Report of the Study Group on the Antimonopoly Act

（Only Japanese Text is authentic）

April, 2017

The Study Group
on the Antimonopoly Act

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○Members of the Study Group on the Antimonopoly Act

（Honorifics omitted, titles as of 25 April, 2017）

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○ The JFTC convenes meetings of "the Study Group on the Antimonopoly Act"

February 23, 2016
Japan Fair Trade Commission

The Japan Fair Trade Commission (hereinafter the "JFTC") convenes meetings of the study group as below, which is made up of experts from various sectors, in order to reconsider the modality of administrative surcharge system including the necessity of discretionary surcharge system (Note) under the Antimonopoly Act (hereinafter the "AMA").

1 Purpose of the study group

The surcharge system, introduced in 1977, has been amended several times for about 40 years. However, the current surcharge system sometimes makes it difficult for the JFTC to properly deal with the business activities and corporate structures that are getting globalized, diversified and complicated. Therefore, the modality of the surcharge system should be reconsidered to keep up with the constant change of economic and social environments.

The discretionary surcharge system, which has been widely introduced into other jurisdictions, allows the competition authorities to decide discretionally the amount of the monetary sanctions with consideration of matters to such as the degree of enterprises' cooperation or noncooperation to the authorities. The introduction of such a discretional system would enhance the cooperative relationship between enterprises and the JFTC during the case investigation process and promote enterprises' voluntary compliance activities.

In addition, regarding the development of the globalization of economic activities, the surcharge system under the AMA should be in line with the systems of foreign jurisdictions.

Based on the recognition as described above, the JFTC convenes meetings of "Study Group on the Antimonopoly Act" (hereinafter the "study group"), which consists of experts from various sectors, in order to reconsider the surcharge system from professional views.

2 Participants

(1) The study group consists of experts shown in the attachment sheet (omitted).
(2) The JFTC asks someone among the experts to be a chairperson of the study group.
(3) The study group may ask relevant parties to attend a meeting as necessary.

3 Publication of the proceedings

The chairperson will publish the summaries of the proceedings immediately after the close of the meetings of the study group. The chairperson will also prepare the minutes in detail and publish them after a certain period of time has elapsed.

4 General affairs

The Planning Office of General Affairs Division, Economic Affairs Bureau, General Secretariat of the JFTC is in charge of the general affairs.

○ **Examination schedule of the Study Group**

Date	Agenda
1st February 23, 2016	・Operation of the Study Group. ・Perspectives for overview and revision of the surcharge system. ・Discussion on how to proceed with the study.
2nd March 18, 2016	・Hearings from Prof. Osamu Sakuma, Osaka University, majors in Criminal Law. ・Hearings from Prof. Toshifumi Sowa, Kwansei Gakuin University, majors in Administrative Law.
3rd April 22, 2016	・Hearings from Attorney Hiromitsu Miyakawa, Chair of Competition Policy Task Force, the American Chamber of Commerce in Japan (ACCJ). ・Hearings from the European Business Council in Japan (EBC). ・Hearings from Attorney Etsuko Kameoka.
4th May 20, 2016	・Hearings from Attorney Toshiaki Tada, recommended by Japan Federation of Bar Associations (JFBA). ・Hearings from KEIDANREN, Japan Business Federation. ・Hearings from National Federation of Small Business Associations (NFSBA).
5th May 27, 2016	・Hearings from SHODANREN, National Liaison Committee of Consumer Organizations. ・Hearings from Japanese Trade Union Confederation (JTUC). ・Hearings from Prof. George Shishido, Graduate schools for Law and Politics, University of Tokyo, majors in The Constitution.
6th June 28, 2016	・Sorting out of the issues.
July 13-August 31	・Request for Public Comments on “Summary of Issues Concerning the Modality of the Administrative Surcharge System”.
7th September 30, 2016	・Examination of the individual issues. ・- Scope of amount of sales serving as basis for calculation of surcharges. ・- Period of calculation of sales as a basis for calculation of surcharges.
8th October 28, 2016	・Examination of the individual issues. - Basic surcharge calculation rate, Calculation rates by type of business, Calculation rates for small and medium-sized enterprises, Aggravation/ mitigation of surcharges. - Systems for increasing incentives to cooperate in investigations.
9th November 11, 2016	・Examination of the individual issues. - Systems for increasing incentives to cooperate in investigations. - Settlement procedure. Method of imposing surcharge.・

Date	Agenda
10th November 25, 2016	・Examination of the individual issues. - Legal status of the surcharge system. - Penalties for obstruction of investigations. - Due Process in proportion of the new system.
11th December 16, 2016	・Examination of the individual issues. - Due Process in proportion of the new system. - Organizing considerations of individual matters.
12th January 27, 2017	・Examination of the Draft of the Report.
13th February 10, 2017	・Examination of the draft of the Report.
14th March 1, 2017	・Examination of the draft of the Report. ・Verification of the new system as a whole.
15th March 30, 2017	・Examination of the draft of the Report.

Conventions of the Study Group, materials, minutes, and “Summary of Issues concerning the Modality of the Administrative Surcharge System” and the public comments on it are available at:
http://www.jftc.go.jp/soshiki/kyotsukoukai/kenkyukai/dkkenkyukai/dokkinken-k aisai.html

○ **Respondents of oral hearings by the Study Group**

(Titles and positions are as of the date of hearings)

The 2nd meeting (March 18, 2016)

・Toshifumi SOWA　Professor, Kwansei Gakuin University Law School

・Osamu SAKUMA　Professor, Graduate School of Law, Osaka University

The 3rd meeting (April 22, 2016)

・Hiromitsu MIYAKAWA

Attorney-at-Law, Partner of Jones Day Law Office, Chair of Competition Policy Task Force, the American Chamber of Commerce in Japan (ACCJ)

・EBC

- Kaori YAMADA　Attorney-at-Law, Counsel of Freshfields Bruckhaus Deringer Law Firm
- Bjorn KONGSTAD　Policy Director, European business council in Japan (EBC), The European Chamber of Commerce in Japan

・Etsuko KAMEOKA　Attorney, Counsel of Van Bael & Bellis Law Firm

The 4th meeting (May 20, 2016)

・Toshiaki TADA　Attorney-at-Law, Partner of Hibiya Sogo Law Offices, Recommended by JFBA

・KEIDANREN, Japan Business Federation

- Yoshiharu OBATA　Director, Business Infrastructure Bureau, KEIDANREN

・National Federation of Small Business Associations (NFSBA)

Kazuyuki YABATA　President & CEO of SK Cylinder Corporation,Chair of the Japan Welding Engineering Society

The 5th meeting (May 27, 2016)

・SHODANREN, National Liaison Committee of Consumer Organizations

- Yasuko KONO　Secretary General, SHODANREN

・Japanese Trade Union Confederation (JTUC)

- Chihiro KAWASHIMA　Executive Director, Department of Economic and Social Policy, JTUC

・George SHISHIDO　Professor, Graduate Schools for Law and Politics, University of Tokyo

Chapter 1. Introduction

The administrative surcharge system under the Antimonopoly Act (AMA) was introduced in 1977 as an administrative measure to deter infringements, by imposing pecuniary disadvantage measures on enterprises involved in such infringements. About forty years have passed since the first introduction of the surcharge system under the Act, and although several amendments of the system have been made over that period of time, business activities and corporate structures of enterprises have become more and more globalized, diversified and complicated. There are many cases where the current rigid surcharge system can neither correspond with the situations in business activities nor handle such situations adequately. It is necessary, therefore, to examine an ideal structure of the system that can adapt to the constant change of the economic and social environments.

Introducing such discretionary surcharge system as widely adopted by other jurisdictions where the authorities may determine the amount of surcharges according to the degree of enterprises' cooperation or non-cooperation to the investigation of infringements, may broaden the fields for finding the facts and handling the cases in cooperation with the enterprises and the JFTC, and may also contribute to promoting enterprises' self-motivating efforts for compliance, including internal investigations.

In addition, as economic activities are becoming more and more globalized, in order to avoid such unequal situations as certain infringements bring on the imposition of a large amount of sanctions in certain countries or regions, while the same infringements bring on that of no or a very small amount of sanction in Japan; we should make efforts to enhance harmonization with the Japanese surcharge system and the systems in other jurisdictions.

Based on these points of view, the JFTC has convened the Study Group on the Antimonopoly Act (hereinafter, the “Study Group”) constituted of experts in various fields, for the purpose of examining the ideal structure of the surcharge system from the perspectives of their specialized knowledge. The Study Group has held 15 meetings since its first meeting in February 23, 2016.

In the four meetings, from the 2nd to the 5th meeting, the Study Group has conducted oral hearings from experts and interested groups (list of respondents of the hearings are on previous page v). After the discussion in the Sixth meeting, the Study Group published the "Summary of Issues Concerning the Modality of the Administrative surcharge system" in July 2016, and requested for public comments on it. A total of thirty nine answers from various fields were filed, which include opinions and information (see attachment sheet).

In the five meetings, from the 7th to the 11th meeting, the Study Group has examined the individual issues with regard to the results of the hearings and the filed opinions and information.

Through the 12th to the 15th meeting, we have examined the draft of the report based on the results of these examinations.

Through the process as mentioned above, the Study Group has wrote up the report hereto. The Study Group hopes that the establishment of required legislative measures and guidelines, and the operations of the AMA shall be carried out based firmly upon this report. The Study Group also hopes that the intent and purport of a new system are widely publicized to the interested bodies and citizens including enterprises, -especially small and medium-sized enterprises, -and lawyers, which are subject to the new system, in order to make it work in a quick and efficient manner, when the amendment is made on the current system.

Chapter 2. Revision of the surcharge system (Overview)

1. The need of the revision of the surcharge system (Problems with the current system)

(1) Rigid calculation and imposition method

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.

These faults in the system have brought, for example, actual problems as shown below, and have caused unreasonable or unequal results in some surcharge payment orders. Such problems, though the cases described below are just the examples, may increase, due to the globalized, diversified and complicated business activities and corporate structures in progress.

(i) The JFTC cannot impose surcharges against the violators in the cases described below:

- When, in the cases of international market division cartel, they have no amount of sales from the consumers in Japan (especially foreign violators).
- When, in the cases of conducts on a corporate group basis in business activities subject to infringements, only the holding company or other bodies with no amount of sales of the goods or services subject to the cartel was involved in such infringement.
- When the amount of sales of goods or services subject to the cartel is generated after such infringements cease.
- When, in the cases of private monopolization, there is no amount of sales stipulated by law (e.g. the amount of sales from the relevant goods or services supplied by the violator to the controlled enterprise), etc.

(ii) Even for the cases of amount of sales of goods or services provided to foreign users that are subject to the calculation of administrative sanctions and surcharges (hereinafter, "sanctions") by foreign authorities as infringements of the competition law, such amount of sales cannot be excluded as a basis for uniform and impartial calculation of surcharges.

(iii) Though the substantive size or business category of enterprises can be deemed as large-sized enterprises or manufacturers, only a reduced calculation rate can be applied to such enterprises as a medium-sized enterprise or wholesaler as far as their size or category corresponds to the formal standards.

(iv) The reduced rate for early withdrawal from infringement, which was introduced to strengthen incentives for parties that had engaged in an infringement to withdraw from such conduct in a short period of time, are applied automatically regardless of the reasons for the cessation of such infringement. Even for the cases that do not match the purport of the system such as where an enterprise was forced to withdraw from infringement due to loss of bid participating qualification of a construction subject to infringement, the reduced rate shall also be applied.

(v) Uniformly and impartially calculated surcharges shall be compulsorily imposed even for cases where there is little need for deterrence by such surcharges, such as when there seems to be no fault to blame on the violator (e.g. when a new business model with no intent of exclusion has accidentally effected results restraining competition, and created exclusive, private monopolization).

Therefore, in order to solve such problems as described above or those that may arise in the future, revisions should be made on the current rigid system under which the JFTC calculates and

imposes surcharges uniformly and impartially pursuant to the stipulated calculation methods.

(2) Lack of incentives to cooperate in investigations

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 in 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. Also, it is difficult for the JFTC to prosecute as a crime the act of refusing to cooperate in or obstructing investigations (hereinafter, "obstruction of investigations") as stipulated in Article 94 of the AMA, because a criminal penalty by nature calls for the principle of restraint and requires a considerably high level of proof.

Therefore, the current situation causes the problems set forth below:

(i) Enterprises are basically liable for detecting and inspecting infringements, and correcting such adverse situations voluntarily and proactively. They are also liable for organizing effective compliance systems for such purport. However, the current system lacks the merit to promote these efforts more effectively.

(ii) Opinions suggest that the JFTC and enterprises stand in opposition with regard to investigations for suspected AMA infringement cases, which hinders efficient and effective solutions or handling of cases. Such circumstances decrease exposure rates and weaken deterrence against infringements.

(iii) In an international cartel, cooperating with investigations for foreign authorities, including the application of leniency, that will have more chances of reduced sanctions as reward for cooperation may be preferred, which may result in lesser or reluctant cooperation for investigations within Japan.

Above are some examples of the problems. As a result, in Japan, it may presently be difficult to promote efforts for infringement deterrence or detection/correction by enterprises' voluntary and proactive efforts, or early detection/early elimination of infringement by the JFTC.

Therefore, to solve these problems, the new systems may be introduced which will secure enough incentives for the enterprises to cooperate in the JFTC's investigations, as well as disincentives for obstructing such investigations.

(3) Deviation from international standard systems

To effectively eliminate infringements among global enterprises in particular, and to promote fair and free competition in this world of globalizing economic activities, international convergence of rules is important. However, the present Japanese surcharge system is not compatible with the standard sanctioning systems of other major countries. This circumstance may lead to the problems like set forth below:

(i) Unreasonable or unfair results, among global enterprises in particular, e.g. in cases of enterprises that were engaged in the same international division cartel, the Japanese enterprise involved shall be heavily sanctioned in the countries and regions where they have made no sales, while foreign enterprises which have made no sales in Japan are free from sanction or are made to pay only a small amount of surcharge. Such unequal situation shall give greater pecuniary disadvantage only to the Japanese enterprises, compared with other competitors.

(ii) Increased costs of developing compliance programs for individual countries, with regard to

global enterprises in particular, e.g. The compliance in Japan may be as having less importance, taking priority of the compliance systems corresponding with laws and systems of other jurisdictions, including order of priority of the application of leniency.

(iii) Weakened enforcement power of competition laws within Japan compared to other jurisdictions, and loss of credibility in the Japanese market among other jurisdictions in particular, e.g. if Japan does not impose while other jurisdictions do, or imposes only a small amount of surcharge compared to other jurisdictions for a certain infringement, such infringements may increase rapidly in Japan, and weaken incentives for the application of leniency, which may hinder early detections and early eliminations of infringements.

Therefore, in order to solve these problems, there may be a need to work toward harmonization with the standard systems in other jurisdiction.

2 The direction of the revision of the surcharge system (Measures based on the problems)

【Opinions of the Study Group】

○ 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.

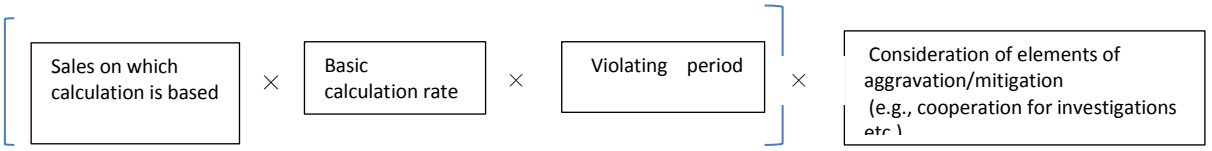
(1) The standard sanction systems adopted in other major countries are as shown in the figure below. The authorities are given a wide range of discretion; the authorities are entitled to impose a necessary and sufficient amount of sanctions to deter infringements, on a case-by-case basis, taking into account the details of each infringement and violator's situation (see attachment sheet 1). Under such systems, the problems, as described above, do not occur in general. Because the authorities of concern use their own discretion to correspond flexibly with the diversified and complicated economic circumstances, they may: (i) establish or change even the calculation method by themselves flexibly, by means of guidelines and other measures, according to the changes in economic and social environment or accumulated infringement cases, (ii) verify the amount of sales serving as a basis for calculation of surcharges flexibly, as well as calculation with a simple method, not including the past individual amount of sales one by one within the term of infringement; and (iii) increase or mitigate the amount of sanction, taking into account the enterprise's degree of cooperation with investigations or their solvency, etc.

【Figure】 Summary of the standard systems in other jurisdictions

○ Basic framework of the systems

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 as well. 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 mitigations
- Reductions through leniency
- Reductions through settlements
- Reductions due to lack of solvency

(2) The same manner applies to Japan for the need to impose necessary and sufficient amount of surcharge to deter infringements, with an amount of surcharge that corresponds flexibly on a case-by-case basis with the diversified and complicated economic circumstances. There are varieties of situations and circumstances which surround the violators even when infringements seem similar to past cases since the AMA applies to all industries and enterprises, and various types of infringement cases continue to arise because of the ever-growing globalized, diversified, and complicated business activities and corporate structures of enterprises today. Considering such characteristics of infringements, establishment of a system may be considered that allows flexible and independent judgements by the authorities on a case-by-case basis, to effectively and specifically promote deterrence of infringements with flexible compatibility with the diversified and complicated economic situations. This should allow legal execution measures, taking into account the violator's individual situation. As mentioned in (1) above, other major countries have adopted systems based on these perceptions so that the authorities of concern are given a wide range of discretion for sanction calculation and imposition.

As well in Japan, it is impossible to stipulate all the administrative details, estimating every case

and matter in complicated and circulating circumstances in advance. There already are systems in Japan for which discretionary measures have been authorized for the administrations to allow case-by-case decisions, such as in the areas where prompt and expert case-by-case judgements are essential, especially to counter unpredictable changes. There are numerous existing systems which allow such discretionary measures. With regard to the pecuniary disadvantage of such measures like surcharge systems, the concerned authorities are given authority for discretionary measures such as non-imposition of surcharges as flexible deterrent measures to handle actual situations, as in the case in the surcharge system of the Certified Public Accountants Act (see attachment sheet 2).

There are other examples of pecuniary disadvantage measures such as in Article 10 of the Employment Insurance Act, and Article 228 Paragraph 3 of the Local Autonomy Act, where the law provides only the upper limit of such amount, but leaves decision-making for the amount or calculation methods in the hands of the administrative agencies of concern (see attachment sheet 3).

