees who are likely to have contact with competitors, clients and suppliers must sign a written oath every year that states that they have not committed violation of the competition law nor have they been involved in such violation, and are not aware of any acts of violations by others around them. (Corporation C, European corporation)

Detection of Violations

1. Internal Auditing Program

From the perspective of risk management under competition laws, it is desirable at the very least that an internal audit be conducted with regard to sections which have the authority to determine prices and the opportunity to come in contact with competitors, such as the sales division.

There are means in the internal audit to confirm that records are being drafted and preserved in accordance with internal procedures (rules concerning contact with competing corporations), to conduct interviews with executives and employees and to check whether there are any records which would be a problem under competition laws, including the emails of individuals and data saved on hard disks.

2. Internal Reporting Program

With regard to the internal reporting program, it is desirable that an internal contact office comprised of the compliance enforcement body and an external contact office comprised of outside experts, such as attorneys, be established as the reporting contact office for compliance as a whole, including competition laws.

In order to correct the mistaken belief that internal reporting is whistle-blowing, top management needs to emphasize that the internal reporting program is a valid way for detecting dangers in advance and should be actively utilized vigorously.

Reference case

- The internal auditing body randomly conducts audits of the sales division in order to ascertain the functioning of the compliance programs. The audit is carried out through methods such as document examination, interviews with employees, and checking of emails. Afterwards, a proposal (need for stricter training, need for guidelines to deal with specific circumstances) is drafted. Further, by conducting another audit one or two years later, try to improve the quality of the compliance program. (Corporation D, European corporation)

3. In-House Leniency Program

There has been some discussion on establishing an “in-house leniency program” (a system of self-reporting where employees who report voluntarily that they have committed acts of violation are granted special leniency with regard to action to be taken against them).

We believe that careful consideration should be given with regard to an in-house leniency program, taking the following points into account, and in accordance with the circumstances of each individual corporation.

- Advantages: Leniency programs are presently established in the competition laws of various countries. Although a quick detection of violation is important, it can be expected that employees will voluntarily come forward through use of the in-house leniency program.
- Disadvantages: May give employees the impression that even if they commit an act of violation, they will not be dismissed so long as it is reported. Thus, there is a possibility that the objective of the rules in the corporation rules “to impose disciplinary action” will be in name only and not in practice.

Reference cases

- We have actually used the in-house leniency program such that “if you report the fact of having committed an act violating the Antimonopoly Act on this occasion, punishment under the internal disciplinary provisions will not be carried out”. (Corporation I, Japanese corporation)
- In the antitrust law compliance program, we stipulate that we will give utmost consideration, in accordance with the circumstances, concerning the applicability of disciplinary action to a person who contacted or inquired with the person in charge of compliance about acts violating or that may violate the competition law. (Corporation M, Japanese corporation)

Measures in Response to Violations

1. Establishment of Contingency Framework

It is important to establish a contingency framework so that, in the event that competition authorities commence an investigation or an internal audit identifies a violation, delay in internal decision-making (including confirmation of relevant facts and whether or not to file for leniency) does not cause losses to the company.

A manual can be created in advance for the handling of contingencies (e.g., listing contact information and procedures for notifying senior managers) and disseminated to officers and employees so that contingencies can be dealt with in a prompt manner.

