

**To: International Reporters**  
**From: Noriko Itai**  
**Re: Answers to Question A**  
**Date: July 25, 2011**

## Answers to Question A: Fines in Antitrust

### 2. Legal Framework

#### *2.1 Institutions*

- Which bodies are responsible for deciding the amount of the fine imposed for an infringement of competition law (“infringements”)? (Please describe hereunder also the degree of independence from other public enforcement bodies and indicate also whether the same body investigates and decides over the fine; please describe whether an appeal is possible and to which body/institution (administrative body, independent tribunal etc..).

We have two types of fines. One is administrative one, surcharge and the other one is criminal one, pecuniary penalty. Therefore, we will answer to the questions with respect to each of the two types of fines.

#### a) surcharge

The Japan Fair Trade Commission (“JFTC”) that is the competition authority of Japan is responsible for deciding the amount of surcharge. The Courts are responsible for deciding the amount of pecuniary penalty.

JFTC is independent from prime minister although it is an administrative agency. The JFTC investigates and decides over the surcharge. However, the persons who take charge in the investigation are internally separated from the persons who take charge in the decision.

An appeal to the decision of the surcharge is possible. A hearing by three examiners may be requested to JFTC regarding the said payment order and an appeal to the decision made through a hearing may be brought to the Tokyo High Court.

#### b) pecuniary penalty

The court decides the amount of pecuniary penalty. The court is independent from any other public enforcement bodies. The prosecutors investigate and the court does not investigate.

An appeal to the decision of the pecuniary penalty is possible. It may be brought to the competent high courts.

#### *2.2 Nature of the Rules governing the assessment of fines*

- What procedural rules are in place to govern the determination of fines? (administrative procedure, court procedure etc).

a) surcharge

The procedural rules to govern the determination of the surcharge are provided in the Antimonopoly Act (“AMA”) and the Rules of JFTC.

b) pecuniary penalty

The procedural rules provided in the Criminal Procedure Code and the Rules of the Criminal Procedure govern the determination of the criminal fine.

- To what extent is the level of fines determined by legislative rules (e.g. prescribing maximum levels of fines, the approach to be adopted in assessing fines)?

a) surcharge

The calculation formula to be used in determining the amount of the surcharge is provided in AMA. No discretion is allowed in determining the amount of the surcharge.

b) pecuniary penalty

The maximum level and minimum level of the pecuniary penalty are provided in AMA and in the Criminal Code. It comes from the legal principle that one cannot be punished for doing something that is not prohibited by law.

- Are there other (further?) guidelines as to the level of fines or as to the methodology to be used in assessing fines?

a) surcharge

No.

b) pecuniary penalty

No.

If so: -

- Who issues the guidelines? Are they binding for the body who determines the fine. Is there a requirement to consult the public on the guidelines and/or do they have to be approved by the legislature or by government ministers?
- To what extent is the competition authority or a judicial tribunal hearing an appeal, required to follow the guidelines in determining the level of fines in any particular case?

- To what extent do they reflect or relate to procedures used in national law to determine penalties or fines payable for other types of economic crimes/infringements (such as fraud/environmental law/consumer protection)?
- Is there a leniency program in place and what is the legal basis for the determination of the criteria for leniency (legislative rules, other binding/non-binding guidelines)?

a) surcharge

There is a leniency program for the surcharge in place. The criteria for the leniency program are provided in AMA.

b) pecuniary penalty

There is no special leniency program for the pecuniary penalty. However, JFTC's policy on criminal accusation and compulsory investigation of criminal cases regarding antimonopoly violations states that the JTFC will not file accusation\* against the undertaking which was the first to submit report and materials and its officers, employees or other individuals to be treated as same as the undertaking. Also, the JTFC states that it will not file accusation against the undertaking which was the second or the later and its officers, etc. taking cooperation for investigation into account.

\*Accusation filed by JFTC is necessary for considering main crimes under AMA.

- Are there any rules that permit or require fines also to individuals?

a) surcharge

Yes.