(3) To the contrary, the surcharge system of the AMA may be deemed to be designed as a restrained, non-discretionary system, where the amount of surcharge is calculated by a uniform and stereotypical calculation method, to the extent not to exceed the level of unjust economic gains (hereinafter, "unjust gains") acquired by such infringement, and compulsorily imposes such amount. The reason for such restraint may be explained as an attempt to avoid the issue of cumulative punishment when the surcharge system was first introduced in the AMA, taking it into consideration that it was a measure to impose pecuniary disadvantage to the violator, functioning as an administrative sanction which is close to criminal sanction.

(4) However, in the 2005 Amendment, from the perspective of a need to collect surcharges beyond what violators gained in unjust gains as a means of deterrence, the basic calculation rate of the surcharge was increased to a level of 25 % and more of the unjust gains equivalents. The Amendment also reconfirmed that the objective of the surcharge system is to deter antitrust infringements by means of imposing pecuniary disadvantage which exceeds their unjust gains on the violators with the administrative procedure, and that there will be no constitutional problems arising from imposing of the surcharge payments cumulatively with criminal penalties or imposing surcharges by the administrative procedures, on the grounds that the surcharge system is different from the criminal penalties because the purports and the objectives of the systems are clearly different from that of criminal penalties, in which the accusation of immorality is the purport. An explanation of the reasons for the persistence of a non-discretionary system is that a wide range of discretion had long been denied, such as the punishment basics on which punishment is determined in consideration of the subjective requirements such as maliciousness or culpability of individual cases in a retributive perspective against past antisocial or unethical infringements (see attachment sheets 4 & 5).

(5) Although there are considerations that the restrictions described in (3) above are the legislative conditions for approving of a surcharge system in Japan, the court decision accepts that *"the immediate objective of the surcharge system provided by the AMA is not to forfeit the violator's unjust gains; it is merely an administrative measure to increase disadvantage to the violator in cases of exposure of such infringement, and weakening their economic incentives, and strengthening an effect on deterrence of such infringement"* (Tokyo High Court Decision as of November 30, 2012, Case number 2012 (Gyo-ke) No. 1) (see attachment sheet 6 (1)). The hearings held by our Study Group also showed the considerations as described as follows:

A At the starting point, it should be considered that, as far as the administrative arbitration is excluded by substantial requirements and the procedures, and foreseeability of the enterprises is secured, introducing a discretionary surcharge system shall not violate the principle of reservation of the law, and that the current surcharge system does meet with the principle of Proportionality. Therefore, introduction of discretionary surcharges shall not violate the principle of Proportionality, and the reasons for this opinion are as follows: (i)On the premise of the problems pointed out regarding the current surcharge system (legislative facts), the rationality of the system being a measure to achieve the objective for enhancing practical effectiveness of the restriction can be approved, (ii) with regard to its necessity as the objective of achieving the measure, the system is merely a post facto restriction against the existing cartels that is the constitutional restriction regarding freedom of business, and may not be considered unnecessary compared with such measures as business suspensions, and should be legally understood as being within legislative discretion, and (iii)if cumulative imposition with the criminal fine is excessively imbalanced and severe, it may be deemed as an infringement of the Proportionality (see Supreme Court of Japan (SCJ) Grand Bench Decision as of April 4, 1973; page 265 of the Criminal Casebook No. 27-3). However, such circumstances may be avoided through governmental ordinances and operations. (See the considerations of Professor Shishido in the 5th meeting and the submitted materials.)

B While the nature of criminal penalty is a legal accusation based on the retrospective judgement of the past criminal cases, and both retributive and deterrent functions are regarded as important, the nature of the surcharge system is a measure based on a prospective judgement for the deterrence of future infringements. Therefore, both conformity to its objective and transparency of the procedures are required, and compliance and the deterrence of recurrences are also regarded as much important. Thus, criminal penalties and surcharges are different from each other clearly for their nature, from a legal perspective. (See considerations of Professor Sakuma and the submitted materials in the Study Group in the 2nd meeting.)

C The surcharge system is a law enforcement measure introduced to secure practical effectiveness of the administrative regulations, and should be approved as such straightforwardly in its existence and necessity. There are no impediments in the legal theories for providing authorizations to the administrative bodies to apply discretion when imposing surcharges. Moreover, discretion within a scope should be given to achieve effective correction of infringements. In such cases, however, clarified conditions or criteria for adequate and effective discretionary operations should be provided in advance. (See opinion of Professor Sowa in the Study Group in the 2nd meeting, and the submitted materials.)

(6) Based on the descriptions in (4) and (5) above, the surcharge system is an administrative measure that is approved for imposing surcharges cumulatively with criminal penalties. Therefore, restrictions as described in (3) above are not the legal requirements for the approval of the administrative surcharge system in Japan; the restrictions should be regarded as a more important system for excluding arbitrary operations by the JFTC. Article 30 of the Administrative Case Litigation Act stipulates that, *"The court may revoke an original administrative disposition made by an administrative agency at its discretion only in cases where the disposition has been made beyond the bounds of the agency's discretionary power or through an abuse of such power.* ". Consequently, if discretionary surcharge is to be approved, judicial review shall be carried out only to check whether or not there were any deviations of the discretion rights or any abusive use of such rights. However, if any required guidelines is established and published in advance, judicial reviews shall be carried out, including evaluation of the JFTC's judgement process in compliance with such standards (SCJ Decision as of June 7, 2011, Case number 2009 (Gyo-hi) No. 91; and SCJ Decision as of March 3, 2015, Case number 2014 (Gyo-hi) No. 225). Going through the public comment procedure, the JFTC cannot even establish arbitrary guidelines by themselves.

This would force the JFTC to operate under the guidelines established by public comments,

which would strengthen the judicial review by the court, resulting in the exclusion of arbitrary operations by the JFTC, as well as enhancement of transparency in legal operations and foreseeability. It can be said that such idea is a solution to exclude JFTC's arbitrary operations, without restrictions as of (3) above.

(7) The reason an independent administrative agency known as JFTC is founded is that specialized knowledge is required to operate the AMA. Therefore, constitutional problems shall not arise on the JFTC's operations or authorization for discretionary surcharges within the scope for case-by-case decision and calculation and imposition by specialized knowledge, with regard to the surcharge system. Furthermore, if the circumstances reveal that the deterrence of infringements are not fully effective, but the revisions required for the effective infringement preventive measures including flexible system designing not under the restrictions as in (3) above, may also be approved, with the conditions that the administrative arbitrariness is excluded (see attachment sheet 4 (4) and (7)).

(8) However, if the amount of surcharges exceeds the required amount for achieving the administrative objective of deterring infringements, or if the broad discretionary powers are granted to the government ministries to set the amount of surcharges based on a wide set of factors for consideration under the culpability principle from a moral accusation perspective, and if the surcharge could actually be deemed as criminal fine consequently, then the surcharge falls into "charging criminal liability" as provided in Article 39 of the Constitution. Such a system that allows cumulative punishment of such surcharges and criminal penalties may be controversial for the constitutional problems or issues of the cumulative punishment. In such cases, even if the criminal penalties are abolished, imposition of such surcharges may generate strict applications of constitutional calls, such as Article 31 of the Constitution (protection of due process) or Article 38 of the Constitution (right to remain silent). Therefore, if the system is to be designed in consideration of all these points, the system would lack swift and effective operations required for an administrative measure. If the system does not set cumulative punishment with criminal penalty as its premise at least, such a system may be tolerable under the laws of Japan. However, based on the history of the introduction of the surcharge system that began as an administrative measure to enhance practical effectivity of infringement deterrence by its swift and effective operation to be imposed cumulatively with criminal penalties, the revision of the current surcharge system may be made in consideration of the amount of surcharge, elements to be considered pertaining to the surcharge calculation/imposition, and the scope of the discretion given to the JFTC's expertise, in order not to be criticized that such system would bring constitutional problems including cumulative punishment.

(9) In addition, to secure stability and the consistency of the surcharge system which has been in operation for about forty years since its introduction in 1977, it may be appropriate for revision of the system to be made based also on such considerations as the necessity of examining the history of the system that had excluded discretionary surcharges, and the reasons for such considerations as follows: (i) The surcharge system is a system that was introduced to "secure fairness by collecting economic advantages gained through cartels", and the basic concept of the calculation is designed as an "ordering payment of economic advantages gained through illegal cartels", and (ii) if discretionary surcharge is to be approved, it would decrease transparency of the administrative systems, and the complexity of the operations would decrease the merits of prompt measures, and therefore it would be appropriate to make the system simple, for a swift and effective operation (see attachment sheets No. 4 and No. 5).

(10) To solve these problems of the current surcharge system described in 1 above, there may be no need or inevitability to approve a wide range of the discretions to the authorities, as in the

sanction systems of other jurisdictions shown in (1) above. On the other hand, infringement of the AMA is a typical crime committed by enterprises, and abolishing legal persons' surcharges would be inappropriate in the present situation where criminal penalties against legal persons are actively applied, and the reasons for such considerations are: (i) generating a risk of misunderstanding among the public that the entire legislative policy of Japan is sending a message that infringement of the AMA is not a severe crime worthy of moral accusation, (ii) there are stronger needs for criminal penalties against the violators, based on the present situation where competition laws in other countries are being executed more and more strictly. Therefore, viewed from the perspective of achieving international harmonization, handling the present problems by introducing the administrative sanction system that abolishes criminal fines while increasing the level of the administrative pecuniary disadvantage such as those in other countries, and approving a wide range of discretion for the authority, may not be the best solution.

(11) Based on above explanations, the Study Group has concluded that:

(i) Securement of an appropriate operation of the system by the JFTC shall be required (e.g. matters to be considered are: the scope of the discretions given to the expertise of JFTC; general rules of the administration, such as Proportionality, equality, transparency, and foreseeability; appropriate procedures according to their nature and the details of the measures; securement of clarification of the investigation procedures.).

(ii) Meeting the constitutional requirements of Japan, jurisprudence, or legal theories shall be required (e.g. issues of cumulative punishment arising from the dual penalties of surcharges and criminal fines or, harmonization with the purports and the nature of the current surcharge system as well as with other ordinances).

(iii) Securement of swift and effective operations of the surcharges shall be required (e.g. evading excessive burden of proof for enterprises and the JFTC).

With regard to the matters above, and with the efforts to solve the problems which are mentioned in 1 above, at first, the Study Group has decided to evaluate the specific surcharge calculation/imposition methods for unreasonable restraint of trade in which troubled cases are accumulated (from 2 through 10 of Chapter 3 and later), and for other types of infringements, has decided to examine separately the individual problems that do not fit into unreasonable restraint of trade (11 of Chapter 3 later on). Then, the Study Group shall examine all the problems common to all of the types of infringements (from 12 through 14 of said Chapter 3), and finally, examine the system as a whole (15 of said Chapter 3). Also, upon examination, the Study Group has noted that enterprises and the JFTC should cooperate to broaden the fields of effective and efficient solution and handling of cases, including revision of excessive requirements and testimony liability as well as arrangement of procedure insurance, from the perspective of increasing practical effectiveness of law enforcement by carrying out cooperative law enforcement as well as combative law enforcement (see considerations by Professor Sowa in the Second meeting and the submitted materials), and from the perspective of reducing employees' burden of the suspected enterprise, who have to respond to hearings and interrogations in the JFTC’s investigation.

However, Specific plans for system design should be carried out in line with the purport and nature of the surcharge system, and therefore, to begin with, the Study Group has agreed to reconfirm the legal positioning of the surcharge system.

Chapter 3. Specific plans for the system design

1 Legal positioning of the current surcharge system

【Opinions of the Study Group】

○ 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.

(1) The purport and objective of the current surcharge system

As examined in 3 of Chapter 2, the surcharge system in the AMA is not immediately the purport of forfeiting unjust gains, but that of deterring infringements. That is to say, the system is aimed not only to secure social fairness by means of collecting unjust gains and not letting the violator keeping such gains but also aimed to strengthen deterrence against cartels by means of increasing disadvantage when a cartel is exposed and giving economic disincentives for such conduct. The system has been established to operate swiftly as an administrative measure for securing practical cartel prohibition, in addition to the existing criminal fines (Article 89 of the AMA) and damage objective system (Article 25 of the AMA). So it has multiple purposes and objectives not only limited to the forfeiture of unjust gains.

Considering that the surcharge system is an administrative measure, it is desirable that the surcharge calculation/imposition methods should be established with a clear standard, and the calculation should be made simple and easy in order to secure an effect on deterrence through proactive and effective operations of the surcharge system. For these reasons, it may be appropriate to create a mechanism allowing a simple and prompt handling, cutting the cases off from the actual economic advantages in individual infringements, and setting abstract economic disadvantage to be forfeited from the enterprise, and not the actual amount that had been generated from infringements.

Unjust gains is just an index within the system designed to prevent excessive measures, exceeding the amount necessary for deterrence of infringement; it is not necessary to give weight to the system design for calculation corresponding to actual unjust gains through each infringement. Therefore, it is appropriate to revise the system accordingly based on the concept of forfeiting unjust gains (see attachment sheet 4 and 6).

(2) Legitimacy of the surcharge system

A As described in (1) above, if the surcharge system can be deemed an administrative measure to deter infringements by means of imposing pecuniary disadvantage to the violator, the surcharge system can be evaluated as a set of administrative measures with strong sanctions which infringe on the property rights of enterprises directly, in comparison to the following measures; (i) administrative measures which impose a greater amount than the fees and the grants of concern to those who have evaded such fees for highly public business or who have gained unfair grants, aimed for reasonable operation of such businesses, (ii)administrative measures such as business suspensions to prevent the enterprises that deal with inappropriate businesses from harming citizens.

B On the other hand, infringements of the AMA are subject only to certain products or services, and measures that may affect the violator's entire business such as suspension of the business or revocation of the license may be too severe, in light of the administrative objective of deterring infringements of the AMA. Also, reducing the number of competitive strength by such suspension or revocation which has resulted from such severe measures would not be appropriate in the sense that it does not meet with the objective of the AMA, from the view

point of promoting fair and free competition. Therefore, imposing pecuniary disadvantage to the violator, as a means of deterring infringements, cannot be deemed as too severe compared to other administrative measures such as suspension of business or revocation of license. It may be said, more than not, that the administrative surcharge system should be strongly approved of as fair, and should meet with the purport of the AMA. The foresaid conclusion also meets with the following judicial precedent by the Supreme Court: "whether a restriction on property rights should be approved as adapting to the Public Welfare prescribed in Article 29 Paragraph 2 of the Constitution should be considered in comparison to the purports, needs, details, type of property rights to be restricted, its nature, and the degree of the restriction" (SCJ Grand bench Decision as of February 13, 2002, Case number 2000 (O) No. 1965; Decision pertaining to the Securities and Exchange Act, examining the constitutionality of the restriction of property rights to maintain equality and fairness in the market in light of Proportionality). Also, the surcharge system of the AMA differs in its purport, objective, and nature from the criminal penalties imposed by criminal procedures which focus on the antisocial and unethical nature of the cartels, and functions as a sanction for such conduct (see attachment sheet 6(8)). It is not a system to "charge criminal liability" as prescribed in Article 39 of the Constitution, which prohibits cumulative punishment. Therefore, the surcharge has enough validity being positioned as an administrative measure to deter infringements, much the same as other administrative measures (see 2(5) of Chapter 2).

C There is one possible idea that forfeiting unjust gains through infringements is the only evidence to validate an administrative surcharge imposition but, the other potent one that the concept of unjust gains forfeiture may be just a means of deterring infringements, and neither the objective of administrative measure, nor the evidence to validate the administrative measures. Formerly, based on the perspective of evading surcharge from being identical with, or of the same nature as, the criminal surcharges, surcharge calculation rate had been set with a standard within the increased levels prescribed by other ordinances, based on a restrainedly estimated unjust gains equivalent amount. The surcharges had been calculated and imposed by uniform and consistent methods pursuant to prescribed calculation methods. As examined in 2 of Chapter 2 above, this may only mean that the restrained system design had been carried out as a policy; that constitutional problems such as cumulative punishment shall not arise so long as the surcharge system lies within its scope. Even if it exceeds the scope, issues on cumulative punishment are unlikely to surface. To achieve the objective for infringement deterrence, there may be no impediments as to raising the amount of surcharge, or introducing a system that approves discretion within a certain scope, that allows decision on a case-by-case basis by the specialized knowledge of the JFTC of individual surcharge calculation and imposition, so long as it does not actually become identical or of the same nature to the criminal penalties, and so long as it does not violate the balance of punishment or Proportionality principles as a result of allowing the level of surcharges to exceed the amount necessary for deterring infringements, or allowing decision-making of discretionary surcharges by the administrative agencies, based on a wide range of elements for consideration under the culpability principle from the perspective of moral accusation.

(3) Examination of the surcharge system based on legal positioning

Based on the legal positioning of the surcharge system as examined in (1) and (2) above, the Study Group decided to examine the surcharge calculation and the imposition methods that may become a solution to the problems of the current surcharge system as shown in 1 of Chapter 2, with regard also to the matters shown in 2 of Chapter 2. Upon verifying the validity of the entire system, the Study Group shall consider the possibility of the solutions as shown below that have an impact on the Japanese legislative system in general terms, such as the difficulty that may arise in amending only within the scope of the AMA, with regard to the following matters: (a) whether or not the entire revised surcharge system does not fit in the system that "charges criminal liability", and, (b) if it does, (i) whether it shall be amended as a

system, but not to "charge criminal liability", or, (ii) whether necessary measures shall be taken, after changing the system that "charges criminal liability". Final conclusions shall be made after the consideration of these matters.

2 Scope of the amount of sales serving as basis for calculation of surcharges

【Conclusions by the Study Group】

○ 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.

(1) Basic concept of the basis for calculation of surcharges

A Under the current system, the law stipulates the basis for calculation of surcharges should be the amount of sales of "the relevant goods or services ". In common cartel cases, this provision is considered to be applied to both cases as follows: ① goods or services belonging to those subject to infringements, ② mutually restraining goods or services by infringements. In common bid rigging cases, it is considered to be applied to both cases as follows: ① goods or services subject to basic agreement, and ② goods or services which have generated specific results restraining competition. The surcharge system is operated under such understandings (see attachment sheet 7).

B It can be said that such operations and understandings as shown in the above A have been established on the assumption of a comparatively simple cartel or bid rigging case, such as when a single enterprise supplies a single product or service to the same customers since the introduction of the surcharge system in 1977. However, there are some defects in this system, that the JFTC is not able to handle infringements flexibly in varieties of the corporate structures and forms in every industry and region, or calculate and impose an appropriate amount of surcharge on a case-by-case basis in light of the purpose of the surcharge system, handling the developing economic activities that are globalized, diversified, and complicated. Such problems with the system as described in 1(1) and (2) of Chapter 2 above are growingly apparent.

