

JAPAN ECONOMIC CURRENTS

A COMMENTARY ON ECONOMIC AND BUSINESS TRENDS

One Year Later.

None of us will ever forget the horror of September 11, 2001. On the morning of that day, we first heard the news and saw on the TV the nightmarish pictures of the airlines flying into the World Trade Center in New York and the towers collapsing into rubble. Standing at my office window, I saw black smoke rising from the Pentagon. We were not Japanese or Americans or any other nationality, but citizens of the world in shared shock and grief. Victims were not just American, but people who had made their way to America from Ireland, Italy, Spain, Russia, Japan, China, South America, the Arab world and many other places.

Pain and anguish from these attacks is still overwhelming for us. For, on that day, the world changed and everything has been different from just the day before.

Looking back a year later, the indelible images remain. There can be no consolation for the losses suffered. But there are hopes. The many brave men and women in New York, Washington and Pennsylvania taught us much about heroism, self-sacrifice and dignity. For every heart-wrenching story, and there are many, we saw hope in the resilience of survivors and their families and communities and outpouring of support from others. One year later, we remember not just the tragedy but how we had all responded and came together to ease the suffering and start to rebuild.

The road ahead for all of us will not be an easy one. America seems to be seeking answers that will fill the emptiness where a pervasive sense of security and goodwill once was. Jointly we also face the challenges of questions about what humanity, democracy, freedom, liberty and prosperity mean. Recognition of these challenges and hopes will, I believe, help us all to build a better world.

September 11, 2002
Hideaki Tanaka, Director
Keizai Koho Center

Japan Relief Fund

Following the terrible events of September 11, 2001, individual and businesses from around the world came together to help the families of victims and their communities. In the initial period, the Japanese business community, including affiliates in the United States contributed more than \$32 million to the Red Cross, the September 11 Fund, and other prominent organizations.

Additional funds were also raised in Japan from individuals, companies and associations for a "Japan Relief Fund" totaling \$3.75 million. These monies were donated to three organizations: the Citizens' Scholarship Foundation of America, the New York Community Trust, and the Washington Grantmakers Community Capacity Fund.

Endorsed by President Bill Clinton and former Senate Majority Leader Bob Dole, the Citizens' Scholarship Foundation of America is providing post-secondary scholarships to the children of fire fighters and police officers who died in the line of duty on September 11. This year, money from the Japan Relief Fund is helping nine "Families of Freedom" children attend college.

The New York Community Trust is meeting the immediate and long-term community needs in New York City, with particular emphasis on the area surrounding Ground Zero.

The Washington Grantmakers Community Capacity Fund is the umbrella organization in Washington for coordinating non-profit emergency response. Japan Relief Fund monies have been dedicated to a ground-breaking effort to strengthen and better organize disaster preparedness efforts for the Nation's capital area.

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Additional information about the Japan Relief Fund and these organizations is available from the Keizai Koho Center US Office and respective recipient organizations:
www.csfa.org
www.nycommunitytrust.org
www.washingtongrantmakers.org

Japan Relief Fund Helps Greater Washington's Disaster Preparedness Plans

by Chuck Bean, the Nonprofit Roundtable of Greater Washington

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Soon after the disaster of September 11, the Japan Relief Fund contributed \$450,000 to a 9/11-related fund called the "Community Capacity Fund." This Fund is managed by Washington Grantmakers, an association of foundations and corporative giving programs.

Based on an assessment of September 11-related funds and still-unmet needs in the Washington region, the Community Capacity Fund (CCF) was created to strengthen the ability of organizations in the Greater Washington region to build the region's capability to respond to possible future disasters and to better respond in the aftermath of terrorist attacks.

The contribution from the Japan Relief Fund focused on disaster preparedness, especially building the capacity of essential nonprofit organizations tasked with preparing for potential future emergencies.

Much of the CCF grants went to support so-called local "Voluntary Organizations Active in Disaster (VOADs)," state-based umbrella organizations that help large and small disaster-relief organizations coordinate their efforts when disasters strike. Active VOADs include the Red Cross, Salvation Army, food banks, and many faith-

based groups such as Catholic Charities, Lutheran Social Services, and other organizations.

The Japan Relief Fund grant was used to strengthen the VOAD for Washington, D.C. and to provide shared training with VOADs from Maryland and Virginia. Due in large part to this Fund, a regional VOAD network has now been developed so the three states can work together.

Other grants went to strengthen the six local chapters of the American Red Cross in the Washington region and to support the development of 2,000 emergency preparedness planning "toolkits." These toolkits are being distributed to small nonprofit organizations and businesses throughout the region that have not yet developed their own emergency plans.

