

## Antimonopoly Act Study Group Report (Summary)

April 25, 2017

### 1. Revision of the Surcharge System (Overview)

#### (1) The need for revision of the surcharge system (problems with the current surcharge system)

Since there are the following problems with the current surcharge system, it should be revised in order to solve these problems.

- Under the current surcharge system the Japan Fair Trade Commission (hereinafter the “JFTC”) compulsorily imposes surcharges that are calculated uniformly and impartially using an impartial calculation method which multiplies the amount of sales of goods or services subject to cartels by a predetermined rate, pursuant to objective calculation requirements and methods stipulated by law. Thus, there are some faults with the current system that the JFTC cannot calculate or impose an appropriate amount of surcharges on a case-by-case basis, in light of the objective of deterring infringements, being unable to handle flexibly some infringements brought by diverse forms and conditions in all kinds of industries and regions, or handle swiftly unpredictable matters, which are not stipulated by law, brought by the progress of business activities and corporate structures that are more globalized, diversified and complicated.
- Although there is a leniency program in the Japanese Antimonopoly Act, the current program is not sufficient enough to secure incentives for enterprises to cooperate in investigations of the authority, or disincentives to obstruct such investigations, compared with the programs in other jurisdictions. For example, an enterprise that has applied for the leniency program (hereinafter, the “leniency applicant”) does not have more than a certain incentive to cooperate with investigations of the JFTC, because it can acquire a uniform rate if it meets some predetermined requirements, regardless of the degree of cooperation. In addition, an enterprise that does not apply for the leniency program cannot be awarded any surcharge mitigation even if it cooperates in investigation of the JFTC. On the other hand, even if an enterprise refuses to cooperate or obstructs investigation of the JFTC, it will not receive any additional surcharge and other sanctions for such act.

**(2) The direction and policy of revision of the surcharge system (Improvement measures and policies on the premise of the problems)**

- Taking the problems described in (1) above into consideration, it is appropriate to revise the current rigid surcharge system in which surcharges are calculated and imposed uniformly and impartially pursuant to the stipulated and objective methods for calculation/imposition, and make the surcharge system flexible to some degrees, in order to handle the growing globalized, diversified and complicated business activities and corporate structures of enterprises, and the constant change of economic and social environments, and to give incentives for enterprises to cooperate in investigation. To make the system flexible, the following system may be adopted with regard to matters required to make a flexible operation with the diversified and complicated economic circumstances and an effective deterrence of infringements: (a) a system where certain requirements are delegated to Cabinet Order etc. or (b) although the requirements are to be stipulated by law, a system where the JFTC can make a decision on a case-by-case basis by its specialized knowledge with regard to whether a certain conduct or circumstance falls under the requirements or their individual calculation rates etc. for cases that meet such requirements.
- Such systems as mentioned above would allow the JFTC to use its discretion within a certain scope of deciding the content of individual surcharge calculation and imposition by its specialized knowledge on a case-by-case basis. However, constitutional problems such as Article 39 of the Constitution (prohibition of cumulative punishment) never arise by introduction of such systems, so long as it meets with the following principles: (i) the surcharge system is not a moral-based liability or accusation for past infringements, but a rational method to achieve a prospective administrative objective of deterring future infringements, and (ii) the amount of surcharges in addition to criminal penalties would not be so excessive to cause severe unbalance and result in lack of principle of proportionality, and (iii) the administrative arbitrariness is excluded through legal substantial requirements and procedures.
- Based on (i) through (iii) above, there would not be any problem regarding the constitution, at least, as long as the following method is adopted; that individual provisions should be stipulated as far as possible to solve problems and the discretion of making an individual decision of the content of calculation and imposition by specialized knowledge of the JFTC on a case-by-case basis should be confined to the extent that such problems could not be solved otherwise, not that

the authority is entrusted in a wide range of discretion to solve the problems like in other jurisdictions.

- Upon planning a specific system design, by taking into account of the matters in (i) through (iii) above, efforts should be made to solve the problems of the current surcharge system. Also, more efforts should be made to expand the area in which enterprises and the JFTC can cooperate to solve and handle cases efficiently and effectively from the perspective of reducing the burdens of employees' response to deposition of suspected enterprises. Such efforts shall include revisions of excessive requirements and severe burdens of proof, as well as arrangements of due process.

## **2. Individual plans for the system design**

### **(1) Legal nature of the current surcharge system**

- The surcharge system is "a system for the administrative agency to impose monetary disadvantage more than the amount corresponding to unjust gains on violators for the objective of deterring infringements"
- In order to achieve such objective, if a circumstance is found not to be sufficient enough to deter infringements, necessary measures should be taken, including redesign of the system.

