Amendment of the Anti-Monopoly Act of Japan

Shuichi Sugahisa *

I. INTRODUCTION

The bill to amend the Anti-Monopoly Act of Japan (the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, or the AMA) was approved in the Diet on 20 April 2005. The 2005 amended Act will enter into force at the beginning of 2006. The AMA, which was enacted in 1947 under the strong influence of the United States, is Japan's competition law and its purpose is to promote fair and free competition.

The AMA adopted a structure similar to the present one by amendment in 1953, and a surcharge system against price cartels and cartels that impose quantitative restrictions was introduced as an anti-cartel measure by amendment in 1977.[1] Furthermore, the importance of competition policy was strongly recognized in the 1990s, which resulted in several amendments to the AMA to strengthen it. The main features of the amendments since 1991 include strengthening the surcharge system (1991) and criminal penalties (1992); fortifying the organization of the Japan Fair Trade Commission (JFTC) (1996); reducing exemptions from the AMA (1997 and 1999); improving the civil remedy system, including the introduction of injunction rights (2000); and increasing criminal penalties to enterprises (2002).

The surcharge system is the core sanction measure in Japan against hard-core cartels. Based on the results of a review of the overall sanction system of the AMA, the surcharge system was revised and a leniency program was introduced by the 2005 amended

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* This paper is written based on the personal views of the author and does not represent the opinions of the JFTC or other organizations.

1 For the history of the AMA until approximately 1990, see SHUICHI SUGAHISA, *Wettbewerbspolitik in Japan*, in: Zeitschrift für Betriebswirtschaft 64 (1994) 153-166; IYORI / UESUGI / HEATH, *Das Japanische Kartellrecht* (Köln 1994).

Act. This was the biggest amendment since 1977 when the surcharge system was first introduced to the AMA.

The amendment arose when in October 2002 the JFTC convened meetings of the Study Group on the Antimonopoly Act to review issues on the AMA. The Study Group was composed of academics and interested parties from businesses, the media, and consumer organizations. About two and a half years were needed from the commencement of the review to the approval of the bill to amend the AMA in 2005, and some important issues are still to be discussed within two years after the 2005 amended Act takes effect.

In the following part of this paper, I will present a summary of the present AMA, the development of the AMA until the 1990s, the background leading to the 2005 amended Act and its main features, and remaining issues to be discussed.[2]

II. SUMMARY OF THE PRESENT AMA

The AMA prohibits anti-competitive conducts by enterprises or trade associations in order to promote fair and free competition in the market.

The main conducts prohibited as anti-competitive include private monopolization, unreasonable restraint of trade (cartels), unfair trade practices, and certain conducts by trade associations. Unfair trade practices include, e.g., concerted refusal to deal (boycott), resale price maintenance, dealing on exclusive or restrictive terms, unjust low price sales, and abuse of dominant bargaining position (abuse of buying power).[3]

When the JFTC finds, based on the results of an investigation, the existence of any conduct in violation of the provisions of the AMA, it may issue recommendations (a tentative decision), which order the enterprises or the trade associations (the parties concerned) who committed such violations to take appropriate measures. When the parties concerned accept the recommendations, the JFTC renders a decision in line with the said recommendation. When the persons concerned do not accept the recommendations, the JFTC initiates hearing procedures. Hearing procedures are administrative procedures that allow the parties concerned to make claims and to produce counter-evidence in a similar manner to court procedures and to the procedures of the U.S. Federal Trade Commission. The JFTC then issues a decision based on the results of the

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2 Article 13 of the supplementary clause of the 2005 amended Act prescribes that the Act shall be reviewed within two years after the amendment takes effect and that the necessary measures shall be taken based on the review. "The necessary measures" mean, for example, further amendment of the AMA. The review will encompass examining the proper surcharge system, the legal procedures necessary to order enough measures to eliminate illegal conduct, and appropriate hearing procedures by the JFTC.

3 Besides these, mergers and acquisitions (*Unternehmenszusammenschlüsse*) which may be to substantially restrain competition are also prohibited. Unlike the competition laws of the EU and Germany, provisions to regulate mergers and acquisitions have existed in the AMA since its enactment in 1947.

hearing procedures. When the persons concerned object to this decision, they can file a suit to the Tokyo High Court to seek annulment of the decision.

The surcharge payment order procedure is a different procedure from the above. Surcharge payments are usually imposed on enterprises after the fact of a violation has been fixed by a decision.