Other CCF grantees include "Greater DC Cares," which is tasked with mobilizing their network of thousands of volunteers in case of disaster, and to the Metropolitan Washington Council of Governments toward support of the development of a Regional Emergency Coordination Plan.

Finally, as the painful experience of September 11 showed, the need for an easy-to-use "hotline" for social services was apparent when thousands of Washingtonians

sought counseling, food banks, and other help. The CCF supported a set of inter-related proposals to develop a three-digit telephone dialing system for the Greater Washington region. This "2-1-1" system is being developed as a point of entry to the nonprofit sector for those who need services. The system resembles the familiar 9-1-1 emergency number. The creation of this system will be an enduring legacy of the Japan Relief Fund's investment through the Community Capacity Fund.

The contributions from the Japan Relief Fund made a huge impact in the Greater Washington region's preparedness to respond in the event of a potential disaster in the future. The Japan Relief Fund's contribution was used strategically to meet unmet needs in our community. We are grateful and deeply appreciate your concern for us in the aftermath of September 11. ■

Chuck Bean directed Washington Grantmakers' Community Capacity Fund (<http://www.washingtongrantmakers.org/WG/Home.asp>) in the year following September 11. He is now the executive director of the Nonprofit Roundtable of Greater Washington.

Competition Rules and Enforcement in the U.S., EU and Japan

by Professor Masahiro Murakami, Hitotsubashi University

Harmonization of Rules Under Substantive Law

American and European antitrust laws have served as the dominant models for regulating competition since the 1980s. These two legal systems have the same basic structure and virtually the same set of rules which have gradually become accepted as the international standard.

Four illegal practices are subject to competition laws: horizontal restraints, vertical restraints, unilateral conduct (abuse of a dominant position in the market), and market concentration (mergers and acquisitions). Competition rules – which are split into two larger categories (ex-ante control and ex-post control) — apply to each category.

Under ex-ante control, competition authorities maintain a system of prior notification, in which certain business practices are reviewed in advance. In the case of market concentration, control is almost exclusively ex-ante: companies party to a proposed merger or acquisition above a certain threshold are required to provide prior notification, upon which competition authorities assess the potential impact of the reduction in

business units or competition units due to the proposed merger or acquisition (M&A).

Under ex-post control, competition authorities investigate the practice after its completion. When a violation has been identified, cease and desist orders are issued and, if necessary, penalties are imposed. Ex-post control can apply to both unilateral conduct and concerted practices:

"Unilateral conduct" practices are used to prohibit companies that enjoy monopolistic power or market dominance from engaging in illegal conduct such as disrupting the business activities of competitors or preventing new market entrants. Typical examples include exclusive supplier/buyer relationships and predatory pricing schemes.

In cases of "concerted practices," rules are applied to agreements between multiple independent business entities which are either outright designed (or have the resulting effect) of restricting competition. Horizontal restraint rules apply to agreements between competitors, while vertical restraint rules apply to agreements among entities in a vertical relationship: parts supplier to manufacturer to distributor or dealer.

US Antitrust Law: Horizontal and Vertical Restraints

Under US antitrust law, concerted "horizontal" practices that have the effect of restraining competition and distorting economic efficiency – price-fixing, volume restriction, market division, bid-rigging, boycotts and vertical minimum price agreements – are per se illegal. Other horizontal restraints – joint production, joint research and development, information exchange and standardization – can be, but are not always, illegal. These practices are examined on a case-by-case basis.

So-called "vertical restraints" are divided into four categories: resale price maintenance, exclusive dealing, sale area customer restriction, and tie-in sales. Vertical minimum pricing agreements are per se illegal. Tie-in sales are illegal when (1) the seller has sufficient economic power to force the buyer to purchase a "tied" product in another market, and (2) when the "tying" has an impact on transactions of substantial volume. Exclusive dealing is illegal when it prevents a competitor's access to customers. In the case of sale area-customer restriction, legality is determined by balancing two

factors: the effectiveness of the relevant restriction in promoting inter-brand competition on the one hand, and restricting intra-brand competition or by looking to facilitating collusion effect or price discrimination (market division) on the other.

In cases of unilateral conduct, business entities with a market share exceeding 50 (or even 40) percent are presumed to have market dominance. But those with a market share of more than 65 percent in the relevant market are treated like a monopoly. Exclusive dealing or tie-in sales by these market dominant entities are, in principle, illegal. The distribution of products at prices below average variable cost by market dominant manufacturers is also, in principle, illegal. Actions by market dominant entities that are aimed at, or have the effect of unfairly maintaining or strengthening their market position, are considered to be exclusionary behavior and is therefore illegal.

