Exhibit 6

harmonization of competition laws either in the OECD or in the GATT. It may be said that the reform of the AML on the basis of the SII is only a forerunner of such harmonization.[13]

2.3 An Overview of the Anti-monopoly Law

The major provisions of the AML are applied to the following three categories of conduct: (1) private monopoly, (2) unreasonable restraint of trade, and (3) unfair business practices. The purpose of this section is to provide a detailed analysis of these three categories. However, it is useful to give an overview before examining them in detail.

A. PRIVATE MONOPOLY

Private monopoly is defined in Article 2(5) of the AML. Under this article, if a powerful enterprise either 'controls' or 'excludes' the business activities of another enterprise or other enterprises and thereby brings about the condition in a market where competition is substantially restrained, the enterprise is regarded as committing a private monopoly. Private monopoly is prohibited under the former part of Article 3. Examples of private monopoly include the acquisition by a powerful enterprise of stocks or assets of another enterprise in competitive relationship whereby the acquiring enterprise controls the business activities of the acquired enterprise, and the contractual terms imposed by a powerful manufacturer on distributors of the product it produces thereby exclude competing manufacturers from the distribution network. If conduct such as the above is carried out by a powerful enterprise and competition in the relevant market is substantially restrained, the enterprise would be accused of having monopolized the relevant market.

There are several provisions which are related to the prohibition of private monopoly. Provisions contained in Articles 9–18 of Chapter 4 of the AML are devoted to the control of mergers and acquisitions. Article 9 prohibits the establishment of holding companies which are defined as companies whose main business is to own stocks of other companies to control them, Article 9.2 sets an upper limit to the value of the stocks of companies which a large-scale company can acquire and hold, and Article 11 prohibits, with some exceptions, financial companies (companies in banking, securities, and insurance) from acquiring and owning more than 5 per cent of the outstanding stocks of another company.

Article 11 prohibits companies from acquiring and owning stocks of

[13] See generally Matsushita, 'The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation', *Michigan Journal of International Law*, 12/2 (1991), 436 *et seq.*

another company or other companies if, as the result of such acquisition and holding, competition in a market tends to be substantially restrained. Article 13 prohibits interlocking directorates if they tend substantially to restrain competition in a market. Article 15 prohibits a merger between companies if by such a merger competition in a market tends to be substantially restrained.

The purpose of these provisions is to arrest the tendency towards concentration of economic power in a market and, in this sense, it may be said that the provisions in Chapter 4 of the AML are designed to operate as 'precautionary measures' in relation to the prohibition of private monopolies.

Article 2(7) of the AML defines a 'monopolistic situation'. In this, a monopolistic situation exists if an enterprise occupies a market share of 50 per cent or above, or two enterprises 75 per cent or more in a product market, new entry into this market is difficult, and the price and profit rate of these enterprises or their general expenses and other expenses are excessively high. The FTC can issue an order to a monopolistic enterprise to restore competition in a market including, in extreme cases, a deconcentration measure whereby the enterprise is broken up into several competing units.

The control of a monopolistic situation is not premissed on 'a wrongful conduct' of an enterprise. As long as there is the monopolistic structure and other requirements as above described, a deconcentration order may be issued. Therefore, this control is a control of structure rather than a control of conduct. This can be regarded as a supplementary measure to the prohibition of private monopolies in the sense that there may be a monopolistic situation without any wrongful conduct which amounts to a private monopoly and yet competition in a market may not exist any more due to a monopolistic or oligopolistic market structure.

B. UNREASONABLE RESTRAINT OF TRADE

Article 2(6) of the AML defines unreasonable restraint of trade as an agreement or arrangement among enterprises to the effect that they mutually refrain from competing with each other with regard to a product or service. By definition, an unreasonable restraint of trade is a cartel. A cartel is prohibited by the latter part of Article 3. Cartels can be created through the decisions of trade associations as well as by agreements among enterprises. Therefore, the AML provides in Article 8(1) for the prohibition of restrictive conduct engaged in by a trade association.

