Summary of Issues Concerning the Modality of the Administrative Surcharge System

(Only Japanese text is authentic)

July 13, 2016

The Study Group on the Antimonopoly Act

Table of Contents

Part 1. Introduction

About 40 years have passed since the administrative surcharge system under the Antimonopoly Act was introduced in 1977. While the several amendments of this system has carried out over that period, there is a need to review the modality of a surcharge system that would be capable of adapting to unceasing changes in economic and social conditions, because there are some cases in which the current surcharge system sometimes makes it difficult for the Japan Fair Trade Commission (JFTC) to properly deal with the business activities and corporate structures that are getting globalized, diversified and complicated.

In addition, the surcharge or fine systems in the competition laws, which has been widely adopted by other jurisdictions, make it possible for the competition authorities to decide the amount of the monetary sanctions depending on the cases with consideration of some factors to such as the degree of enterprises' cooperation or noncooperation to the authorities. Introducing such a similar system would enhance the cooperative relationship between enterprises and the JFTC during the case investigation process and promote enterprises' voluntary to establish the compliance programs to comply with the Antimonopoly Act.

Also, regarding the development of the globalization of economic activities, the surcharge system under the Antimonopoly Act should be in line with the systems of foreign jurisdictions.

From the point of view as described above, the JFTC has convened the Study Group on the Antimonopoly Act (hereinafter the "Study Group"), intended to study the modality of the surcharge system*, including a discretionary surcharge system from the perspective of specialized knowledge. The Study Group has held meetings five times since February 2016, including hearings with experts and related organizations, and recognized matters such as problems with the existing surcharge system, perspectives for revising it, and problems in institutional design.

Accordingly, the Study Group has summarized the issues based on the discussions between the members at each meeting and the results of hearings with experts and related organizations at the sixth meeting. On July 13th 2016, the Study Group compiles and makes public the report entitled "Summary of Issues Concerning the Modality of the Administrative Surcharge System" and launches a public consultation on the summary of issues addressed in this report to request comments on opinions, policies, concrete ideas and helpful information with regard to each of the issues from various interested parties.

The Study Group will continue studying each of the issues in detail based on this Summary of Issues, considering the results of the public comments.

* The discretionary surcharge system against the infringement of competition law, which allows the authorities to decide discretionally the amount of the surcharge with consideration to such as the degree of enterprises' cooperation or noncooperation to the authorities, has been widely introduced into many other countries or areas including EU and the some countries in EU/Asia.

Part 2. Problems with the existing surcharge system, review considerations and procedures

1 Problems with the existing surcharge system (necessity of amendment)

(1) Rigid calculation and compulsory imposition methods

Under the current surcharge system, the JFTC is not able to calculate and impose appropriate amount of surcharges flexibly for infringements on a case-by-case basis by taking into account the business activities and corporate structures that are getting globalized, diversified and complicated. in accordance with advances in areas, such as the globalization, diversity, and complexity of economic activities (in particular, business activities on the basis of a group of companies) because the JFTC must compulsorily impose the surcharge on the infringed enterprises, which is calculated in a rigidly uniform, mechanical method of multiplying amount, such as sales of goods or services subject to cartels or other infringements by a standard uniform rate in accordance with objective calculation requirements and methods stipulated by law (see First Study Meeting document (only Japanese text available) 3-II and document 4-1 concerning the framework of the existing surcharge system).

Some specific cases below hereby may give rise to some problems that amount of the surcharges imposed on the infringed enterprise by the JFTC' order to pay to the national treasury are unreasonable or unfair. (For specific examples of such cases, see First Study Meeting document 4-3.)

(i) It is not possible for the JFTC to impose surcharges on the infringed enterprises in the following cases:

- When in a case of an international market division cartel, for example, the foreign enterprises don't supply the goods or services subject to the infringement to users located in Japan (applies particularly in cases of foreign enterprises)
- When in a case of private monopolization, there is no sales amount as defined by law because the infringed enterprises didn't supply the goods or service related to the infringe conducts.(e.g. amount of sales of subject goods

or services supplied to a controlled enterprise)

- When the infringed enterprises didn't supply the goods or service subject to the cartel during the period of infringement and the amount of sales of goods or services subject to a cartel arises after the infringement has ended
- When only a holding company or similar organization, that don't supply the goods or services subject to a cartel, took part in the infringement and the other enterprises belonging to the corporate group supplying them.