The surcharge system was introduced in 1977 by amendment of the AMA as an administrative means to ensure social equity by preventing parties that engage in unlawful conduct from retaining the economic benefits gained from a cartel, by granting the government the right to assess such benefits, and by allowing the government to simultaneously help restrain unlawful conduct and ensure the effectiveness of the provisions prohibiting cartels.

Specifically, when enterprises or trade associations effect cartels that restrain the price of goods or services or affect the price of goods or services by substantially restraining the volume of supply (e.g., price cartels, bid-riggings, cartels that impose quantitative restrictions), the JFTC orders the enterprises to pay the Treasury an amount equivalent to the amount arrived at by multiplying the sales amount of such goods or services during the implementation period of such cartels by a fixed percentage. The fixed percentage differs according to whether the parties engaged in the unlawful conduct are large-sized or small and medium-sized enterprises, and whether they are engaged in retail, wholesale, or other businesses (e.g., manufacture). For example, the fixed percentage for large-sized manufacturers was 2% when the surcharge system was introduced in 1977 and was increased to 6% in 1991. The surcharge system is the most important measure against hard-core cartels in the enforcement system of the AMA.

It is efficient to calculate the sales amount of goods or services for the implementation period of cartels after the fact of the violation has been fixed by a decision because – as mentioned above – the surcharge is equivalent to the amount arrived at by multiplying the sales amount of goods or services during the implementation period of cartels by a fixed percentage.

Measures against violation of the AMA are divided into three categories, that is, administrative, criminal, and civil measures.

As for administrative measures, the JFTC issues cease-and-desist orders (administrative dispositions) to enterprises or trade associations that commit the anti-competitive conducts mentioned above. In addition to cease-and-desist orders, the JFTC issues surcharge payment orders to price cartels, bid-riggings, cartels that impose quantitative restrictions, and other cartels affecting the price of goods or services by substantially restraining the volume of supply.

Besides administrative measures, the AMA prescribes penal provisions for private monopolization, unreasonable restraint of trade (cartels), and other conducts which are serious violations against the AMA. Any offense concerning such violations shall be considered only after the JFTC has filed an accusation (Art. 96 of the AMA on exclusive accusation by the JFTC).

Moreover, as for civil measures, a person who has suffered damages from violations of the AMA can file a civil damage suit, and a person whose interests have been infringed or are likely to be infringed by unfair trade practices is entitled to demand the suspension or prevention of such infringements (injunction rights). But the number of damage suits (*Schadensersatzklage*) and injunction suits (*Unterlassungsklage*) remains very small.[4]

III. THE DEVELOPMENT OF THE AMA UNTIL THE 1990S

The AMA was enacted in 1947 under the strong influence of the U.S. anti-trust laws, and at the same time the JFTC was established to enforce and attain the purpose of the Act. The original AMA had some powerful provisions, such as a) a breakup order based on unreasonable disparity in terms of economic power among enterprises and b) unconditional prohibition of some types of cartels, which even the U.S. anti-trust laws did not have at that time.

Such strong provisions, including a) and b), were abolished by amendment in 1953 and exemptions to the AMA – for example, depression cartels, rationalization cartels, and certain resale price maintenance contracts – were introduced. The introduction of such exemptions to the AMA was influenced by discussions on matters of German competition law (*Gesetz gegen Wettbewerbsbeschränkungen*), which was enacted in 1958.

In the 1960s, industrial policy, which aims to strengthen the international competitiveness of Japanese manufacturers by way of reorganizing industry (forming oligopolistic structures through mergers and acquisitions) and other discretionary measures, had priority over competition policy. The merger case of Yawata Steel (the No. 1 steel manufacturer in Japan) and Fuji Steel (the No. 2), which was settled in 1969 by a consent decision after the initiation of a hearing procedure, was the turning point, after which the existence and power of the AMA began to be deeply recognized. In the following years, the JFTC detected many illegal cartels in the period of steep price hikes during the oil crises in the 1970s. In 1974, the JFTC filed an accusation with the Public Prosecutor General against 12 prime wholesale dealers of oil products on the charge of a price cartel. This case resulted in a guilty verdict at the Supreme Court in 1984. Under these circumstances, the AMA was amended in 1977 to strengthen the effectiveness of the prohibition of cartels. The amendment included the introduction of a surcharge system against price cartels and cartels that impose quantitative restrictions.