When a cartel fixes prices or otherwise affects prices, the FTC must impose on the parties concerned an administrative surcharge. Similarly, when enterprises in a market simultaneously raise their prices, the FTC

can demand the reasons. Although this is not a control of cartels as such, it is a measure related to the prohibition of cartels.

Some cartels are exempted and authorized by law. They include depression cartels, rationalization cartels, export and import cartels, small business cartels, and ocean freight conferences. Some of these cartels will be more closely examined when we look at legal aspects of industrial policy. When we study the law on cartels, it is necessary to examine the legal rules that permit cartels by way of exemption as well as those which prohibit them since there are many such authorized cartels.

C. UNFAIR BUSINESS PRACTICES

The third category of conduct which is prohibited by the AML is unfair business practices. They are defined in Article 2(9) and prohibited by Article 19. According to Article 2(9), the FTC is required to designate unfair business practices. In Notification 15 of 1982, the FTC designated sixteen items. They will be covered in subsequent sections so we will only lightly touch on them here.

Article 2(9) states that the FTC shall designate unfair business practices within six basic categories: (1) unreasonable discrimination, (2) a transaction with unreasonable pricing, (3) unreasonable inducement of customers or coercion of customers, (4) unreasonable restriction imposed on the other party to the transaction, (5) abuse of a dominant position in the transaction, and (6) unreasonable interference in the internal matters of competitors.

Unreasonable discrimination includes conduct such as a boycott, a refusal to deal by a single enterprise, and price discrimination. A transaction with unreasonable pricing is typically a sale below the cost of production or of purchasing. Unreasonable inducement of customers is exemplified by a false or misleading advertisement or representation and offering excessive premiums when an enterprise sells a product. Unreasonable coercion of customers is generally a tie-in sale whereby the seller of a product sells the product with the condition that the purchaser purchases another product or other products. Unreasonable restriction imposed on the other party to the transaction includes various conducts of which the typical ones are a resale price maintenance, an exclusive dealing arrangement, a vertical territorial restriction, and customer restriction. Abuse of a dominant position means that an enterprise with a stronger position *vis-à-vis* the other party to the transaction imposes harsh conditions on the other party. Unreasonable interference in the internal matters of competitors includes interfering with transactions between a competitor and its customers and inducing stockholders of a competitor to act against its interests.

It can be stated that the importance of the prohibition of unfair business practices lies in the following two areas. First, the control of unfair business practices is regarded as a precautionary measure in relation to the prohibition of private monopolies. The theory is that, if unfair business practices were allowed to continue with impunity, there would be a gradual concentration of economic power in the hands of those who practise them and the concentration of economic power would be the seed-bed of private monopolies. Therefore, it maintains that it is necessary to apply the prohibition on unfair business practices with the view to preventing private monopolies.

Beside the above, however, prohibition of unfair business practices is part of the law of consumer protection. For that matter, the whole AML is part of the law of consumer protection. However, this is especially true with the control of such unfair business practices as the prohibition of false and misleading advertisements, resale price maintenance, and a tie-in deal whereby consumers are forced to buy products tied to the product which is the main object of the transaction. Also the prohibition of unfair business practices is part of the law of small business protection. This is especially true with regard to the prohibition of the abuse of a dominant position in which the party to a transaction with superior bargaining power imposes harsh conditions on the other party to the transaction. Of course, the small business protection law has a much wider scope. However, the prohibition of unfair business practices by the AML is an important part of it.

There are two supplementary laws. One is the Law to Prevent Unreasonable Representation and Unreasonable Premiums[14] and the other is the Law to Prevent Unreasonable Delay in Payment to Subcontractors and Related Matters.[15] The contents of those two supplementary laws will be touched upon in a later section of this chapter. It is sufficient here to mention that, while the provisions of the AML are general, they specifically designate conduct which should be prohibited and provide for a more expedited procedure for enforcement.

2.4 The Basic Concepts of the Anti-monopoly Law

There are several important concepts in the AML which are common to different types of regulation under the AML. To avoid repetition in later sections, these basic concepts are explained below all together.

[14] Futōkeihinrui Oyobi Futōhyōuji Bōshi Hō, Law 134, 1962.
[15] Shitaukedaikin Shiharai Chien Boshi Hō, Law 120, 1956.

