

Chapter 2 Comprehensive Review of the Surcharge System

1 The Legal Position of the Surcharge System Currently in Force

It would be appropriate to summarize the legislative purpose and intent of the surcharge system currently in force in the following manner (See Appendix 16 concerning decisions and legal precedents related to the system).

- The surcharge system currently in force was enacted in 1977 by the Law to Amend the Antimonopoly Act, as an administrative means to ensure social equity by preventing parties that engage in unlawful conduct from retaining the economic benefits gained from a cartel, by granting the government the right to assess such benefits, and simultaneously to help restrain unlawful conduct and ensure the effectiveness of the provisions prohibiting cartels.
- With respect to the legal position of this system, a judicial precedent in a lawsuit to quash decision states: although it is undeniable that the system will have a function as a kind of sanction (not criminal punishment, so-called sanctions; disadvantageous treatment in the broad sense) looked at socially because they expect it to have a certain restraining effects against cartel conduct, it is clear that the basic character of surcharges lies in the point that they are a forfeiture of inappropriate economic gains attained from cartel conduct in order to ensure social equity, and from that standpoint they are understood to be different from criminal penalties in intent, objective and character.
- Regarding the relationship between the surcharge system and civil requirement to return excessive profits, the judicial precedent mentioned above understands: both surcharge system and the requirement to return excessive profits can be consistent with each other as administrative measures, because they have a character that is completely different legally and because of the respective inherent legal roles they fulfill and because of the fact they produce inherent legal results under their respective unique requirements. (It has also been pointed out in other judicial precedents that there is a possibility to conflict in certain situations.)

2 Review from the Standpoint of Ensuring Effectiveness

In light of the direction of a comprehensive review of enforcement systems described in Chapter 1 Section 2(1), the Study Group will investigate specific action policies concerning a review of the surcharge system from the standpoint of ensuring effectiveness as stated below.

(1) Direction of the Review

Given the legal character of the surcharge system currently in force, the Study Group conducted a study into what form would be appropriate for the review from the standpoint of further ensuring the system's effectiveness.

With regard to the legal character of the surcharge system, it was also pointed out that given the concept of emphasizing the intent to make firms forfeit excessive profits, the JFTC should verify and assess the amount of the excessive profits in each separate case, and for cases

where this is not possible, given that firms' operating income margins have been squeezed recently because of deflation, the JFTC should lower the surcharge calculation percentage, because the percentage for the surcharge system currently in force uses the average value of firms' operating income margins.

Nevertheless, if one considers the need to ensure promptness and rationality by calculating the surcharge amount using a method to uniformly multiply sales by a fixed percentage, it is not appropriate to substantiate the amount of the excessive profit in each case. In addition, considering that cases where the profit margin of the product subject to the cartel are high can be observed, regardless of the profit margin for firms overall (see Appendix 6), we believe lowering the calculation percentage would not be appropriate.

Specifically, when investigating the direction of a review from the standpoint of ensuring greater efficiency, the following two policies can be considered.

- ① Conduct a fundamental, comprehensive review of the system currently in force and adopt a so-called sanctions system (a system in which the JFTC can establish the amount at its own discretion according to the maliciousness and culpability of the unlawful conduct, within the range of a maximum amount), and adopt a system with sufficient deterrence by adjusting the maximum sanction amount, tempering it for concerns such as the losses resulting from the unlawful conduct or the probability of the unlawful conduct being discovered (economically, it becomes possible to ensure deterrence by setting the amount in consideration of the likelihood of exposure. Based on this standpoint, it is appropriate to assess an amount calculated by multiplying the amount of the excessive profits by the inverse of the likelihood of the crime being discovered (the likelihood of discovery is thought to be a relatively low value (10–30%), so the amount will be relatively larger than the surcharges at the present time)).
- ② Eliminate the discretion of the JFTC, and do not change their position as an administrative measure (a measure having a function socially as a type of sanction) to uniformly assess a fixed percentage of the sales amount from the standpoint of ensuring the effectiveness of the prohibition provisions. However, change the concept of assessing up to the amount equivalent to excessive profits, and from the standpoint of making the guilty parties cover or compensate the economic welfare loss (excluding the portion related to the entrepreneurs

violating the law; the same applies below) inflicted on society because of the unlawful conduct, adopt a system to levy from parties that engage in unlawful conduct an amount up to the amount equivalent to losses caused to consumers by the unlawful conduct. As the grounds for this approach,