AMA provides that the surcharge is applicable to the undertaking, which may be an individual or a legal entity.

b) pecuniary penalty

Under AMA, legal entities may be levied pecuniary penalty only if individuals who acted against Antimonopoly Act are accused of their act and levied pecuniary penalty. In Japanese criminal jurisprudence, it is commonly understood that legal entities may not be ethically reprehensible and thus may not be punished independently of individual's violating acts under the principle that no punishment may be levied without ethical reprehensibility. Legal entities are imputed

- What are the overall objectives of fining policy (e.g. to deter further infringements by the undertaking concerned, further infringements by other undertakings, or, to mark the seriousness of the infringement) and are those objectives made transparent (e.g. legislative materials, recitals etc.)?

a) surcharge

There has been an argument on the legal nature and the objective of the surcharge. The surcharge used to be regarded as a deprivation of unjust enrichment. However, in the amendment of AMA in 2005, it was aimed to deprive more than the amount of unjust enrichment. After that, the objective could no longer be regarded as a deprivation of unjust enrichment and since then it has been regarded as administrative measures for the purpose of deterring further infringements.

b) pecuniary penalty

The overall objectives of the pecuniary penalty are understood to be retribution against the criminal and special deterrence of the criminal and general deterrence of others.

2.3 *General Methodology used in determining the amount of the fine*

- Please briefly summarise the methodology used to determine the amount of the fine (only key factors)

a) surcharge

Surcharge is calculated by multiplying the sales amount of the relevant goods or services for the period during which the infringement is continued by the rate of 10%. The rate is 3% in the case of retail business and 2% in the case of wholesale business.

There are some grounds to increase or decrease the rate. The decreased rate is applicable to minor companies whose capital and number of employees are less than certain levels or companies which discontinued infringement in certain short terms. The increased rate is applicable to companies which have repeated infringements.

b) pecuniary penalty

Pecuniary penalty is determined within the range between the maximum amount and the minimum amount taking various extenuating circumstances into account.

- Does the methodology vary depending on whether the infringement is unilateral (e.g. monopolisation/abuse of dominant position, failing to notify a merger) or multilateral (e.g. cartels)?

a) surcharge

The basic methodology does not vary depending on whether the infringement is unilateral.

However, the rates to be used for calculating the surcharge vary depending on whether the infringement is unilateral. The rate used for calculating the surcharge is as in the table below. The rate for unilateral infringements other than Private monopolization arising from the control of the business activities of other undertakings is less than that for bilateral infringements such as cartel, bid-rigging, etc.

	Manufacturing business, etc.	Retail business	Wholesale business
Unreasonable restraint of trade (Cartel, Bid-rigging, etc)	10%	3%	2%
Private monopolization arising from the control of the business activities of other undertakings	10%	3%	2%
Private monopolization achieved by excluding the business activities of other undertakings	6%	2%	1%
Unfair trade practices	3%	2%	1%
Abuse of dominant position	1%		

b) pecuniary penalty

Pecuniary penalty has been hardly applied to monopolisation case or other unilateral infringement cases and is applied almost only to cartel cases. Therefore, it is difficult to say the difference in the methodology.

- Is there a maximum fine that may be imposed? If so, how is that maximum amount determined?

a) surcharge

No.

b) pecuniary penalty

Yes.

Maximum amounts are provided for each type of acts in AMA or the Criminal Code under the principle that crimes and penalties must be provided in the acts beforehand.

- Insofar as the fine depends on the seriousness of the infringement, explain whether and (if so) how the following factors are assessed and taken into account:

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- the role played by the undertaking in the infringement

- the effects of the infringement;
- duration of the infringement;
- the persons affected by the infringement (e.g. consumers or vulnerable groups);
- the size of the affected market/relevant economic market;
- the existence of a genuine compliance policy at the time of the infringement;
- the involvement of senior management in the infringement;
- any intention by the undertaking (or employees involved) to harm competition, or recognition that competition would be or would be likely to be harmed;
- whether the infringing conduct could reasonably have been regarded as lawful or was of a type not previously found to be an infringement;
- the leading or subsidiary role played by the undertaking in the infringement;
- previous infringements of competition law and or other serious economic crimes or infringements?
- co-operation (other than taking advantage of a leniency program) with, or obstruction of, the investigation, or by a decision not to contest the competition authority's allegations
- measures taken by the undertaking since the infringement to prevent future infringements (e.g. to introduce a more effective compliance programme) or to compensate victims of the infringement?

a) surcharge

The surcharge does not depend on the seriousness of the infringement.

b) pecuniary penalty

Pecuniary penalty may vary depending on the seriousness of the infringement. Each of the listed factors may be taken into account as an extenuating circumstance.

