

Summary of the Amendment to the Antimonopoly Act



Japan Fair Trade Commission
June, 2009

Expansion of Types of Conduct Subject to Surcharges: Outlines

- Exclusionary type of private monopolization
- Certain types of unfair trade practices
 - concerted refusal to trade
 - discriminatory pricing
 - unjust low price sales
 - resale price restriction
 - abuse of superior bargaining position

Expansion of Types of Conduct Subject to Surcharges (1)

- Exclusionary type of private monopolization

- Surcharge calculation:

- (Sales of goods or services concerned) x 6%

Note: Applicable surcharge rate will be 2% for retailers and 1% for wholesalers

- New guidelines as to exclusionary conduct will be made public

Expansion of Types of Conduct Subject to Surcharges (2)

- Four types of unfair trade practices
 - (i) concerted refusal to trade, (ii) discriminatory pricing, (iii) unjust low price sales, (iv) resale price restriction
 - Surcharge calculation :
 - (Sales of goods or services concerned) x 3%
- Note: Applicable surcharge rate will be 2% for retailers and 1% for wholesalers
- Levied against the second offence of the same type of infringement within ten years

Expansion of Types of Conduct Subject to Surcharges (3)

- Another type of unfair trade practices
 - Abuse of superior bargaining position
 - Surcharge calculation :
 - (Amounts of transaction with trade partner(s) that suffered the abuse) x 1%
 - Levied against the continuous offence
 - Elements of violation defined in the AMA
 - coercion to purchase, unjust receipt of economic benefits, refusal to receive, unjust return of goods, etc.

Surcharge Rate Table

(Under the existing law)
(Under the proposed bill)

	Manufacturer, etc.	Retailer	Wholesaler
Unreasonable restraint of trade	10% (4%)	3% (1.2%)	2% (1%)
Control type of Private monopolization	10%	3%	2%
Exclusionary type of Private monopolization	6%	2%	1%
Concerted refusal to trade, discriminatory pricing, etc.	3%	2%	1%
Abuse of superior bargaining position	1%		

Percentages in parentheses are applicable to small and medium enterprises

Increase in Surcharge Rates Applicable to those playing Leading Role

- Applicable to cartels, bid rigging
- Surcharge rates increased by 50% (e.g., 10% → 15%)
- Levied against those that
 - Originate the illegal scheme, and request other firms to participate in or not to cease from the infringement
 - Continuously set prices or allocate trade partners, in response to conspirator's request