- (a) In some cases the economic gains produced by unlawful conduct are at a sufficiently high level in excess of the level of the existing surcharges;
- (b) The losses caused to consumers by unlawful conduct can be understood not only as the losses caused by consumers being forced to purchase at prices above the market price (excessive profits for the parties engaged in the unlawful conduct), but also as social losses (this refers to the concept that consumers faced budget restrictions because prices were increased as a result of unlawful conduct, and includes losses etc. to consumer accompanying the price increases in adjacent markets or losses from being unable to purchase the produces or services in question. This same concept is used below. For more information concerning this kind of social loss see Appendix 17).

Of these, although ① is suitable from the standpoint of ensuring deterrence, it presents a number of problems, including the danger of violating the principle of legal balance between crime and penalty when the amount is extremely high, the fact the functional allocation of criminal penalties decided by assessment of a case from standpoints such as retribution against past unlawful conduct will become ambiguous, the fact that the criminal accusation system applied to corporations should play an important role in enforcement systems overall and cannot be abolished in light of factors such as the powerful social influence provided by criminal penalties, and the fact it is necessary to recognize aspects such as the willfulness or negligence of unlawful conduct from the legal character of sanctions and that disposition of cases will be complicated. We therefore believe it is inappropriate to introduce a sanctions system in Japan so long as criminal penalties are continued.

With regard to point ②, on the other hand, it is possible to make adjustments as described below. We believe this is the most appropriate alternative to carry out a comprehensive review from the standpoint of ensuring the effectiveness of the provisions prohibiting cartels etc. considering the allocation of functions with criminal penalties.

- If there is a measure to assess entrepreneurs that commit violations for the economic disadvantages roughly up to the amount equivalent to losses caused to consumers by the unlawful conduct such as cartels, it is possible to view this as a measure within a range that will make such entrepreneurs cover or compensate the economic welfare losses to society. Moreover, on the point of making the party that causes a loss responsible for an amount equivalent to the loss, considering the fact this shares the concept of the “perpetrator pays principle” seen in other legislation such as environmental legislation, positioning this as an administrative measure will be possible even assuming we assess the economic disadvantages to that level.
- In this case it is undeniable that the character of the surcharge system will change and the function as sanctions viewed socially will grow stronger, because the level of the economic disadvantage will be changed to an assessment of an amount that exceeds the excessive profits. Nevertheless, this function as sanctions is one that will accompany the adoption of the necessary measure to achieve administrative objectives such as ensuring social equity, or to encourage parties to strictly fulfill their obligation of nonfeasance in unlawful conduct in the future, in the sense that a fixed percentage amount of the sales related to the unlawful conduct from the day the unlawful conduct was begun will be assessed mechanically, and if the unlawful conduct has been halted, will not be assessed after that date and is different from the intent and objectives of criminal sanctions fined as an evaluation of circumstances following the nature of the crime and after the fact of past unlawful facts.
- Furthermore, because the surcharge system will be positioned as an administrative measure to levy economic disadvantage within the range of the losses caused by the unlawful conduct, and because those losses are different from the gains and injury that are proven separately like the concept of excessive profits and injuries under the Civil Code, the surcharge system will not contradict the civil injury compensation system.

We next considered the following concepts, as methods to raise the level, when deciding to review the surcharge system as a measure to levy the economic disadvantages roughly up to the amount equivalent to the losses caused to consumers (referred to below as “the level equivalent to losses from unlawful conduct”) by unlawful conduct such as cartels as described in ②.

- A. Uniformly raise the fixed percentage to the level equivalent to losses from unlawful conduct.
- B. Continue to use the fixed percentage currently in effect as a standard, and from the standpoint of ensuring the effectiveness by levying a high level surcharge against entrepreneurs whose incentive to engage in unlawful conduct is recognized to be strong, (such as repeater of unlawful conduct), raise the percentage to the level equivalent to losses from unlawful conduct by establishing objective conditions and introducing a system to add fixed percentages (referred to below as an “additional percentage system”) for conduct that

applies under each condition.