2. Establishment of Prompt Internal Investigation Framework and Decision-making

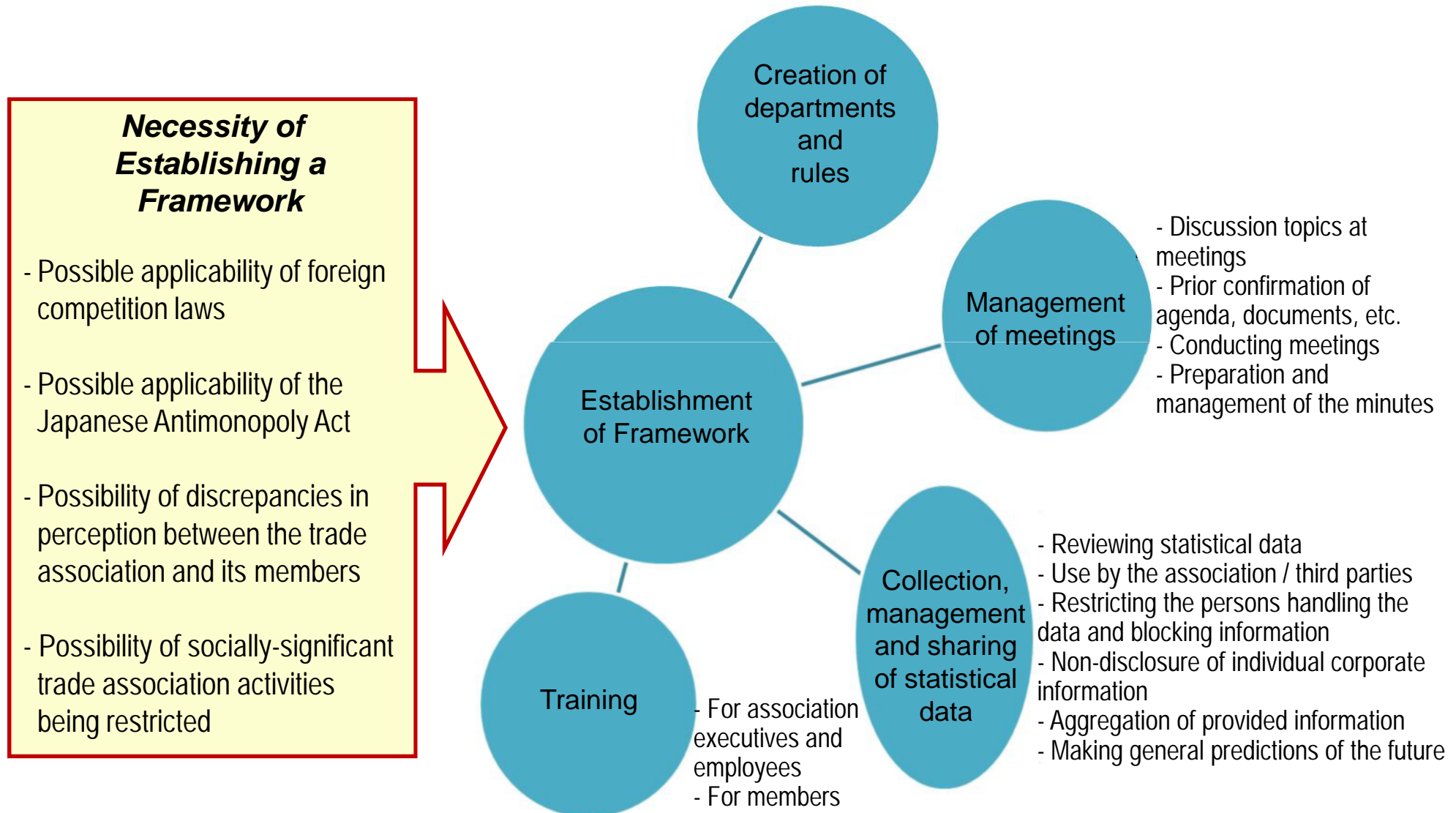
In cases where competition authorities actually commence an investigation, it is important to immediately establish an internal investigation framework based on a policy that has been created in advance. In particular, since there is a limit to the number of companies that can file leniency applications, it is important for top management to promptly decide whether or not to apply for leniency.