At the end of the 1980s, trade conflicts between Japan and the U.S. intensified, and Japan was required, even with the support of domestic opinion, to change from a

4 Concerning AMA procedures, please see M. MISHIRO, *Die Annäherung des Wettbewerbsverfahrens an das Gerichtsverfahren* (Berlin 2004).

producer-oriented economic policy to a consumer-oriented one and to realize the enhancement of living standards consistent with the economic power of the country. The importance of the AMA and of competition policy to the Japanese economy came to be widely recognized against this background. In the 1990s, a series of amendments to the AMA, strict and active enforcement by the JFTC based on the amended provisions of the AMA, and the expansion of the organization of the JFTC were carried out, as already mentioned above.

IV. BACKGROUND LEADING TO THE 2005 AMENDED ACT AND ITS MAIN FEATURES

Especially since the 1990s, the number of administrative measures (administrative dispositions) has substantially increased, that is, from about 10 a year on average between fiscal years 1980 and 1989, to about 28 a year on average between fiscal years 1990 and 2003. Enforcement of the AMA by the JFTC had been activated dramatically, along with strengthening of the provisions of the AMA. But many cartels and bid-riggings were still being detected by the JFTC; moreover, not only were well-known and representative Japanese firms included as violators, but also numerous enterprises repeatedly engaged in unlawful conduct. According to Exhibit 4 of the Report of the Study Group on the Antimonopoly Act (October 2003), for example, the JFTC issued five administrative dispositions concerning cartels and bid-riggings by electronics manufacturers between 1995 and 2003. Among these five cases, the JFTC issued two administrative dispositions to one leading electronics manufacturer while the said manufacturer was under a hearing procedure in another case. In addition to this manufacturer, administrative dispositions were issued by the JFTC to 26 enterprises respectively more than two times, and four administrative dispositions were issued to eight enterprises respectively concerning cartels and bid-riggings in six markets between 1992 and 2003.

As a result, the JFTC concluded that the AMA had to be amended primarily at the following two points to address these situations:

First, sanctions on unlawful conduct, especially cartels and bid-riggings, were insufficient, and enterprises did not have enough incentive to avoid illegal conducts. In the United States, the amount of fines (*Geldbußen*) imposed on enterprises which violate competition laws is a hundred million dollars or less, or between 15% and 80% (20% as a standard) of the sales amount of such goods during the period of violations, and in the EU it is 10% or less of the total sales amount of the enterprise that committed the violations. In Japan, the surcharge amounts were much less than the amounts of fines in the U.S. and the EU.

Although 10% or less of the total sales amount of an enterprise that committed violations is a ceiling in the EU, the actual amounts of fines imposed by the EU were more than the surcharge amounts in Japan. According to Exhibit 7 of the Report of the Study

Group on the Antimonopoly Act (October 2003), the amounts of fines imposed on five international cartel cases by the EU ranged from twice to 18 times more than the amounts of surcharge calculated in Japan based on the surcharge system before the amendment of 2005.

It was necessary, therefore, to strengthen the sanctions against violations of the AMA, such as hard-core cartels, to make enterprises avoid illegal conduct. And it was especially necessary to increase the surcharge rate, because the surcharge system is the most important measure against hard-core cartels in Japan.

Secondly, as violations of the AMA, such as cartels, are done behind closed doors, it was difficult for competition authorities to get information on such violations. To overcome this difficulty, leniency programs (*Bonusregelungen*) have been introduced in the U.S., the EU, Germany, and many other OECD countries with the following requirements, including:

a) enterprises shall provide information to the competition authority before it initiates investigations,
b) enterprises shall cooperate with the competition authority on its investigations,
c) enterprises shall not compel other enterprises to participate in a cartel.[5]

A leniency program grants immunity from or a reduction in fines or other sanctions to enterprises that commit violations when such enterprises report the unlawful conduct themselves to the competition authority, based on requirements published in advance. In the U.S., the EU, and Germany, the competition authority uses its discretionary powers to determine the amount of fines, that is, by taking into account many factors, such as the extent of the illegal conduct. A leniency program can be introduced by adding the requirements immunity from or a reduction in fines to the factors of discretion.

Leniency programs have achieved remarkable effects on the detection and resolution of cartels, especially international cartels, for example, including Japanese firms. Japanese firms have made the most use of leniency programs in the U.S. and the EU. There were some international cartel cases involving Japanese firms in which fines were imposed in the U.S. and/or the EU, but in Japan only warnings or no measures were issued. One of the reasons behind such results is that no leniency program existed in Japan,[6] so it was therefore necessary to introduce one.