As for market concentration, M&As that create or strengthen monopolistic power or market dominance and those that establish an oligopolistic market structure entailing price coordination are prohibited.

In addition, the US has a unique "Secondary Price-Discrimination" regulation that prohibits, except in certain cases, a seller from distributing identical products to a buyer at different prices. Aimed at protecting small and medium-size retailers from competition with large-size retailers, it has rarely been used since the mid-1970s.

As a result of the enormous volume of individual antitrust cases litigated in the United States, US antitrust laws are now clearer than any other country's competition law rules. In the latter 1990s, European competition laws adopted American prohibitions on market concentration and vertical restraints. As a practical matter, US antitrust laws are becoming the international standard.

Japan's Anti-Monopoly Laws

Japan's Anti-Monopoly Laws are similar to US antitrust rules. Cartels are automatically illegal upon their formation except in special emergency situations that are permitted on the grounds of protecting the public interest. The combined market share of cartel participants, however, must exceed 50 percent for these rules to apply.

Within vertical restraints, price restrictions systematically imposed on multiple distributors or dealers

are quasi-per se violations. Exclusive purchase agreements are illegal if distribution channels to customers are closed to competitors.

According to the 1991 Japan Fair Trade Commission (JFTC) guidelines concerning distribution systems and business practices, sale area customer restrictions are illegal when the price level of the product covered by the restriction is kept artificially high. But no penalty has ever been applied since the guidelines were published.

Unlike in the US, where exclusive-term dealing, tie-in sales, and disruptive practice to injure competitors or prevent new market entrants are illegal, in Japan, there are no clearly established rules regarding below-cost sales or predatory pricing by manufacturers that operate on a nationwide scale. Indeed, in Japan, it is not clear at what level of market dominance (that is, at what percentage of market share) entities are subject to unilateral conduct rules.

Under 1998 JFTC guidelines concerning M&As, market concentration is deemed illegal when market dominant conditions would enable companies to coordinate with another. It is now

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understood even in Japan that market concentration, which results in an oligopolistic market structure with price coordination, is illegal.

Today, advanced industrialized countries share virtually the same analytical methods and violation criteria for each category of competition law. Moreover, since Japan's Anti-Monopoly Law was modeled on the US antitrust law, it should gradually come to have the same rules as the US antitrust law as more rulings and decisions establish legal precedence.

Enforcement

When authorities investigate and determine antitrust violations have occurred, they issue a cease and desist order in order to restore market competition in civil cases. For the most serious violations under criminal law, such as cartels, hefty criminal and administrative sanctions (prison terms and fines) are imposed.

In cases of market concentration, M&A issues are dealt with at the preliminary review stage by issuing cease and desist orders.

Under US antitrust laws, there are two types of cease and desist orders to eliminate violations and restore competition. The first are injunctions, which are issued by a Federal court when the Department

of Justice has brought suit, and the second are final decisions or consent orders of the Federal Trade Commission.

US antitrust laws stipulate that an entity likely to suffer business or asset loss due is entitled to seek a court injunction. Furthermore, an entity is able to seek triple damage awards on business or asset injuries. Such private action is often taken and helps in forming and ensuring the effectiveness of antitrust rules, especially those governing vertical restraints.

The JFTC's cease and desist orders are designed to eliminate violations and restore competition. Throughout the 1990s, some 20 to 30 cease and desist orders were issued annually. Nearly all were cease and desist orders made through recommendation decisions, and almost 90 percent involved cartels.

In the case of price-fixing violations and volume restriction, the JFTC is obligated to issue fines, in addition to cease and desist orders. The amount of the fine is equivalent to the value of sales of the relevant product over the period when the cartel was effective, multiplied by a specified rate according to type of industry and firm size. The JFTC has no discretionary power with regard to

imposing the fine or determining the amount to be paid.

For the most serious cartel violations, criminal sanctions can be imposed by the JFTC against the firms or individuals in question, in addition to fines. But this is rare – in the 1990s, criminal sanctions were only imposed once.

Companies injured by monopolies are entitled to seek an actual damage award from the violator. To date, there have been only two cases of Anti-Monopoly Law violations where damage award liability has been recognized. As a result, many competition experts believe that Japan's system of seeking damage awards is not working as intended.

Nor can an entity that is injured by a monopoly seek a prohibition order against the violator. Such legislation is now under consideration, however, and may be passed this year.

Problems and Tasks Related to Enforcing Japan's Anti-Monopoly Law

There are two problems related to the enforcement of Japan's Anti-Monopoly Law: the effectiveness of the rules cannot be sufficiently ensured and the procedures themselves lack transparency since many cases are handled through administrative guidance. This lack

of effectiveness is due to the fact that the enforcement of competition rules started later in Japan than in the US and the penalties imposed on the violator are not yet heavy enough to serve as a deterrent.