(ii) In some cases reduced calculation rates must be applied to companies that qualify as small and medium-sized enterprises or wholesalers by meeting the relevant formal standards, even though in fact they could be deemed to correspond to large-sized enterprise or manufacturers, for example because they belong to large-scale corporate group.

(iii) Though the 20% reduction of normal calculation rates for surcharges for early withdrawers were introduced to strengthen incentives for parties that have voluntarily and promptly ceased infringements, they must be applied the 20% reduction of surcharge in cases that do not fit with the purport of the system (such as when a violator was forced to withdraw from the infringement due to losing a qualification to join biddings) because they are applied mechanically without considering the reasons to cease infringements.

(iv) The aggravated calculation rate of surcharges applied to parties playing leading roles in infringements must be applied mechanically to the entire amount of sales over the period of the infringements regardless of the details and period of his role.

(v) Under the compulsory and uniform surcharge system, the JFTC must certified amount of sales of goods or service subject to infringement as the basis for calculation surcharge even though they are included the amount of sales or goods which are sold in overseas markets and subject to sanctions by the foreign competition authorities.

(vi) Under the compulsory and uniform surcharge system, the JFTC must impose the surcharge on the infringed enterprises even when there is little need for deterrence through imposition of surcharges, such as when the infringed enterprise had no intention to break the law (for example, cases that qualify as a private monopolization [exclusionary type] due to the competition-restraining effects of a new business model with no intention of exclusion).

For these reasons, it is thought that there could be a need to review the existing compulsory and rigidly uniform system of calculation and imposition of

surcharges in accordance with calculation methods stipulated by law in order to resolve problems such as those cited above.

(2) Lack of incentive to cooperate in investigation

Although there is the leniency program in the Antimonopoly Act, compared to other countries competition laws, the current system to increase the incentives for enterprises to cooperate in the Antimonopoly Act investigations by the JFTC and disincentives for failing to cooperate or obstructing investigations is insufficient. For example, even if an enterprise cooperates in the JFTC investigation without the framework of the leniency program, the JFTC has no power to reduce the amount of surcharges by taking into account the extent of the cooperation. On the other hand, the JFTC has no power to aggravate the amount of surcharges by taking into account the extent of the enterprises' refusal or obstruction of the JFTC investigation. (See First Study Meeting document 4-4 for a comparison of the differences between Japan, Europe, and the U.S. in systems for securing incentives for cooperation in investigation.)

This current situation leads to problems such as those listed below. As a result, it is conceivable that in Japan it is difficult to realize a situation in which enterprises voluntarily make efforts to discover, correct, and prevent infringements, and the JFTC can identify and eliminate infringements early.

(i) It is insufficiently beneficial for enterprises to implement the internal investigation and correct the Antimonopoly Act infringement of their own within the organizations voluntarily and proactively or to develop effective compliance systems for such purposes.

(ii) It also has been pointed out that the JFTC's investigations under the Antimonopoly Act investigations are carried out through an antagonistic relationship between the JFTC and enterprises, this undesirable relationship making it difficult for the JFTC to carry out the fact-finding of the infringements and handle the case efficiently and effectively. (Furthermore, it has been pointed out that there also are concerns that this circumstance could lead to reduction of the probability to detect and cease the infringement under the Antimonopoly Act and decrease the deterrent effect against violations.)

(iii) There are concerns that in cases of international cartels, enterprises prioritize cooperation with the foreign competition authorities in areas that include application for the leniency programs and give less attention to cooperation with the JFTC's investigations under the Antimonopoly Act.

For these reasons, it is conceivable that in order to resolve the above problems,

there is a need to introduce a system fully capable of strengthening incentives for enterprises to cooperate with the JFTC'S investigations under the Antimonopoly Act and disincentives for enterprises to prevent the refusal or obstruction of the JFTC investigations.

(3) Deviation from international standard systems

At a time when the international convergence of rules is important in order to contribute to the smooth business activities of enterprises to respond to progress in globalization of economic activities, Japan's surcharge system lacks consistency with types of surcharge systems adopted by other leading countries. (See First Study Meeting document 4:5-7 concerning sanction systems and other systems in leading countries.)

This circumstance may lead to problems such as those listed below.