### **(2) Scope of amount of sales for the basis for calculation of surcharges**

- Basically, the basis for calculation of surcharges shall be stipulated by law, so that its scope should be revealed in advance.
- Concerning the amount of sales serving as the basis for calculation of surcharges, based on the nature of the surcharge system that is required to operate swiftly and efficiently, the revisions of the current "relevant goods or services" provision that requires verification of identifying whether any mutual restraint or specific result restraining competition for each sale have actually occurred shall be made, so that the whole amount of sales of products subject to infringements (hereinafter, "basic amount of sales") shall be established as a new basis for calculation of surcharges.
- In cases such as when the basic amount of sales never arises, concerning some types of infringements on which actual economic gain or expected one from them can be generally and abstractly assumed, the provisions of sales serving as the basis for calculation of surcharges (hereinafter, "basic amount of gains") on each type of infringement shall be stipulated by law. In addition, in order to deal with unpredictable types of infringements in advance, concerning infringements that do not correspond to types of infringements stipulated by law, the provisions shall be

stipulated by law that some equivalent types of infringements to stipulated ones and their basic amounts of gains should be defined on a comprehensive basis or these types and amounts can be additionally stipulated by means such as Cabinet Order and etc.

- Provisions shall be stipulated by law to allow the JFTC to deduct a certain amount of sales within the scope on which it approves of necessary deduction, if the basic amount of sales is found to exceed the required amount, in light of the purport and the nature of the system.
- To clarify the scope of amount of sales serving as the basis for calculation of surcharges as far as possible, necessary guidelines shall be formulated and published for cases such as when the basic amount of sales never arises or a certain basic amount of sales can be deducted.

**(3) Calculation period of amount of sales serving as basis for calculation of surcharges**

- The current “three year” upper limit of the calculation period of surcharge shall be abolished; a new provision shall be stipulated by law to establish the calculation period as "backdating ten years from the date on which the JFTC started to investigate".
- Provisions on the definition of act in violation in business activities related to the calculation period shall be abolished; the calculation period shall be from the date on which the enterprise began to engage in infringement to the date on which it stopped engaging in it.

**(4) Basic calculation rate of surcharges**

- The current level of amount of surcharges is not sufficient enough to deter infringements for the following reasons: not even average amount of unjust gains has been collected under the current basic calculation rate and the current `three years` upper limit of the calculation period; there have been repeated infringements even after the current basic calculation rate, which was raised from 6% to 10% in 2005, has been applied; the authorities in other countries tend to promote more strict enforcement of the competition law such as imposition of higher surcharges on violators.
- The level of amount of surcharges shall be raised as a whole, for example, extending or abolishing the upper limit of calculation period of amount of sales serving as basis for calculation of surcharges. The basic calculation rate shall be revised, if necessary, considering such revisions.

**(5) Calculation rates by type of business**

- Calculation rates by type of business shall be abolished for lack of necessity, taking into account the past applied cases or recent economic circumstances.
- If calculation rate by type of business is to be maintained, then it is necessary to make a deliberate and radical revision of each calculation rate of each type of business, application of requirements and so on, so as not to cause similar problems to those under the current system and others, because it would be difficult to design a system that makes it possible to apply such calculation rates both under uniform requirements, and in accordance with the purport of the system, which are required to operate swiftly and efficiently.

**(6) Small and medium-sized enterprise calculation rate**

- Although small and medium-sized enterprise calculation rate may not be deemed necessary, based on the past applied cases or recent economic circumstances, concerning the ratio of amounts of surcharges to gross sales of enterprises subject to surcharges, the surcharge payment rates of small and medium-sized enterprises are higher than those of large-sized corporations. It follows that even the amount of surcharges reduced by small and medium-sized enterprise rate are sufficient enough to function relatively well in deterring infringements for small and medium-sized enterprises. Also, there are some opinions that severe environments surrounding small and medium-sized enterprises should be taken into consideration. Based on these facts, small and medium-sized enterprise calculation rate shall be maintained.
- On the other hand, provisions shall be established to confine application of small and medium-sized enterprise calculation rate to the scope of fulfilling the purport and the objective of the surcharge system, because the present situation hinders such purport and objective, in which small and medium-sized enterprise calculation rate can be applied to enterprises that cannot be deemed substantially as small and medium-sized enterprises, such as subsidiaries of large-sized corporations.

**(7) Aggravation/mitigation of surcharge**

- Most of the cases where reduced calculation rates for early withdrawal from the relevant infringement were applied are actually contrary to the purport of the system. Some enterprises were applied to 60 % of surcharge mitigation using both the reduced calculation rates for early withdrawal and the leniency program.

Based on these situations, the reduced calculation rate for early withdrawal shall be abolished and introduced to the new leniency program.