For example, criminal fines were not imposed against cartels until 1977 and it wasn't until the 1990s that substantial criminal sanctions were meted out. Clearly, tougher investigatory powers by competition authorities and heavier penalties are necessary to crack down on cartels.

In terms of unilateral conduct and vertical restraints, the JFTC is not authorized to impose penalties against violators of the Anti-Monopoly Law, other than cease and desist orders. The damage award system has not worked effectively in Japan, and there are no effective sanctions against unilateral conduct and vertical restraints as a result.

Japan is not unique in this respect. Indeed, the US is practically the only country in the world where private action (triple damage award and injunction) is actively taken to enforce competition law. But private action is expected to rise steadily, even in Japan, as civil groups play an increasing role in enforcement

through the granting of prohibition order-rights to private entities, the strengthening of evidence-gathering power, and the expansion of disclosure systems.

Another weak point in the enforcement of Japanese competition law is the lack of procedural transparency, which makes it difficult to establish case law. This is because the JFTC has enforced the Anti-Monopoly Law through bureaucratic procedures. When the JFTC exercises its investigative authority and takes up a case, it often closes with administrative warnings whereby the party in question is asked to take certain corrective measures due to the concern that they might have violated the Anti-Monopoly Law.

EC Competition Law

The basic structure and the rules of the EC Competition Law and rules concerning vertical non-price restraints and market concentration have recently become more similar to those of the US antitrust laws. The process of rule making in the EU is affected by the exemption system of the EC Competition law.

In 2000, the EC Commission issued a new block exemption which covers all vertical restraints including exclusive dealing and establish the similar rules to those of U.S. antitrust laws rules.

In terms of unilateral conduct, Article 82 prohibits a business entity with a market share of over 40 percent (the threshold for a dominant market position) from exercising abusive arrangements (exclusive dealings through rebates, tying arrangement and sales at a price below average variable cost, etc).

The EU has a unique set of competition rules. The common market strictly regulates the territorial protection of sales, export restriction, license clauses for export bans and active sales, parallel import, and the like. These rules aim to promote market integration – the is the main purpose of the EC Competition Law. But the more the EC is integrated, the more the significance of these unique rules tend to be diminished.

Enforcement of the EC Competition Law

Under the EC Competition Law, the Commission issues cease and desist orders when it formally determines a violation has occurred. In cases of serious violations, such as cartels, the Commission is authorized to impose an administrative fine, up to either 1 million ECU or 10

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percent of the previous year's sale of the violator based on the gravity and duration of the violation. Factors the Commission takes into consideration include the type of violation, its anti-competitive effect, the violator's role, the degree of cooperation to the investigation and so on. However, the EC Commission does not have authority to impose criminal sanctions.

An entity which has suffered injury due to a violation of the EC Competition Law is able to press suit in its home country's court and recover actual damages according to the member country's remedy to antitrust violations. To date, however, EC damage awards for antitrust violations have not been substantial.

Effectiveness and transparency of the EC Competition Law

The effectiveness of the overall enforcement of the EC Competition Law is almost the same as that of the Japanese Antimonopoly Law. In terms of cartel regulation, the enforcement of the Japanese Antimonopoly Law is more effective than that of the EC Competition Law. The JFTC is obligated to impose fines for certain types of cartels and sometimes bring a criminal penalties to bear.

And although the EC Commission is authorized to impose much higher fines than the JFTC, the actual amount of administrative fine is nearly the same in both countries. Furthermore, in civil cartel investigations, JFTC authorities are slightly more powerful than those in the EC Commission.

When it comes to unilateral conduct and vertical restraints, the enforcement of EC Competition Law is more effective than the Japanese Antimonopoly Law. This is because the EC Commission has the authority to impose administrative as well as enforce cease and desist orders.

With respect to transparency, the enforcement of the EC Competition Law is much more transparent than the Japanese Antimonopoly Law. This is due to the fact that the EC Commission issues formal decisions even on market concentration cases, joint venture (horizontal cooperation) and vertical non-price restraint (selective distribution etc.) cases. Furthermore, the EC's block exemption regulation produce much clearer rules than the JFTC's guidelines and U.S. guidelines. ■

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Keizai Koho Center (KKC) is an independent, non-profit organization designed to promote the understanding of Japan's economy and society at home and abroad. Its financial resources are derived entirely from the private sector.

KKC fosters a deeper understanding of Japan's basic social structure. Furthermore, it conducts public affairs activities to improve the Japanese people's recognition of Japan's global role.

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