A. ENTERPRISE

In principle, the AML is applied to an 'enterprise'.[16] Article 3, which prohibits private monopoly and unreasonable restraint of trade, states that enterprises shall not engage in private monopoly or unreasonable restraint of trade. Similarly, Article 19, which prohibits unfair business practices, also states that an enterprise shall not engage in unfair business practices. There are some exceptions, such as Article 10, which controls the acquisition by a company of stocks of another company and Article 15 which controls a merger between companies, which states that 'companies' are the object of regulation. Likewise, Article 13 prohibits directors and employees of a company from being in the position of director of another company, if to do so would tend substantially to restrain competition in a market. However, generally, enterprises are the object of regulation under the AML.

An 'enterprise' is defined in Article 2(1) as 'person who carries on business of a commercial, industrial, financial, or any other nature'. Commercial, industrial and financial businesses are but a few examples of business enterprises. Activities of 'any other nature' include agriculture, services, and research and development. In short, business engaged in by an enterprise comprises a wide variety of activities. Although the major parts of such business activities are profit-making activities, they are not necessarily limited to such. As long as an enterprise is an active participant in a market, the business activity engaged in by such business is regarded as coming under the definition of Article 2(1).

Of course, profit-making companies are central to the concept of enterprise as defined in Article 2(1). However, an enterprise in this Article is not necessarily limited to a profit-making enterprise. For example, co-operatives established by laws such as the Agricultural Co-operatives Law[17] and the Medium and Small Enterprises Organizations Law[18] are prohibited from engaging in profit-making activities. However, they do engage in continuously buying and selling products and are active participants in a market. Therefore, they are enterprises under the definition of Article 2(1). As long as an entity participates in a market by way of selling, buying, or otherwise, regularly, continuously, and repeatedly, the entity is qualified as an enterprise in the sense of Article 2(1).

Recently some questions were raised as to whether or not activities of professionals and educational institutions are business activities in the sense of Article 2(1). The FTC decisions answered them in the affirmative. Some examples are given. There are a number of FTC decisions in

[16] In Japanese, it is 'jigyōsha'.
[17] Nogyō Kyōdō Kumiai Hō, Law 132, 1947.
[18] Chūshōkigyō Dantai Hō, Law 185, 1958.

which the issue was a restrictive condition imposed by medical associations on newly opened medical clinics, such as the restriction of the location of a newly established clinic to the effect that the new clinic must be located a certain distance away from existing ones. The FTC held such a restriction as unlawful on the ground that medical associations were trade associations and the move on the part of medical associations stated above violated Article 8(1) of the AML, which prohibits trade associations from engaging in activities which restrain competition substantially.[19] The premiss of these decisions was that medical doctors and clinics which made up the medical associations were enterprises in the sense of Article 2(1).

In the *Architect Association* case,[20] an association composed of architects was accused by the FTC of establishing a minimum fee schedule. The FTC proceeded against this association on the theory that it was a trade association. Here again the premiss of the FTC's challenge was that architects who made up the Association were enterprises in the sense of Article 2(1). This case was settled between the FTC and the respondents.

Once it is established that medical doctors and architects are enterprises in the sense of Article 2(1), other professionals such as lawyers, accountants, and independent business consultants also become enterprises. This extends to educational institutions and vocational schools.

Enterprise is a functional concept and the form of enterprise does not matter. So it makes little difference whether a given enterprise is a joint-stock corporation, a non-profit making entity, or an individual. As long as an enterprise is actively participating in a market, it qualifies as an enterprise in the sense of Article 2(1) of the AML.

B. TRADE ASSOCIATIONS

Trade associations play a very important role in business activities in the Japanese economy. There are trade associations in virtually all fields of business—the Steel Alliance in the steel industry, the Automobile Industry Association in the car industry, and so forth. Generally their work involves gathering business information, formulating industrial standards, acting as the channel through which enterprises in the industry petition the government, and engaging in activities that relate to a social cause (such as the campaign for the elimination of industrial pollution). Also some anti-competitive activities are carried out by trade associations. Consequently, the AML provides for the regulation of trade

[19] See, for details, Matsushita, *Keizaihō Gaisetsu* (*Introduction to Economic Law*) (Tokyo, 1986), 40–4.