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5 U.S.: Department of Justice, Antitrust Division: "Leniency Policy for Individuals" (10 August 1994) and "Corporate Leniency Policy" (10 August 1993).
EU: Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), and *Neue Kronzeugenregelung für Insiderinformationen über Kartelle* (Commission adopts new leniency policy for companies which give information on cartels) IP/02/247, 13 February 2002.
Germany: *Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen – Bonusregelung* – (Notice No. 68/2000 on the guidelines of the Bundeskartellamt relating to the setting of fines), 17 April 2000.

6 Many enterprises that apply for leniency (immunity from or reduction of fines) provide competition authorities of both the U.S. and the EU with information, and allow the author-

But the surcharge system, which is the core sanction measure in Japan against hard-core cartels, did not allow the JFTC to determine the amount of surcharge with discretionary power while taking into account various factors, such as the extent of the illegal conduct. Moreover, no system existed in Japan allowing administrative agencies to determine the amount payable of sanctions with discretionary power. For this reason, a leniency program could not be introduced in Japan under existing laws, so the AMA had to be amended to introduce one.

In light of the above, the improvement of the surcharge system and the introduction of a leniency program were realized by the 2005 amended Act.[7]

1. Revision of the Surcharge System

The fixed rate of surcharge prescribed by the present AMA was settled based on the average value of a firm's operating income margin, that is 6% for large-sized manufacturers (3% for small and medium-sized ones), 2% for large-sized retailers (1% for small and medium-sized ones), and 1% for wholesalers.

The fixed rate (the calculation percentage) of surcharge was increased, for example, from 6% to 10% for large-sized manufacturers, from 2% to 3% for large-sized retailers, and 1% to 2% for large-sized wholesalers. Furthermore, the revisions also:

a) reduce the surcharge rate of 20% of the normal respective surcharge rate on those enterprises whose duration of violation is less than two years and who have ceased the unlawful conduct more than one month before the JFTC initiates an investigation;

b) impose a surcharge rate of 150% of the normal respective surcharge rate on those enterprises that repeat violations which resulted in a surcharge payment order within the last 10 years, and

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ities to share the information. Competition authorities of the U.S. and the EU can therefore share information about anti-competitive conducts. But the reporting enterprises did not have an incentive to provide the JFTC with such information because of the absence of a leniency program in Japan. This difference is one of the most significant reasons that while the U.S. and the EU have executed many simultaneous inspections, there has been only one case of simultaneous investigations carried out by Japan with other countries, including the U.S. and the EU, at least according to press releases. JFTC press release: "A Recommendation to Producers of Modifiers that Conducted Price-hike Cartel Activity", 11 December 2003 (<*http://www2.jftc.go.jp/e-page/pressreleases/index03.html*>); EU press release: "Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids – International cooperation on inspections" (MEMO/03/33), 14/02/2003.

7 It is written in the "explanation of reasons for a proposal of the bill to amend the AMA" that "the fixed rates of surcharge imposed on enterprises that effected unreasonable restraint of trade (cartels) shall be substantially increased in order to strengthen the measures against violations of the AMA. In addition to this, a leniency program shall be introduced, the provisions concerning hearing procedures shall be revised, and compulsory measures for criminal investigations shall be introduced." The 2005 amended Act includes, as just described above, not only the review of the surcharge system and the introduction of a leniency program, but also revisions from the standpoint of improving the guarantee of due process.

c) expand the scope of conduct subject to the surcharge system into private monopolization through controlling the business activities of other enterprises and purchasing cartels, in addition to the present scope of conduct, such as price cartels and cartels that impose quantitative restrictions, and make clear that cartels restraining market share and customers or suppliers are included in the scope of conduct subject to the surcharge system.

As a result of such revisions, although the surcharge system remains an administrative measure to achieve an administrative objective – that is, the prevention of violations of the AMA, including cartels and bid-riggings – it will become a system to levy the amount of more than the economic benefits gained from cartels (excessive profits), changed from the present system of levying the amount assumed to be legally consistent with excessive profits. The legal character of "administrative sanctions" is therefore intensified. Business groups, including the construction industry, have criticized the revisions on the grounds that the combined application of criminal penalties and the revised surcharge described above may create a conflict with the provision against double jeopardy (the provision that prohibits bringing criminal charges repeatedly for the same crime; The Constitution of Japan, Article 39).[8]