Although requirements in the above A ② are considered to be based on the idea of adjusting the amount of surcharges to actual unjust gains, there are rare cases where some products

were exempted from the relevant goods or services by claims of enterprise`s allegation (see attachment sheet 8). On the other hand, there are a number of cases that were brought to trial and court for cancellation of their decisions on this issue, and detailed verification are being made. It can be said that this circumstance has hindered the swift and effective operations of the surcharge system.

C To solve these problems, for example, a system to calculate the amount of surcharges based on the objective values such as gross amount of sales of all the violators may be pointed out, in light of the swift and effective operations of the surcharge system. However, although such infringements are subject to specified goods or services, for example, if the amount of surcharges should be deemed as gross amount of sales of all the violators multiplied by a predetermined rate, it might result in an excessively large or small amount in light of the objective of deterring infringements. Therefore, from the perspective of principle of proportionality or balance of punishment, it is desirable that the amount of sales relevant to infringements should be the basis for calculation of surcharges. Under systems in other jurisdictions, in general, the amount of sales relevant to or that are affected by infringements are established as the basis for calculation of surcharges (see attachment sheet 1).

D In cases where the amount of sales relevant to infringements should be established as the basis for calculation of surcharges, there are assumably countless patterns of the scope of amount of sales relevant to infringements serving as a basis for calculation of surcharges, according to the details of infringement, corporate structure of the violator, subject products and the distribution routes and so on (see attachment sheet 9). It may be difficult to make a uniform provision to cover all of these patterns. Therefore, from the perspective of effectively deterring infringements, it is desirable to entrust decision on the scope of such applications on a case-by-case basis by the specialized knowledge of the JFTC. In general, the competition authorities in other countries can identify with flexibility the scope of amount of sales serving as basis for calculation of sanctions according to the infringements (see attachment sheet 1).

However, a system in which any amount of sales can be established as the basis for calculation of surcharges, as long as it is relevant to the infringement, may broaden the basis for calculation of surcharges endlessly. This consequence may not be appropriate from the perspective of securing the transparency and foreseeability of the surcharge system. Therefore, basically, it is desirable that the scope of basis for calculation of surcharges should be stipulated by law, and it is necessary that the scope of an appropriate range of sales within which the JFTC can make a decision on a case-by-case basis according to violators' attitudes and situations should be limited to the minimum requirements.

(2) The need and the direction of the revision of the scope of basis for calculation of surcharges

A The requirements in (1) A ①above may be appropriate from the perspective of amount of sales relevant to infringement being the basis for calculation of surcharges, and meet with the purport and objective of the surcharge system as described in 1 (1) above. On the other hand, requirements in (1) A ② above may stem from the purport that the basis for calculation of surcharges should be limited to some extent in light of actual results from infringements,, based on the idea of adjusting the amount of surcharges to actual unjust gains. However, considering that detailed verifications on trial or in court as well as detailed fact findings under investigation shall be required, such requirements may not necessarily meet with the purport and objective of the surcharge system as described in 1 (1) above. In this respect, `Report of the Study Group on the Antimonopoly Act` issued in October, 2007 stated the following; *with regard to the goods or services that are the object of the basic agreement in a bid rigging case (the fundamental agreement concerning the parties to receive orders), the number of hearings cases to dispute whether each good or service should be subject to a surcharge has increased.…The intent of the surcharge system is to ensure the effectiveness of the provisions prohibiting cartels, by forcing entrepreneurs that violate the law to fully divulge the actual*

economic gains they`ve earned and assess an impartially and uniformly calculated monetary amount. When we consider this intent of the system, we believe it did not originally assume proving the circumstances of order coordination concerning each individual good or service. ⋯Therefore it is reasonable that all of the goods or services supplied by entrepreneurs that violate the law on a specific transaction sector be subject to the surcharge.

To further effectively achieve the objective `deterrence of infringements` of the surcharge system, it may be more appropriate to institute the system from the perspective of forfeiting gains typically expected by the violator at the time of such infringements, rather than of forfeiting their actual gains. With regard to the Financial Instruments and Exchange Act, the statement has been made that, "from the perspective of deterrence of infringements, it is appropriate to impose an amount of surcharges equivalent to gains that the violator typically expects to earn at the time of such infringements". Based on this standpoint, the authority has increased the amount of surcharges against Insider Trading (Article 175 of the said Act) in its 2008 Amendment. This concept may harmonize with Japanese legal system and legal theory.

B As cartel and bid rigging are by nature conducted in closed rooms, and there is little proof left in most cases, these conducts are featured by difficulty of detecting or revealing. Based on this standpoint, to prove the requirements described in (1) A ② above, the JFTC must rely mainly on depositions of employees involved in the infringements, and this circumstance partly may cause the number of depositions to increase under investigation. This may put a heavy burden on the enterprises and the employees, prolong periods of time for dealing with cases, and result in hindrance of the purport and the objective of the surcharge system for deterring infringements.

C Therefore, from the perspective of forfeiting gains typically expected by the violator at the time of such infringements, and securing the swift and effective operations of the surcharge system, it may be appropriate to abolish the requirements described in (1) A ②above, and to establish the amount of sales of the goods or services subject to infringements, as the uniform basis for calculation of surcharges to infringements, regardless of the result of any actual mutual restraint or specific result restraining competition. For example, like the surcharge provision on private monopolization (Article 7-2 Paragraph 4 of the said Act), it may be appropriate to stipulate by law the provision that the amount of sales for `all the goods or services supplied by the enterprise in any particular field of trade through the act' shall be established as the basis for calculation.

D Through this revision, the basis for calculation of surcharges may be expanded to some extent, because it would also include the goods or services that apply to the requirements in (1) A ① above, but do not apply to A ② above under the current system. However, establishing the amount of sales of all the goods or services subject to the infringement as the basis for calculation of surcharges may harmonize with the following concept: "from the perspective of deterring infringements, it is appropriate to impose the amount of surcharges equivalent to gains typically expected by the violator at the time of such infringements", and not cause the basis for calculation of surcharges to expand so as to exceed the purport and objective of the system described in the above 1 (1). Also, according to this revision, the basis for calculation of surcharges shall be determined depending on the requirements pursuant to (1) A ① in general cases, the transparency and foreseeability may be secured. In addition, enterprises can argue against the determined scope, and the system may meet with the principle of proportionality in the sense that the amount of sales that have nothing to do with infringement shall not be included in the basis for calculation of surcharges.

(3) The need and the direction to handle cases where the amount of sales never arises

A Under the current system, the JFTC cannot impose surcharges on the violators who have no amount of sales of the goods or services subject to infringements such as the following cases (see attachment sheet 10):

①For violators in an international division cartel, if the Japanese market is established as a particular field of trades, who have no amount of sales in the Japanese market, despite the existence of the amount of sales of products subject to infringements in other jurisdictions.

②For violators who have participated in bid-rigging, but have no amount of sales for the property subject to infringements for such reasons as they didn`t have an opportunity to receive an order.

③For violators who have no amount of sales as a result of engaging in an agreement not to supply certain goods or services, on condition that they would receive subcontracts or money from existing enterprises.

④For violators who have no amount of sales of the products subject to infringements because only the group company that does not actually sell the relevant products was involved in the infringement, though the relevant products were produced and sold on a corporate group basis.

⑤For violators who have some amount of sales of the goods or services subject to cartels after ceasing the infringement.

B For violators described in A above, there is a strong need to impose surcharges based on the purport and objective of the surcharge system described in 1 (1) above, because: ① they are the actual parties involved along with other violators, and there is a strong need to deter and ② even if there is no amount of sales of the goods or services to infringements, they have assumably received some kind of monetary benefit. Also, as (2) A described above, in order to effectively achieve the objective of deterring infringements, it may be more appropriate to design a system whose focus is not on the actual benefits the violators have gained, but on the typical benefits they expected at the time of such infringements.

C The authorities in other countries impose sanctions, etc. by specifying and assuming the amount equivalent to that of sales of the products subject to infringements, at a wide range of discretion in calculating and imposing sanctions (see attachment sheet 1).

D In Japan, the Financial Instruments and Exchange Act are authorized to impose the equivalent amount of surcharges to financial gains that can be typically and abstractly assumed" (see attachment sheet 2).

E Therefore, at least for cases where financial gains of the violators are typically and abstractly assumed, it is appropriate to impose surcharges. Because the assumed cases shall vary in each case, a system to make decisions on a case-by-case basis by the specialized knowledge of the JFTC may be desirable. However, from the perspective of securing the principle of proportionality/equality/transparency/foreseeability, and from the perspective of eliminating arbitrary operations of the JFTC through adequate court judgements, it may be appropriate to stipulate what concretely and individually by law as far as possible and clarify what amount should be established as the basis for calculation on each type of infringement, stipulating as much as possible based on the patterns in the past cases. The prescribed standards should be examined carefully for the details and the amount of the typically and abstractly assumed financial advantages.

F However, it is impossible to stipulate all the types of infringements concretely and individually by law, predicting future changes in economic and social environments. Therefore, to deal with unpredictable types, concerning types that do not correspond to such stipulated ones as described E above, it may be appropriate to stipulate the provisions 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. Establishing such provisions can be acknowledged under the Japanese

legal system and legal theory, because the provisions to define the requirements of infringements subject to surcharges on a comprehensive basis and delegate the basis for calculation of surcharges to Cabinet Order also have already existed in the Financial Instruments and Exchange Act (see attachment sheet 2). In such cases, from the perspective of securing transparency and foreseeability of legal operations, it will be appropriate to formulate and publish the necessary guidelines pertaining to the scope of basic amount of gains, taking into account the operational results.

(4) The need and the direction to deduct the certain amount of sales

A If the basis for calculation of surcharges is uniformly and impartially established as the amount of sales of all the goods or services subject to infringements, some people point out that the amount of surcharges in some cases may exceed the amount required for in light of the purport and nature of the surcharge system, for example, charging twice the amount of sales pertaining to the same goods or services, as shown below (see attachment sheet 11). In particular, for cases where the amount of sales overlaps with the goods or services subject to sanctions by the competition authorities in other countries, the amount would automatically be established as the basis for calculation if it is to be acknowledged as the goods or services subject to infringements. This would lead to an excessively large amount of surcharge for the violator:

①For cases where the amount of sales of specific goods or services overlap each other in a number of infringements

②For cases where the amount of sales of the goods or services subject to infringements that were sold to foreign users are subject to sanction and penalty calculation for the relevant infringement by a foreign competition authority

③For cases where only part of the goods or services subject to infringements is considered as an infringement

④For cases where the goods or services subject to infringements are traded between the group companies, when the violator is operating a business subject to infringements on a corporate group basis

⑤For cases where the goods or services subject to infringements are traded between other violators

B Therefore, for cases such as from ① to ⑤, it is appropriate to exclude a certain predetermined amount from the amount of sales to be used as the basis for calculation of surcharges. However, how much to be excluded may be considered according to the details of infringement, corporate structure, trade structure, and geographical scopes. It is impossible to provide all the cases in the laws in advance, by overviewing the future changes in the economy as well as in social environments. Therefore, it seems to be appropriate to introduce a system to allow JFTC to decide on a case-by-case basis, with their specialized knowledge.

C However, from the perspective of excluding JFTC's arbitrary operations, and from the perspective of not receiving too many pointless law suits by enterprises that are seeking exemption from unjust gains, it is appropriate to establish the exemptions within certain cases of ① through ⑤ of A above. Also, from the perspective of securing transparency and foreseeability of legal operations, it is appropriate that the necessary guidelines pertain to the scope of amount of sales to be excluded, and shall be established and published.

D Also, the scope of corporation group as described in (3) A and (4) above shall be stipulated by law, referring to the understanding of corporation group under Chapter IV (Shareholdings, Interlocking Officers, Mergers, Splits, Share Transfers and Acceptance of Assignments of Business) and Article 7-2 Paragraph 13 and 14 (Joint submission of reports and materials) of the AMA and Companies Act and so on.

3 Calculation period of the amount of sales serving as basis for calculation of surcharges

【Conclusions by the Study Group】

○ 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.

(1) The need and the direction of the revision of the upper limit of the calculation period

A The upper limit of the calculation period was not stipulated when the system was first introduced in 1977. The following matters were taken into account when the basic calculation rate was raised in 1991, and as a result, the calculation period was limited to three years:

①Approving an excessive long period of implementation would cause various problems, from the perspective of social stability in legal relationships

②To avoid placing excessive burdens on the enterprises involved by tracing back their amount of sales to backdating many years (in general, most of the retention periods of accounts and documents for enterprises and public offices are for five years)

③The average period of implementation for the cases subject to surcharge payment order were one year and two months. The periods which exceed three years were exceptionally rare, so even such limitation should be sufficient to deter infringements

B However, an upper limit of the surcharge period would allow the violators to achieve a certain amount of unjust gains because they would not be collected when the violators have engaged in their infringements for a long period. In addition, the upper limit unreasonably would result in a much larger amount of unjust gains, if the violator have engaged for much longer. Both from the perspective of deterring infringements and forfeiting unjust gains, the current surcharge system is unreasonable, under which not even unjust gains of the violators cannot be collected. As a matter of fact, for the cases on and after 2009 where violators were subject to payment order, the average period of infringements were about four years, many of them over five years. Some were almost ten years (see attachment sheet 12). In many cases, violators may achieve a certain amount of unjust gains. Considering that there are very few examples of upper limits in sanction calculation period in other jurisdictions (see attachment sheet 1), and that the EU, in particular, stipulates infringement period as an important calculation element for the amount of sanction, and it may be appropriate to revise the" three years" upper limit.

C However, if a violator has engaged for excessive long, the basis for calculation of surcharges over such a period need to be calculated, and if the enterprise have not kept accounting books or documents for such a period, it would be impossible to calculate. Therefore, upon revision of the three year upper limit, other measures such as set forth below should be considered:

①Limiting the calculation period to an extent the JFTC can generally calculate the basic amount of sales and gains. For example, the Commercial Code and Companies Act stipulates that merchants and stock companies keep their accounting books and documents for ten years (see attachment sheet 13). Based on these provisions, provision shall be stipulated by law to establish the basis for calculation of surcharges as the amount of sales for ten years backdating from the date on which the JFTC began to investigate.

②Allowing the JFTC to establish the average amount of sales of the past few years as a basic amount of sales or gains. If an enterprise alleges that such amount is excessively large, such allegation shall be accepted for the time being, and unless an enterprise presents a reasonable amount of sales, the JFTC shall establish the average amount of the past few years multiplied by infringement period as the basis for calculation.

Also, in the Study Group, while some members expressed an opinion that calculation period

should be limited to seven years backdating from the date on which the JFTC began to investigate, referring to provisions under the tax laws, majority of them were against this opinion because ① a system under which even unjust gains can't be collected wouldn't have an effect on deterrence and ② it is possible to calculate the amount of sales during a period for which enterprises are obliged to keep their accounting books and documents by other laws.

D If the upper limit of the calculation period is not abolished, and a certain limit of such period is established instead, it is appropriate to apply such limit to the whole group for the cases that business transfers within the corporate group during infringement period have been performed. For example, if the foresaid ① of C is applied, when the violator X transfers its business to company Y within their corporate group seven years before the date on which the JFTC began to investigate, and Y has continued to engage in infringements, then the surcharge may not be imposed on X due to the period of exclusion. Therefore, the basis for calculation to Y will have to include the three year during which X had engaged, backdating ten years to seven years from the date on which the JFTC began to investigate. Such handlings meet with both cases of the foresaid 2 (3) A④ as well as the surcharge imposition system.

(2) The need and the direction of the revision on commencement and termination of the calculation period

A In the current surcharge system, with regard to exclusive private monopolization and unfair trade practices, the calculation period shall be from the date on which the enterprise began to engage in the act to the date on which it stopped engaging in the act. On the other hand, with regard to unreasonable restraint of trade and dominant private monopolization, the calculation period shall be from the enterprise began implementing the act in violation in its business activities to the date on which it stopped implementing the act in violation in its business activities (hereinafter, "period of implementation").

B Period of implementation on unreasonable restraint of trade was established to set the date on which trade through cartel has commenced as that from which the basis is calculated, based on the concept: "on the scope of enterprises' actual economic gains by cartels, the idea of establishing the amount of surcharges as the relevant one to their gains", because the purport of the system was to prevent violators from achieving a certain amount of unjust gains when the surcharge system was first enforced in 1977. However, with regard to the amount of sales after the initiation of the period, it is interpreted that whether or not the sales have been made by actual cartels is not in question. Therefore, based on the purport and objective of the surcharge system as described in 1 (1) above, there is little need or rationale to apply such performance period to enhance correctness of unjust gains only during a calculation period, by targeting the unreasonable restraint of trade and dominant private monopolization only.

C Therefore, much the same as other types of infringements, it is appropriate to amend the surcharge calculation period for unreasonable restraint of trade and dominant private monopolization, from the date of the occurrence of the first infringement to the date of cessation of such occurrence.

4 Basic calculation rate of surcharges

【Conclusions by the Study Group】

○ 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.

(1) The current basic calculation rate

In 1991, the basic calculation rate of surcharges was raised to 6% (average operating profit ratio in the corporation statistics) from the former 1.5% (half the average ordinary profit ratio in the corporation statistics) which, was the ordinary rate. However, there had been no decline in infringements by such change, and repeated violators prevailed. The rate was raised again to 10% (see attachment sheet No. 14) by the 2005 Amendment, because the former rate was deemed insufficient from the perspective of deterring infringements in this conventional system of collecting the amount corresponding to unjust gains.

The 10 % rate had been established, adding 25 % onto the 8 % to provide a sufficient level in light of the administrative objective of deterring infringements, based on the following circumstances: ① analysis of unjust gains in the past infringement cases showed that (hereinafter, "previous gains analysis") the violators had gained more than 8 % in nine out of ten of such cases (see attachment sheet 15), although the average unjust gains percentage was about 16.5 %, and ② there had already been systems under other laws and regulations that collect 1.4 times or double larger amount than that of unjust gains, such as charging increased taxes or increased impositions for medical insurance benefit fraud.