- From the perspective of more effective deterrence of infringements, higher calculation rate for repeated infringements and leading roles in infringements shall be maintained: a uniform rate of 1.5 multiplied by the basic calculation rate, based on the fact that unjust gains of violators on these cases are about 50 % larger than on other general cases.
- Introduction of provisions to apply, for specific cases, higher calculation rate for repeated infringements on a corporate group basis shall be examined.
- Other factors for aggravation or mitigation such as compliance system arrangement or lack of ability to pay are not necessary to consider in this amendment, because there seems no urgent need for introducing such factors.

**(8) System to increase incentives to cooperate in investigation**

- In order to increase incentives to cooperate in investigation, a system shall be established under which the JFTC can reduce the amount of surcharges according to the value of proof which suspected violators have voluntarily submitted.
- For specific methods, the system shall be amended so that the current limit on applicable enterprises in the leniency program shall be abolished (currently, up to five enterprises); and the application term shall be extended (currently, twenty business days starting from the date on which the JFTC started to investigate). Reduction rate shall be flexible within a certain scope, and individual mitigation rate shall be determined by the JFTC according to the value of proof which applicants have voluntarily submitted.
- To secure incentives to continuous cooperate in investigation, the obligations of applicants shall be stipulated by law to cooperate continuously with investigations, from the date of the applicant's submission to the date of the end of administrative investigation (hereinafter, "continuous cooperation obligation"). Qualification for mitigation shall be cancelled upon breach of such obligation.
- A predetermined rate shall be added to the amount of surcharges pertaining to the infringements of substantive provisions by the violator, for cases of any obstruction equivalent to one under Article 94 of the AMA, or any other obstruction of investigations (hereinafter, "obstruction of investigations") by enterprises, directors, employees, or representatives. Obstruction of investigations subject to surcharge aggravation shall be stipulated by laws as far as possible, and the provisions shall be stipulated by law that some types of infringements equivalent

to stipulated ones can be delegated to means such as Cabinet Order and etc. in order to deal with unpredictable cases in advance.

- To clarify the methods of the scope of cooperation in investigations and obstruction of investigations, and the range of mitigation rates, necessary guidelines shall be formulated and published.

**(9) Direct settlement system**

- Introduction of similar systems to direct settlement, which European Commission adopted in 2008, (notes below) shall be shelved in this amendment, and left as issues to be examined in the future accordingly, after looking at the operational status of the new system.

(Note) a system that simplifies administrative disposition procedures and the amount of fine is reduced by agreements between the authorities and the enterprises who have admitted the violation of concern.

**(10) Imposition methods**

- The basic framework and factors taken into consideration pertaining to the surcharge calculation and the imposition methods shall be basically stipulated by law. The matters required to effectively deter infringements in correspondence with the diverse and complicated economic circumstances shall be ① delegated to Cabinet Order, or ② delegated to the specialized knowledge of the JFTC.
- Compulsory surcharge imposition methods shall be maintained. Provisions for not imposing surcharges in certain predetermined cases with regard to private monopolization shall be examined accordingly, after looking at the operational status of commitment system (notes below).
- Exemption due to small scale (under one million yen) in the current system shall be maintained.

(note) a system described in the TPP Agreement Arrangement Act, enacted in December 9, 2016. With regard to the AMA infringement suspected cases, it is a system to resolve alleged violations against the AMA voluntarily by consent of the JTFC and enterprises.

**(11) Different provisions for different types of infringements**

- Types of infringements which are not subject to the current surcharge system (such as unreasonable restraint of trade that has no price-affecting requirement, and part of unfair trade practices) shall still not be subject to the new system, for

lack of legislative facts to place.

- The current system shall be maintained, apart from some necessary amendments in correspondence with the revision of unreasonable restraint of trade, on the grounds that there are many cases on abuse of superior bargaining position under trial and no recorded cases on other unfair trade practices (four types) and private monopolizations subject to the surcharge payment orders.
- However, with regard to the surcharge system for abuse of superior bargaining position, the costs of investigation/lawsuit are so immense that the arrangement of a variety of methods are necessary in order to promptly exclude infringements because of legal dispute over that practice and interpretation of the provisions. Therefore, the need to revise the surcharge system for abuse of superior bargaining position may be examined after looking at the decisions, the judgements of courts and the operational status of the commitment.
- The need to revise surcharge mitigation according to the degree of cooperation in investigation for the infringements by type of act not subject to the leniency program under the current system shall be examined after looking at the operational status of the commitment.

#### **(12) Relationship between surcharges, criminal penalty and civil damages**

- Since the new revised system mentioned in this report shall be designed within the scope of the purport and the objective of the current surcharge system, systems on current criminal penalties, such as dual liability provisions and criminal penalties for individuals, shall not be amended.
- Provisions for adjusting surcharges and civil damages shall not be established.