(i) Unreasonable or unfair results, particularly among global firms

(ii) Increased costs of developing compliance programs that differ by country, particularly for global firms

(iii) Reduced enforcement of competition law in Japan compared to other countries, as a result, there is a risk that in particular lose confidence in the Japanese market from outside the country

For these reasons, it is conceivable that in order to resolve the above problems, there is a need to work toward consistency between Japan's surcharge system and standard systems of other countries.

2 Considerations and procedures for reviewing the surcharge system

(1) The standard sanctions and other systems adopted in other leading countries are summarized in the table below. In response to diverse economic circumstances, these systems (i) enable the competition Authorities to set and revise the calculation methods discretionally and flexibly through guidelines and other means , based on matters such as changing economic and social conditions and accumulation of cases of infringements; (ii) enable the scope of sales on which calculation is based to be set flexibly at the discretion of the authorities and make it possible to calculate amount of sales during periods of infringement through simplified methods; and (iii) involve decision on appropriate levels of amount corresponding to infringements through the judgment and discretion of the authorities, for example, by enabling the authorities to aggravate or mitigate sanctions on their own discretion in consideration of various matters such as enterprises' degrees of cooperation in investigation and abilities to pay. Under such systems, the problems described

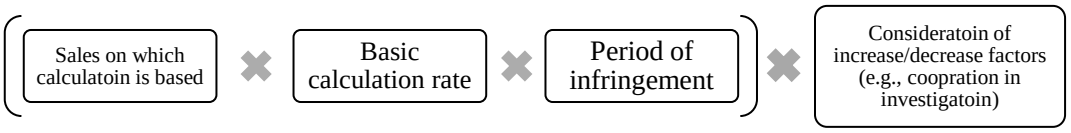
under 1 above basically do not arise.

Table: Summary of standard systems in other countries

○ Basic system framework

The law specifies only that sanctions may be imposed not to exceed the amount of gross sales multiplied by a certain percentage in the most recent fiscal year for intentional infringements and those due to negligence. (In some cases, general factors for consideration in deciding amount of sanctions etc., such as the severity of infringements, are specified by law.) The setting of specific calculation methods is left to the discretion of the authorities. While the authorities calculate sanctions in accordance with such calculation methods, the calculation methods themselves also leave room for discretion.

○ Specific calculation method



Additional reductions: ○ Reductions through leniency
○ Reductions through settlement procedures
○ Reductions due to inability to pay

Accordingly, in order to thoroughly and effectively resolve problems such as those described under 1 above, it is conceivable that Japan also needs to revise its existing surcharge system while referring to the standard systems of other countries.

(2) However, it is conceivable that in a consideration for the purpose of revising Japan's surcharge system, there is a need to take into account matters such as the following:

(i) It should be noted that there is the need for a system to secure appropriate operation by the JFTC (for example, there is a need to pay attention to securing limits on the scope of discretion, general administrative principles such as those of proportionality, principle of equality, foreseeability, and transparency, due process in accordance with the nature and content of disposition, elucidation of the facts in review procedures)

(ii) It should be noted that there is the need for a system based on the

constitutional requirements of Japan and on Japanese legal system and legal theory (for example, there is a need to pay attention to problems of cumulative penalties between surcharges and criminal penalties and to consistency with the nature and purport of the existing surcharge system and other legal and regulatory systems)

(iii) It should be noted that there is the need for a system to enable the JFTC to calculate amount of surcharge and impose it to the infringed enterprises, easily and promptly. (for example, there is a need to pay attention to avoiding excessive burdens on enterprises and the JFTC)

In such a case, one conceivable approach would be that it is also possible to introduce a wide range of discretion, such as the discretion of the calculation of the fines given to the European Commission On the other hand, it is also possible to adopt the system that the JFTC allow the room to determine on the basis of expertise in the range of laws and regulations in terms of the provisions in laws and regulations as much as possible the calculation method is defined in detail.

(3) For these reasons, it is thought that it would be appropriate to consider specific methods of calculation and imposition of surcharges which make it possible to thoroughly and effectively resolve problems such as those described under 1 above in reference to standard systems of other countries, while paying attention to considerations such as those identified under (2)(i)-(iii) above. In doing so, it is conceivable that there is a need for study with attention to the possible options e.g. making an addition, removal, and revise of terms of statutory calculation and imposition methods, delegating specific details to cabinet orders, regulations, etc. for responding easily and promptly to unceasing changes in economic and social conditions or relying on the specialized judgment of the JFTC, the commission responsible for the Antimonopoly Act, which requires enforcement and judgment based on a high degree of specialization.