(2) The need of the revision of the basic calculation rate

Analysis of unjust gains in the past infringement cases that occurred after the cases subject to the previous gains analysis (hereinafter, "latest gains analysis") showed that, although estimates for unjust gains have decreased in comparison with the previous gains analysis, the average unjust gains was estimated at about 13.5 % (see attachment sheet 16). This result revealed that even the average amount of unjust gains cannot be collected under the current surcharge system. To begin with, the current 10 % basic calculation rate is a rate that adds a more restrained level for deterrence in comparison with other laws and regulations onto the amount corresponding to unjust gains, which was restrainedly estimated as described in (1) above. Therefore, the current rate can theoretically hardly expect a sufficient effect on deterrence. Also, the current system, which limits the calculation period to three years (see above 3(1)), allows the violators to achieve a large amount of unjust gains, if they have engaged for a long period Likewise, under the current system, there are some cases where even the unjust gains cannot be collected and the current surcharges may not be sufficient enough to deter infringements.

Even after the basic calculation rate was raised to 10 % in the 2005 Amendment, there are numerous cases where enterprises had repeated or continued infringements (see attachment sheet 17). Furthermore, with regard to the public bid-rigging cases, there are cases where the JFTC found through the investigation that infringements had been committed, even though the enterprises had announced that they had not committed any infringement nor would they do

so in the future in the hearings conducted for the bid issuers and had submitted such written oath, before the JFTC had initiated the investigation. These cases may show that there are some enterprises that lack sincerity to comply with the AMA, such as malicious enterprises that intend to conceal infringements systematically, or enterprises that cannot detect infringements by themselves in their internal investigations. They also may show that the current surcharge system is still not sufficient to deter infringements.

In addition, now that the recent economy has been globalized, the competition authorities in other countries tend to make a more strict enforcement, for example, imposing heavier sanctions on the competition law violators including international cartels (see attachment sheet 19). On the other hand, the current level of surcharges imposed in Japan is still fairly low compared to other jurisdictions, particularly in Europe and the US. If law enforcement of the AMA in Japan remains weak compared to other jurisdictions, the Japanese market may lose credibility. Recently there have been some cases where a large amount of surcharges have been imposed on the Japanese enterprises by the authorities in other countries including Europe and the US (see attachment sheet 20). It is pointed out that such circumstances may have resulted partly from the environment where Japanese enterprises are insufficiently aware of complying with competition laws because of the weak enforcement of the AMA by the JFTC.

Recently, although the number of infringement of the AMA cases have decreased slightly (see attachment sheet 21), this may result from the prolonged procedures due to introduction of the hearing procedures as a pre-procedure for the cease and desist orders and surcharge payment orders, corresponding with an abolishment of the decision as of the 2013 Amendment. The decline in the number of handled cases in itself may not mean that the current system is sufficient enough to deter infringements and, as a result, the number of infringements has decreased.

The number of leniency applicants had decreased to only 50 cases in the fiscal year 2013, but increased again to 61 cases in fiscal 2014, and to 102 cases in fiscal 2015 (JFTC "Status of processing of cases in infringements of the AMA In fiscal 2015").

Based on these circumstances, the current basic calculation rate may not be insufficient in light of the administrative objective of deterring infringements.

(3) The direction of the revision of the basic calculation rate

Therefore, in order to achieve the administrative objective of deterring infringements, it may be necessary to make a revision to raise the level of surcharges, including basic calculation rate. However, if other matters to be revised are enforced, such as revision of the calculation period upper limits (see above (3)), or surcharge aggravation for obstruction of investigation (see later mentioned 8(3)), the overall surcharge level of the system maybe secured sufficiently enough to deter infringements. Therefore, it will also be appropriate to revise the level of the basic calculation rate according to these situations, with the objective to raise the level of surcharges in the entire system.

5 Calculation rates by type of business

【Conclusions by the Study Group】

○ 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.

(1) The purport of calculation rates by type of business

Calculation rates by type of business system began with the introduction of the surcharge system in 1977, having taken into account the following matters: ① wholesalers and retailers tend to serve as a medium between transactions and receive their values as brokerages to the transactions, and their small profitability are featured by their nature, and ② corporation statistics show that wholesalers' and retailers' operating profit on sales differs greatly.

With regard to the individual calculation rate, in the 1991 Amendment, the calculation rates for manufacturers, retailers, and wholesalers were established at 6 %, 2 %, and 1 %, respectively, based on the average operating profits on sales of retailers and wholesalers being approximately 2 % and 1 %, as shown in the corporation statistics of operating profits on sales of corporations that deal with retail or wholesale businesses as their major business activities. On the other hand, in the 2005 Amendment, while the manufacturer's calculation rate was established at 10 % based on the previous gains analysis (see above 4(1)), retail and wholesale business calculation rate was deemed suitable to maintain the rate difference as it is, for the reason why deciding each calculation rate by generalizing based on the past cases were found to be difficult due to insufficient samples to be referred. Therefore, according to the new calculation rate for manufacturer, calculation rates for manufacturer, retailer, and wholesaler were set at 10%, 3%, and 2%, respectively (see attachment sheet 22).

(2) Operations and interpretation of type classification

Under the current surcharge system, the sector classification is divided according to not whether the main operation of the violators is a wholesale business or retail business, but whether the business activities subject to infringements apply to the wholesale business or retail business. Also, even if the business activities in general include buying and selling of products from third parties, when there are special circumstances where the actual business activities are found not to be classified as wholesale or retail, these cases shall be classified as other type (see attachment sheet 23). Such classifications for business activities are made on a corporation basis. Therefore, in some cases, the reduced calculation rate is forced to be applied, classified as wholesaler, (see attachment sheet 24) despite the fact that the violator belongs to large-sized corporation groups, and purchases from another corporation which belongs to the same group and sells to a third party.

(3) The need of the revision of calculation rates by type of business

The calculation rates by type of business are considered to be based on the purport that the amount of surcharges shall be in correspondence with the actual unjust gains, as described in (1) above. However, unlike the calculation rate for manufacturer, the current calculation rates for retail and wholesale businesses were not established according to an analysis of unjust gains of past infringement cases. According to the latest gains analysis, although the sampled cases are few, the average rate of unjust gains in cases that includes violators approved as wholesalers (about 12.7 %) are roughly the same level as the overall average (about 13.5 %) (see attachment sheet 16).

Furthermore, in 1977 when the AMA was first enforced, there were not so many enterprises which operated more than one business activity in an integral way; wholesale and retail business might be individually operated by enterprises which carried out their business as their major business activity. However, there are many business activities going on within a corporate group basis today. Increase in diversified business activities, such as vertical mergers, integration of manufacturing and sales sections, large-scale retailers which sell their PB products, complicated OEM transactions and lump-sum subcontracts, have made the borders unclear between wholesale, retail, and other sectors. Many cases are found in which enterprises split their business sectors such as manufacturing and sales into some companies within a corporate group.

These diversified business activities have increased complexity in sector approvals, and

because enterprises have the benefit of competing for such approvals due to the large difference in calculation rates, the existence of the calculation rates by type of business has caused costs for approvals or law suits to increase. Also, for example, if the business activity is carried out unitedly by a corporate group, by putting one of their enterprises that do not manufacture into a cartel conduct pertaining to price-fixing of a certain product, it is easy to get away with the basic calculation application and receive an order with a small amount of surcharge. In such case, the applied calculation rates may differ greatly between the enterprises involved in the same infringement, resulting in unequal imposition. As a matter of fact, there are virtually few cases where all the violators were approved as a wholesale business, and as described in the above (2), there were many cases where wholesale calculation rate was applied to retail subsidiaries of a large-sized corporate group (see attachment sheet 24). Also, there were no enterprises which were approved as retailers. Other jurisdictions have no such mitigation system of sanctions in relation to sectors of industry (see attachment sheet 1).

(4) The direction of the revision of calculation rates by type of business

Based on the grounds that calculation rates by type of business require detailed examination as described in (2) and (3) above, the system may hinder an effect on deterrence of infringements, including swift and effective operations, and much the same as the basis for calculation of surcharges described in (2) of 2 above. This may not necessarily fulfill the purport and the objective of the surcharge system as described in (1) of 1 above. As examined earlier, the concept of placing an amount equivalent to the actual unjust gains as that of surcharge may not fulfill the purport and the objective of the surcharge system for deterring infringements. As shown in (3) above, the calculation rates by type of business does not meet with such concept either, and there is no significance in maintaining such a system. Therefore it may be appropriate to abolish such a system.

Meanwhile, there have been a strong opinions within the Study Group that the calculation rates by type of business should be maintained, by limiting its application to such enterprises which manage only single business activity such as wholesale or retail business even on a corporate group basis. This opinion is based upon that the profit rate of the wholesale and retail businesses have been and still are in fact small. However, even in such a case, the subjects of approval would just shift from individual enterprises to the individual corporate group, and will not be a sufficient solution to the problems which current systems have. In the present situation where borders between the sectors are becoming more and more obscure due to the diversifying business activities, and it is difficult to design a system that enables both the application of the Calculation rates by type of business based on uniform and consistent requirements and the application of a system that meets with the purport of the system. As a result, irrational results may be originated, such as more cost for the sector approvals or corporate groups' eagerness to reorganize their groups to ease their surcharge imposition, or other evasive measures. Therefore, if the sector-by-sector approval system is to be maintained, there may be a need to revise it carefully and drastically on the sector classifications, application requirements, and the calculation rate of each sector so that the problems of the current system or other problems should not occur.

6 Small and medium-sized enterprise calculation rate

【Conclusions by the Study Group】

○ 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.

(1) The purport of small and medium-sized enterprise calculation rate

Medium-sized enterprise calculation rate is not a system that began with the introduction of the surcharge system in 1977,but that was first introduced in the 1991 Amendment when the basic calculation rate was raised for the following reasons : ① the actual range of price-fixings in cartels differs by size of corporations, ② as a result, the operating profit ratios of large-sized corporations and medium-sized enterprise differ a great deal, and ③ if the rate is to be raised uniformly, a relatively greater economic burden shall be imposed on the medium-sized enterprises.

Like the calculation rates by type of business (see above 5(1)), individual calculation rate was established according to the average operating profit on sales of medium-sized enterprises in the corporate statistics, in the 1991 Amendment. On the other hand, in the 2005 Amendment, similar to the calculation rates by type of business, the rate was changed to a lower level (from 3 % to 4 %) than the raised rate of the large-sized corporation basic calculation rate (from 6 % to 10 %), based on the following situations (see attachment sheet 22) due to a lack of data pertaining to unjust gains regarding the size of enterprises : ① there was a situation in which medium-sized enterprises seemed to be weaker in their ability to make payment compared to 1991, and ② the business community suggested that the medium-sized enterprises should especially be concerned about raising surcharge calculation rates.

(2) The current scope of small and medium-sized enterprises

The scope of medium-sized enterprises to which the medium-sized enterprise calculation rate can be applied depends on the definition of medium-sized enterprise provided in the Small and Medium-sized Enterprise Basic Act. As shown below, it shall be a company or an individual according to each ① sector that either fits into the standards in ② or ③. (Article 7-2 Paragraph 5 of the said Act). Unlike the calculation rates by type of business, whether the scope of medium-sized enterprises should be included or not depends not on a business activity pertaining to infringements, but on a sector of the major business activities of the violators. Approval of the scope as set below shall be made on a corporation basis:

【table】 Scope of medium-sized enterprise for which medium-sized enterprise calculation rate applies

① Sector	② Capital or Investment	Full-time Employees
Manufacturing, construction, transportation	300 million yen and under	300 and under
Wholesale	100 million yen and under	100 and under
Service	50 million yen and under	100 and under
Retail	50 million yen and under	50 and under
Rubber products manufacturing (partially excluded)	300 million yen and under	900 and under
Software, Data processing, services	300 million yen and under	300 and under
Hotels	50 million yen and under	200 and under

(Note) see Article 7 Paragraph 2, section 5 item 6 of the AMA for cooperative associations and others

(3) The need of the revision of small and medium-sized enterprise calculation rate

The medium-sized enterprise calculation rate is a system with a view of making the amount of surcharges correspond with the actual unjust gains of the violators, as well as taking into account the economic burdens for medium-sized enterprises, as described in (1) above. However, the current calculation rate has not been established in accordance with the analysis of unjust gains of the past infringement cases. According to the latest gains analysis, the average unjust gains of the violators which were approved as medium-sized enterprises (about 13.0 %) were roughly equivalent to the level of the overall average (about 13.5 %) (see attachment sheet 16). Also, with regard to public bid-rigging, in which general business partners are not required to negotiate price, or with regard to subsidiaries of large-sized corporations, the original the purport of the medium-sized enterprise calculation rate may not be applicable. However, there were many cases where a medium-sized enterprise calculation rate was applied to the public bid-rigging or to such subsidiaries (see attachment sheet 25).

In addition, there are no countries other than Japan that have such systems of reducing any sanctions due to the size of the enterprises (see attachment sheet 1).

Likewise, it is less significant to maintain such systems than before, under the definition of medium-sized enterprise in the current system, an effect on deterrence of infringements may be insufficient and the original purport, at the time of introduction, of making the amount of surcharge correspond with the actual unjust gains may also be hindered.

On the other hand, abolishment of the medium-sized enterprise calculation rate should be carefully considered for the moment, for the following reasons: ① under the current system with the medium-sized enterprise calculation rate in operation, regarding the ratio of the amount of surcharges in gross amount of sales of the enterprises that were subject to a surcharge payment order, medium-sized enterprises are relatively large (see attachment sheet 26). This shows that, relatively speaking, such reduced surcharges are functioning well as to deter infringements, ② the economic environment surrounding medium-sized enterprises is still very severe, and the business community suggests that the surcharge of the medium-sized enterprises should be addressed seriously.

(4) The direction of the revision of small and medium-sized enterprise calculation rate

Therefore, in this revision, it may be appropriate to maintain the medium-sized enterprise calculation in general, but some measures should be taken so that such rate shall not be applied to those that are substantially not medium-sized enterprises, such as those belonging to large-sized corporations.

Under the Japanese legal system and legal theory, a system for excluding subsidiaries of large-sized corporations from the application of the medium-sized enterprise calculation rate may be approved, because a system has already existed in Japan which excludes such subsidiaries from the measures subject to medium-sized enterprises in the tax laws. Meanwhile, under the Japanese legal system and legal theory, in principle administrative measures are performed on an individual corporate body basis, it would be difficult to place surcharge payment orders on a corporate group basis.

Therefore, it would be appropriate to prescribe uniformly the scope of corporate groups by referring to: Companies Act, Chart 4 of the AMA (Restriction on business combination), and joint application for surcharge leniency (Article 7-2 Paragraph 13 and 14 of the AMA), and then establish a provision to exclude enterprises which belong to a corporate group that has a large-sized corporation.

The current problems arises only in cases where the medium-sized enterprise calculation rate could be applied to subsidiaries of large-sized corporations. Therefore such problems can be solved even if the scope of a corporate group is uniform. However, if irrational results arises from such uniform scope, such as application of a medium-sized enterprise calculation rate to enterprises which are suitable for such application, then it would be appropriate at that time to examine introduction of a system where the JFTC can individually decide on a case-by-case basis whether the medium-sized enterprise calculation rate should be applied or not, with its specialized knowledge, considering the needs to maintain such calculation rate.

7 Aggravation/mitigation of surcharges

【Conclusions by the Study Group】

○ 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 rate 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 rates 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.

(1) The purport of the current system

Apart from the general 10 % basic calculation rate rule, the current surcharge system provides: ① reduced calculation rate for early withdrawal (8 % as a general rule); and higher rates for ② repeated infringements, and ③ leading roles in infringements (15 % for each case as a general rule; 20 % in cases where both of the higher rates are applied to the same infringement, as a general rule).

In the 2005 Amendment, a reduced calculation rate for early withdrawal was introduced to enhance incentives for the violators to withdraw from such conduct in a short period of time. Also in the 2005 Amendment, a higher calculation rate for repeated infringements was introduced for the reason that the normal surcharge level could not deter infringements of repeated violators who realize the risk of surcharges. In the 2009 Amendment, a higher calculation rate for leading roles of infringements was introduced, the purport being to deter infringements more practically and effectively, for the reason that the existence of enterprises who play leading roles in infringements made it easier to begin with and continued the cartels and bid-riggings.

These reduced and higher calculation rates are not a system under which the amount of surcharges can be aggravated or mitigated according to individual factors, but a system under which, as a substitute to the basic calculation rate, a predetermined and uniform reduced or higher calculation rate are applied in each case. These rates have been established as ones associated with the unjust gains. Although the current basic calculation rate is set at 10 %, which is the sum of 25 % added from the perspective of deterring infringements onto 8 % of the amount corresponding to unjust gains, the reduced calculation rate for early withdrawal is designed to set at 8% as a system for collecting only the amount corresponding to unjust gains, in which the additional value (25%) is reduced. The higher calculation rates both for repeated infringements and for leading roles in infringements are designed to set at 15%, taking into account that the unjust gains achieved by such violators are about 50 % larger than those in general cases (see attachment sheet 22).

(2) The need and the direction of the revision of surcharge aggravation and mitigation

A reduced calculation rate for early withdrawal has been in operation for about ten years since its enforcement in the 2005 Amendment. Reviewing the past cases, most of the enterprises which such rate was applied to did not voluntarily withdraw from infringements, such as a mere loss of qualification for bid-rigging (see attachment sheet 27). Therefore, the purport and the

need of the surcharge system are in doubt, and the revision of the system may be required. To clarify the purport of the system, one of the ideas is to maintain the system, limiting the application to enterprises which truly voluntarily withdraw. However, an amendment of the leniency program as mentioned in 8(2) below (abolishing the limit in the number of leniency applicants and raising the upper limit of the reduced rate in the leniency program) would enable all the enterprises to have incentives for early withdrawal, so it is appropriate to abolish the reduced calculation rate for early withdrawal.

In the EU, there are no mitigation measures for early withdrawal, because short periods of infringements could be taken into account in the calculation methods multiplied by periods of infringements. If Japan abolishes or extends the three year upper limit of the calculation period, an effect on early withdrawal would relatively increase. Therefore, from the perspective of securing incentives for early withdrawal, it is appropriate to abolish or extend the upper limit of the current three year calculation period.

B With regard to the current higher calculation rate for repeated infringements and leading roles of infringements, it seems to be little problem that requires immediate revision. Therefore, it may be appropriate to maintain the current system as it is for a while.

However, in recent years, there are about ten cases of repeated infringements on a corporate group basis (see attachment sheet 28). According to the latest gains analysis, although there are not so many cases, the average unjust gains value of repeated infringements on a corporate group basis is fairly large; which is about 21.9 % (see attachment sheet 16).

Also, it may be appropriate to consider the introduction of a system to apply a higher calculation rate for repeated infringements on a corporate group basis, because: ① recently, compliance on a corporate group basis is required, ② in other jurisdictions, the higher calculation rate for repeated infringements is applied on a corporation group basis, and ③ the leniency program also allows a joint application by enterprises within the same corporate group.