2. *Introduction of a Leniency Program*

A surcharge leniency program was introduced to the AMA from the standpoint of providing incentives for enterprises to quit cartels and ensuring early recovery of the competitive market by way of prescribing the leniency requirements; such as, that an enterprise committing violations shall disclose their existence and provide related information and materials to the JFTC. This is because, as mentioned above, the leniency requirements need to be stipulated by law, as the surcharge system does not allow the JFTC to determine the amount of surcharge with discretionary power. Specifically, the first applicant before the initiation of investigation is 100% immune from surcharge; the second applicant before the initiation of investigation is 50% immune; the third applicant before the initiation of investigation is 30%; any applicant after the initiation of investigation receives a 30% deduction from surcharge. The total number of enterprises that may apply to the leniency program is limited to no more than three per case.

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8 If this criticism is correct, and the combined application of criminal penalties and the revised surcharge creates a conflict with the provision against double jeopardy, the 2005 amended Act should not have been approved in the Diet because of the breach of the Constitution. But when we considered the issue in light of past precedents in Japan, we found it impossible to think that the combined application of criminal penalties and the revised surcharge created a conflict with the provision against double jeopardy, and therefore the 2005 amended Act was indeed approved.

V. REMAINING ISSUES TO BE DISCUSSED

When the bill to amend the AMA was under preparation, the initial idea was to present it in the ordinary session of the Diet in 2004. But because of strong oppositions from business circles, including Nippon Keidanren (Japan Federation of Economic Organizations), the approval of the bill was delayed about one year from originally intended.

The business community expressed various opinions on the revisions. Their main opinion concerning issues related to item 4 above were, at first, that the sanction system of the AMA should be changed to one, for example, that imposed surcharges only on enterprises, and that criminal penalties should be imposed only on natural persons. This opinion was formed on the basis that when the surcharge system is to levy the amount of more than the economic benefits gained from cartels (excessive profits), the current system, which allows surcharges and criminal fines to be imposed on enterprises that committed violations on one case, would create a conflict with the provisions against double jeopardy.[9]

Secondly, they criticized that the total number of enterprises that may apply to the leniency program would be limited to three, and that simultaneous applications by some enterprises for leniency would not be permitted.

Moreover, they insisted on changing the current hearing procedure and on establishing a hearing examiners system totally independent of the JFTC because the level of sanctions would be intensified, as the amount of more than the economic benefits gained from cartels (excessive profits) would be levied as surcharge, representing a change from the present system to levy the amount assumed to be legally consistent with excessive profits.[10]

The opinions above were reflected in Article 13 of the supplementary clause of the 2005 amended Act, that is, "the proper surcharge system, the legal procedure necessary to order enough measures to eliminate illegal conducts, and the appropriate hearing procedures by the JFTC."[11] These two points, the relation between the surcharge system and criminal penalties, and the appropriate hearing procedures, are supposed to be the most important issues in the process of further reviews of the AMA within two years.

In addition, the provision "provided, that in case hearing procedures have been initiated with respect to such violating act, such order shall not be issued by such time as such procedures have been completed" (Article 48-2 of the AMA) was deleted by the

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9 Surcharges are imposed only on enterprises, and criminal penalties can be imposed on natural persons and enterprises by the present AMA and also by the 2005 amended Act.

10 A system whereby the administrative agency examines the motion of complaint against the administrative dispositions of said agency, and when not satisfied with the results can appeal to the court (the court makes final judgments) exists even in, for example, the area of national tax (National Tax Tribunal) and patent (patent appeal), so this kind of system is not peculiar to the AMA.

11 See *supra* note 2.

2005 amended Act, allowing the JFTC to issue decisions (cease-and-desist orders) and surcharge payment orders simultaneously. This is to begin on the basis of the concept that it is appropriate to show the fact of the violation, which is the basis of the calculation of the surcharge, and the amount of surcharge based on this fact, as the rates of surcharge have been vastly increased; secondly, for the purpose of reducing cases leading to hearing procedures by way of introducing a system that allows the JFTC to issue decisions after having provided the respondent an opportunity to submit its opinions and evidence, and allows the JFTC to issue decisions and surcharge payment orders simultaneously.

But we have to wait and see the development of future enforcement to judge whether cases leading to hearing procedures are actually reduced, even though the surcharge system is not one that allows the JFTC to determine the amount of surcharges with discretionary power, and "the amounts equivalent to the amounts arrived at by multiplying by a fixed percentage the sales amounts of such goods and services for the period of implementation of such cartels" remains to be levied as surcharge.