(4) In addition, in standard systems of other countries provisions on calculation and imposition are not separated by type of infringement as in the Japanese Antimonopoly Act. Instead, under such a system sanctions for all types of infringements are calculated and imposed in accordance with a single set of calculations and imposition rules. For this reason, it is conceivable that calculation and imposition rules could be unified in Japan as well. However, in consideration of the fact that the existing system stipulates methods for each type of infringement and there are some problems specific to individual types of

infringements, study by individual types of infringements may also be considered essential.

Accordingly, for these reasons and for purposes of efficient study, methods of calculation and imposition of surcharges for unreasonable restraint of trade, which are applied often and for which numerous examples of problems have been identified, will be studied first. Other types of infringements should be discussed separately and issues specific to the types which are not involved in cartel matters will be picked up.

Part 3. Issues

1 Methods of calculation and imposition of surcharges for unreasonable restraint of trade

(1) Basis of calculation of surcharges

A. Scope of amount of sales serving as basis for calculation of surcharges

Reference: Basis for calculation of standard sanctions in other countries
○ Amount of sales serving as bases for calculation of sanctions may be identified with flexibility through the discretion of the competition authorities, for example, as sales amount related to infringements.
○ Under the discretion of the competition authorities, other figures may be used instead in cases such as when no domestic sales are arose.

Main related problems:

Part 2-1(1)(i), (v) and (3), above

First Study Meeting document 4-3 (i)-(v)

- ○ Under the existing system, only amount of sales of goods and services subject to mutual restraint through infringements (i.e., goods and services for which specific results restraining competition have occurred) serve as the basis for calculation of surcharges (there is a need to identify the restraining effects and specific results restraining competition for each goods or service). Is it necessary to change this current method?
- ○ If adopting a system of flexible identification of amount of sales serving as bases for calculation of surcharges, as in other countries, what scope of sales should be used as the basis for calculation of amount of surcharge?
- ○ What sales figures or other economic gains in place of sales should be used as the basis for calculation in cases such as then there are no sales figures in a particular field of trades or no sales arose during the period of

infringements?

○ In order to calculate and impose more appropriate surcharges, is it necessary and acceptable to introduce a method of individual determination of the scope of sales and the calculation rate of surcharges on a case-by-case basis from the perspective of the specialized knowledge of the JFTC? What points would require attention if such a method were to be adopted?

B. Period of calculation of sales as a basis for calculation of surcharges

Reference: Standard period of calculation of sales in other countries

- There is no upper limit to the infringement period (calculation period) subject to sanctions etc.
- In the EU, a simplified calculation method is adopted, for example multiplying the amount of sales for the final fiscal year of the infringement period by the length of the infringement period. (However, if it would not be appropriate to use the figure from the final fiscal year of the infringement period, at the discretion of authorities the figure from another fiscal year may be used, as the most appropriate standard figure.)

Main related problems:

Part 2-1(1) (i) and (3), above

First Study Meeting document 4-3 (vi), (vii)

○ Is it necessary, legitimate, and otherwise appropriate to limit the calculation period to three years?

○ If revising the three-year limit, what kind of period should be used? Is it necessary to identify amount of sales over the entire period? (In such a case, since the retention period for account documents is specified by law as seven years in general, would this not bring about the obstacle that even the enterprises themselves are unable to ascertain accurately amount of sales prior to that?)

○ If revising the three-year limit, would it be necessary to use a method like that of the EU of multiplying sales for the final fiscal year of the infringement period by the infringement period (number of years etc.) itself. Also, if the figures for final fiscal year cannot be described as being standard, would it be necessary and acceptable for purposes of calculation and imposition of more appropriate surcharges to adopt a method of use of figures for other fiscal years or periods on a case-by-case basis based on

the specialized knowledge of the JFTC? What points would require attention if such a method were to be introduced?

(2) Basic surcharge calculation rate

Reference: Standard basic calculation rate in other countries

- ○ The authorities may, at their discretion, determine the basic calculation rate on a case-by-case basis (e.g. taking into consideration the severity of infringements by type of act or other factors) within a certain scope.
- ○ An enterprise's type of business and whether it is a small or medium-sized enterprise are not among the factors taken into consideration in calculation of sanctions.