However, based on the principle that administrative measures are taken on a corporation basis under the Japanese legal system and legal theory, upon examining such a system design, it may be necessary to examine it carefully, such as limiting the scope of repeated infringements subject to the higher calculation rate (e.g. excluding repeated infringements by a group company that has no chance of knowing of the first infringement), from the perspective of limiting such application to be an essential one for deterring infringements.

C According to the latest gains analysis, average unjust gains of repeated infringements were estimated at 16.5 %, and those of leading roles of infringements were at 15.9 %. Therefore, from the perspective of more effective deterrence of infringements, considering that the amount of unjust gains in such cases is about 50 % larger than that of general cases, it may be appropriate to maintain the current system. This is because the rationality of the current system is being maintained, under which the higher calculation rate 15 % (or 20 % in the case where both rates for repeated infringements and leading roles of infringements are applied) is substituted for the basic rate 10 %.

D Surcharge aggravation and mitigation as a system for increasing incentives to cooperate in investigation shall be examined in the following 8. At this time surcharge aggravation or mitigation by the other factors may not need particularly to be introduced. While it would be difficult to provide a uniform and impartial standard concerning surcharge mitigation corresponding with the compliance system arrangement or lack of ability to pay, there seems no immediate call for decisions on such circumstances from the specialized knowledge of the JFTC for. Therefore, it would be appropriate not to consider these factors in this revision and to leave them a task for considering for the future.

8 System for increasing incentives to cooperate in investigations

【Conclusions by the Study Group】

○ 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 mitigated 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 mitigated rates, necessary guidelines shall be formulated and published.

(1) Overview

A The current leniency program is a system, under which prescribed, uniform rates are applied if applicants fulfill certain predetermined requirements according to the order of their applications. Therefore, with regard to the enterprises that could not fit into the limitation on the number of applicants (only up to five enterprises can apply), or enterprises that could not apply during the application term (twenty business days starting from the date of investigation), there is no system for securing the incentives to cooperate in investigations. Therefore, there are many cases where smooth cooperation by the enterprises cannot be obtained (see attachment sheet 29). Also, because applicants can obtain immunity or a certain reduction in surcharge through the predetermined requirements regardless of any cooperation, even if applicants are not liable for sincere or positive cooperation. This prevents applicants from cooperating more positively than a certain extent. Therefore, there are not a few cases where applicants are reluctant to cooperate in investigations (see attachment sheet 30).

B Although the AMA stipulates a punishment for obstruction of investigations, this applies only to specific conducts against the JFTC investigations carried out pursuant to Article 47 of the said act. Also, this punishment, which is a criminal penalty by its nature, calls for restrained application, and requires a high level of proof. Resources for the proof which JFTC may spend, apart from their main duty of suspected infringement investigations, are limited. Therefore, although there are not a few cases where the punishment for obstruction of investigations could have been applied (see attachment sheet 31), there is no case where an enterprise was actually charged, and the function of punishment for obstruction of investigations may be limited as a measure to swiftly and effectively deter obstruction of investigations.

C In general, enterprises will not voluntarily report to the authorities any facts which would be

a disadvantage to them, unless there is some benefit in doing so, as shown in 4 (2) above. Some of the cases are found in public bid-rigging, for example, that infringements had been committed even though the enterprises had responded that they had not involved any infringements, nor would they do so in the future in the hearings conducted for the bid issuers and had even submitted written oath (see attachment sheet 18). In order to make a sufficient effect on deterrence, as securing practical effectiveness of investigations of suspected infringement is a major challenge, it is necessary to enhance incentives for enterprises to cooperate in the JFTC's investigation by preparing such merits as mitigated surcharges to those who voluntarily reported facts that would be a disadvantage to them, as well as to enhance disincentives for obstruction of the JFTC's investigations. For this, it may be appropriate to establish a system, with a close look at cases of other major countries (see attachment sheet 1) where they impose mitigated surcharges for actual section infringements according to the degree of cooperation, as well as aggravated surcharges for the cases where the enterprise, directors, employees, or representatives had committed actions subject to the penalty on obstruction of investigations or other certain obstruction of investigations.

D Infringements in cartels and bid-rigging are, by their nature, conducted in a closed room, and are therefore featured by lack of proof or difficulties of detecting and solving. If positive cooperation by such violators can be obtained, prompt and correct solutions can be achieved, and such efficiency of dealing with the cases is expected to increase the likelihood of exposure, resulting in a stronger power in deterrence. On the other hand, obstructions by the violators can particularly delay the JFTC's handling of cases. If these obstructions decrease the likelihood of exposure, such circumstances will weaken an effect on deterrence. This idea has already been introduced in the current leniency program, under which the amount of surcharges are mitigated for enterprises that have voluntarily reported their infringements, with the purport of: achievement of exposures, promotion of fact finding, and cancellation and deterrence of infringements (see attachment sheet 32).

Also, cooperating in investigations with a positive attitude shall mean that the internal investigations or compliance systems are functioning well in the enterprises in case of infringements. This shows a smaller chance of repeated infringements by these types of enterprises. On the other hand, taking non-cooperative attitudes toward the investigations may show that such systems are not functioning in the enterprises, and therefore there are more chances of repeated infringements. Because infringements by the latter enterprises may be deemed more difficult to deter, surcharge aggravation should be required to achieve effective deterrence. Aggravated surcharges on intentional false certification in The Certified Public Accountants Act (as of Article 31-2 Paragraph 1 item 1 and others) is also a system that is introduced to counter such difficulty of deterrence compared to false certificates due to the failure of taking reasonable care; it is not on the basis that the intentional false certificate creates larger unjust gains (see attachment sheet 2). Likewise, systems under which the amount of surcharges is aggravated with the whole objective of deterrence in infringements have already been introduced in Japan.

E Based on these circumstances, the necessity and the adequacy of a system under which the amount of surcharges are mitigated according to the enterprises' degree of cooperation, as well as that of surcharges are aggravated due to obstructions can be approved. In addition, it can be also tolerated under the Japanese legal system and legal theory. The following ideas may be appropriate for a specific system design.

(2) The need of a system for increasing incentives to cooperate in investigations and the direction of the revision

A Surcharge mitigation according to the degree of cooperation

(A) Expansion of leniency

a As described in (1) above, to enhance incentives to cooperate in JFTC's investigation, it may be appropriate to set up a system for reducing the amount of surcharges according to the enterprise's degree of cooperation.

b For such cases, because the leniency program to mitigate the amount of surcharges has already existed in the current system, a relation between a new system for reducing the amount of surcharges according to the enterprise's degree of cooperation and the current leniency program can be questioned. In this respect, it may be desirable that the new system in question shall be applied only to the leniency applicants, from the perspective of securing foreseeability by avoiding the systems that would be too complicated, and securing transparency by clarifying the subject of surcharge mitigation. This would result in prevention of the arbitrary operations of the JFTC.

c To be specific, in order to provide a wide range of enterprises with their incentives to cooperate in investigations, abolishment of the current limitation on the number of applicants (currently, up to five enterprises can apply) may be deemed appropriate, as well as the extension of the application term (currently, twenty business days starting from the date of the investigation). Meanwhile, it may be appropriate to introduce a system in which the JFTC can make decisions on the individual mitigated rates within a certain scope according to the enterprises' degree of cooperation, for the applicants that have come in the second place and after in order to maintain incentives for early and prompt application, apart from the exemption of the surcharges for an applicant that has come in the first place, which shall be maintained. In the process of legislation, there may be a need to examine the scope of mitigated rate carefully, by referring to the mitigated rates or the reduced rates in the current system or cases in other major countries (see attachment sheet 33), based on the following perspectives: ① to include the reduced rate for early withdrawal into the leniency program (which would enhance incentives for early withdrawers), ② to secure incentives for a prompt and early application, and ③ to obtain effective cooperation in investigation in light of the judgement standards on the degree of cooperation that shall be examined in (B) later on. In general, a wider range of mitigated rates will give more outcomes for the effective cooperation in investigation.

d If the purport of the surcharge mitigation corresponding with the degree of cooperation is understood as described in (1) D above, no specific problems wouldn't arise with abolishment of the limitation on the number of applicants (currently, up to five) or extension of the application term (currently, twenty business days starting from the date of investigation).

(B) Judgement standards for the degree of cooperation in investigation

a With regard to standards for judging cooperation in investigation, from the perspective of excluding an arbitrary legal operation by the JFTC or excluding the elements of plea bargaining; for example, it may be appropriate that the proof (including statements) which applicants voluntarily submit shall be evaluated with the following perspectives and that the individual decisions on mitigated rates shall be made with such evaluation:

①For applications filed before the commencement of the investigation: the degree of proof regarding the enhancement of security, correctness and promptness of inspection

②For all applications: the degree of contribution to prove infringements to be approved for the JFTC's administrative measure (including the degree of added value evaluated in comparison with the proof which JTFC had already obtained)

b With regard to the degree of added values, if the decisions regarding the mitigated rate are to be made based on the added value of such proof at the time of its submission, it will hinder efficient and prompt handling of the cases because: ① it is not until that the JFTC totally

solves the facts of infringements that it can judge whether such proof had contributed to efficient and effective the fact-findings and handling of the cases, so it is avoidable to judge at phases where final approval of the facts of infringements are confirmed, and ② the judgement process for the decision on the mitigated rate can be too complicated. Therefore, it may be appropriate to determine a mitigated rate according to the added value as to how much it contributed to prove the "the facts found by the JFTC" (Article 50 Paragraph 1 item 2 in the AMA), and "the basis of calculation of the surcharge and the violation related to the surcharge" (Article 62 Paragraph 4 in the AMA), included in the notice for the hearings pertaining to the cease and desist orders and the surcharge payment orders. Also, because early submission of proof can contribute to early and efficient solutions, added values of such proof should be highly evaluated. It may be appropriate to determine the mitigated rate by taking into account the date on which applicants have submitted proofs.

c From the perspective of transparency and foreseeability, the evaluation standards of proof values and the decision-making methods for the mitigated rate needs clarifying as far as possible. However, it may be impossible to establish all the judgement standards for proof values or the decision-making methods for the mitigated rate corresponding with a variety of cases. In addition, an excessively rigid standard may only secure very little cooperation in investigation or insufficient incentives to cooperate in investigation, as is the case in the current leniency program. Therefore, it may be appropriate to delegate to the specialized knowledge of the JFTC for the evaluation of proof values and the decision-making on the individual mitigated rate.

(C) Factors to be considered upon introduction of a system to mitigate the rate according to the degree of cooperation

If a new system is to be introduce under which the JFTC investigators evaluate the content of statements through depositions of leniency applicant employees, there are concerns that false written statements may be prepared as a result of false statement by the employees, who may have compromised the JFTC's investigation policy so as to gain a larger mitigated rate or to avoid disqualification. Taking this concern into account, it may be appropriate to exclude written statements from the subject of evaluation upon deciding the mitigated rate (for the Right of Defense that will be required in the system for enhancing incentives to cooperate in investigations, see 14 later on). On the other hand, it may be fairly possible for enterprises to submit proofs to the JFTC to contribute to prove their infringements through internal investigations, in light of the operations of the leniency program in Japan or cases in other jurisdictions. Because attorneys can take a part in such a process, there may be essentially no concern over compromise of the JFTC's investigation policy. Therefore, it may be appropriate that only the proof submitted by leniency applicants is to be the subject for the evaluation upon deciding the mitigation rates. This mechanism promoting voluntary submission of the proof by enterprises, and when necessary and sufficient proof can be obtained from the enterprises or attorney promptly, frequency of depositions can be reduce. So, this mechanism will function to decrease apprehension related to the due process.

Also, the considerations suggest that the proof which denies the existence, or curtails suspected infringement, of facts should also be the subject of evaluation. However, the purport of the introduction of the surcharge mitigation corresponding with the degree of cooperation is to provide incentives for a voluntary report of facts which are a disadvantage to themselves. Therefore it may be appropriate to establish that it is subject to mitigation only for the cases where it is a disadvantage to them to submit proof of their infringements.

Furthermore, to enhance further incentives of the enterprises' to cooperation in investigation, and to make the system even more practically effective, there is a need to raise a basic level of surcharges imposed on infringements, as well as the foresaid expansion of the leniency program. It may be appropriate to enforce such amendments by raising a basic calculation rate, or by extending the calculation period of the amount of sales serving as basis for calculation of

surcharges.

B Continual cooperation obligation and disqualifications

(A) Since there are leniency applicants who lack cooperative attitudes for the investigations (see attachment sheet 30) under the current surcharge system, it may be appropriate that the leniency applicants in the new system shall have obligations imposed upon them for continual cooperation as shown below, for example, to prevent such a non-cooperative attitude and to promote solutions to infringements efficiently and effectively. This can disqualify those who have breached such obligations, to secure compliance of such obligation:

a. to submit all the information promptly to the JFTC that they have and are able to obtain pertaining to infringements
b. to respond promptly to the request for information submission (not necessarily pursuant to Article 47 of the AMA) required for the JFTC's administrative measures
c. to order their employees answer to the depositions conducted by the JFTC (not necessarily pursuant to Article 47 of the AMA)
d. to not reveal their the application of leniency nor the details to any third party, without reasonable reasons
e. to comply with all the obligations in ① through ⑤ until the administrative investigation by the JFTC ends

(B) Also, because there is no reason for changing the current system that disqualifies applicants for the cases as set forth, it may be appropriate to maintain such system: ① if there should be any false statement in the materials reported or submitted by the leniency applicants (Article 7-2 Paragraph 17 item (i) of the AMA), ② if the leniency applicant fails to answer to the JFTC's additional report request after their first report, or if they made a false report or submitted false material for such request (Article 7-2 Paragraph 17 item (ii) of the AMA), or ③ if the leniency applicant had either forced other enterprises to commit infringements or prevented other enterprises from withdraw from infringement (Article 7-2 Paragraph 17 item (iii) of the AMA). However, with regard to such disqualification, there is a need to organize applications in conformance with the continual cooperation obligation described in (A) above, and surcharge aggravations for the obstruction of investigations described in (3) below.

(C) About (A)③ above, some members indicated the concern that JFTC's investigators might keep on calling employees until they sign and imprint with deposition records which are contrary to the fact, taking advantage of this obligation, and, if they deny investigators' calling, then the JFTC judge that they should be disqualified as a leniency applicant due to breach of this obligation.

However:

a. Even if a leniency applicant, in the cases where the content of reports is insufficient, probably false, or conflict with other evidence, the JFTC needs to investigate the leniency applicant. So, it is reasonable to obligate the leniency applicant to cooperate to the extent necessary for the investigation
b. The purpose of this obligation is just "to order their employees answer to the depositions conducted by the JFTC". So, this obligation has nothing to do with the content of employee's depositions
c. When some suspicion are found that the JFTC's investigators might take advantage of this obligation and force employees to sign and imprint with deposition records which are contrary to the fact, enterprises can use complaint filing system related to deposition procedures (December 25, 2015. hereinafter referred to as the "complaint filing system")
d. When an enterprise is suspected in breach of this obligation, the JFTC shouldn't

immediately disqualify it, but put into practice such as requesting the enterprise to take corrective actions during the investigations and providing opportunities to discuss measures for correction between the chief investigators and representing attorneys, etc.(see 14 (4) F later on). Through these operation, adverse effect can be avoided

(D) From the above reason, (A)③ above should be included in the continual cooperation obligations.

(3) The need of a system for enhancing disincentives for the obstruction of investigations and the direction of the revision

A As described in (1) above, it may be appropriate to establish a system that allows the amount of surcharge to aggravate, at a predetermined rate, to the infringements of substantive provision for the cases where the enterprises, directors, employees, or representatives have obstructed the investigations subject to the obstruction of investigations surcharges or certain other obstruction of investigations, as a system for enhancing disincentives for the obstruction of investigations.

B In such cases, relationship with the criminal penalties against current obstruction of investigations and infringements of substantive provision shall be questioned. However, the system to aggravate the amount of surcharges for obstruction of investigations is not a sanction based on a moral accusation on the antisocial or unethical side of the obstruction. As described in (1) D above, it is purported to enhance deterrence of infringements such as: ①increase of exposures, by preventing obstructions and achieving efficient and effective solutions and handling of infringement cases, ② objective for an effective deterrence for possible repeated violations. It also meets with the purport and the objective of the surcharge system, in the end, deterring infringements. Differing from the system that mitigates surcharges to enhance incentives to cooperation in investigation, as examined in (2) A above, this system functions by use of aggravated surcharges. It may be appropriate to predetermine a uniform rate, and not leave any decisions to the JFTC within scope. Also, it may be appropriate to determine such aggravated rate within the purport and the objective of the surcharge system as examined in 1(1) above, taking into account the surcharges for the obstruction of investigations (see 13 later on) or other laws and the regulations on the increased taxes. If the new system meets with such systems, it can duly be categorized as an administrative measure to deter infringements, which have different purports and objectives from the obstruction of investigations surcharges, under the Japanese legal system and legal theory. Therefore, the issues related to Article 39 of the Constitution (prohibition of double punishment) for cumulative imposition of the surcharge aggravation for the obstruction of investigations and criminal penalties for the obstruction of investigations or infringement of substantive provision should not arise. Also, for clarity, it may be appropriate to introduce a law for the specific obstruction of investigations which are subject to the aggravated surcharge as much as possible. At the same time, it may be appropriate to establish a system that can regulate conduct which is not covered by laws in the Cabinet orders, in order to swiftly add other conduct which is not possibly predicted in the present situation.

C If the leniency applicant obstructs investigations, the applicant of concern shall be disqualified based on the following reasons: ① to approve leniency for those who obstruct efficient and effective solutions and handling of cases shall be a breach of the purport of the surcharge leniency program, and ② the current system also disqualifies those who have reported falsely or submitted false materials.

(4) The need to secure transparency, effectiveness, and foreseeability of legal operations, and the direction of the revision

Upon introduction of such systems to enhance the incentives to cooperation in investigation or to enhance the disincentives for obstruction of investigations as described above, the JFTC will have to establish and introduce necessary guidelines in advance to secure transparency and

effectivity of the JFTC's legal operations as well as to enhance foreseeability for enterprises, and to publicize such system to a wide range of people in advance, as well as to publicize such operational results including explanations of the actual applied aggravates or mitigates to a wide range of people as soon as possible after impositions. All these should be carried out with regard to how the submitted proof is evaluated and how much surcharges are to be mitigated, or, what kind of conduct is to be the subject of the aggravated surcharge for the obstruction of investigation.