- C. Increase to the level equivalent to losses caused by unlawful conduct, by introducing an additional percentage system from the standpoint of ensuring efficiency, together with uniformly raising the fixed percentage.

When we compare these concepts, we believe the third alternative – namely introducing an additional percentage system together with uniformly raising the fixed percentage – is the most appropriate. The reason is that under the level currently in force, social equality has not been adequately ensured because this level does not make entrepreneurs cover or compensate the social losses caused by unlawful conduct, and because we believe there is a strong need to ensure effectiveness against entrepreneurs whose incentive to engage in unlawful conduct is high.

Accordingly, as the direction for a review from the standpoint of ensuring the effectiveness of the provisions prohibiting cartels, we believe that it is appropriate to continue to maintain the position of the surcharge system as an administrative measure, while introducing a system to add fixed percentages under objective conditions such as repeated involvement in unlawful conduct, together with uniformly raising the fixed percentage within the range of losses caused by unlawful conduct.

(2) Approach to an Additional Percentage System

From the standpoint of ensuring the efficiency of the provisions prohibiting cartels, when introducing an additional percentage system it will be necessary to study what type of conditions for adding percentages to establish. We believe the following points should be considered carefully at such time.

- Given that the surcharge system is a measure to ensure the effectiveness of provisions prohibiting cartels, and considering administrative transparency and the possibility of entrepreneur foreknowledge, establish objective conditions that eliminate the malicious and culpable elements of unlawful conduct and adopt the conditions necessary to ensure effectiveness.
- Make certain the conditions are well-defined and clear, taking into consideration factors such as ease of findings for case examination activities or the procedural burdens for both investigators and parties subject to an investigation when conducting proceedings in accordance with the hearing procedures.

When the above points are taken into consideration, circumstances such as ① repeat violations and ② long-term violations can be considered as conditions for adding percentages. we believe it will also be necessary to consider the possibility of setting ③ violations by

large-scale entrepreneurs and ④ participation by the officers of entrepreneurs that commit violations as conditions for adding percentages.

(3) The Problem of Double Jeopardy

It was pointed out that introducing an additional percentage system along with increasing the level of the surcharges as described in the preceding section may create a conflict with the provision against double jeopardy (the provision that prohibits bringing criminal charges repeatedly for the same crime; The Constitution of Japan, Article 39) and the principle of legal balance between crime and penalty (the thinking there should not be a marked imbalance between injury caused by unlawful conduct and the punishment levied against the party that committed the crime) as constitutional issues, because these changes will strengthen the surcharge system's function as one type of social sanction.

Therefore, when conducting its investigation concerning these two problems, the Study Group examined precedents and the literature while continuing to take into consideration factors such as the actual circumstances of unlawful conduct. We believe it is possible to coordinate such changes as described below in order to prevent the changes from being a problem under the Constitution.