- Insofar as the fine depends on the size or economic power of the undertaking, explain whether and (if so) how the following factors are assessed and taken into account: -
  - the turnover of the undertaking in the affected markets;
  - the overall size of the undertaking in the jurisdiction concerned;
  - the overall size of the undertaking worldwide;
  - other measures of size or economic power such as profitability/assets;
  - the turnover of parent companies/subsidiary companies?

a) surcharge

The amount of the surcharge is calculated based on the calculation formula without discretion. The size or economic power of the undertaking may not be considered in determining the amount.

Note that the amount of the surcharge is calculated multiplying the sales amount of the relevant goods or services for the relevant period by the certain rate stipulated in AMA. The rate used for calculation of a surcharge is decreased for minor undertaking in the amount of its capital and the number of its employees. Thus, the sales amount of the relevant goods or services and amount of capital or number of its employees are the necessary factors to calculate the amount of the surcharge under AMA.

b) pecuniary penalty

Pecuniary penalty may vary depending on the size or economic power of the undertaking. Each of the listed factors may be taken into account as an extenuating circumstance.

- Is the size/economic power of the undertaking assessed at the time of the infringement or at the time of the fining decision? What happens if the undertaking has grown or shrunk in size since the date of the infringement, or (by reason of acquisitions or divestments) forms part of a larger or smaller group of companies than it did at the time of the infringement?

a) surcharge

Basically, those factors are not assessed in determining surcharge. However, the amount of capital and the number of employees (at the time of the infringement) are considered in applying the decreased rate stipulated for small companies under AMA.

b) pecuniary penalty

Such factors may be considered. For instance, if the economic power of the undertaking is big, the social impact of the infringement would be greater and it justifies heavier punishment. Also, if the size of the undertaking is big, the amount of the pecuniary penalty may be increased in terms of the impression to the undertaking of the punishment.

- Please describe any adjustment made for "failing firms" (i.e. cases where the undertaking concerned cannot pay the fine or cannot do so without causing damage to innocent third parties such as creditors or employees)? How does the body responsible for determining the amount of the fine deal with cases where a "failing firm" argument is made? Are there any cases where a competition fine has led to the insolvency of an undertaking?

a) surcharge

There are cases in which companies went bankrupt were exonerated from a surcharge payment order. Other than that, such adjustment cannot be found.

b) pecuniary penalty

Such adjustment cannot be found.

- Is there any evidence that the level of fines has increased over recent years? If so, to what extent has that been the result of changes in legislative rules or published guidance, or has it resulted from a change in decision-making practice by the competition authority?

a) surcharge

Yes.

The basic rate to be used in calculating the surcharge under AMA was increased from 6% to 10% in 2005. Also, the increased rate which is applicable to the undertaking which led cartel, bid-rigging, etc. was newly provided in AMA in 2009.

b) pecuniary penalty

The maximum amount applicable to legal entities for infringement of Antimonopoly Act was increased from 100 million yen to 500 million yen in 2002.

- Are competition fines, and the procedures by which they are determined, consistent with international human rights standards (insofar as they apply to corporate bodies)?

a) surcharge

It is difficult to tell whether the surcharges and the procedures with international human rights standards. The hearing proceedings through which a decision regarding a payment order of surcharge is made have been criticized as lacking due process protection. One of the criticisms is that in the hearing procedures JFTC plays both as prosecutors and judges. Thus, abolishment of the current hearing proceedings has been discussed and a bill regarding a new system has been submitted to the Diet. In the new system, a person who dissatisfied with the payment order of surcharge may bring a lawsuit in judicial courts, which determine the fact on its own and may submit new evidences to such court.

b) pecuniary penalty

Yes.