And moreover, opinions demanding stricter regulations on unfair trade practices – especially unjust low price sales, discriminatory pricing, and abuse of dominant bargaining position – were expressed many times in the discussions on the 2005 amended Act, including during deliberations in the Diet. It is assumed that the appropriate regulations on unfair trade practices will be one of the important points of argument in the process of further reviews of the AMA within two years.

ZUSAMMENFASSUNG

Am 20. April 2005 stimmte das japanische Parlament einem Gesetzesentwurf zur Teilnovellierung des Antimonopolgesetzes zu, die Anfang 2006 in Kraft treten wird.

Als wettbewerbswidrig verboten sind Verhaltensweisen wie Monopolisierung, unbillige Handelsbeschränkungen (Kartelle), unfaire Handelspraktiken und gewisse Verhaltensweisen von Handelsvereinigungen. Zu den unfairen Handelspraktiken gehören etwa der Boykott, ungerechte Verkäufe zu Niedrigpreisen und der Mißbrauch einer dominierenden Verhandlungsposition.

Deckt die FTC bei ihren Nachforschungen verbotene Verhaltensweisen auf, so kann sie Empfehlungen aussprechen (eine vorläufige Entscheidung), in denen sie die jeweiligen Unternehmen oder Handelsvereinigungen anweist, geeignete Maßnahmen zu ergreifen. Falls die Betroffenen diese Empfehlungen akzeptieren, entscheidet die FTC entsprechend ihrer Empfehlung. Falls nicht, leitet sie eine Anhörung ein, in der die Betroffenen Gegenargumente vorbringen können. Darauf aufbauend trifft die Wettbewerbskommission dann ihre Entscheidung. Dagegen können die Betroffenen wiederum vor dem Obergericht Tokyo auf Aufhebung der Entscheidung klagen.

Es gibt drei Kategorien von Sanktionen bei Verletzung des Antimonopolgesetzes: administrative Maßnahmen (wie Unterlassungsanordnungen oder die Anordnung, eine Mehrerlösabschöpfung zu bezahlen), Strafmaßnahmen bei schweren Verletzungen des Antimonopolgesetzes und Zivilmaßnahmen (Schadensersatz- oder Unterlassungsklagen der durch das wettbewerbswidrige Verhalten Benachteiligten). In Japan ist das 1977 eingeführte System der Mehrerlösabschöpfung eine zentrale Verwaltungsmaßnahme zur Sanktionierung von Hardcore-Kartellen. Es verhindert, daß wettbewerbswidrig Handelnde ihre durch das verbotene Verhalten erzielten Gewinne behalten. Die Mehrerlösabschöpfung wird mittels fester Prozentsätze errechnet und ist an das Finanzministerium zahlen.

Seit den neunziger Jahren ist die Zahl der Wettbewerbsverletzungen jedoch gleichwohl deutlich angestiegen. Häufig waren bekannte Firmen darin verwickelt, und zahlreiche Unternehmen verstießen sogar wiederholt gegen das Wettbewerbsgesetz. Das machte eine Verschärfung der Sanktionsmöglichkeiten erforderlich. Daher wurde im Jahr 2005 das System der Mehrerlösabschöpfung durch Anhebung der festen Prozentsätze revidiert. Als Ergänzung wurde eine Art Bonusregelung eingeführt – die größte Gesetzesänderung seit 1977. Den Unternehmen, die von sich aus Angaben über wettbewerbswidriges Verhalten machen, werden die Geldbußen erlassen oder verringert. Hintergrund dafür war die Tatsache, daß Wettbewerbsverletzungen häufig im Geheimen geschehen und es daher für die FTC schwierig ist, Nachforschungen anzustellen. Seit 2002 hatte eine von der FTC einberufene Studiengruppe zur Überprüfung des Antimonopolgesetzes diese Gesetzesänderungen vorbereitet. Ihr gehörten Wissenschaftler sowie Interessierte aus Unternehmen, Presse und Verbraucherorganisationen an.

Für die Zukunft bleibt jedoch weiterer Diskussions- und Änderungsbedarf. So ist das Verhältnis zwischen dem (verschärften) System der Mehrerlösabschöpfung und den Kriminalstrafen wegen eines möglichen Verstoßes gegen das verfassungsrechtliche Verbot der Doppelbestrafung stark umstritten. Auch wird zunehmend die Schaffung eines von der FTC unabhängigen Anhörungssystems gefordert.

(Zusammenfassung durch d. Red.)