- Even assuming the level of surcharges is raised based on social losses, this may be called a step to make the guilty parties cover or compensate society's economic welfare losses and achieve the administrative objective of ensuring social equity, arising through the administrative concept embodied in the "perpetrator pays principle" (the party that causes a loss is responsible for restitution). In addition, just as under the system currently in force, raising the surcharge level is a means to uniformly assess a fixed percentage amount during the period when an entrepreneur is committing an unlawful act, and may be said to not change the position as an administrative measure to encourage entrepreneurs to perform their obligation to not engage in unlawful conduct in the future. An additional percentage system will also be applied automatically in situations that meet the objective requirements set by law from the standpoint of achieving the above objectives.
- Accordingly, its intent, objective and procedures are different than those of criminal penalties that, with regard to past unlawful conduct, assume to decide a sentence according to subjective conditions such as the maliciousness and culpability of conduct separately and add sanctions from a standpoint such as retribution for anti-social and immoral unlawful conduct.
- Furthermore, by introducing a system to reduce the surcharge in situations where an entrepreneur reports to the authorities information related to unlawful conduct considering factors such as the nature of cartels and bid rigging that make it difficult for a firm to voluntarily halt unlawful conduct itself as described above, the legal character as an administrative measure to encourage firms to perform their obligation to not engage in unlawful conduct in the future will be better defined and its position as a measure different from criminal penalties will be clarified.
- Accordingly, we believe the combined application of surcharges and criminal penalties following a comprehensive review, even when considered in light of past precedents in Japan (see Appendix 18), will not violate the provision prohibiting double jeopardy (we believe it will also not be a problem based on precedents concerning the Constitutional provision prohibiting double jeopardy in the U.S. (see Appendix 19)).
- On the other hand, with regard to the principle of legal balance between crime and penalty, even if the level of surcharges is increased to the level equivalent to losses from unlawful conduct through means such as introduction of an additional percentage system, this cannot be said to result in an overall disadvantage that is markedly unbalanced compared to the injury caused by the unlawful conduct (see Appendix 20) and will not violate the principle of legal balance between crime and penalty.

Furthermore, although it also pointed out there should be concerns about the balance between crime and penalty with regard to measures such as suspension of the designated bidder status and civil procedure for compensation, when one considers that even though these possess a sanctions function, suspension of designated bidder status apply to acts by procuring individuals to buy goods and services by assuming the other party to a contract is unfit from some standpoint such as the principal of good faith, and actions such as orders to suspend business carried out by government authorities also are not generally debated as a problem of balance between crime and penalty, these should not be debated as problems of

balance between crime and penalty (however, it was pointed out that the JFTC, from the position of a competition policy authority should make clear the proper approach for suspension of the designated bidder status .

Because civil procedure for compensation for damages is not positioned as a program for either sanctions or deterrence purposes (it was pointed out there are many instances in fact where suits are not brought for reasons such as court expense, and the reality is it is difficult to expect this to act as a deterrence function), we believe there is no need to discuss such compensation as a problem concerning the balance between crime and penalty.

3 Surcharge Leniency Program

Based on the investigation described in Chapter 1 Section 2(2), the Study Group's specific thinking with regard to introducing a leniency program into surcharges is as follows.

(1) Proper Approach to the Surcharge System

We believe it would be appropriate when introducing a leniency program into the surcharge system to take into account the intent of the surcharge system as an administrative measure to ensure the effectiveness of the provisions prohibiting cartels, to prescribe the leniency conditions and levels by legislation, and create a system to automatically waive the surcharges in situations that satisfy relevant conditions. The Study Group therefore looked at specifically what kind of conditions should be established, and what sort of procedures should be used.

A. Conditions and extent of leniency

From the standpoint of ensuring the effectiveness of the provisions prohibiting cartels, it is appropriate to establish conditions that ① increase the incentive for entrepreneurs committing violations to report the unlawful conduct themselves to the JFTC, ② contribute to making case examinations more efficient and ③ are linked to persuading entrepreneurs to voluntarily quit unlawful conduct. From this standpoint, it would be appropriate to establish the following types of conditions.

- Entrepreneurs committing violations shall provide the necessary, adequate information on their own to the JFTC.
- Entrepreneurs shall voluntarily quit unlawful conduct.

Furthermore, it would be appropriate for certain parties, such as entrepreneurs that compel

other entrepreneurs to participate in a cartel, to be ineligible for application of the leniency program.

From the standpoint of increasing the incentive to report, it would be appropriate to create a system that includes, as a level of leniency, full leniency of the entire amount for the first party to report a violation.

B. Reporting procedures

With regard to leniency program application procedures, the study report on circumstances in other countries described above noted that they think it necessary and indispensable in the U.S. and the EU to establish procedures to increase predictability for entrepreneurs and increase legal stability in order for the system to function effectively.

Based on the experiences of the U.S. and the EU, we believe it would be appropriate to set up procedures for rendering a document to the entrepreneur that has applied for a leniency within a set period of time when the JFTC decides to approve giving leniency.