Main related problems:

Part 2-1(1), (ii) and (3), above

First Study Meeting document 4-3 (viii) and (ix)

A. Determining on the basic calculation rate

- ○ From what perspectives are the basic calculation rate derived? In particular, specifically on what kinds of factors are levels of calculation rates based in consideration of the principle of proportionality and other considerations?
- ○ Under the existing system, out of consideration for matters such as approximating the amount corresponding to unjust gain differing calculation rates are applied mechanically by (i) type of business, (ii) whether the enterprise is a small or medium-sized enterprise, (iii) early termination, (iv) whether infringements were repeated, and (v) whether the enterprise played a leading role in the infringement. However, is there a need to apply different basic calculation rates in accordance with such circumstances when stipulating a new basic calculation rate? If so, then what reasons should be taken into consideration and how should each of them be reflected in the calculation rate?
- ○ Would it be necessary and acceptable for purposes of calculation and imposition of more appropriate surcharges to adopt a method of individual decisions on the basic calculation rate based on the specialized knowledge of the JFTC, on a case-by-case basis? What points would require attention if such a method were to be introduced?

B. Calculation rates by type of business

○ Would it be necessary and legitimate to retain the existing calculation rates by type of business? What conceivable harmful effects could result from abolishment of calculation rates by type of business?

○ If retaining the calculation rates by type of business, how would types of business, conditions for qualification as such types, and calculation rates be set? In addition, from the point of view to calculate and impose more appropriate surcharge, would it be necessary and acceptable to adopt a method that the JFTC decides types of business, and calculation rates, etc., based on its specialized knowledge on a case-by-case basis? What points would require attention if such a method were to be introduced?

C. Calculation rates for small and medium-sized enterprises

○ Would it be necessary and legitimate to retain the existing calculation rates for small and medium-sized enterprises? What conceivable harmful effects could result from abolishment of calculation rates for small and medium-sized enterprises?

○ If retaining the calculation rates for small and medium-sized enterprises, how would conditions for qualification as small and medium-sized enterprises and calculation rates be set? In addition, from the point of view to calculate and impose more appropriate surcharge, would it be necessary and acceptable to adopt a method that the JFTC decides whether conditions for qualification as small and medium-sized ones and calculation rates based on its specialized knowledge on a case-by-case basis? What points would require attention if such a method were to be introduced?

(3) Aggravating/mitigating surcharges

Reference: Standard aggravation/mitigation in other countries

○ Amount of sanctions may be aggravated or mitigated at the discretion of the competition authorities in consideration of various circumstances such as the enterprise's degree of cooperation in the investigation, its degree of involvement in the infringements, and its ability to pay.

○ The extent of such aggravation and mitigation may be determined at the discretion of the competition authorities on a case-by-case basis. (Although in most cases a maximum limit is specified, there also are cases in which no explicit scope or limit is specified, such as in the case of the extent of

aggravation or mitigation according to degree of cooperation in investigation in the EU.)

Main related problems:

Part 2-1 (1) (iii), (iv), (vi), and (3), above

First Study Meeting document 4-3 (x), (xi)

○ Is it necessary and acceptable to aggravate or mitigate, in consideration of individual reasons, the amount calculated by multiplying the amount of sales serving as the basis for calculation ([1] above) by the basic calculation rate ([2] above)? What should be considered the nature of such aggravation/mitigation in the amount of surcharges in the basic nature of the surcharge system?

○ What kinds of reasons (for example, early withdrawal, recidivism, leadership roles, status of compliance system, inability to pay) should be taken into consideration when aggravating or mitigating surcharges? In addition, would it be necessary and acceptable to introduce a method of establishing such reasons to be taken into consideration flexibly through cabinet orders, regulations, etc.? What points would require attention if such a method were to be introduced?

○ When aggravating or mitigating surcharges, would it be necessary and acceptable for purposes of calculation and imposition of more appropriate surcharges to adopt a method of individual decisions on what reasons qualify for aggravation or mitigation and rates of aggravation or mitigation based on the specialized knowledge of the JFTC on a case-by-case basis? What points would require attention if such a method were to be adopted?

(4) Systems for increasing incentives to cooperate in investigations

Reference 1: Standard method of aggravating/mitigating surcharges in other countries

○ Amount of sanctions may be aggravated or mitigated at the discretion of the authorities in consideration of the enterprises' degree of cooperation in the investigation.

