



The Outline of the Antimonopoly Act Amendment Bill

-the direction of the revision of the surcharge system-

March, 2019
Japan Fair Trade Commission



Challenges with the current system and the direction of the revision

- Challenges** Due to the current system of surcharges that are calculated and imposed uniformly and impartially,
- ❑ The JFTC cannot consider the degree of the enterprise's cooperation for JFTC's investigation, when making decisions on the reduction of the amount of surcharges.
 - ❑ The JFTC cannot calculate or impose an appropriate amount of surcharges according to the nature and extent of the violation.

The direction of the revision

- The AMA shall be amended to introduce the system which increases incentives for enterprises to cooperate in JFTC's investigation, which will promote efficient and effective fact findings and investigation process by enhancing the cooperative relationships between enterprises and the JFTC, and allow the JFTC to calculate and impose an appropriate amount of surcharges according to the complicated economic environments.

Outcome of the revision

- Enterprises and the JFTC will cooperate each other, not standing in opposition, to eliminate the infringements of the AMA.
- The deterrence against infringements will be strengthened by imposing necessary and sufficient surcharges according to the complicated economic environments.
- Promoting fair and free competition will invigorate the economy and enhance consumer interest.

Reference : Related Cabinet Decisions, etc.

The "Action Plan for Strengthening Industrial Competitiveness" (2018) (approved by the Cabinet on February 6, 2018)

- ...to further enhance the effectiveness of law enforcement and to deter violations, the government will review the surcharge system and take necessary measures intending to submit a bill to amend the Antimonopoly Act.

Report of the Study Group on the Antimonopoly Act (April 25, 2017)

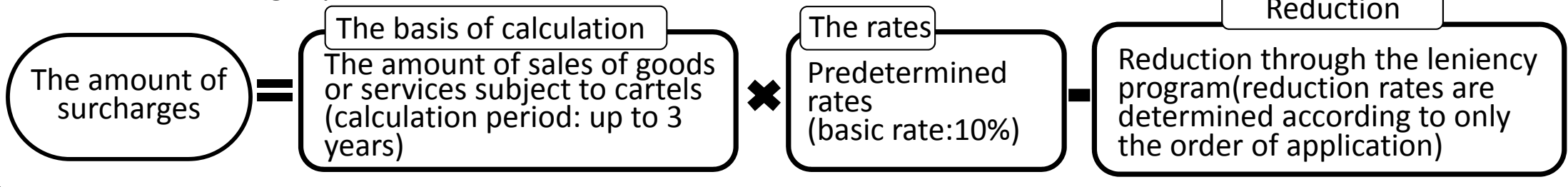
- ...It is appropriate to revise the current rigid surcharge system in which surcharges are calculated and imposed uniformly and impartially pursuant to the stipulated and objective methods for calculation/imposition, and make the surcharge system flexible to some degrees, in order to handle the growing 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.

*The Study Group held 15 meetings from February, 2016 to March, 2017. The study group consists of Chairman (Daitaro KISHII (Professor of Law, Faculty of Law, Hosei University)) and the 15 experts from academics, business associations, consumer associations, bar associations, etc.

The Outline of the Revision of the Surcharge System



The current surcharge system (in case of unreasonable restraint of trade)



The basis of calculation

- Extension of the calculation period, etc.
 - Establishing the calculation period as “being traceable back to 10 years from the date on which the JFTC started to investigate”(current period is 3 years), and extending the statute of limitation to 7 years(current period is 5 years).
 - Introducing the estimation provision which allows the JFTC to estimate the basis of calculation when the part of the amounts of sales is unknown due to the dissipation of relevant documents, etc.
- Addition of the basis of calculation
 - Adding the following unjust gains due to the infringements to the basis of calculation of the surcharges
 - ✓ the financial gains as a reward for not supplying the goods or services subject to cartels
 - ✓ the amount of sales of the business related to goods or services subject to cartels(e.g. subcontract)
 - ✓ the amount of sales of the certain enterprises that belong to the same group as the violators and receive the instructions or information from the violators
- Imposition of the surcharges on the violator’s subsidiaries that have succeeded to the business related to the infringements before the JFTC starts the investigation(the current system stipulates only the succession the day and after the investigation starts)

The calculation rates

- Small and Medium-sized Enterprise calculation rate
 - Limiting the application of the SME calculation rate only to the enterprises that can be deemed substantially as an SME
- Calculation rates by type of business
 - Abolition(unification to the basic calculation rate)
- Reduced calculation rate
 - Abolition of the reduced calculation rate for early withdrawal from the infringement
- Increased calculation rates
 - Adding the following act to the increased calculation rate applied ones for leading roles in infringements
 - ✓ Requiring others to obstruct the investigations
 - Revision of the scope of the increased calculation rate application for repeated infringements
 - ✓ The increased calculation rate shall not be applied to the case that enterprises had committed two infringements and had ceased one before they were imposed the surcharge payment order on in relation to the other.
 - ✓ Application the increased calculation rate to the infringements by the enterprises whose subsidiaries have been imposed the surcharge payment order on within the past 10 years and by the enterprises which have succeeded to the business of the enterprises that violate the law within the past 10 years.