[20] In re Nihon Kenchikuka Kyōkai Case, FTC Decision, 19 Sept. 1979, *Shinketsushū*, 265 (1980), 25 *et seq.*

associations. Article 8(1) provides that trade associations shall not engage in cartel-like activities and unfair business practices. They will be analysed in a later section. Here we will deal with the definition of trade associations.

Article 2(2) of the AML defines a trade association as: 'any combination or federation of combinations consisting of two or more enterprises and having as its principal purpose the furtherance of the common interest of its members . . .'. Organizations such as associations, foundations, and co-operatives are included within this category.

Sometimes an entity has the dual character of an enterprise and a trade association. For example, a farmers' co-operative is an entity composed of farmers for the purpose of furthering their common interest and so is a trade association. At the same time, the co-operative engages in selling and buying and, as long as it is engaged in market activities in such a way, it is regarded as an enterprise.

C. PARTICULAR FIELDS OF TRADE

In General

In order to determine whether a private monopoly or an unreasonable restraint of trade occurs, or a merger or acquisition of stocks by a company of another company tends substantially to restrain competition, it is necessary to decide the scope of the market in which such conduct occurs. In other words, a market must be determined in which anti-competitive conduct takes place. For example, a merger between companies which together occupy 80 per cent of the market would probably restrain competition. The question, however, is what is the market of which the two companies hold an 80 per cent market share. Even if those two companies occupy 80 per cent of the market when only a single product is taken into consideration, there may be other competing products, and if all those are taken into consideration the market share of the two companies may be only 10 per cent or less.

Therefore, it is necessary to determine the market in question and, in the AML, a market in this sense is referred to as 'a particular field of trade'. Although it is impossible to define it with mathematical exactitude, we can discuss some general criteria which are useful.

Product Markets

One criterion is the product market. One test is to determine whether a commodity or service is a substitute for another commodity or service. Theoretically, if there is 'cross-elasticity of demand' or 'reasonable interchangeability' between two or more products, they can all be substituted

for each other and together they constitute a particular field of trade.[21] In the *Chūōseni-Teikokuseima* case,[22] there was a merger between two companies which occupied more than 70 per cent of the market for hemp yarn rope. However, if rope made of hemp yarn and that made of chemical fibre were put together, the market share of these two companies' was less than 10 per cent. The FTC regarded rope made of hemp yarn and that made of chemical fibre as interchangeable and decided not to challenge the merger.

If a product is highly differentiated by brand name, grade, and prestige, there may be several sub-products within a product. For example, a cosmetic product of a high grade is differentiated from a product of lower grade since they have different customers.[23] In such a case, a sub-product constitutes a particular field of trade.

Geographical Markets

Even if two enterprises are engaged in the same business, there is no competition if the locations of their business are so far away from each other that competition is impossible. A geographical market is the geographical area in which competition takes place. There is no standard which can be applied uniformly to every case. However, generally, a geographical market in retail business is narrow and that in manufacturing and wholesale is wide.[24] When the FTC announced the guidelines on mergers and acquisitions in the retail industry, the FTC stated that the administrative boundaries of a city would be regarded as a particular field of trade in retail business except for the six large cities for the purpose of reviewing mergers and acquisitions.

D. SUBSTANTIAL RESTRAINT OF COMPETITION

Competition

There is a definition of competition in Article 2(4) of the AML which states that competition is:

> a situation in which two or more enterprises do or may, within the normal scope of their business activities and without undertaking any significant change in their business facilities or kinds of business activities, engage in any one of the following acts, (i) supplying the same or similar goods or services to the same consumers

[21] *United States* v. *E.I. du Pont de Nemours & Co.*, 351 US 377 (1956).
[22] See Kōseitorihiki Iinkai (The Fair Trade Commission), n. 5, above, pp. 199–202.
[23] *United States* v. *Guerlain, Inc.*, 153 F. Supp. 77 (SDNY 1957).
[24] In 1981, the Fair Trade Commission announced a set of guidelines titled 'On Mergers and Acquisitions in Retail Business' in which the Commission states that a particular field of trade in retail business is the city as an administrative unit or an area which is slightly larger than that except for the cases of large cities.

or customers; (ii) obtaining supplies of the same or similar goods or services from the same supplier.