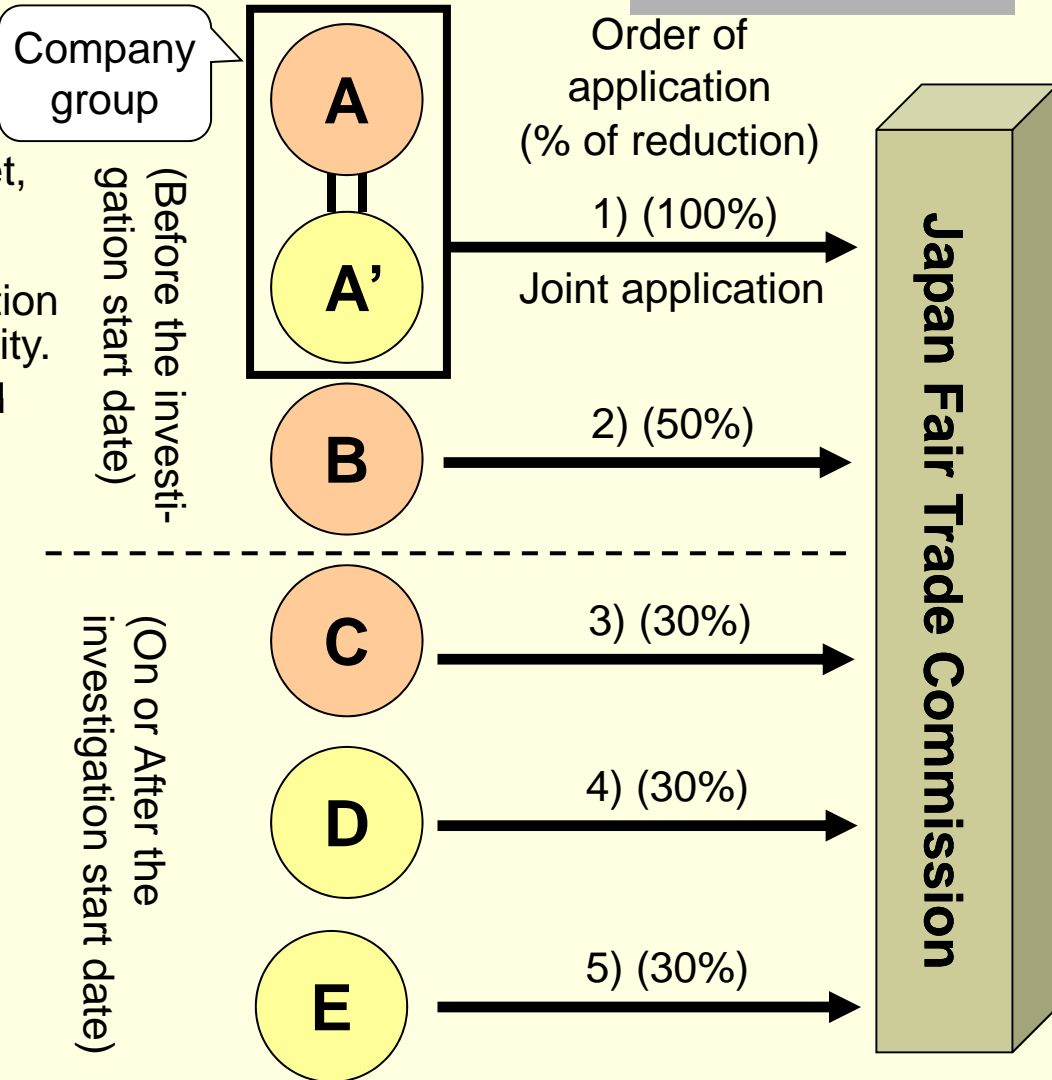
Review of the Leniency Program

Joint Application

Upon certain conditions being met, two or more violators within the same company group will be permitted to jointly file an application for surcharge reduction or immunity. All the applicants will be assigned the same order of application.

Expansion of the Number of Leniency Applicants

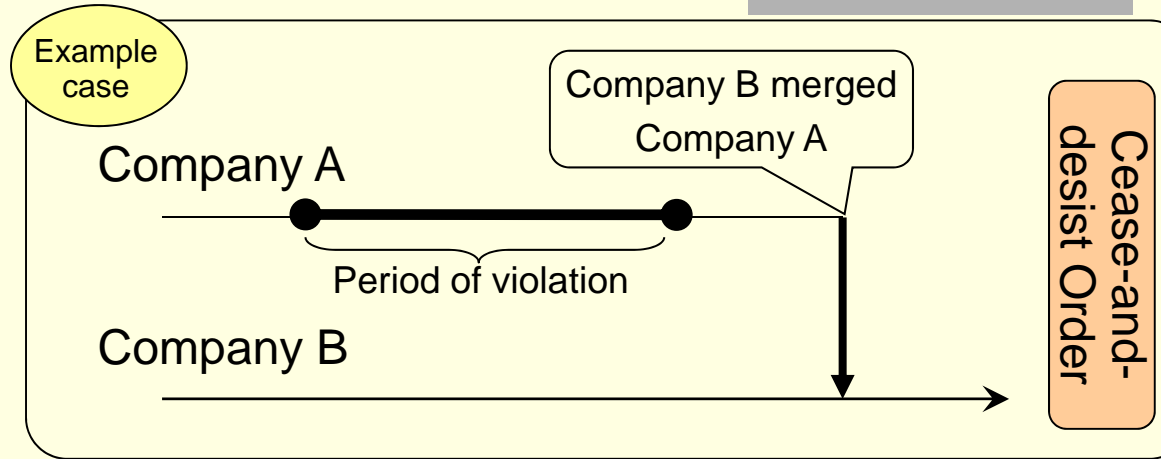
A total of 5 (currently 3) violators including before and after JFTC's investigation will be permitted to file an application for surcharge reduction or immunity. (Up to 3 applicants after the investigation start date.)