* The amendments of the surcharge system for private monopolization and unfair trade practices shall be made in correspondence with those of the surcharge system for unreasonable restraint of trade such as the extension of the calculation period and the abolition of the calculation rates by type of business.

The Outline of the Revision of the Surcharge System



The Leniency Program

● After the revision

The date of application	The order of application	Reduction rate according to the order of application	Reduction rate according to the degree of cooperation
Before the Investigation Start Date	1 st	100%	+ up to 40%
	2 nd	20%	
	3 rd -5 th	10%	
	6 th and after in order	5%	
After the Investigation Start Date	Up to 3*	10%	+ up to 20%
	Other than the above	5%	

【References】 the current system

The date of application	The order of application	Reduction rate according to the order of application
Before the Investigation Start Date	1 st	100%
	2 nd	50%
	3 rd -5 th	30%
	6 th and after in order	
After the Investigation Start Date	Up to 3*	30%
	Other than the above	

- Adding the reduction rate according to the degree of the enterprise's cooperation for JFTC's investigation (the value of proof which the enterprise submits voluntarily) to the rate according to the order of application.
- Abolishing the current limitation on the number of applicants (currently, up to five enterprises can apply). (all the enterprises under the investigation will have the opportunity of cooperating in JFTC's investigation voluntarily)
- Conferring between the enterprises and the JFTC on the content of enterprise's cooperation and JFTC's addition of the reduction rate.

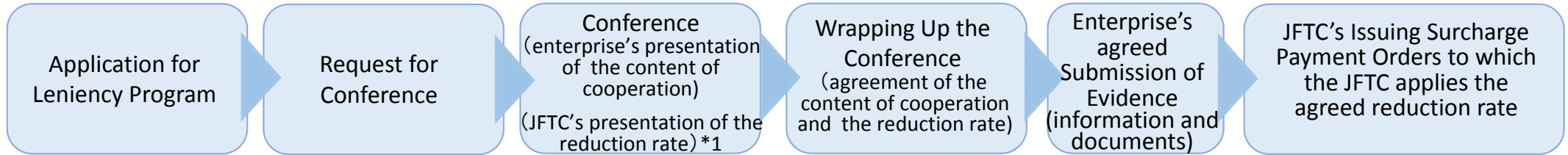
- An enterprise which has applied for the leniency program can acquire a uniform rate if it meets some predetermined requirements, regardless of the degree of the enterprise's cooperation for JFTC's investigation.
- The number of applicants is limited to 5.

* They can acquire the reduction rate on condition that the total number of applicants (the applicants who apply before the Investigation Start Date are included) is 5 or less.



The Leniency Program

● The Outline of the Conference



*1 When enterprises and the JFTC have not reached agreement, the JFTC shall not use records which the enterprises have presented in the conference, even if the JFTC has recorded the enterprise's explanation about the information during the conference.

*2 When enterprises cooperate in JFTC's investigation as agreed, the JFTC applies the agreed reduction rate (when enterprises fall into the disqualified, the reduction rate according to the order of the application as well as the rate according to the degree of cooperation for JFTC's investigation shall not be applied.)

● Introducing the guideline concerning the methods of evaluating evidence (information and documents) enterprises submit to the JFTC voluntarily

The direction of the guidelines

- ❑ Stating that the JFTC evaluates enterprise's cooperation from the viewpoint of how much the submitted evidence contributes to fact finding.
- ❑ Stating the information which the JFTC evaluates (ex. the goods or services subject to cartels or bid-rigging, rule to decide the winner of bid, participants, the period of implementation, implementation status, etc.), and that the JFTC determines the reduction rates according to the content of the information.

The other amendments

- Lowering the rate of delinquency charges
- Raising the limit of the amount of fine for juridical person charged with the offence of obstructing investigation
- Introducing procedures for gathering electronic record in the investigation of criminal cases, etc.