From the wording 'may . . . engage', we can infer that potential competition as well as actual competition is included. Also it is clear that competition in the AML includes not only that among sellers but also that among purchasers.

Substantial Restraint of Competition

In several key provisions of the AML, the words 'substantial restraint of competition' appears. For example, in Articles 2(5) and 2(6), which define private monopolization and unreasonable restraint of trade, and Articles 10 and 15, which control acquisition of stocks and a merger respectively, these words are used. There must be a *substantial* restraint of competition (rather than a mere restraint of competition) when these provisions are applied.

According to a decision of the Supreme Court,[25] competition is substantially restrained if an enterprise or a group of enterprises can determine prices and other terms of business independent of market forces. This means that there exists a situation in which an enterprise or a group of enterprises have dominant power in a market and the price and other terms of business can, at least up to a degree, be manipulated by them.

Whether this situation exists or not must be decided on the basis of the specific set of facts involved in each case. Therefore, it is difficult to present the tests which can be applied uniformly to all cases. The FTC announced the guidelines concerning the regulation of mergers and acquisitions.[26] In those guidelines, the FTC states that the following tests are used. If there are these situations when a merger or acquisition is consummated, the merger or acquisition will be closely scrutinized: (1) if the market share of one or both of the parties to the merger is above 25 per cent, (2) if the ranking of the company in terms of market share after the merger is at the top and the market share is above 15 per cent, (3) if the ranking in terms of market share of the company after the merger is at the top and the difference in terms of market share between that company and other companies is great.

The above quantitative tests are only general guidelines by which the

[25] The Tōhō-Shintōhō case, Decision of the Supreme Court, 25 May 1954, *Minshū*, 8/5 (1954), 950 *et seq.*

[26] The merger guidelines by the Fair Trade Commission are entitled 'Administrative Procedure Standards for Examining Mergers, etc. by Companies (1980)' and included in Nakagawa, n. 3, above, pp. 79 *et seq.* and the guidelines on stockholdings are entitled 'Standards for Examination of Stockholding by Companies (1981)' and included ibid. 89 *et seq.*

FTC proceeds in investigating cases of mergers and acquisitions. They are by no means the conclusive criteria by which to judge that competition in a market is substantially restrained. Also there may be a need to use somewhat different methods when judging whether a cartel restrains competition substantially or a merger restrains competition substantially. However, the above figures may give a good starting-point even if they do not provide the conclusive tests when considering whether a merger, the creation of a monopoly or a cartel, or the activity of a trade association restrains competition substantially.

E. THE PUBLIC INTEREST

In General

The words 'contrary to the public interest' appear in two provisions in the AML: Article 2(5) (private monopolization) and Article 2(6) (unreasonable restraint of trade). There is an acute difference of views with regard to the meaning of this term with respect to Article 2(6). Although the words are used in Article 2(5), their meaning has never been the subject of debate. The reason is that whether or not the creation of a private monopoly is held illegal depends on the conditions of the relevant market, the powers of the accused party compared with those of competitors, the ease or difficulty of new entry, the possibility of imports and other forms of international competition, as well as many other economic factors, and the issue of whether a monopolization is contrary to the public interest can be adequately considered in connection with these factors.

However, when the FTC or courts have to decide whether an unreasonable restraint of trade (a cartel) is illegal or not, they must consider whether a cartel agreement is contrary to the public interest. To put it simply, the question is: can you hold a cartel agreement as illegal when it substantially restrains competition or should you prove that the cartel is contrary to the public interest *in addition to the fact that it restrains competition substantially*?

The Views of the Fair Trade Commission and the Majority of Commentators

The FTC and the majority of commentators[27] assert that 'contrary to the public interest' provided in Article 2(6) is the same as 'substantial restraint of competition' in the same article. In their view, the term 'contrary to the public interest' has no independent meaning apart from 'substantial restraint of competition'. The reason is that the basic philosophy of the

[27] See Matsushita, n. 19, above, pp. 57–67.