Reference cases

- Added a section in the compliance rules entitled “When officials from competition authorities visit our building” and stipulated specific steps to take. (European Trade Association C)

IV Status of Cartel Competition Law Compliance by Trade Associations

Depiction of Status of Cartel Competition Law Compliance by Trade Associations



1 . Need for Establishment of Competition Law Regime by Trade Associations

It is difficult to say that when compared to Japanese corporations, Japanese trade associations have sufficient recognition of competition law compliance (see note). However, for example, judging from the factors given below, we believe that it is necessary for Japanese trade associations to also prepare a competition law compliance regime.

(1) Possibility of applicability of domestic and foreign competition laws to trade association activities

1) Risk of applicability of overseas competition laws such as of the EU

- As with the corporations, if, for example, a Japanese trade association forms a cartel which affects the EU market, even if it is was formed outside of the territory, there is the risk that through the applicability of EU competition law, the trade association itself will have a fine imposed on it.

2) Risk of applicability of the Japanese Antimonopoly Act

- Taking into account the recent enforcement state of the Japanese Antimonopoly Act, there is the possibility that activities of trade associations which have carried out such as the exchange of statistical data and operation of conferences, may be under close investigation from the perspective of abiding by the Antimonopoly Act.

Note: Based on the results of a survey, conducted by the JFTC, of corporations listed in the first section of the Tokyo Stock Exchange (1,041 replies received out of 1,738 surveyed corporations), of the 97.6% who replied that they had established compliance manuals, 85.5% of corporations replied that the manuals contained rules on abiding by the Antimonopoly Act (“Survey on State of Preparation of a Compliance Structure in corporations – State after Enforcement (January 2006) of the Revision of the Antimonopoly Act” published in March 2009, JFTC Secretariat). Moreover, trade associations were not taken up in this Report but according to the hearing survey of Japanese trade associations conducted by the Ministry of Economy, Trade and Industry, there was only a small number of trade associations that had established rules, not just limited to competition law but on any form of compliance rules.

1 . Need for Establishment of Competition Law Regime by Trade Associations

(2) Effect of strengthened enforcement of competition laws in various countries in recent years

1) Risk of discrepancies in perception arising between the trade association and its members

- Recently, in the midst of strengthened enforcement of competition laws in various countries, there has been a rapid increase in the awareness of competition law compliance, particularly among members engaging in global activities.
- If trade associations fail to take any action relating to competition law compliance, there is a possibility that those member with a high level of awareness will not actively take part in the association's activities or withdraw from the association in order to protect themselves.

2) Risk of restrictions on socially-significant trade association activities

- Notwithstanding the fact that trade associations are engaging in socially-significant activities such as compiling statistical data and creating technical standards, in cases where the number of members decrease or members only participate in association activities in a passive manner, there is a risk that the trade association will have a weakened influence and that it will become more difficult to carry out such activities.

Taking the above into account, potentially helpful approaches and reference cases are set forth below for the creation of a specific system by trade associations.

Reference cases

- Since joining a trade association and participating in meetings presents a risk for corporations under competition law, recently there is a trend for corporations to perform a rigorous review as to whether competition law compliance is being implemented by the trade association. Accordingly, the trade associations must have compliance programs relating to competition law and prove to members that it is a safe environment as far as competition law is concerned. (European Trade Association B)
- The catalyst for the creation of compliance rules was that there was an increasing number of cases in which foreign competition authorities imposed huge fines and we felt that there was a need for trade associations to take some form of action. Another big factor was that other trade associations were taking similar measures. (Japanese Trade Association J)

2. Establishment of Compliance Enforcement Body

In order for compliance measures to be carried out effectively and continuously, it is recommended that the top management of the organization appoint a person responsible for compliance, and then to establish a compliance enforcement body and officers and/or employees in charge of the actual performance of duties.

3. Establishment of Competition Law Compliance Regime

In order to create an effective competition law compliance regime, it is recommended that the rules to be followed by the trade association's officers, employees, and members are clearly worded and that such rules are shared among them.