2.4 *Comparison of Methodology used in competition matters versus other serious economic crimes or infringements*

- Are there any common rules to be applied to infringements of competition law and other serious economic crimes or infringements?

a) surcharge

No.

There is no specific rule applicable to infringement of competition law and other serious economic crimes or infringements. However, there would be a common belief that infringement of competition law and some other economic crimes or infringements doing harm to the market such as infringements of securities transaction law are extremely serious, and that unjust enrichment of such crimes or infringements should be deprived in order to deter further crimes or infringements.

- Is there any evidence that the level of fines imposed for competition infringements is out of proportion to the level of fines imposed for such serious economic crimes or infringements?

a) surcharge

Yes.

The Financial Instruments and Exchange Act provides administrative fine, surcharge, as well as AMA. The amount of the surcharge imposed for infringement of the Financial Instruments and Exchange Act is between about 0.5 million yen and 68 million yen per payment order from 2005 to 2010 and is much smaller than that of the surcharge imposed for infringement of AMA (See the answer to Question 3).

b) pecuniary penalty

Yes.

The maximum amount of the pecuniary penalty applicable to legal entities for infringement of Financial Instruments and Exchange Act is 700 million yen and higher than that for infringement of AMA.

2.5 *Other Material Aspects of the Rules governing the assessment of fines*

- To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines
  - to apply a consistent approach to different undertakings involved in the same infringement

a) surcharge

The surcharge must be imposed and calculated based on the calculation formula under AMA without discretion. A consistent approach would be applied to different undertakings involved in the same infringement in result of applying the calculation formula under AMA.

b) pecuniary penalty

Judges have discretion in determining the level of pecuniary penalty. However, a consistent approach to different undertakings involved in the same infringement should be applied for the purpose of securing the legal stability and the equality of results.

- to have regard to the level of fines imposed for similar competition infringements in previous cases?

a) surcharge

As stated above, surcharge should be imposed and calculated based on the calculation formula under AMA without discretion. It is not required to have regard to the level of surcharges imposed for similar competition infringements in previous cases.

b) pecuniary penalty

As a matter of practice, it is required to have regard to the level of fines imposed for similar competition infringements in previous cases for the purpose of securing the legal stability and the equality of results.

- to have regard to the level of fines imposed on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?

a) surcharge

As stated above, surcharge should be imposed and calculated based on the calculation formula under AMA without discretion. It is not required to have regard to the level of surcharges imposed on corporate bodies for other serious economic crimes or infringements.

b) pecuniary penalty

It is not required to have regard to the level of the penalties imposed on corporate bodies for other serious economic crimes or infringements since the interests which AMA intends to protect are different from those which other laws intend to protect.

- to take into consideration the amount of fines already imposed (or likely to be imposed) on the same corporate body or bodies for the same infringement(s)?

a) surcharge

Under AMA, there is an adjustment between pecuniary penalty and surcharge that, if the undertaking is imposed pecuniary penalty for the same infringement, one half of the amount of the pecuniary penalty is deducted from the amount of the surcharge.

b) pecuniary penalty

No.

- Is it possible to appeal against the amount of the fine to an independent judicial tribunal?

a) surcharge

Yes.

However, it is possible only after a decision is rendered through a hearing.

b) pecuniary penalty

Yes.

If so: -

- On what grounds may such an appeal be brought?

a) surcharge

A person who is dissatisfied with the payment order may request a hearing by the examiners of the JTFC regarding the payment order. After a decision is made through the hearing, an appeal for cancellation of the decision may be brought. No specific grounds are required for such an appeal.

b) pecuniary penalty

Main grounds for appeal are errors of fact or unjustified severe punishment.