AML is the maintenance of competition and, therefore, public interest in the AML should be regarded as competition as such. Therefore, if competition is substantially restrained by a cartel, the public interest is injured by that very fact. This view also maintains that, if 'contrary to the public interest' is something other than 'substantial restraint of competition', in order to prohibit a cartel the FTC or the courts would have to prove that (1) the cartel restrains competition substantially *and* (2) the cartel is contrary to the public interest in other ways. This would make the prohibition of cartels very difficult. This view has been strongly influenced by the *per se* illegality doctrine developed in United States antitrust laws with regard to cartels.[28]

The View of the Business Community

There is a different view expressed by the Keidanren (the Federation of Economic Organizations) which represents the opinion of at least part of the business community.[29] Although the MITI has not officially expressed its view as to how the meaning of 'contrary to the public interest' should be interpreted, some of the private writings by MITI officials take the same point of view.[30] This view, in short, holds that the public interest in the AML includes not only competition but also other economic and social goals such as the measures to deal with pollution, depression, and preservation of morals as well as the protection of consumers and other social values. Once an agreement among enterprises to increase international competitiveness was regarded as one of such goals but not any more.

The holders of this view argue that a cartel or an agreement among enterprises to eliminate competition among themselves should not be held as a violation of the AML simply because it restrains competition substantially. There may be situations in which competition is substantially restrained but agreement to do so may serve a useful social purpose. For example, an agreement among enterprises jointly to cut back production in a depression serves the useful purpose of avoiding bankruptcy and preserving enterprises in the market even if competition among them is substantially restrained.

The View of the Supreme Court

The Supreme Court expressed its view of the meaning of 'contrary to the public interest' in the *Oil Cartel Price Fixing* case.[31] The Supreme Court took a middle-of-the-road approach and synthesized the above two

[28] *United States* v. *Socony-Vacuum Oil Co.*, 310 US 150 (1940).
[29] See Matsushita, n. 19, above, p. 60.
[30] See n. 29, above.
[31] Decision of the Supreme Court, 24, Feb. 1984, *Keishū*, 38/4(1984) 1287 *et seq.*

approaches. According to its view, the public interest in the AML is in principle the maintenance of competition, but there are exceptions. It states that 'contrary to the public interest' means in principle a situation in which competition is substantially restrained but there can be an exceptional situation in which an agreement among enterprises restrains competition substantially but has sufficient redeeming virtue to hold it lawful. In this situation, the FTC and courts should weigh the advantage of maintaining competition against what would be accomplished by such an agreement, and, if the advantages which accrue from the agreement are greater than those which would be accomplished through maintaining competition, the agreement should be held as not contrary to the public interest even though it restrains competition substantially.

The Supreme Court did not specifically show what those redeeming virtues should be. One can speculate, however, that the Supreme Court had in mind factors such as avoidance of pollution, preservation of good morals, and elimination of danger to public safety. Therefore, for example, if an agreement among enterprises is aimed at abolishing a substance which causes environmental pollution or a food additive which may be injurious to the human body, or is aimed at prohibiting publication of obscene literature, it may be regarded as having a sufficient redeeming virtue even if the agreement restrains competition among the participants substantially in the particular field of trade concerned.

Commentary

It seems that the view taken by the Supreme Court is the most balanced and appropriate one. The view taken by the FTC and the majority of commentators is pure and faithful to the philosophy of competition. However, if this interpretation is applied uniformly and without any exception at all, the result may not be a desirable one. For example, there could be a situation in which manufacturers of insecticide conclude an agreement whereby they jointly decide not to use an additive which may be a hazard to the environment and to public health. If the use of this substance is totally eliminated by this agreement, competition in purchasing the substance is abolished. At the same time, competition in selling the insecticide which contains this substance is eliminated. However, one can hardly say that this agreement should be prohibited by the AML. If one were to apply the prohibition to any agreement among enterprises which restrains competition without exception, this would be too stiff and inflexible.