Reference cases

- Established responsible officers and employees and a department in charge of compliance. (Japanese Trade Association H)
- Appointed one of the officers (an executive director) as the person responsible for compliance-related issues, and assigned to the general affairs committee the function of collecting opinions from and providing guidance to each of the corporations. (Japanese Trade Association I)
- Stipulated the following in the compliance rules: 1) matters that cannot be discussed with competitors (price of the product, sales conditions, etc.) and matters that cannot be agreed to with competitors (setting prices, restricting production, etc.) as a general matter under European competition law, 2) matters such as the methods of exchanging market information, refusal to allow membership into the association, and boycotting by trade associations, which are competition law issues that are unique to trade associations, and 3) specific procedures to take when competition authorities visit the association. (European Trade Association C)

4. Management of Trade Association Meetings

The competition law risks of trade association meetings are inevitably high because it is where competitors gather. Thus, it is necessary for the trade association, acting as a secretariat, to establish preventive and responsive measures against acts at meetings that may pose problems under competition laws.

(1) Discussion topics at meetings

It is recommended that topics that are prohibited from being the subject of information exchange and discussion at the meeting be listed in advance in the competition law compliance rules and that these are brought to the attention of officers and employees of the trade associations, the chair and the members.

(2) Prior confirmation of the agenda and documents

It is recommended that the secretariat confirm in advance the agenda of the conference and the documents which are to be handed out to ensure that there are no contents which may violate competition laws.

It is recommended that discussions at the meeting be limited to the agenda and documents which have been confirmed in advance.

Reference cases

- Created a list (card) of permitted acts (entered in green) and prohibited items (entered in red) relating to competition law, and distributed the list to the participants in order to bring the items to the participants' attention. (European Trade Association C)
- Notified participants of the agenda in advance in writing or by email. In addition, in important matters, outside legal counsel reviews all agenda items in advance. (European Trade Association E)

4. Management of Trade Association Meetings

(3) Conducting meetings

Rules could be prescribed so that the chair makes a declaration at the commencement of the proceedings that violation of competition law will not be tolerated, and that if a topic is raised during the meeting which may be a problem under competition law, the chair will issue a warning that the topic be discontinued and if such warning is not heeded, the chair will close the conference after having this recorded in the minutes of the proceedings.

In order to avoid having competitors meet among themselves only at the meeting, it is recommended that at least one officer or employee of the secretariat trade association attend the meeting.

With regard to meetings where a problem under competition law is likely to arise, one option would be to request the presence of a third party such as an attorney or legal staff of a member corporation or to discourage the participation of individuals with the authority to make pricing decisions.

(4) Preparation/management of the minutes of the proceedings

The minutes of the meeting serve as a fundamental document indicating that the participants took appropriate actions. It is recommended that the minutes be prepared by an officer or employee of the trade association who attended the meeting; but with regard to meetings not attended by any officers or employees of the trade association, it is important that a participant prepare the minutes and that the department within the association in charge of compliance uniformly manages such minutes.

Reference cases

- If there is an act of violation of competition law in the conference: 1) the chair immediately raises his/her hand, declares that there is the possibility that the direction of the discussions may be a problem under competition law and calls for such discussion to be discontinued; 2) If the discussion is nonetheless continued, then the chair makes an entry in the records, leaves the conference room and then contacts the legal affairs department; 3) The legal affairs department comes to the meeting and orders that it be brought to a close and the participants leave the building. (European Trade Association C)
- The compliance rules prescribe specific methods of preparing and handling the minutes. (German Electrical and Electronic Manufacturers' Association (ZVEI))

5. Collection, Management and Sharing of Statistical Data

Collecting, managing and sharing of statistical data is an important role of trade associations. However, if “as a result of the information activities of trade associations, businesses in a competitive relationship are able to make predictions among themselves concerning specific details of important means of competition, such as prices relating to current or future business activities” (Trade Association Guidelines), there is a risk of inviting suspicion under competition law.

In this regard, trade associations must be extremely careful that individual statistical data that allows identification of a member are not disclosed to other members.