(2) Administration of Criminal Accusation for Entities Subject to Leniency

A. Basic thinking

The Study Group investigated the question of how to handle the criminal accusation of a party eligible for leniency when the party in question eligible for surcharge leniency is involved in a case the JFTC will file an accusation.

Even when entrepreneurs benefit from the application of the surcharge leniency program, the incentive to use the leniency program will be seriously impaired and will not function effectively if there is a possibility that entrepreneurs will be charged in a criminal accusation. From the standpoint of increasing the effectiveness of the surcharge leniency program, the Study Group therefore believes it will be necessary to establish measures so entrepreneurs that satisfy certain leniency conditions are not subject to accusation. For these situations, it will be necessary to keep the following points in mind when investigating the conditions under which the JFTC would not accuse.

- From the standpoint of ensuring the effectiveness of the provision prohibiting cartels, it will be necessary to increase the incentives to provide information to the JFTC.
- There must be just cause legally for cases in which the JFTC will not accuse an entrepreneur that has violated the law.

When considering these points, if one assumes the party that initially provided information before the JFTC begins its investigation will be a requirement, this can be considered equivalent to surrender to the JFTC, the party with the right to prosecute violations of the Antimonopoly Act, which is also consistent with the standards of criminal law. The Study Group therefore believes it is possible to design a system not to prosecute a party that fulfills the requirements.

B. System design

It has been pointed out that from the standpoint of consistency with the entire criminal law system, there may be problems if the JFTC decides to not accuse a party subject to leniency. We therefore have arranged the specific method and legal approach below.

At the present time, although the JFTC has publicly announced its policy with regard to criminal accusation (see Appendix 21), it is possible to announce the JFTC will not accuse a party that satisfies the conditions in section “A” above using such a format. In this event, we believe this kind of system design is possible, even in relationship to criminal law, given that it does not encroach on the public prosecutor’s right to bring suit because ① criminal accusation is something the JFTC will undertake based on its decision as an administrative institution, taking into consideration the deterrence power of criminal penalties, ② not accusing is an approach that takes the system into account, and ③ even assuming that only some of the entrepreneurs participating in a cartel report to the JFTC, they will be subject to application of the indivisibility of complaint principle (the principle that in a crime where a charge is assumed to be a condition for a lawsuit, when some the accessories have been charged or had charges dismissed, the effect applies to all of the accessories. Criminal Procedure Law, Article 238).

4 Ensuring Effectiveness Related to Provisions for Prevention of Serious Unlawful Conduct Other than Price Cartels

As described in Chapter 1 Section 1 above, the surcharge system currently in force is limited to only those unfair trade restriction practices involving ① cases related to prices or ②

cases that affect prices by practically limiting supply quantities, and all other unfair trade restrictions or serious unlawful conduct such as private monopolization are treated as ones by which they do not lose anyway. The Study Group conducted a study into specific problems and action measures by type of conduct with regard to these circumstances.

Furthermore, because the influence of many unfair trade practices on competitive order is different from that of patterns of conduct such as unfair trade restrictions and private monopolization, which have substantial limitation of competition as a structural requirement, and there is a question about how to calculate the surcharge even for situations where it is not possible to clearly visualize the economic gains resulting from the unlawful conduct, we believe it is not necessarily suitable to make every situation subject to application of the surcharge system.

(1) Unfair Trade Restrictions

A. Problem

The limitations related to the range of conduct subject to the existing regulations is based on the view of price cartels as the prototypical instance of a violation at the time the surcharge system was introduced in 1977. Today, after a quarter century of experience, it is necessary to heed the fact the law is no longer in tune with the actual circumstances of unlawful conduct as explained below.

- In recent years, a diverse range of forms of unlawful conduct has come to light, including cases of cartels to restrict businesses or cases of share of market cartels (market share ratio), in addition to more simple unlawful conduct that seeks direct, mutual restriction of prices or supply quantities.
- Under these forms of unlawful conduct, entrepreneurs involved in a violation can act as monopolies in markets where supply has been allocated by reaching an agreement concerning supply share, business partners, supply regions or other aspects of business. Accordingly, as an economic fact it is possible to judge such cases to be earning the same level of economic gain as other unlawful conduct such as price cartels.