Reference 2: Standard leniency programs in other countries

○ Within a certain scope, rates of mitigation may be determined at the discretion of the competition authorities, in accordance with matters such as the value of evidence submitted by enterprises and the timing of its

submission.

○ Enterprises applying the leniency program are obligated to cooperate fully and continuously in investigations by the competition authorities.

Main related problems:

Part 2-1(2) and (3), above

A. Necessity of aggravation/mitigation in accordance with degree of the enterprise's cooperation in the JFTC investigations under the Antimonopoly Act

○ Is it necessary and acceptable to aggravate or mitigate the amount of surcharges in accordance with the degree of cooperation in investigations? What should be considered the nature of such aggravation/mitigation in surcharges?

○ When aggravating or mitigating surcharges in accordance with the degree of cooperation in investigations, what criteria should be used to measure the degree of cooperation in investigations? (How should the scopes of cooperation in investigation eligible for mitigation and lack of cooperation in investigation causing aggravation be defined? For example, should admission that enterprises have engaged in the infringements themselves be considered to constitute cooperation in an investigation eligible for mitigation?)

○ When aggravating or mitigating surcharges in accordance with the degree of the enterprise's cooperation in the JFTC investigations under the Antimonopoly Act, would it be necessary and acceptable for more appropriate calculation and imposition of surcharges to adopt a method of individual decisions on whether an enterprise is qualified as having cooperated in investigations or not and the applied rates of aggravation or mitigation based on the specialized knowledge of the JFTC, on a case-by-case basis? (For example, would such an approach lead to legal problems as a system similar to plea bargaining?) What points would require attention if such a method were to be introduced?

○ The problems listed below have been pointed out with regard to aggravating and mitigating surcharges in accordance with the degree of cooperation in investigations. Is there also a need to set up provisions to resolve such problems? If so, what kind of measures should be established?

- Conceivable harmful effects include (i) being forced to accommodate

the picture of a case that policies of the JFTC or investigators have, or (ii) drawing into JFTC`s investigations to enterprises that ultimately would be determined not to be violators as a result of enterprises submitting a wide range of information to the JFTC as part a of their cooperation in its investigations and the JFTC expanding the scope of its investigations based on such information.

- Would a conflict of interest arise between enterprises receiving surcharge payment orders and their staff actually involved in the infringements?
- Would any problems arise in connection with criminal penalty of obstructing an investigation (Article 94 of the Antimonopoly Act)?

B. The relationship between the leniency program and mitigation of surcharges in accordance with the degree of the enterprise's cooperation in the JFTC investigations under the Antimonopoly Act

○ If adopting mitigation in the amount of surcharges in accordance with the degree of the enterprise's cooperation in the JFTC investigations under the Antimonopoly Act, how would they relate in application to the leniency programs?

the following methods are conceivable.

- Abolishing reductions of the amount of surcharges by enterprise's applications after the start of the JFTC investigation under the leniency program, and instead applying the rule of mitigation in accordance with the degree of cooperation in investigations
- Restricting application of mitigation in accordance with the degree of cooperation in the JFTC investigations to enterprises to which reduction of surcharges is not applied
- Handling all mitigation in accordance with the degree of cooperation in the JFTC investigations within the framework of the leniency program (e.g., placing no limits on the framework for application of the leniency program).

○ Are there any matters that should be considered when using both mitigation of surcharges in accordance with the degree of cooperation in investigations and the leniency program?

For example, the following matters need to be studied.

- Whether to ensure the level of mitigation in accordance with the degree of cooperation in investigations outside the framework of the

leniency program lower than the level under that program in order to keep the efficiency of the program

- Whether to make enterprises that have cooperated separately in investigations in meaningful ways eligible for mitigation in accordance with the degree of their cooperation in investigations even if there are grounds for disqualifying them from the leniency program.

C. The leniency program

(A) Nature of the leniency program

○ What should be considered the nature of the leniency program if they will coexist with mitigation of surcharges in accordance with the degree of cooperation in investigations?

(B) Requirements for immunity or reduction of surcharges

○ To encourage more beneficial submittal of evidence and cooperation in investigation on the part of enterprises, would it be necessary and acceptable to adopt a method of individually awarding eligibility for immunity or reduction of surcharges in accordance with the added value of the evidence submitted, such as its content and the timing of its submittal, based on the specialized knowledge of the JFTC? What points would require attention if such a method were to be introduced?