Therefore, it is recommended that the policy of collecting, managing and sharing statistical data be administered by establishing clear rules, for example, with respect to the following issues:

- The collection, management and sharing of statistical data should only be handled by the trade association or by a third party organization and not between or among any of the members.
- The person responsible for the collection and management of statistical data within the trade association should be clearly restricted and information should be carefully managed by, for example, implementing an information firewall with regard to external parties and other departments.
- Individual corporate information should not be disclosed to members.
- When sharing statistical data with members or the general public, the information should be aggregated so that it is difficult to extract individual corporate information.
- Future predicted figures should be general rather than detailed.

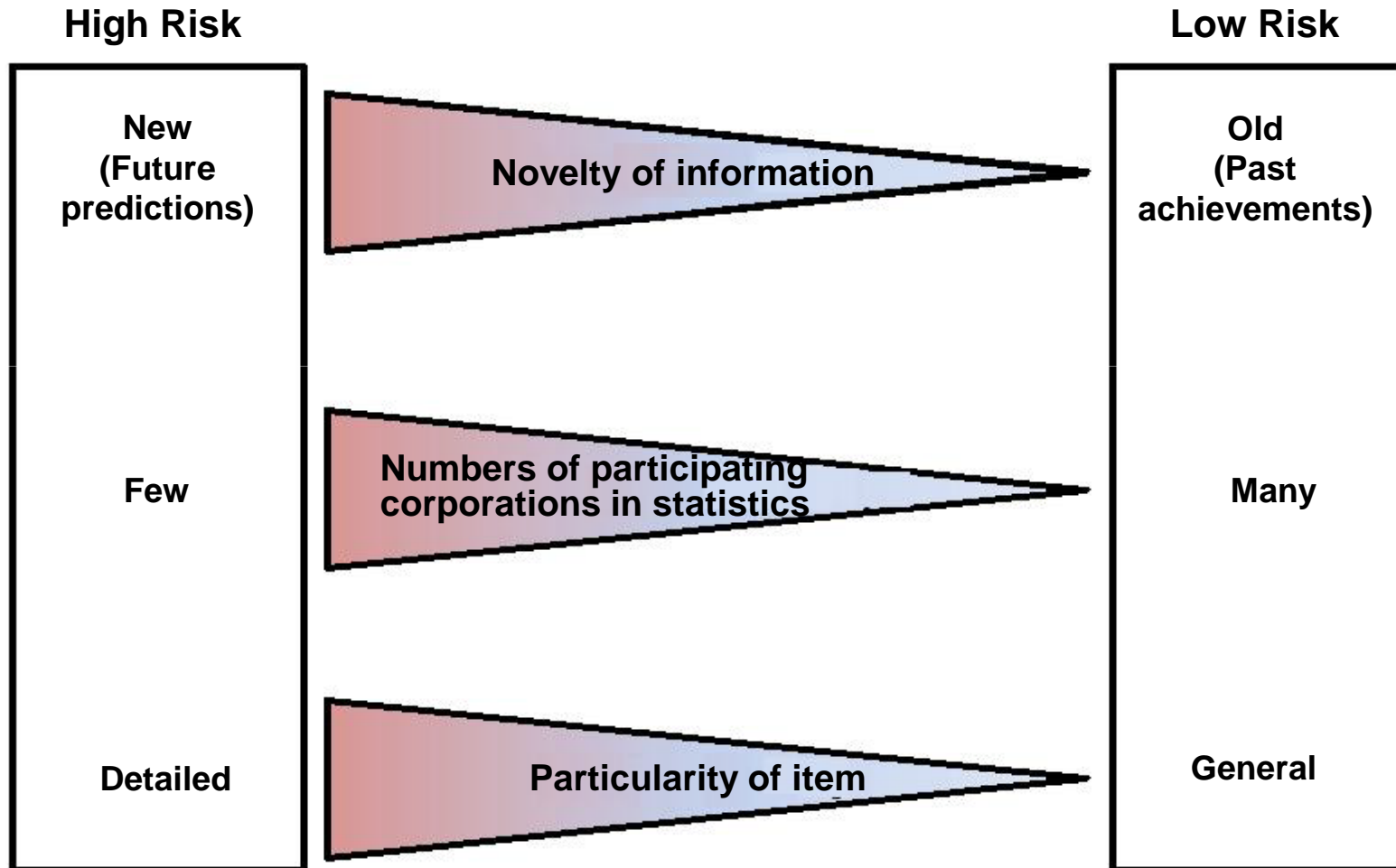
Moreover, with regard to statistical data that is currently in the association’s possession, in order to assess whether or not the information is really necessary, one possibility is to conduct a review by referring to the elements for determining the legality of information activities as outlined in the trade association guidelines, while confirming the needs of the members.