Review of Addressees of Cease-and-desist Order and Surcharge Payment Order

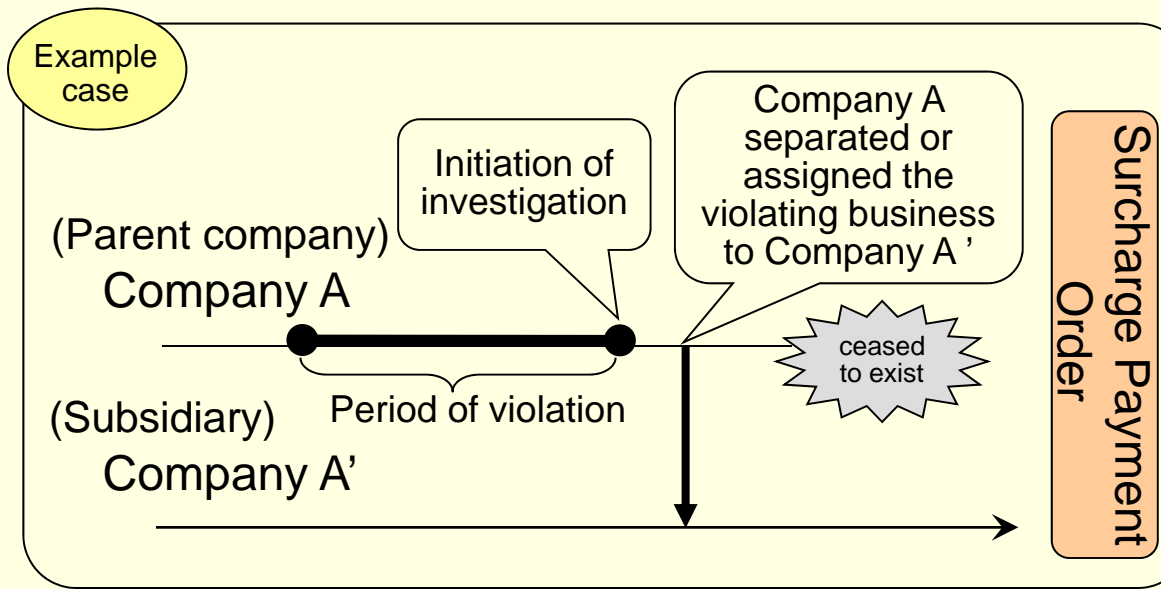
Cease-and-desist Order

Clarify that cease-and-desist order can be issued to the company that took over the violating business from the violator, e.g., in such case as the company merged the violator.



Surcharge Payment Order

Stipulate that surcharge payment order can be issued to the company that took over the violating business from the violator within the same company group in certain cases.



Increase in Maximum Jail Term for Cartels and Bid-riggings

- There is no end of cartels and bid-riggings, so strengthening deterrence against individuals who engage in collusion is needed.
- Current maximum term is short compared with those for other white-collar crimes and foreign countries' antitrust penalties

3 years
(current)



5 years
(amendment bill)

Extension of the Statute of Limitations for Administrative Order

- There have been cases where an order cannot be issued because the statute of limitations has elapsed.
- ➔ Need to Extend the statute of limitations applicable to cease-and-desist order and surcharge payment order: from the current three years to five years

<the statute of limitations of other statutes>

National Tax Procedure Act	Financial Products Trading Law	Certified Public Accountant Law	U.S. antitrust law	E.U. competition law
five years	three years	seven years	five years	five years (max. 10 years)

Review of Regulations on Business Combination (1)