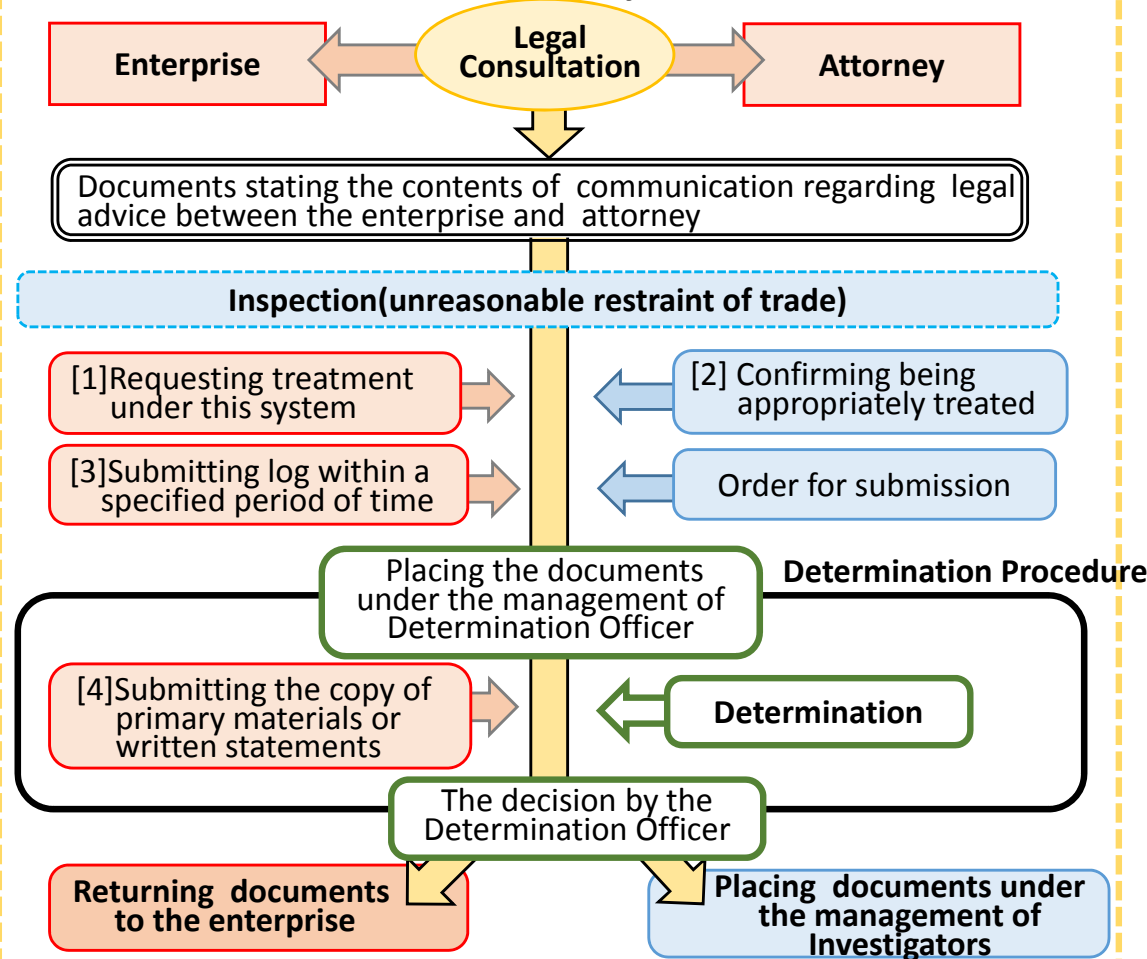


Methods of Making the New Leniency Program More Effective

Approach to so-called “Attorney-Client Privilege”

In relation to administrative investigation procedures regarding unreasonable restraint of trade prohibited in the Article 3 of AMA, JFTC shall establish rules pursuant to the Article 76 of AMA and guidelines as below from the perspective of making the new leniency program more effective, protecting confidential communication related to legal advice, etc. between an enterprise and independent attorneys substantially and ensuring the appropriateness of administrative investigation procedures.

The Flow of the System



➤ The Outline :

- If the documents stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade is confirmed to be met with the requirements[1]-[3] as below, they shall be promptly returned without Investigators’ access.
- Pre-existing materials before consulting the attorney, materials indicating facts underlying confidential communication regarding legal advice between the enterprise and attorney : so-called primary materials/fact finding materials are out of scope.

➤ Requirements :

- [1] The enterprise shall request treatment under this system at the time of order for submission.
- [2] The documents shall be treated appropriately.
- [3] Submission of lists (the “Log”) stating the time and date of preparation of the documents, name of the person preparing the documents, names of persons with whom the documents was shared, attributes and the summary, etc. for each documents that the enterprise is seeking treatment under this system, shall be performed within a specified period of time after the order for submission.
- [4] If out of scope documents are included, report all of their contents to the JFTC.

➤ Measures for Prevention of Abuse(Determination Procedure)

The Determination Officer shall confirm whether the documents that the enterprise requested treatment and submitted to the JFTC under this system satisfy the requirements above (especially above [3] and [4]).

Noting Down after the Completion of Interrogation Conducted by Investigators

The JFTC shall add to the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” (December 2015) that employees, etc. of the applicant for the leniency program may note down on the spot after the completion interrogation conducted by investigators.