○ Is there a need to review requirements for loss of eligibility for immunity or reduction of surcharges?

(C) Rates of reduction

○ To encourage more beneficial submittal of evidence and cooperation in investigation of enterprises, would it be necessary and acceptable to adopt a method of individually determining rates of reduction in accordance with the added value of the evidence submitted, such as its content and the timing of its submittal, based on the specialized knowledge of the JFTC? What points would require attention if such a method were to be introduced?

(D) Duty of cooperation

○ Is there a need for a system to require applicants for the leniency program to cooperate in the investigation to a certain extent throughout the investigation and to deprive those who have failed to perform this

duty of eligibility for the leniency program?

○ If imposing a duty of cooperation in the investigation, what kind of duty should be imposed and when?

(5) Settlement procedure

Reference: Settlement and other systems in other countries

○ In the EU, discussions begin after the authorities have determined that a case is suitable for settlement, and when the enterprise has applied that it would not dispute the authorities` finding of facts regarding the infringement and the content of disposition ,then the authorities have approved the settlement, procedures related to administrative disposition are simplified, and the amount of fine is reduced.

○ In the United States, through means such as admitting fault, a party that has concluded a plea bargain with the Department of Justice may receive preferential treatment in imposition of culpability (e.g. lesser penalties) through a summary indictment without a trial by jury on the facts of the case, although it does receive a guilty judgment (plea bargaining).

Main related problems:

Part 2-1(2) and (3), above

○ Would it be necessary and acceptable to adopt a system of simplification of procedures related to administrative disposition and reduction of the amount of surcharges (i.e., a settlement system) through agreement with an enterprise that has admitted an infringement as in the EU, under the Japanese legal system? If such a system is introduced, what is the nature of the agreement and the reduction in the amount of surcharge?

○ If a settlement system were introduced, how would matters such as the infringements subject to the settlement system, timing of starting discussions and agreements, requirements for application of the system, procedures, and effects be arranged?

(6) Method of imposing surcharges

Reference: Basic legal frameworks for standard sanctions etc. in other countries

The law specifies only that sanctions may be imposed not to exceed the amount of gross sales in the most recent fiscal year multiplied by a certain percentage for intentional infringements and those due to negligence. (In some cases, general

factors for consideration in deciding amount of sanctions, such as the severity of infringements, are specified by law.) The setting of specific calculation methods is left to the discretion of the competition authorities.

Main related problems:

Part 2-1(1) (vi) and (3), above

A. Basic calculation method of surcharges

○ To what degree do the calculation methods of new surcharges system to resolve the problems described under 1 above, need to be stipulated by law?

○ Would it be necessary and acceptable to establish a system under which the basic framework of calculation methods is stipulated by law and the details of specific calculation methods can be set more flexibly through means such as cabinet orders and regulations, in order to ensure more appropriate calculations and imposition of surcharges in response to unceasing changes in economic and social conditions? What points would require attention if such a system were to be introduced?

B. Surcharge imposition requirements

○ Is there a need to impose surcharges compulsorily? In order to calculate and impose more appropriate surcharges, would it be necessary and appropriate to adopt a method in which surcharges are not imposed in certain cases determined on a case-by-case basis based on the specialized knowledge of the JFTC? What points would require attention if such a method were to be adopted?

○ Should subjective requirements be made surcharge imposition requirements? Are there any other items (such as exemption due to small scale) that should be made imposition requirements?

2 Differences by type of infringement

○ Is it necessary and legitimate to stipulate detailed requirements for imposition of surcharge and setting methods of surcharges respectively by type of infringement?

○ Is it necessary and legitimate to retain price-affecting requirements stipulated solely for unreasonable restraint of trade and control-type private monopolization?

○ Is there a need to revise the types of infringements subject to surcharges?

○ Are there any points on which there is a need for a different system than the methods of calculation and imposition of surcharge studied under 1 above, such as the following points, with regard to types of infringement affecting considerations other than those of unreasonable restraint of trade?

- How should the basis for calculation of surcharges for cases of abuse of superior bargaining position be established? (Is there a need to change the existing calculation system?)
- Is there a need for a system of reduction of surcharges through self-reporting, like that established under the Act Against Unjustifiable Premiums and Misleading Representation, and Financial Instruments and Exchange Act for other types of infringements as a system corresponding to the leniency program for unreasonable restraint of trade?
- Is it acceptable to maintain the existing objectives and framework of surcharges on enterprises that are members of trade associations, when a trade association engages in infringement, under new surcharge system? If not, then how should they be changed?