9 Direct settlement system

【Conclusions by the Study Group】

○ Introduction of similar systems to direct settlement, which the 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.

(1) In the EU, with regard to cartel cases, a new system was introduced in 2008 in which the European Commission (EC), the executive body of competitive law, shall first determine whether or not the case is applicable to settlements, commence conference. And if the authority agrees to the violator's proposal by admitting the facts which are pertaining to infringements and not raise an objection to the punishment imposed, procedures for the administrative punishment shall be simplified, and the sanctions shall be reduced.

(2) The system objectives to enhance the EC's efficiency as competition law enforcer in general, by efficient procedures through simplified procedures before punishment is carried out, and by increasing exposure by allowing the EC resources to handle more and more cases. In the EC, the usual procedures for cartel cases will take an average of 21 months, starting from the sending of the punishment proposal till the actual punishment is carried out. However, when the said settlement system is applied, such period is shortened to an average of 2.3 months (see attachment sheet 34). On the other hand, in Japan, pre-procedures pertaining to infringement cases (hearing procedures) are to be completed in two months in general. Therefore, in Japan, handling of cases has been carried out promptly from a global standard, and there seems no urgent need to introduce a new system to make such period of procedures shorter.

(3) Also, if the new systems for increasing incentives to cooperate in investigations are introduced, there would be more voluntary cooperation by enterprises, and hopefully it would increases the efficiency and promptness of the JFTC's solutions and handling of cases. Therefore, with regard to settlement, it may be appropriate to examine such issues accordingly in the future, after looking at the operational status of the system for increasing cooperation in investigations.

10 Imposition methods

【Conclusions by the Study group】

○ 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 a 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 for resolving alleged violations against the AMA voluntarily by consent of the JTFC and enterprises.

(1) Basic surcharge calculation method

As examined in 2 of Chapter 2 and 1 of Chapter 3 above, with regard to the matters required for effective deterrence of infringements in correspondence with diversified and complicated economic circumstances, the following systems are also tolerated under the current surcharge system: ① system to delegate to Cabinet Order, or ② system to delegate to the specialized knowledge of the JFTC. Also, if the system is to fall under those examined from 2 to 9 above, the scope that requires systems as described in ① and ② above shall be limited to: decisions regarding the amount of sales serving as basis for calculation of surcharges; decisions regarding mitigation rate in correspondence with the degree of cooperation; and, decisions regarding obstruction of investigations subject to the aggravated surcharges. This would allow measures to be carried out, within the scope of the current surcharge system's purport and objective, basic framework and elements for a consideration pertaining to the surcharge calculation and the imposition described by law as a principle. At the same time, provisions such as ① and ② can also be established.

(2) Compulsory imposition method

A Article 7-2 Paragraph 1 stipulates that, in the cases of infringements, "a surcharge payment order must be imposed", and there lies no option to withhold such order. This is because when the system was first introduced in 1977, it was considered inappropriate to take into account any individual situations and backgrounds of the violators, as a system, and remit surcharges by JFTC's discretion when calculated by a predetermined method. The reasons for such considerations were: ① there were other similar systems such as the surcharge system in the Act on Emergency Measures for Stabilization of National Life, or increased tax in the tax laws, and these systems all functioned to impose surcharges compulsorily according to the predetermined requirements, ② the surcharge system is an administrative measure, and differs from criminal penalties in its nature, in which it operates taking into account all the situations pertaining to the conduct of concern.

B As described in 1(1) of Chapter 3, from the perspective that the legal nature of the surcharge system is "imposes pecuniary disadvantage charged by the administrative agency, with an amount more than the amount corresponding to unjust gains that gained by a violator, with an objective to deter such infringements", a system that withhold surcharge imposition may be appropriate if such deterrence is no longer needed. Therefore, for the cases in which there

seems no fault to be blamed on the violator (e.g. if a new business model with no intent of exclusion accidentally results in the effect of restraining competition, and falls under exclusive private monopolization), or certain other cases where there seems little need for deterrence by a surcharge imposition, it may be appropriate to establish provisions for the withholding surcharge imposition.

C However, if such provision stipulates that "Penalties may be imposed", then reasons for the JFTC's imposition will be required, and become a hindrance to smooth law enforcement. Also, at least for the cartels and bid-rigging, there seems no need for such non-imposition provisions, and for conduct other than the cartel and bid-rigging, there seems no urgent need for non-imposition either. Furthermore, for conduct other than cartel and bid-rigging, it can be assumed that such conduct shall be a subject to the commitment system prescribed in the TPP Agreement Arrangement Act, enacted on December 9, 2016. With regard to suspected infringements, the commitment system works to exclude suspected conduct, and to not make a judgement of such conduct as infringements, by means of agreements between JTFC and the enterprises of concern. It will contribute to early and prompt corrections of problems in competition and broader fields to be handled by the authorities and enterprise cooperation. Immediate enforcement of this commitment system is very desirable. Therefore, with regard to conduct other than cartels and bid-rigging, efficient and the effective solutions for cases can be expected through this new system, and it will be more effective to examine the needs of the revision of such conduct after looking at the operational status of such a system.

D Therefore, it may be appropriate to maintain the current compulsory surcharge system, and to leave the provisions as is for non-imposition for certain cases to be examined in the future.

(3) Exemption due to a small scale

A Article 7 of the AMA stipulates that "if the calculated surcharge is below one million yen, such payment of the surcharge shall not be ordered". This exemption provision was established along with the introduction of the surcharge system in 1977. It is a system that stipulates that the surcharge payment order may not be imposed if the calculated amount of surcharges is below a certain predetermined amount. The purport of such exemption is: ① to avoid pointless, small impositions, in light of deterrence, ② to ease the clerical works for the JFTC, and ③ to care for the small and medium-sized enterprise(s).

B When the surcharge system was first introduced in 1977, the exemption was two hundred thousand yen. In the 1991 Amendment, it was raised to five hundred thousand yen due to a significant increase in nominal GDP. In the 2005 Amendment, it was raised to one million yen, to correspond with the surcharge basic calculation rate becoming 10 %. This is because, if the exemption was left unchanged, there could arise cases which apply to the surcharge payment orders even if the amount of sales was the same as before. There seems no specific need to revise the current exemption based on the circumstance as set forth, and it may be appropriate to maintain the current system as is in this revision: ① the amount corresponding to unjust gains as basis for calculation of surcharges or the added amounts seems to be within the same level as that of other laws and regulations, ② nominal GDP of 2015 is roughly the same level as that of 2005, when the exemption was last raised, and ③ there are significant cases of enterprises to which such exemptions were applied.

11 Difference according to type of infringement

【Conclusions by the Study Group】

○ 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.

(1) Infringements subject to the surcharge system

A Major types of infringement subject to the surcharges under the current system are as follows (see attachment sheet No. 22):

○ among the unreasonable restraints of trade, those which " those related to the price " or " those affecting their price " (hereinafter, "price-affecting requirements"). Cartel for buyers is also included

○ among the control-type private monopolization, those which fit into the price-affecting requirements

○ All of the exclusionary private monopolization

○ Part of unfair trade practices (part of: concerted refusal to deal , discriminatory pricing, unjust low price sales, restriction of resale price, and abuse of superior bargaining position)

○Part of prohibited conduct of trade associations

B Based on the reason that the recorded cases of the legislative measures with regard to infringements other than A above are very few (see attachment sheet 35) at present, there seems to be no specific need to broaden the range of infringements subject to the surcharges, including unreasonable restraint of trade which does not fit in the price-affecting requirements. Also, there seems to be no specific need for the amendment with regard to infringements subject to the surcharges, except for the matters shown in (2)-(5) below.

(2) Private monopolization

Among the matters pertaining to the revision of the surcharge calculation/imposition method for unreasonable restraint of trade examined in 1 through 10 of Chapter 3, with regard to: ① revision of the scope of the amount of sales serving as basis for calculation of surcharges, ② extension or the abolishment of the calculation period, ③ abolishment of the calculation rates by type of business, ④ introduction of the additional rate for repeated infringements on a corporate group basis ⑤ introduction of the surcharge aggravation system for the obstruction of investigations, for these matters it may be appropriate to make necessary amendments for

the control-type/ exclusionary private monopolization also, in correspondence with the revisions of the surcharge system of unreasonable restraint of trade, for the reason that the revision of control-type/ exclusionary private monopolization is required much the same as unreasonable restraint of trade.

Private monopolization is assumed to be subject to the commitment system (see 10 (2) C above), and because efficient and effective solutions can be expected with this commitment system, it will be appropriate to examine the need for the revision of the surcharge mitigation system according to the degree of cooperation in investigation as examined in Chapter 8 (2), after looking at the operational status of the commitment system.

(3) Unfair trade practices

A With regard to unfair trade practices other than abuse of superior bargaining position that are subject to surcharges (concerted refusal to deal, discriminatory pricing, unjust low price sales, and restriction of resale price), taking into account that there has been no recorded cases subject to the surcharge payment orders for such cases since the introduction of the system in 2009 to this day. Taking into account this situation, there seems to be no particular need for the amendment, and it seems appropriate to maintain the current system as is in general terms.

On the other hand, as is the case of private monopolization, with regard to: ①extension or abolishment of the calculation period, ② abolishment of the Calculation rates by type of business, ③acknowledgment of the repeated infringements on a corporate group basis ④ introduction of the surcharge aggravation system for the obstruction of investigations, for these matters, it may be appropriate to make necessary amendments for any unjust trade practices as well in correspondence with the revisions of the surcharge system of unreasonable restraint of trade. This is because the revision of unfair trade practice is required much the same as unreasonable restraint of trade. Unfair trade practice is assumed to be subject to the commitment system (see 10 (2) C above), it will be appropriate to examine the need for the revision of the surcharge mitigation system according to the degree of cooperation in investigation as examined in Chapter 8 (2), after looking at the operational status of the commitment system.

B With regard to the surcharge system for an abuse of superior bargaining position, the cost of investigations/law suits are immense because the recognitions are made in detail for each of the abused enterprises for designating which party falls under "the counterparty of infringement of concern" in hearing procedures. Therefore, it is conceivable that the arrangement of a variety of methods are necessary in order to promptly exclude this type of infringements. However, it will be appropriate to examine the needs of such revision after looking at the decisions and the judgements of courts and the operational status of the commitment. This is because: firstly, numerous cases are still under hearing procedures, and making an amendment in a circumstance where operations and understandings of surcharge calculation are not fully and firmly established, and may only create confusion in the system; and secondly, abuse of superior bargaining position is assumed to be subject to the commitment system described in 10 (2) C above.

(4) Infringements by trade associations

A Under the current surcharge system, for infringement of prohibited conduct by the trade associations provided in Article 8 item 1 and item 2 of the AMA, the parties subject to the surcharge imposition are not the violating trade association, but the enterprises which constitute the association (Article 8 paragraph 3 of the AMA).This is because: ① the constituting enterprises are the actual beneficiaries of such infringements, and ② it is effective from the perspective of infringement deterrence to impose surcharges against constituting enterprises who receive the outcomes of infringements.

B If the surcharge system is understood as " 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 ", and not as an immediate purport for forfeiture of their gained unjust gains as described in 1(1) , there shall be no need to regard the importance of ① in the above clause A; it may be appropriate to impose surcharges against a trade association of concern who is the actual violator. However, there seems no particular need to revise the current system, and it may be appropriate to maintain the current system, taking into account the following circumstances: ① as described in 2 of Chapter 2, this revision is argued only within the scope of the purport and the objective of the current surcharge system, ② it is likely that trade associations cannot pay the surcharges considering their financial situations, and ③ the trade associations are easily dissolved and formed.

C The surcharge system for infringements by the trade associations is virtually equal to that of unreasonable restraint of trade, and the leniency system can also be applied. Therefore it may be also appropriate to make necessary amendments in correspondence with the matters pertaining to the revision of the surcharge calculation and the imposition methods for unreasonable restraint of trade examined in 1 through 10, including surcharge mitigation system according to the degree of cooperation in investigations.

(5) Voluntary Report System

A In Japan, there are surcharge mitigation systems for the voluntary reports in such acts as the Act Against Unjustifiable Premiums and Misleading Presentations, and the Financial Instruments and Exchange Act, from the perspective of enhancing incentives for enterprises to build compliance systems (Article 9 of the Act Against Unjustifiable Premiums and Misleading Presentations, and Act No. 185-7 Paragraph 14 of the Financial Instruments and Exchange Act) (hereinafter, "voluntary report system").

B Although the AMA provides a leniency program, such system is only subject to cartels and bid-rigging, taking into account that these are conducted in a closed room and therefore are difficult to detect or solve, and it is introduced aiming to fully expose and solve such infringements. Therefore, there are no similar systems for other types of infringements, and there are no incentives for the violators to detect infringements and voluntarily report such conduct to the JFTC.

C However, private monopolization is difficult to clarify or detect whether or not it is the conduct of violations objectively or externally, compared to infringements of the Act Against Unjustifiable Premiums and Misleading Presentations, the Financial Instruments and Exchange Act. Therefore, a compliance system constructed by enterprises may not function effectively. With regard to unfair trade practices other than the abuse of superior bargaining position, one of the requirements for such conduct is being a repeated infringement. Recurrence of infringements is a result of the ineffectiveness of the compliance system after the first infringement. There is little need for establishing a voluntary report system for such enterprises.

D With regard to abuse of superior bargaining position, there may be room for consideration, because there have been some achievements in the voluntary report system in subcontract acts that regulate similar conduct. However, with regard to private monopolization or unfair trade practices that are not subject to leniency, there seems to be no specific problem without such voluntary report system. Also, the said conduct assumed to be subject to the commitment described in 10(2)C above, it will be appropriate to examine the need to introduce such a system after looking at the operational status of the commitment

12 Relationship between surcharges, criminal surcharges and civil damages

【Conclusions by the Study Group】

○ 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.

(1) Relationship between surcharges and criminal penalties

A Criminal penalties to juridical persons

(A) In cases of private monopolization or unreasonable restraint of trade, the current system stipulates surcharges for such violators pursuant to Article 95 of the AMA (dual criminal liability provision), as well as fines of up to five hundred million yen to the juridical person of concern (Article 95 of the AMA). Such infringements are charged exclusively by the JFTC, and the primary judgement of whether to bring the case into criminal prosecution is entitled to the JFTC. If the case is not charged by the JFTC, prosecutors cannot take legal action to the case of concern (Article 96 of the AMA).

(B) The current system imposes both surcharges and the criminal penalty cumulatively, and so far the foresaid 2 of Chapter 2 has proved that such cumulative imposition does not violate prohibition of cumulative punishment. The needs for criminal penalty has been discussed many times in the Study Group meetings (see attachment sheet 5). It may be appropriate to maintain the current system framework with both the surcharge and the criminal penalty in operation, because the need for criminal penalties has grown rather than decreased, taking into account the recent trend of strict execution of competition laws in other countries as described in as described in 2(10) of Chapter2.

(C) Under the current system, since the surcharges and the criminal fines have the same function as deterrence of infringements, policy judgement has been provided for adjusting this common element: surcharge shall be deducted half the amount of said fine (e.g. Article 7-2 Paragraph 19 of the AMA). In this revision, the above provisions may be revised if the revised system strengthens the sanctioning function, in light of a call for criminal responsibility. However, as far as the revision is made within the scope of the purport and the objective of the current surcharge system, there may be no need for the revision of the provisions of concern.

B Criminal penalties to natural persons

(A) In cases of private monopolization or unreasonable restraint of trade by natural persons, the current system stipulates imprisonment of up to five years or imposition of up to five million yen (Article 89 and 95 of the AMA).

Today, to effectively promote the leniency program, the JFTC adapts the policies which shall not charge the first enterprises or the employees who have applied for the leniency program prior to an investigation, for the reason that the enterprises may withhold from applying for the leniency program in fear of criminal charges (see attachment sheet 36). However, for applicants or employees who have come second and after, such decisions are left to JFTC's judgements case by case (see attachment sheet 32).

(B) If the system for increasing incentives to cooperate in investigation is to be introduced upon the revision of the surcharge system, particularly for those applicants who have come second and after, there may be more cases where the enterprise of concern instructs its employees to cooperate in the investigations with the hope of obtaining a larger mitigated rate. Opinions suggest that such employees who have cooperated in the investigation should be excluded as targets of criminal charges, because There may be a risk that it will be difficult for JFTC to maintain cooperation in investigations if they are to be charged in an criminal investigation starting after administrative investigation in which he/she had cooperated according to the

enterprise's instructions. However, records of written statement prepared in the administrative investigation phase are not used as proof of criminal investigation; a new record of written statement shall be prepared, and the right to remain silent is duly secured (SCJ Decision as of March 27, 1984 case number 1983 (A) No. 180). Therefore, there is no need for consideration of a fear of criminal charges in the cases of administrative investigation cooperation (testimony and statement of infringement, in particular), and less fear of lack of investigation cooperation incentives under the current policy on Criminal Accusation. It is appropriate to maintain the current system framework for the criminal penalties, including policies on Criminal Accusation.

(2) Relationship between surcharge and civil damages etc.

A The violator of AMA may receive a surcharge payment order pursuant to AMA (Article 7-2 of the AMA), as well as ① charges of civil damage by persons who had suffered from infringement (Article 25 of the AMA and Article 709 of the Civil Code, and others), ②demand for restitution of unjust gains (Article 703 of the Civil Code), ③ and penalty by the order. Such monetary claims and the surcharge or penalty are generated from different purports and objectives, therefore there should be no need for the adjustment of the provisions for surcharges and civil damages in light of constitutional requests. The court also shares this perspective: "systems relating to unjust gains pursuant to the Civil Code are a system under the private law whose objective is to adjust the interests of the entitled parties involved, in sole light of the principle of equality; its purport and objective differs from that of the surcharge system… it is clear that the surcharge of concern and the unjust gains which the state is calling for its plaintiff to restore do not require any adjustment between them to avoid imposition of twice the amount of economic disadvantage from only one infringement. " (Tokyo High Court Decision as of June 6, 1997, case number 1996 (Ke) No. 179.188.189) (see attachment sheet 6(9)). Therefore, there may be no constitutional requests to establish adjustment provisions for the surcharges and civil damages as long as the surcharge system is amended within the purports and objectives of the current surcharge system.

B Although cumulative imposition of the surcharges and fines is not an infringement prohibition of cumulative punishment, both impositions function as a deterrence of infringement, and taking into account that adjustment provision is provided by policy. Based on the above description, it is conceivable that the adjustment provisions for the surcharges and civil damages should be provided by policy because the violator shall pay each amount separately by reason of the same incident. Because the party of concern may be charged more than the gained amount of unjust gains through such payments. However, Japan provides no punitive civil damage systems such as the “treble damage suit” in the U.S., and the civil damage system itself has basically no common elements with surcharge as to its function as a deterrence of infringement, so there is little need for such adjustments.