- What approach is adopted by the appeal tribunal (e.g. is the appeal confined to correcting errors of law or manifest errors of appreciation, or is it a redetermination of the fine *de novo*)?

a) surcharge

The appeal tribunal determines whether it is reasonable to determine the fact determined through the hearing procedures of the examiners of the JTFC from the evidences examined at the hearing procedures. The determination of facts at the hearing procedures binds the court so far as it is reasonable. New evidences may not be submitted to the appeal court. These mean that the court should respect determination of facts by the JTFC which has expertise about Antimonopoly Act cases.

b) pecuniary penalty

The appeal tribunal basically decides only whether the decision is right or not. However, it may disaffirm the original decision and re-determine the fine *de novo*.

- Does the appeal tribunal have power to increase the amount of the fine, and, if so, when is that power used?

a) surcharge

Yes.

The power is used if the court disaffirms the original decision and re-decides the case.

b) pecuniary penalty

Yes.

The power is used if the court disaffirms the original decision and re-decides the case. However, if only the accused appeal, the court may not sentence more serious penalty than sentenced in the original decision.

- Is there a right of further appeal to a superior court, and if so on what grounds?

Yes, as for both surcharge and pecuniary penalty.

A further appeal to a superior court may be filed mainly on grounds of violation or misconstruction of the Constitution or contradiction with judicial precedents of the Supreme Court. Also, a further appeal to a superior court may be filed on grounds of error in facts although acceptance of the appeal is discretionary.

- Is the procedures used to determine the amount of the fine in anti-trust cases consistent with constitutional/international human rights standards?

a) surcharge

There is an issue on the procedures of determining the amount of a surcharge which are provided in AMA. It is said that the hearing proceedings which may be requested regarding a payment order of a surcharge lack due process protection. (See the answer to the last question of 2.4)

Also, there is a constitutional issue. Under the current system, both the surcharge and the pecuniary penalty may be imposed for the same act infringing AMA. It has been discussed that imposing both the surcharge and the pecuniary penalty for the same act might fall on double jeopardy prohibited in the Constitution. The purpose of the deduction of one half of the amount of the pecuniary penalty from the amount of surcharge in imposing both is to avoid this double jeopardy issue. The Supreme Court has not yet decided this issue. In some inferior court cases, it is judged that it does not fall on double jeopardy since the objective, intent or nature of the surcharge is different from that of the pecuniary penalty.

b) pecuniary penalty

Yes.

The procedures used to determine the amount of the pecuniary penalty are provided in the Code of Criminal Procedure and those are consistent with international human rights standards.

### 3. Statistics

- It would be helpful if you could provide a list of the fines imposed in your jurisdiction over the last 10 years and a brief description of the infringement (e.g. price-fixing/information sharing/exclusionary abuse). If that is not practical, could you indicate the range of fines that has been imposed over that period, pointing out any general trends (such as a general pattern of increasing fines)?

a) surcharge

The table below shows the amount of surcharges in the last 10 years. Obviously the amount of surcharge per order has been increasing in the last 10 years.

Year of Decision	Amount of surcharge	Number of payment	Amount / order (100 million yen)	Infringement (100 million yen)
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	(100 million yen)	orders of surcharge		Bid-rigging	Price-fixing cartels, etc
2001	21.9	248	0.088		
2002	43.3	561	0.077		
2003	38.7	468	0.082	38.3	0.4
2004	115.5	219	0.527	34.5	77.0
2005	188.7	399	0.472	188.0	0.7
2006	92.7	158	0.586	63.8	28.9
2007	112.9	162	0.696	73.7	39.2
2008	270.3	87	3.106	28.9	241.4
2009	360.7	106	3.402	47.1	313.6
2010	720.8	156	4.620		

b) Pecuniary penalty

The table below is the list of the cases where pecuniary penalties were imposed on companies in the last 10 years. Only bid-rigging cases were accused.