Introduction of Prior Notification System for Share Acquisitions

- Prior notification system for share acquisitions will be introduced, similar to those for other forms of business combinations.
- Minimum yen thresholds for notification will be revised as the following;

	Current	Amendment Bill
Acquiring corporation	10 billion JPY on the basis of the total of the assets of an acquiring corporation, its parent corporation and its subsidiaries in Japan	20 billion JPY on the basis of the total of domestic turnover of a “corporate group”
Acquired corporation	1 billion JPY on the basis of the asset of an acquired corporation (Japanese corporation)	5 billion JPY on the basis of the total of domestic turnover of an acquired corporation and its subsidiaries

Note: “corporate group” refers to a group of corporations consisting of an ultimate parent company of the acquiring corporation and its subsidiaries.

Review of Regulations on Business Combination (2)

Review of Notification Thresholds for Share Acquisitions

- Percentage thresholds will be simplified from three-step thresholds (10%, 25% and 50% on the basis for voting rights held solely by an acquiring corporation) to two-step thresholds(20% and 50% on the basis for voting rights held by a “corporate group” as a whole).

Review of Regulations on Business Combination (3)

Review of Notification Thresholds for Mergers, etc.

- The scope of notifications for mergers, acquisitions of business, etc. will be determined by a “corporate group” in principle.
- Domestic turnover will be used as minimum yen thresholds.
- Minimum yen thresholds will be revised in general as the following;

Current	Amendment Bill
10 billion JPY on the basis of the total of the assets of an acquiring corporation, its parent corporation and its subsidiaries in Japan	20 billion JPY on the basis of the total of domestic turnover of a “corporate group”
1 billion JPY on the basis of the total of the assets of an acquired corporation, its parent corporation and its subsidiaries in Japan	5 billion JPY on the basis of the total of domestic turnover of a “corporate group”

- Same notification thresholds will be applied to both Japanese and foreign corporations.

Review of Regulations on Business Combination (4)

Expansion of the Scope of Exemptions from Notifications, etc.

- Mergers, acquisitions of businesses, etc. among corporations within a “corporate group” will be exempted from notifications.
- Provisions on notifications for joint share transfer, etc. will be introduced.

Note: “Joint share transfer” refers to a transfer whereby more than two corporations cause all of their issued shares to be acquired by a newly incorporated corporation.

Provisions for Information Exchange with Foreign Competition Authorities

- Introduce of provisions that stipulates conditions to be satisfied when the JFTC exchanges information with foreign competition authorities

- * Competent foreign competition authorities are able to provide JFTC with information equivalent to information provided by JFTC.
(→Reciprocity)
- * The same degree of confidentiality as is practiced in Japan is assured.
(→Assured confidentiality)
- * Information provided by JFTC will not be used by competent foreign competition authorities for any purpose other than that sought for their duties.
(→Prohibition of information use for inappropriate purposes)
- * Appropriate measures will be taken to prevent provided information from being used for criminal procedures.
(→Restrictions on use of information for criminal procedures)

Provisions Concerning Access to the Case Record by Interested Parties

- Article 70.15 of the AMA provides that interested parties may access to or copy the case record pertaining to the taken decision.
- Tokyo High Court decision (dated September 27, 2006; pending at the Supreme Court)
 - “JFTC is NOT allowed to restrict the scope of access or copying the case record of its discretion without statutory provision.”
- ➔ Need to introduce statutory provisions to allow the JFTC to restrict the access to case records by interested parties if there is a justifiable reason for such restriction

Special Rules of Document Production Order issued by Courts

- In private (civil) injunction suits seeking an injunction to stop unfair trade practices, documents containing “trade secrets” (e.g., account books) is exempt from submission obligation under the Code of Civil Procedure.

➔ Need to Introduce special rules: The court can issue an order to produce documents unless there is a justifiable reason for refusing the production

Note: similar to the rules in the Patent Act, etc.

- Simultaneously introduce provisions that allow the judge can issue a confidentiality order to those litigants who touch upon “trade secrets.”