13 Penalties for obstruction of investigations

【Conclusions by the Study Group】

○ 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.

(1) Penalties for obstruction of investigations (Articles 94 and 95 of the AMA)

A Article 94 of the AMA aims at securing the effectiveness of investigation authority based on Article 47 of the said Act (hereinafter referred to as the "Article 47 investigation authority") and stipulates that ① a person who has refused, obstructed, or evaded the inspection and ② a person subject to interrogation who has failed to appear or to make a statement, or has made a false statement, or failed to submit a report, or submitted a false report be punished by imprisonment with work for not more than one year or by a fine of not more than three million yen.

B In the 2005 revision, it was considered appropriate to raise penalties for obstruction of investigations to the level comparable to the penalties for other economic laws, and penalties for obstruction of investigations penalties were raised from imprisonment with work for not more than six months or by a fine of not more than 200,000 yen to imprisonment with work for not more than one year or by a fine of not more than three million yen for natural persons but remain at a significantly low level for juridical persons (three million yen) when compared to other economic laws (200 million yen) (see attachment sheet 37). Considering that the average amount of surcharges per enterprise in the past five years was approximately 220 million yen, a penalty of three million yen is considered insufficient to secure the effectiveness of investigation authority.

C In addition, while the introduction of surcharge aggravation for obstruction of investigations is considered appropriate, raising fines against juridical persons for obstruction of investigations to the same level as for other economic laws is considered appropriate with consideration given to the amount of surcharge raised under the said system.

D At the same time, it is necessary to consider encouraging the JFTC to actively press criminal charges when cases that fall under obstruction of investigations provided for in attachment sheet 31 are found.

(2) Other effective systems for deterring obstruction of investigations

A As mentioned in (1) above, penalties are stipulated for obstruction of investigations. Considering the significant social impacts of criminal charges, therefore, the existence of provisions for criminal charges undoubtedly is certainly effective in deterring obstruction of investigations.

B On the other hand, for crimes such as penalties for obstruction of investigations, pressing charges is restrained in principle, and thus ① a high level of proof is considered necessary for finding criminal intent and ② finding maliciousness and concrete damage/impacts serious

enough for criminal charges is considered necessary. Therefore, it may be difficult to swiftly apply penalties for obstruction of investigations. Even when an act of obstructing an investigation and destroying evidence has been committed only once, it can significantly hinder the clarification of facts and make enforcement of the AMA extremely difficult. Therefore, considering the desirability of strengthening deterrence against obstruction of investigations and swiftly dealing with such acts, establishing effective measures and penalties against obstruction of investigations apart from criminal charges is considered necessary.

C In order to do so, the use of the increased surcharge system described in 8(2) above is considered appropriate. In such cases, however, no penalty is imposed even with the introduction of surcharge aggravation for the obstruction of investigations if an infringement is not acknowledged unless penalties for obstruction of investigations penalties are applied. To achieve the effectiveness of administrative investigation, therefore, introduction of administrative pecuniary disadvantage measures against the act of obstruction of investigations itself may be appropriate. Since there is no other legislative case of imposing administrative pecuniary disadvantage measures against obstruction of investigations, however, careful examination is necessary and thus its introduction at the time of this revision is considered difficult. In any case, the introduction of such system should continue to be examined with consideration given to the operational status of the new system.

14 Due process under the new revised system

(1) Overview

【Conclusions by the Study Group】

○ 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.

A The due process under the current system had been examined at the meetings of the "Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act", held in the Cabinet Office between February and December 2014, with attention paid to points such as ① ensuring adequate defense of the parties to the case, ② ensuring the fact finding ability of the JFTC, ③ consistency with other domestic administrative investigation procedures and criminal procedures, ④ comparison with overseas systems/mechanisms and practices, and ⑤ ensuring the appropriateness and transparency of administrative investigation procedures, etc. and consideration given to Article 16 of the Supplementary Provisions of the 2013 revision of the AMA and the supplementary resolution of the Committee on Economy, Trade and Industry of the House of Representatives concerning the said Article (November 20, 2013), the Advisory Panel had concluded the report published on December 24, 2014. This report mentioned that the Panel could not reach a conclusion that the so-called attorney-client privilege and the right to defense such as presence of lawyers at the deposition, etc. should be adopted because of

the concern over the impacts on the fact finding ability of the JFTC.

B Needless to say, in investigation procedures for suspected infringement of the AMA cases in Japan, protecting due process and rights/interests of the other party of the investigation/measure is important. The current system of the JFTC's investigation procedure under the AMA are designed with sufficient consideration given to due process in light of the Japanese legislative system, and the JFTC also gives sufficient consideration to due process in the enforcement of the AMA. Ensuring strict enforcement of the AMA by the JFTC is also important, the effectiveness of law enforcement should not be impeded by enhancing due process beyond the need. It would eventually cause damage to the benefits to general consumers. Therefore, mutually balancing ① investigation power granted to the JFTC for clarifying facts and the content of the measure against infringement, etc., and ② protection of due process for the enterprises subject to investigation/measure, are necessary. The importance of balancing the content of investigation power granted to the authority, etc. and protection of the right of defense of the other party of the investigation/measure is commonly recognized in the Japanese and overseas criminal procedures, etc. (see attachment sheet 38).

C The Japanese AMA is considered to already provide sufficient protection of due process in light of ① the Supreme Court Grand Bench judgment of July 1, 1992/Final appeal case No. 11 of 1986, which ruled that opportunities of defense for the other party of administrative measures "should be decided after considering comparing and balancing the content, nature, and degree of restrictions of rights/interests restricted by the administrative measures and the content, degree, and urgency of public interests to be achieved by the administrative measures, etc.", ② the purports and provisions of the Administrative Procedure Act, ③ the content of pre-procedures and other protection of due process of other laws, and ④ the fact that announcement/hearing, inspection of documents, notification of reasons, and establishment/publication of guidelines are considered to have been universally recognized as four elements of due process in the area of administrative law including other jurisdictions, etc. (see attachment sheet 39).

In other foreign countries, the level of the amount of sanctions, etc. is high when compared to that in Japan, calculation/imposition of sanctions, etc. is left to the broad discretion of the authority, plea bargaining is accepted, and severe and effective penalties for obstruction of investigations exist (see attachment sheet 40). It is therefore inappropriate to design the content in consideration of international standards by simply or formally comparing the content of protection of due process without considering such differences in the entire system. There were opinions within the meeting of the Study Group that in the EU, on the premise of severe sanctions and broad jurisdiction of the authority, while the "risk" of sanctions being increased when not cooperating with the authority's investigation "had been used as hostages to force submission of information in a vast number of cases", the right of defense such as the attorney-client privilege, etc. was the "right to put a brake on excessive cooperation obligation'" (weapons that can be used to fight against the authority on even ground). In this way, when comparing with the level of right of defense in the EU, comparing the underlying severity of sanctions and extent of the authority's jurisdiction at the same time is considered necessary.

D Therefore, revising the protection of due process under the new system to the extent necessary, taking into account the need for various rights of defense, comparison with the entire systems of other jurisdictions, impacts to fact-finding ability of the JFTC, and procedures of other laws and regulations in Japan and on the premise of establishing measures to prevent abuse of various rights of defense at the same time, while balancing the content of investigation power granted to the JFTC, etc. and protection of the right of defense of the enterprises subject to the investigation/measure, are considered appropriate.

(2) Pre-procedures

【Conclusions by the Study Group】

○ 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 for increasing 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.

A Pre-procedures under the current system

(A) For administrative measures such as cease and desist orders, etc. based on the AMA, in light of the characteristics of infringement cases of the AMA and the fact that the administrative agencies that take measures are disparate independent administrative commissions, the JFTC shall conduct a hearing of opinions with the would-be addressee of the orders before taking administrative measures such as cease and desist orders and surcharge payment orders, etc. (Article 49 of the AMA, etc.). Because final judgments by the JFTC are to be rendered in cease and desist orders and surcharge payment orders due to an abolishment of the trial system in the 2013 revision of the AMA, hearing procedures are developed from the point of view of the necessity of further enhancing pre-procedure for the cease and desist orders and surcharge payment orders before the revision.

(B) Unlike procedures for filing lawsuits, hearing procedures are not for both sides to contest their claims by submitting evidence, but for the JFTC to provide notice of the content of the orders to the other party and hear its opinions before taking administrative orders. In doing so, as the purpose of allowing to inspect or copy of evidence is to substantiate hearing procedures by showing what evidence supports the content of the orders decided by the JFTC, the evidence subject to inspection or copying are those that provide evidence for "the facts found by the JFTC" and "the basis of calculation of the surcharge and the violation related to the surcharge" and there is no intention to make all the evidence held by the JFTC subject to disclosure and to establish a procedure to decide whether to disclose them or not upon request from the enterprises.

(C) With the evidentiary disclosure system under the AMA, inspection and copy of items submitted by defendants is allowed in investigation procedures (Article 18 of the Rules on Investigations by the Fair Trade Commission). In addition, those who received the JFTC's documentary notifications that contained the expected contents of cease and desist orders or surcharge payment orders, etc., under the hearing procedures, may inspect all the evidence supporting "the facts found by the JFTC" and "the basis of calculation of the surcharge and the violation related to the surcharge" upon request from the parties concerned (copying is limited to the evidence submitted by defendants from the point of view of effectively conducting the investigation of the cases with cooperation from the parties concerned while protecting the confidential information of the enterprises). When applying the new surcharge system calculated according to the degree of cooperation and other new systems introduced by this revision, the proofs providing evidence for the facts supporting the application are also considered to be included in the evidence supporting "the facts found by the JFTC" and "the basis of calculation of the surcharge and the violation related to the surcharge". Therefore, the enterprises are may be able to find out the reasons why a specific mitigated rate is applied based on the leniency program and the aggravated rate is applied due to obstruction of investigations before receiving a payment order, and express their opinions against these reasons.

(D) As described above, the inspection/copying system in hearing procedures under the AMA provides more careful due process, when compared with hearing procedures under the Administrative Procedure Act and pre-procedures for monetary disadvantage orders under other

laws (see attachment sheet 39), as it legally establishes copying of the evidence, etc. Therefore, pre-procedures under the current system are considered necessary and sufficient from the point of view of protecting the defense rights of the parties concerned. As a system to allow further careful due process, those similar to trial procedures before issuing surcharge payment orders under the Financial Instruments and Exchange Act and the Certified Public Accountants Act may be considered. Given the circumstances that the trial system was abolished in the 2013 revision of the AMA, however, it is considered difficult to introduce a new system similar to past trial procedures in this future revision.

B Need of the revision of pre-procedures by introducing a system for increasing incentives for investigation cooperation

(A) There are opinions that when introducing the surcharge mitigation system according to the degree of cooperation, the current scope of inspection/copying of evidence, including the evidence that diminish the values of the evidence contributing to providing evidence for finding violations, needs to be expanded to enable the parties to verify how the JFTC evaluated the proof values and determined the specific mitigated rate at the time the evidence was submitted.

(B) As described in 8(2)A(B) above, however, it is considered appropriate for the JFTC to decide the mitigated rates according to the level of contribution to the proof providing evidence for "the facts found by the JFTC" and "the basis of calculation of the surcharge and the violation related to the surcharge". Therefore, all the poofs subject to evaluation when deciding the mitigated rate are considered to fall under the evidence supporting "the facts found by the JFTC" and "the basis of calculation of the surcharge and the violation related to the surcharge", which are subject to inspection/copying under the current system. Accordingly, by clearly indicating the dates on which the JFTC obtained the specific evidence to enable the enterprises to compare the period of submitting the evidence, the enterprises can sufficiently verify how the added value of the evidence was evaluated and their specific mitigated rates were determined to the extent that the inspection/copying of the evidence is allowed under the current system. Therefore, it is basically considered unnecessary to revise the current pre-procedures, including the scope of inspection/copying of the evidence.

Under the current hearing procedures, however, the evidence submitted by other enterprises may be inspected but not copied. Some members expressed an opinion that in order to enable the enterprises to sufficiently verify how their specific mitigated rates were decided based on the content of the evidence submitted by other enterprises, copy of the evidence submitted by other enterprises should also be allowed under the new revised surcharge systems and thus continue to be considered, including the need/adverse effect.

(3) Attorney-client privilege

【Conclusions by the Study Group】

○ 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 in the operation 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.

A In Europe and the US, although the range varies depending on the state and region, the privilege, which allows the client to refuse to disclose certain communications between an attorney and his/her client, is generally acknowledged to a broad extent not limited to the area of competition laws in combination with severe sanctions and fines, broad discretion of the authority, and plea bargaining, etc. (see attachment sheet 42). On the other hand, strong administrative measures and administrative investigation power such as those in Europe and the US are not generally granted to administrative authorities in Japan. There is no explicit provision to grant the privilege for the enterprises not only in administrative investigation procedures for suspected infringement cases of the AMA, but also in administrative investigation procedures in accordance with other laws and criminal procedures, and in a court precedent (Tokyo High Court judgment dated September 12, 2013/Appeal case No. 80 of 2013) the privilege is also not granted in the current Japanese legal system and legal theory.

B The "Report of the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act" published on December 24, 2014 concluded that introducing the privilege was not appropriate at that time because concerns of impeding JFTC's fact-finding ability could not be dispelled. On the other hand, the said Report did not completely deny the privilege, but deemed it as a system well worthy of examination and suggested that further deepening the discussion was desirable to resolve concerns and questions presented by the Panel (page 17 of the said Report).

C If the revision as described above can be made, including the enhancement of enterprises' incentives to cooperate in investigations through the introduction of a system under which the JFTC determines the mitigated rates according to the degree of cooperation of leniency applicants, the introduction of a system to aggravate the amount of surcharges on certain obstruction of investigations, and the abolishment or extension of the current "three year" upper limit of the surcharge calculation period, then enforcement power of the JFTC is considered to be further strengthened to a certain extent. Therefore, when the privilege is deemed necessary after thoroughly examining the need under the new system, it may be appropriate to examine the nature, specific content, and procedures, etc.

D At the Study Group, there was concern that needs would arise from the introduction of the new system that, while surcharges are to be mitigated based on the values of the evidence, leniency applicants submit to the JFTC, etc., consultation with attorneys would be indispensable in determining the extent to which the continuous cooperation obligation is imposed when a system for increasing incentives for investigation cooperation by imposing continuous cooperation obligation on leniency applicants, etc. is introduced, but requiring the submission of all the advice provided by attorneys to provide appropriate investigation cooperation might deter consultation with attorneys and thus the use of the leniency program. Another opinion suggested that broadly ensuring the privilege over the content of internal investigations on infringements of the AMA and consultation with attorneys, etc. would enable the enterprises to conduct fact finding with security and request attorneys for legal assessment, and therefore even if the enterprises are allowed to voluntarily keep the information on infringements of the AMA secret and thereby preventing the JFTC from using the information, discovery of infringements of the AMA, leniency applications, and voluntary submission of the evidence afterwards would be promoted/thoroughly enforced as a whole, and therefore an effect on deterrence would increase.

E Although not especially relevant to the introduction to the new system, as a disadvantage of the privilege not being granted in Japan, there is a concern that for international cartel cases that affect the markets in foreign countries, for example, when the JFTC orders the submission of certain communications between attorneys and their clients (enterprises) for which the privilege is granted in foreign countries and detains the suspects, the US court in particular may determine that communications not protected in Japan where the privilege is not granted need not be protected in the US and order the disclosure of the communications concerned (will be subject to the discovery). In the Study Group, some members expressed their opinions that there have actually been cases where, for example, when Japanese enterprises request foreign attorneys for advice on foreign competition laws to deal with investigations and lawsuits in foreign countries, providing legal advice in writing is refused for the reason that it may become subject to discovery because the privilege is not granted in Japan, resulting in Japanese enterprises being placed in disadvantageous positions in investigations and lawsuits in the foreign countries when compared to the enterprises in other countries. However, with regard to these concerns, the Study Group could not find concrete facts that such determinations have actually taken place in the US courts. In addition, as ① at least in the US, some courts made judgments that the privilege would not be denied when submitting communications in response to orders by the authority, ② when discovery requests are made to domestic enterprises applying for the leniency program, the JFTC expresses its position to oppose the requests concerned by submitting written opinions to the US courts, ③ there is no fact found that the JFTC has submitted the evidence collected based on its investigation authority, including the documents that fall under the records of the communications concerned (see attachment sheet 43), ④ the Study Group could not find actual cases where the communications concerned were forced to be disclosed to foreign courts because the privilege is not granted in Japan, etc., the Study Group could not share a common understanding whether those concerns form the basis for introducing the privilege or not.

F The Study Group could not find actual cases where the enterprises actually suffer disadvantages because the privilege is not granted, beyond abstract concerns as mentioned in D and E above. In addition, in the Study Group, there were opinions such that ① granting the privilege would undoubtedly impede the fact-finding ability of the JFTC function, and there seemed to be no sufficient need or rationale for granting the privilege to justify such disadvantage, ② with or without the “privilege”, enterprises would still have social responsibilities to discover violations, report them to the appropriate authorities, and correct them, but if consulting with attorneys

would allow keeping the results of internal investigations of violations secret without reporting to the JFTC through leniency applications, it could impose a risk of making investigations by the JFTC difficult and impede the fact-finding ability of the JFTC, ③ since no actual case was found where enterprises hesitated to conduct internal investigations or consult with attorneys for the reason that the privilege was not being granted under the current system, a basis for the need for the privilege might not even exist, ④ even if fact-finding could not be conducted with security unless the results of internal investigations of violations, etc. could be kept secret, such security would not deserve consideration, ⑤ including not only the records on the consultations with attorneys but also the results of internal investigations of violations, etc. to the scope of the privilege would be excessively broad, ⑥ if the internal investigations resulted in the determination that there was no violation, keeping the results of the internal investigations secret would not add any practical benefits. In addition, there were cases in the past where such instructions were given as "a method to avoid a record of statement from being created = to take notes", "to discard notes (dispose of documents)", and "to dispose of a series of documents (for fiscal year ●●●●), as hiding only a half of the series is prone to be detected, hide everything" (see attachment sheet 44). Many expressed the opinion that the content of the following advices should not be granted as a subject of privilege if an attorney advised the client that leniency applications need not be made even though violations were found in internal investigations by attorneys or an attorney advised that leniency applications should be made by trivializing the scope of violations found in internal investigations.