3 Legal status of the surcharge system

(1) Basic nature of the surcharge system (legal nature, purport of system)

○ What kinds of legal nature and purport does the existing surcharge system have based on matters such as past parliamentary statements, judicial precedent, and consistency with other domestic laws and regulations? (See First Study Meeting document 4: 8-11 for past parliamentary statements etc.) In addition, why has discretion been excluded from the surcharge system heretofore?

○ Under the nature and purport of the existing surcharge system, would it be acceptable to adopt new methods of calculation and imposition as studied under 1 and 2 above ("new system" hereinafter)? Is there a need to change the nature and purport of the surcharge system in order to adopt the new system?

○ What about the nature and purport of the leniency program?

(2) Relationship between the new system and criminal penalties

○ Is there a need for corporations to be imposed both surcharges under the new system and criminal penalties (fines) for the same infringement?

○ Would any constitutional problems such as cumulative penalties arise to impose both surcharges under the new system and criminal penalties (fines)

on a corporation for the same infringement?

○ Even if no constitutional problems arise, are there any other matters that should be considered if imposing both surcharges under the new system and criminal penalties (fines) on a corporation? If so, what kinds of measures should be taken?

○ Is there a need for criminal penalties against natural persons such as enterprises' employees?

(3) Relationship between the new system and civil damages

○ Is there a need to impose surcharges under the new system when the violator pays civil damages resulting from its infringements under the same infringement?

○ Would any constitutional problems arise as a result of a system of imposing surcharges under the new system without any consideration for payment of civil damages by the violator?

○ Even if no constitutional problems would arise, would it be necessary and legitimate to consider payment of civil damages by the violator when designing a new surcharge system? If so, what kinds of measures should be taken?

4 Penalties for obstructing investigations

○ Is there a need to secure effective penalties for obstructing investigations itself?

○ In such a case, what kinds of systems are conceivable? For example, are measures such as the following needed?

- Adoption of a surcharge system for obstructing investigations itself.
- Adding acts such as concealing evidence to crimes of obstructing an investigation stipulated in the article 94 of the Antimonopoly Act.
- Formulating and publishing policies and guidelines on proactive lodging of charges for crimes of obstructing an investigation stipulated in the article 94 of the Antimonopoly Act.

5 Due process in proportion of the new system

(1) Preliminary procedures

○ What kinds of preliminary procedures is required for the new system? Is there any need to change existing procedures for a hearing of opinions stipulated in the article 49 of the Antimonopoly Act?

○ Should attention be paid to consistency with the systems of other foreign

countries as well as consistency with domestic systems with regard to preliminary procedures (for example, the necessity of full access to evidence)?

(2) Rights of defense

- ○ What kind of rights of defense is necessary if the new system is introduced?
- ○ In studying expansion of rights of defense, is there a need for consideration of balance with the fact-finding ability under the new system? If so, what points would require attention?
- ○ Should attention be paid to consistency with the systems of other foreign countries as well as consistency with domestic systems with regard to rights of defense (for example, attorney-client privilege, the right to have a lawyer present during deposition, formats of records of depositions, the need for audio and video recordings during depositions)?

6 Verification of the new system as a whole

(1) Levels of amount of surcharges

- ○ Is the level of the amount of final surcharge amount calculated under the new system excessive or not? Is there a need to establish some kind of upper limit of the amount of surcharge? If some kind of maximum limit were to be established, what kind of legal nature would it be considered to have?

(2) Transparency and prompt implementation of surcharges

- ○ Are the transparency and foreseeability of calculation and imposition of surcharges ensured under the new system? Are any provisions needed to ensure transparency and foreseeability? What kinds of matters should be covered in guidelines etc.?
- ○ Is the prompt implementation of surcharges ensured under the new system? Will the system enforce an excessive burden on enterprises or the JFTC?

(3) Overall verification

- ○ Are there any problems with regard to the new system as a whole in light of domestic constitutional requirements, legal system, or legal logic?
- ○ Is consistency or compatibility lacking between the surcharge system as a whole and the Antimonopoly Act system as a whole, including those in relation to the legal nature of surcharges, calculation methods, the leniency program, or the settlement system?