Year of Decision	Name of the Case/ Parties Names	Amount of Fine (100 million yen)		Type of Infringement
		Total amount/ number of companies	Maximum amount	
2004	Cosmo Oil Co., Ltd.	2.73 / 9	0.8	Bid-rigging
2004	Aichi Tokei Denki Co.,ltd.	0.5 / 2	0.3	Bid-rigging
2004	Kimmon Manufacturing Co.,ltd.	0.2 / 1	0.2	Bid-rigging
2007	JFE Engineering Corporation	1.2 / 1	1.2	Bid-rigging
2007	Miyaji Iron Works Co.,	13.2 / 3	0.6	Bid-rigging
2007	Obayashi Corporation	70 / 5	2	Bid-rigging
2007	Ringyo Doboku Consultants	20 / 3	0.9	Bid-rigging

#### 4. Normative Questions / Recommendations

- What body should determine the level of fines (judicial/administrative)? If administrative, should the decision-maker be separate from the team that investigated the infringement?

I personally believe that courts should determine judicial criminal fine.

On the other hand, competition authorities should determine the administrative fine in the first place since it has expertise in competition law cases and promptness in its actions. However, in terms of due process protection, appeals to courts should be allowed.

The decision-maker should be separate from the team that investigated the infringement in order to avoid prejudice. Under AMA, it is prohibited for a person who has performed duties of an investigator of a case to be designated as a hearing examiner of the same case.

- To what extent should the methodology used/level of fines be determined by, or be subject to the approval of, the legislature or politically-accountable government ministers, or should the level of fines and methodology used be left to independent competition authorities or courts?

I personally believe that, at least, the maximum of the judicial criminal fine should be determined by the legislature, and that the level of administrative fines and methodology should not be ultimately left to competition authorities.

- What role should courts play in supervising the fining decisions of independent competition authorities? To what extent should they have regard to guidelines issued by competition authorities?

I personally believe that courts should supervise factual-finding and application of law by competition authorities, and that they should have regard to guidelines issued by competition authorities to the extent that they do not bind the judges in determining the fines.

- To what extent should the level of fines reflect the size of the undertaking concerned? If so, how should "size" be measured? If turnover is to be used, what measure of turnover is appropriate (relevant market/overall turnover; year of infringement/year of fining decision)?

I personally believe that, for the purpose of the effectiveness in deterring its further infringements, the level of fines should reflect the size of the undertaking and that turnover of the relevant market in year of infringement is appropriate.

- How should the seriousness of an infringement be judged? To what extent should the anti-competitive intentions of the undertaking or its employees be relevant?

I personally believe that the seriousness of an infringement should be judged from the various elements such as the role played by the undertaking in the infringement, the effects of the infringement, the duration of the infringement, the persons affected by the infringement, the size of the affected market, the intention by the undertaking (or employees) and previous infringements of competition law by the undertaking.

The anti-competitive intentions of the undertaking or its employees should be relevant. However, such a subjective factor should not be weighed heavily.

- To what extent should the actual effects of the infringement be relevant? Should the amount of the fine exceed the harm caused (or likely to have been caused) by it, in order to provide suitable deterrence bearing in mind a low likelihood of detection?

I personally believe that actual effects of the infringement should be relevant. In order to provide suitable deterrence, the amount of the fine need not to exceed the harm caused by it but it should be as much as the amount of enrichment by the infringement.

- To what extent should the level of fines in competition cases be consistent with the level of fines imposed for other economic crimes/infringements (fraud/environmental law/consumer protection)?

I personally believe that the level of the fines in competition cases need not to be consistent with the level of fines imposed for other economic crimes or infringements if the objectives of other economic laws or the interests to be protected by such laws differ.

- To what extent should fines on an undertaking reflect its behavior after the infringement, such as co-operation/non-co-operation with the investigation/introduction of compliance measures/disciplinary action against employees involved/payment of compensation to victims?

I personally believe that the fines may reflect its behavior after the infringement. However, it should be considered second to the infringement itself in determining the fines.

- If competition fines are now high compared to fines for other economic crimes/infringements, is there any factor (such as the relative difficulty of detection) that might justify that difference, or is the difference not justifiable?

Competition fines are now relatively high compared to fines for other economic crimes. Infringement of competition law do harm to the function of the market. Since the market is fundamental in the economy, the necessity to deter further acts jeopardizing the market is higher than other economic crimes/infringements. This probably would justify the difference.