On the other hand, the view held by the Keidanren seems to be too vague. In its view, there is no limitation to the scope within which the public interest in Article 2(6) of the AML should be interpreted. This will create instability in interpretation and, since a violation of Article 2(6)

and Article 3 of the AML can be a criminal offence, an undefined scope for the interpretation of the public interest in Article 2(6) is highly undesirable. Also, if this view were to be adopted, it would indeed be difficult to prohibit cartels and collusive agreements since there are always some reasons for these as the proponents of the view of the FTC and the majority of commentators fear.

Compared with the two interpretational doctrines above, the view of the Supreme Court seems to be more balanced. It is based on the premiss that competition is the basic value in the AML and, therefore, this view is faithful to the philosophy of competition. It is also flexible in the sense that it allows some exceptions to the rule of competition if it is absolutely necessary for the purpose of accomplishing something of social or economic value. It should be emphasized that, in this doctrine, the prohibition of cartels and similar collusive activities is the principle and exceptions are allowed only in those situations where the valid reason for an agreement which restrains competition is sufficiently vindicated, and that therefore this doctrine is closer to the view of the FTC and the majority of commentators than to that of the Keidanren.

However, as mentioned before, the scope of exceptions to the rule of competition is not clear from a reading of this decision yet. This decision merely declares the general principle and a general direction to which the FTC and courts should look to reach a right and stable interpretational doctrine. Therefore, it is probably correct to say that the question of what should be the right kind of inteipretation of the public interest in Article 2(6) is not settled yet.

2.5 The Enforcement Agency and the Procedure of the Anti-monopoly Law

A. THE FAIR TRADE COMMISSION AND ITS ORGANIZATION

In General

The enforcement of the AML is entrusted to the FTC and the courts. In brief, the FTC has the power to investigate suspected violations, hold an administrative hearing about the case, and determine whether there is a violation or not. A decision of the FTC is reviewable by the Tokyo High Court and the Supreme Court.

There are three types of legal consequence to a violation of the AML. First, the FTC proceeds against the violation and issues a cease-and-desist order. The FTC issues an order to impose an administrative surcharge on a party which is held to have engaged in a price cartel or any other cartel affecting price. This is an administrative process.

The second is an action by a private party to seek the recovery of damages sustained by the party on account of a violation of the AML. A private damage action can be brought under either Articles 25 and 26 of the AML or Article 709 of the Civil Code as a tort claim. Third, some violations of the AML are punishable as crimes. Among the above three, the administrative process by the FTC is most frequently used.

The Organization of the Fair Trade Commission

The FTC is an independent administrative commission and the agency created for the purpose of the enforcement of the FTC. Officially, the FTC is part of the Prime Minister's Office (see Fig. 2.1). However, no agency, including that of the Prime Minister, can exercise control over the decision-making of the FTC and, therefore, its independence with regard to the determination of violations, the choice of measures to be applied, and other forms of exercise of the enforcement power is guaranteed. The FTC is composed of one Chairman and four commissioners. Candidates for the Chairman and commissioners must be persons aged 35 or above and possess knowledge of law and economics. They are appointed by the Prime Minister with the consent of the House of Representatives and the House of Councillors, and the appointment of the Chairman must be certified by the Emperor. The term of office for the Chairman and the commissioners is five years. There is a secretariat attached to the Commission which has various sections and divisions.

As stated above, the appointment of the Chairman and commissioners is made by the Prime Minister with the consent of both Houses of the National Diet, and the budget of the FTC is, of course, decided by the National Diet. In this way, the appointment of the Chairman and commissioners can be influenced by political forces. The FTC must report its activities to the National Diet annually. However, once the appointments have been made and the budget has been decided, the FTC is independent from other administrative powers and political influences except for the fact that its decisions are reviewable by the courts.

The Powers of the Fair Trade Commission

The powers of the FTC can be classified into three categories: (1) administrative power, (2) quasi-legislative power, and (3) quasi-judicial power. The quasi-judicial power is that of enforcing provisions of the FTC by holding particular conduct as a violation of the AML and issuing an order which would impose on the violating party the obligation to refrain from the conduct. This is probably the core of the powers of the FTC. We will examine it in a later section. In this section, we will examine the administrative power and the quasi-legislative power.

The administrative power includes a variety of powers such as the