5. Collection, Management and Sharing of Statistical Data

Reference cases

- Statistical data are legally collected by the trade association or a third party organization, and they only handle aggregated data from which individual member information cannot be extracted. (European Trade Association A)
- Statistical data are handled by the statistics section of each department and each section asks for the provision of information from each corporation and collects such information. The floor on which the sections are located cannot be entered using the usual entry card and the electrical system is also separated from the other buildings, and a firewall using sophisticated security tools has been installed. (European Trade Association B)
- To ensure that the statistical data do not become a source of price induction, statistical data guidelines were established in July 2007. These guidelines stipulate that all methods used to compile statistics and make predictions and all the results should be disclosed; that the confidentiality of the data for each individual corporation should be held in strict confidence; and that the discussion and creation of predicted numerical figures at the meeting (excluding trend analysis of aggregate results) are prohibited. However, if statistical data are made public, information will also be passed onto corporations that did not take part in the survey and since it will not be difficult for such corporations to prepare their own independent statistics based on the disclosed information, there is a risk that this will serve as an incentive not to participate in the compiling of the statistical data. (Japanese Trade Association H)
- The guidelines on statistical data stipulate that data collected from individual corporations should be treated as confidential information and only full-time staff in charge of statistics who are not responsible for conferences relating to products should be allowed access to such data. In addition, there is a provision prohibiting the disclosure and distribution of individual data, and exchange of information concerning demand projections is also not conducted. (Japanese Trade Association J)

Reference: Depiction of risks relating to statistical data in the “Guidelines under the Antimonopoly Act Relating to the Activities of Trade Associations” (Trade Association Guidelines)



6. Training

(1) Training for trade association officers and employees

With regard to trade associations that are at risk under competition law, in order to provide a forum where members can hold discussions with a peace of mind, it is important that trade association officers and employees possess knowledge concerning competition law compliance. To this end, training can be conducted by making adjustments to increase its effectiveness by, for example, using case studies based on the state of actual discharge of work at the trade association.

In cases where it is difficult to conduct independent training, it is recommended that at the very least the existence of competition law risks and the basic contents of competition laws are made known by having the officers and employees participate in external seminars or by asking the compliance department of member corporations to give a presentation.

(2) Training for members

Since it is necessary to familiarize the members with the trade association's compliance rules and to request actions in compliance with such rules, it is recommended that an explanation of these rules be provided.

One possibility is that, with regard to small and medium size corporations that find it difficult to conduct training on competition law compliance on their own, the trade association could provide training as a part of the services that they offer to members.

Reference cases

- Engaged an outside law firm to conduct training on competition law compliance in relation to the activities of the association once or twice a year for the staff of the association and the staff of business organizations that are members of the association. The training consists of lectures on the following four points: 1) permitted matters, prohibited matters and general matters, 2) specific problems faced by the association, 3) responsive measures to on-the-spot inspections (dawn raids), and 4) a framework for information exchange in the market. (European Trade Association C)