G As described above, the Study Group could not sufficiently share a common understanding for need to grant the privilege. From the point of view of making the new leniency program function better, however, many expressed an opinion that circumstances such as those described in D above were worthy of consideration. An opinion was also expressed that granting the privilege only on the communications between attorneys and their clients (enterprises) after the commencement of the investigation may be considered by positioning it as the right of defense against the use of the JFTC's administrative investigation power. However, as there is no provision granting the privilege under the current Japanese legislative system and no court precedent granted it, many expressed an opinion that legally establishing the privilege as the right of defense against the JFTC's administrative investigation power was not appropriate at this point because of the significant impacts on other law fields, including civil lawsuits. Therefore, the JFTC shared the opinion that, from the point of view of promoting the use of the new leniency program by the enterprises, in view of the particularity of investigation of suspected infringement cases of the AMA as described above, taking care of the privilege in the operation by limiting communications between attorneys and their clients (enterprises) on the use of the new leniency program to the extent of not impairing the function of clarifying facts would be appropriate. Under the operation with consideration given to the privilege, harmful effects of enterprises requesting considerations that include the content of instructions listed in F above can occur. Therefore, on the premise that the JFTC operates with consideration given to the privilege, ① establishing procedures that enable appropriate determination whether the privilege should be considered for the documents concerned and ② introducing the surcharge aggravation system for obstruction of investigations and strengthening obstruction of investigations penalties are necessary for preventing harmful effects such as concealment of evidence, etc. When cases of attorneys providing non-cooperative advice, including concealment of evidence, etc., such as those listed in attachment sheet 44 are found, the JFTC needs to actively request for disciplinary actions to the bar associations to which the attorneys concerned belong. In addition, when the JFTC operates with consideration given to the privilege, the Japan Federation of Bar Associations is expected to respond to the operation and take measures to

make the attorney disciplinary system function more effectively.

(4) Rights of defense in deposition procedures

【Conclusions by the Study Group】

○ 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 mitigated 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.

A In infringement cases of the AMA which the JFTC have ever handled, there are no case where voluntariness of deposition records were denied or false charge were found as a result. With the introduction of the system for increasing incentives to cooperate in investigations, however, employees, etc. of the enterprises suspected of having committed violations may cater to the JFTC's investigation policy to obtain a higher mitigated rate or avoid immunity or leniency disqualification, resulting in false charges. It is therefore pointed out that in order to prevent the JFTC's investigators from preparing inappropriate deposition records, ① presence of lawyers during the deposition, ② audio/video recording of the deposition, taking notes by those subject to the deposition at the deposition, etc. should be allowed.

B However, AMA infringements such as cartel/bid-rigging, etc. are, by their nature, conducted in a closed room, and therefore tend to lack proof or to be difficult to be detected and solved. Nevertheless, constituent elements of, and standard of proof for, an infringement in Japan are different from those in Europe and the US (see attachment sheet 45), and making the presumption of a concerted act from circumstantial evidence not easy, and proving infringements only by limited/fragmented material evidence is extremely difficult. Record of statements that link limited/fragmented material evidence are therefore important/essential and, unlike Europe and the US, have been an indispensable investigation method for fact-finding.

C On the other hand, there are quite a few suspected infringement cases of the AMA where attorneys gave such instructions as ① a method to avoid a deposition record from being created = to take notes, ② to take the attitudes of "don't remember anything" and "don't know" as soon as entering the JFTC, ③ to change the personality, not to answer earnestly, to hold the stance of "don't know, don't understand, don't remember", and ④ to resist to the bitter end or not to say anything, etc. (see attachment sheet 44). Taking into consideration these actual conditions, strengthening the right of defense in deposition procedures is likely to impede the fact-finding ability of the JFTC.

D For this reason, addressing the concerns over potential issues such as catering and false charge not by strengthening the right of defense in a deposition but by not including the deposition records prepared by investigators, etc. from employees, etc. of the enterprises suspected of having committed violations which are the subject of evaluation when calculating the surcharge mitigation is considered appropriate. Regarding the case where employees, etc. state the truths

about violations despite having received instructions such as those in C above as a cooperation of the enterprises is considered inappropriate, and as it is evident from the overseas cases, the enterprises can report the facts about violations by conducting internal investigations themselves. It is therefore consistent with the surcharge mitigation/aggravation according to the degree of cooperation.

E Regarding this, some members expressed an opinion that for the enterprises not making leniency applications nor intending to cooperate in investigations and the enterprises making leniency applications but not adequately reporting, if false statements during a deposition were to be regarded as obstruction of investigations and subject to surcharge aggravation, enhancement of the right of defense was considered necessary. However, depositions by the JFTC are conducted without detaining the suspected persons, and repressive investigations are not performed. There was no case where the voluntariness/credibility of deposition records were denied in ruling/decision for the reason of unjust investigation by the investigator, nor was there a case of so-called false charge involving irrelevant parties being found. In addition, the "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (December 25, 2015)" stipulates the following matter; a deponent can contact attorneys and take notes based on memories during a break and a break shall be given in a timely manner during a deposition.; furthermore, even during a deposition, a deponent can take notes which is permitted by investigator from the point of view of performing appropriate and smooth depositions. As long as employees, etc. subject to deposition make statements about the facts they experienced based on their memories, it may be sufficient to take notes based on their memories during a break, and not necessary to take notes during a deposition. In addition, on the same day, the JFTC introduced a complaint filing system for the cases where words and actions of investigators, etc. are contrary to the Guidelines. According to reports by the JFTC after the introduction of the said system, approximately 2,000 depositions have taken place, but the number of cases for which claims were filed was only four and, as a result of investigation, no problem was found in any of these cases. Therefore, enterprises can perceive what their employees stated in depositions as necessary, and as described in (2) above, when the amount of surcharges is aggravated due to false statements, the proofs of proving facts as evidence will be disclosed in hearing procedures, and the application of laws to these facts will be explained.

F As described above, the right of defense in depositions is sufficiently secured under the current system, and by taking measures as described in D above, the need to enhance the right of defense will not arise with the introduction of the new system. For the enterprises not making leniency applications or intending to cooperate in investigations and the enterprises making leniency applications but not adequately reporting in particular, enhancing the right of defense to a higher level than at present is likely to increase the risk of causing harmful effects as described in C above. Therefore, enhancing the right of defense in deposition procedures to a higher level than at present with this revision is considered unnecessary.

When obstruction of investigations such as false statements by employees, etc. is found, the JFTC should address this not by aggravating the amount of surcharges but by requesting the enterprises to take corrective actions during the course of investigations and providing opportunities to discuss measures for correction between the chief investigators and representing attorneys, etc., and clearly describing such in guidelines on a surcharge system to aggravate that for the obstruction of investigations may be appropriate. Providing enterprises with opportunities to correct obstruction of investigations as required would contribute to early correction of obstruction of investigations. In addition, if the amount of surcharges is not to be aggravated when early correction by the enterprises results in restoration of efficient/effective

operations of fact-finding/dealing with cases, then it may contribute to ensuring the right of defense of enterprises.

G Some members pointed out that this revision would expand the range of efficient/effective operations of fact-finding/dealing with cases by joint cooperation of enterprises and the JFTC, and prompt submission of necessary and sufficient proofs enough to prove the infringements by enterprises would decrease the opportunities of depositions. After the enforcement of the new system, therefore, the situation surrounding deposition procedures may change. However, such a change in situation is expected to take place only with the establishment and actual functioning of incentives to cooperate in investigations and disincentives for obstruction of investigations with which necessary and sufficient cooperation can be expected. Therefore, it may be appropriate for the JFTC to follow up the situation surrounding deposition procedures after a certain period of time has passed following the enforcement of the new system, and take the results into consideration to examine the measures for the entire system, including the ideal right of defense, as necessary.

H In response to this, some members expressed an opinion that, with incentives to cooperate in investigations and disincentives for obstruction of investigations actually functioning, a risk of impede the fact-finding ability of the JFTC could be reduced by ensuring a higher level of the right of defense than the current system, and therefore the JFTC should take these points into consideration and continue to examine the ideal right of defense ensuring the fact-finding ability of the JFTC without damaging the balance such as allowing a deponent to take notes to the extent that it would not hinder smooth operations of deposition procedures.

15 Overall verification of the system as a whole

【Conclusions by the Study Group】

○ 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 surcharge mitigation according to the degree of cooperation than under the current system, swift and efficient operations of the system as a whole would not be hindered.

(1) Appropriate amount of surcharges

A With this revision, the level of surcharge amounts may be increased to a certain extent for some cases when compared to the conventional level due to ① revision of the amount of sales serving as basis for calculation of surcharges, ② abolishment or extension of the upper limit on the calculation period, raised in the basic calculation rate, ③ abolishment of the calculation rates by type of business, ④ determination of appropriate subjects for the application of the calculation rates for small and medium-sized enterprises, ⑤ abolishment of the early withdrawal system, ⑥ increased surcharge system for the obstruction of investigations, etc. Therefore, from the perspective of preventing the final surcharge amounts for such cases from becoming excessively high in light of the principle of proportionality or the principle of the balance between responsibility and punishment, for example, following the systems of foreign countries, introducing a system, which establishes 10% of the total amount of sales on profit and loss statements of the previous fiscal year of the violators to be the upper limit of surcharges, may be considered.

B However, this revision provides amendments necessary for ensuring the effectiveness of the current surcharge system, which “imposes pecuniary disadvantage charged by the administrative agency, with an amount more than the amount corresponding to unjust gains that gained by a violator, with an objective to deter such infringements”. Considering that the surcharge level is still based on the restrainedly estimated the amount corresponding to unjust gains and remains within a range that does not exceed the increased levels prescribed by other laws and that the scope of making a decision by the specialized knowledge of the JFTC is limited to the extent necessary for deterring infringements, there will be no case where the final surcharge amounts calculated in the new system become excessively high in light of the principle of proportionality or the principle of the balance between responsibility and punishment, and therefore establishing the upper limit of the surcharge amounts is considered unnecessary.

(2) Securing transparent and swift operations in the surcharge system

A In order to ensure transparency/mobility of the surcharge system, the clarity of the calculation standards and ease of calculation need to be ensured to the extent possible, and legally establishing the calculation/imposition methods to the extent possible is considered desirable. On the other hand, it is necessary to delegate the matters necessary for effectively deterring infringements according to diverse and complicated economic situations to the Cabinet Orders to the extent necessary and to leave decision-making to the expertise of the JFTC.

B According to the results of examination by the Study Group, with this revision, while the basic framework of the calculation/imposition methods of the current surcharge system is maintained, the system is considered to have the calculation/imposition methods stipulated by law in a concrete manner to the extent possible and making a decision by the specialized knowledge of the JFTC with the scope limited to the extent necessary for resolving the problems of the current system. For the scope of making a decision by the specialized knowledge of the JFTC, ensuring fairness/transparency of procedures by establishing/publishing necessary guidelines is considered necessary. More concretely, it is desirable to clarify in advance the guidelines necessary for determining what concrete acts fall under ① the scope of the amount of sales serving as basis for calculation of surcharges (cases where the sales cannot be determined or cases where certain amounts are deducted), ② the methods of evaluating the proof values and of deciding the surcharge mitigated rates when applying the surcharge mitigation according to the degree of cooperation, and ③ obstruction of investigations subject to aggravated surcharges. In addition, promptly clarifying the JFTC's judgement process for the calculation/imposition of surcharges and the operational results of the new system, including newly introduced elements for consideration by this revision, in the surcharge payment orders is considered necessary.

C Where elements for consideration pertaining to the surcharge calculation/imposition are increased by this revision, the costs of proof/law suits are expected to increase. On the other hand, however, the cost of proving the amount of sales serving as basis for calculation of surcharges and type of business will decrease, and once cooperation in investigation is increased with the surcharge aggravation/mitigation according to the degree of cooperation, swift and efficiently operation of the entire system is not considered to be obstructed.

In addition, excessive burden is not considered to be placed on enterprises because ① with the surcharge mitigation according to the degree of cooperation, when enterprises voluntarily report the facts about violations to a satisfactory extent, not only the surcharge mitigation rate is raised, but depositions of employees, etc. can also be reduce, ② abolishing the requirements of mutual restraint, specific results restraining competition and calculation rates by type of business on the sales amount for the basis for calculation of surcharges, will eliminate the need of undergoing investigations for approving the sales and business type in detail, ③ with the upper limit set to the calculation period in conformity to the mandatory preservation period for accounting books stipulated in the Commercial Code and the Companies Act, etc., no special burden for preserving accounting books and calculating the sales will be placed, and ④ according to B above, transparency of the surcharge system will be ensured.

However, there can be cases where promptly submitting necessary and sufficient evidence is difficult in particular for small and medium-sized enterprises with little management resources. Therefore, it is considered necessary for the JFTC to endeavor to adequately publicize the new system, and to pay due consideration to making the leniency program easier for enterprises to use such as explaining to enterprises about the content of the evidence and reports to be submitted in an easy to understand manner.

D In the Study Group, many members expressed the opinion that in order to reduce the burden of employees of the enterprises suspected of having committed violations of responding to depositions, clarification of facts by voluntary submission of evidence through the new system

should be promoted. Promotion of clarification of facts in this way is considered to lead to reduced concerns over protection of due process and is therefore basically desirable.

However, it is considered necessary to note that in order for enterprises and the JFTC to cooperate in efficient/effective operation of the clarification of facts/case disposition, promptly obtaining necessary and sufficient cooperation from enterprises is essential, and otherwise, the investigation period may be prolonged.

Enterprises and attorneys should endeavor to promptly and sincerely cooperate in administrative investigations by the JFTC by rapidly conducting sincere and rigorous internal investigations in case of any suspected violations, promptly reporting to the JFTC all the facts about the violations without concealing or trivializing them, and strictly refraining from obstruction of investigations such as concealment of evidence by taking advantage of the operation with consideration given to the privilege, etc.

Under the new system, it is assumed that some enterprises may not make leniency applications and that even with leniency applicants there may be cases where the content of reports is insufficient, reports conflicting with other evidence are made, or the content of reports is false, etc. Therefore, deposition procedures are considered to continue to be used as an important investigation method. Under the new system, however, the JFTC should endeavor to carry out efficient/effective operation of the clarification of facts/case disposition in cooperation with enterprises, including the operation of continuous cooperation obligation described in 8(2)B(A) above, while effectively using the new leniency program, etc. with sufficient respect for the evidence voluntarily submitted by enterprises without excessively depending on depositions.

Considering that cease and desist orders and surcharge payment orders against AMA infringements are administrative measures, excessive value should not be attached to depositions, but swift/effective operation of the AMA should be promoted through more active utilization of presumption by material evidence in acknowledging AMA infringements.

(3) Results of overall verification

A According to the results of examination by the Study Group, this revision is made within the purports and the nature of the current surcharge system, and there will be no doubt that surcharges become identical or of the same nature to the criminal penalties because this revision does not raise the level of surcharge amounts apart from unjust gains, the scope of making a decision by the specialized knowledge of the JFTC is limited to the extent necessary for deterring infringements, and the revision does not introduce the calculation/imposition requirements based on the culpability principle aimed at moral accusation. Therefore, even for the entire system, problems under the constitutional requirements and legislative system/legal theories in Japan, including double punishment, are considered not to occur.

B The purports and objectives of the Japanese AMA and surcharge system are to take administrative measures to “impose pecuniary disadvantage charged by the administrative agency, with an amount more than the gained unjust gains by a violator of concern, with the objective of deterring such infringements” established in addition to criminal surcharges (Articles 89 and 95 of the AMA) and no-fault compensation system (Article 25 of the AMA) in consideration of the fact that sufficiently and effectively deterring AMA infringements is difficult only by cease and desist orders and criminal surcharges/civil damages, etc. In addition, for the surcharge amount calculation/imposition methods, in order to swiftly/efficiently operate the surcharge system as administrative measures for ensuring the effectiveness of deterring infringements, the clarity of the calculation standards and ease of calculation need to be ensured, and the financial benefits actually gained by violators that are extremely difficult to calculate need to be separated from the surcharge amounts.

C With this revision, ① the revision of the amount of sales serving as basis for calculation of surcharges, ② abolishment or extension of the upper limit on the calculation period and raising

the basic calculation rate, ③ abolishment of the calculation rates by type of business, ④ determination of appropriate subject to the application of small and medium-sized enterprise calculation rate, ⑤ abolishment of the reduced rate for early withdrawal, ⑥ surcharge mitigation according to the degree of cooperation, and ⑦ surcharge aggravation for obstruction of investigations, and so on will newly take place. All the contents of these revisions, which have been discussed to date, would solve the problems against the purports and objectives of the surcharge system and be more consistent with the nature described in B above. For example, ① and ③, in particular, contribute to swift/efficient operations and ② and ④, in particular, contribute to ensuring an effect on deterrence, and therefore the revision is considered to be in line with the purport and objective of the surcharge system.

D On the other hand, some infringements of the AMA may not be subject to the surcharge system and the surcharge calculation/imposition methods may vary depending on type of infringement, and therefore, the system may be considered to lack coherence/consistency. However, concerning unreasonable restraint of trade and other unfair trade practices not meeting the price-affecting requirements, for example, there is almost no case where legislative measures were taken, and therefore the need to enhance an effect on deterrence by imposing surcharges is not recognized at present. For this reason, the revision is considered to be in line with the system described in B above. On this point, as described in 10(2) C above, concerning infringements other than cartel/bid-rigging, efficient/effective clarification of facts through the use of the commitment system is expected, and, therefore it is appropriate to examine the need of the revision with consideration, based on the operational status after the introduction of the commitment system. In this respect, introducing the commitment system as early as possible is desirable, which contributes to early and prompt correction of problems in competition and expansion of the fields to be handled by the authorities and enterprises cooperation with each other. In addition, surcharges for infringements by the trade associations are imposed not on trade associations that committed the infringements but on member enterprises. Considering 11(4)B ① through ③ above, however, it is reasonable to impose surcharges on member enterprises in order to make an effective deterrence of infringements, and therefore the revision is considered to be in line with the system described in B above.

E When effectively deterring infringements becomes difficult even with the new surcharge system due to further changes in economic/social environment in the future, if necessary, it is appropriate to revise the surcharge system by referring to standard sanctioning systems in other jurisdictions. In doing so, it is desirable to re-examine the matters pointed out in the Study Group, including ① making all the infringements of the AMA subject to the surcharge system, ② expanding the scope of discretion entitled to the JFTC in making decisions on specific calculation/imposition of surcharges, and ③ applying laws on a corporate group basis.

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