#### **(13) Penalties for obstruction of investigations**

- Considering that the current level of criminal penalties to a juridical person pursuant to Article 94 of the AMA remains significantly low in comparison with other economic laws and is not sufficient enough to ensure the effectiveness of the JFTC's investigation, the level of criminal penalties to a juridical person shall be raised up to the same level in other economic laws.
- The JFTC should make an active application of Article 94 of the AMA, which stipulates `penalties for obstruction of investigations`.
- While obstruction of investigations is an act of impeding the fact-finding ability of the JFTC, if an infringement is not acknowledged, no penalty would be imposed even with the introduction of surcharge aggravation for obstruction of



investigations unless penalties for obstruction of investigations are applied. Therefore, introduction of administrative monetary disadvantage measures against obstruction of investigations shall continuously be examined, looking at the operational status of the new system.

#### **(14) Due process under the new revised system mentioned in this report**

##### **( i ) Overview**

- Needless to say, in investigation procedures for suspected AMA infringement cases in Japan, ensuring due process and protecting rights/interests of the other party of the investigation/measure is important. At the same time, however, ensuring the strict enforcement of the AMA is also important. Should the effectiveness of law enforcement be hindered by protecting due process beyond the required extent, it would eventually cause damage to the benefits of general consumers. Therefore, the mutual balance between ① the investigation authority granted to the JFTC for finding facts and the content of measures against infringement, and ② the protection of due process of enterprises subject to investigation/measure, should be required.
- It is appropriate to revise the due process under the new system to the extent necessary on the premise of establishing measures to prevent abuse of each right of defense, taking into account the need for various rights of defense, in comparison with the entire systems in other countries, impacts on the fact finding ability of the JFTC, and procedures of other laws and regulations in Japan.

##### **( ii ) Preliminary-procedures**

- Because the existing procedures for a hearing of opinions under Article 49 of the AMA are basically sufficient enough to protect the rights of the parties concerned even if a system to increase incentives to cooperate in investigation is introduced, a revision is not deemed necessary. Therefore, the existing procedures for a hearing of opinions need not to be revised.

##### **( iii ) Attorney-client privilege**

- Concrete facts were not found that enterprises have actually suffered from disadvantages for lack of so-called attorney-client privilege (hereinafter referred to as the “privilege”), which allows enterprises to refuse to disclose certain communications between an attorney and his/her client, etc.
- If the leniency program is expanded by this revision mentioned in this report, on

the other hand, the need to consult with attorneys is expected to grow in order to apply for the program. Therefore, from the perspective of enabling the new leniency program to function better, it is appropriate for the JFTC to take care of the only communications between attorneys and their clients (enterprises) related to the use of the new leniency program to the extent that the fact-finding ability of the JFTC should not be impeded, on the premise of establishing measures to prevent adverse effects such as concealing evidence, etc.

- Even though the JFTC takes care of specific communications, the fact that the privilege is not acknowledged under the current Japanese legal system and legal theory should be taken into consideration.

**(iv) Rights of defense in deposition procedures**

- In order to address the concerns of catering to the JFTC's investigation policy and the resulting false accusations caused by the introduction of the surcharge aggravation/mitigation according to the degree of cooperation, deposition records of employees, etc. shall not be subject to evaluation upon deciding the mitigation rate in the leniency program.
- The rights of defense in deposition procedures is sufficiently protected under the current system, since the guideline clearly allows employees to contact with their attorneys and take notes based on their memories during a break during a deposition. Even further enhancement in conjunction with this revision is unnecessary because it would provide the rights of defense beyond the required extent and may impede the fact-finding ability of the JFTC.

**(15) Overall verification of the system as a whole**

- Even if the total amount of surcharges in some cases under the new system is raised in comparison with that under the existing system, by abolishing or extending the upper limit on the calculation period of sales serving as basis for calculation of surcharges and so on, unlike the EU, a system to establish the upper limit of surcharges based on the amount of sales on profit and loss statements (consolidated profit and loss statements for the cases where consolidated accounting is adopted) of the previous fiscal year shall not be introduced. This is because the legal nature of the current surcharge system shall be maintained, and the level of surcharges shall still be based on the restrainedly estimated amount corresponding to unjust gains and shall not exceed the increased levels prescribed by other laws and regulations.

- This revision shall be made within the purport and the nature of the current surcharge system. In addition, the scope of making a decision by the specialized knowledge of the JFTC shall be confined to the extent necessary, and its transparency/foreseeability shall be secured by formulating and publishing policies and guidelines.
- Regarding some increased factors taken into consideration, the costs of proof/law suits are expected to increase. On the other hand, the cost of verifying the amount of sales serving as basis for calculation of surcharges and type of business shall decrease. In addition, if enterprises try harder to cooperate in investigations due to aggravating or mitigating surcharges according to degree of cooperation than under the current system , swift and efficient operations of the system as a whole would not be hindered.