B. Response

In light of the problem described above, when it comes to unlawful trade restrictions there is no need to limit actions to practices related to prices, and from the standpoint of ensuring the effectiveness of the provisions prohibiting cartels it is appropriate to clearly make practices to

limit supply share, business partners, supply regions or other aspects also subject to surcharges. As a surcharge calculation method, in these instances the same method can be used because the economic reality of the unlawful conduct is exactly the same as with price cartels.

(2) Purchasing Cartels

A. Problem

Purchasing cartels are a means to restrict competition among the consumers of goods and services, where the parties involved in the unlawful conduct increase or maintain their own profits through conduct such as reducing the prices of the goods or services targeted. Such cartels can be viewed as an attempt to obtain economic gains through the purchasing cartel in a manner similar to price cartels, but they have not been subject to surcharges because the parties to the unlawful conduct do not have any sales to use as the base for the surcharge calculation.

B. Response

Making purchasing cartels as well subject to surcharges would also be appropriate. A procedure to multiply the purchase amount of the subject goods or services covered by the surcharge by a fixed percentage can be considered as a surcharge calculation method. In this case, although there is a problem in that the surcharge will conversely grow smaller as the economic gains increase the lower the purchase price is reduced, considering the need to ensure the effectiveness of the prohibition provisions we believe it is appropriate to make the purchase amount the criteria.

(3) Private Monopolization to Restrict Prices, Supply Quantities, Suppliers, Etc.

A. Problem

Cases in which the leading companies in an industry restrict the prices and supply quantities for an entire market and effectively limit competition, by controlling other industry participants and instructing them on business activities such as prices, supply quantities and suppliers, have also been noted recently. These conducts can be determined to result in economic gains identical to those of price cartels, but such conduct is not subject to surcharges.

B. Response

These conducts as well can appropriately be made subject to surcharges. Because the economic reality of these unlawful conducts are no different than that of price cartels, using the same calculation method for the surcharge calculation would be reasonable.

(4) Private Monopolization and Unfair Trade Restrictions to Exclude Competitors

A. Problem

As regulatory reform proceeds and the IT revolution continues to unfold, industries where competition is being stimulated by the entry of new entrepreneurs can be noted. Unfortunately, numerous instances of conduct such as private monopolization that effectively limit competition by eliminating new market participants can also be observed (See Appendix 22). Even though existing entrepreneurs are able to maintain or expand their monopoly position in their own market by such conduct and obtain economic gains, such conduct is not currently subject to surcharges. Because the effectiveness of the prohibition provisions concerning such conduct to eliminate new market entrants is not being adequately planned and provided for, there is a strong possibility the results of regulatory reform are being lost.

B. Response

Making this type of conduct also subject to surcharges would be reasonable. Because the monopoly profits earned by eliminating competing entrepreneurs may be regarded as economic gains from the conduct in question, in such instances we believe the profit ratio in highly oligopolistic markets where competition appears to be comparatively inactive, such as markets where almost no changes in market share or the order of market share can be noted, will serve as a reference for the surcharge calculation method.

For example, the difference between the profit ratio of the leading firms in highly oligopolistic markets where there is extremely little change in market share and no change in the ranking of firms over the long-term and the profit ratio found in average markets (the average profit ratio for all industries) can, we believe, be regarded as the economic gain from the conduct in question (for specific details, see Appendix 23).

5 Problems Requiring Study Based on Operating Considerations After Introduction of the

Surcharge System

A quarter century has already passed since the surcharge system was introduced in 1977. In light of the application of this system to-date or hearing precedents, we believe issues such as the handling of small and medium-size firm business organizations when applying the reduction ratio, in addition to those indicated below, for example, should be investigated from the standpoint of the system's promptness and fairness.

(1) Problems Related to Corroboration of Separate Incidents Involving Bid Rigging

A. Problem

Recently, 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 hearing cases to dispute whether each good or service should be subject to a surcharge has increased. As this indicates, the problem is one of whether we can say the actual conditions, in which evidence related to coordination of orders for each good or service with regard to the goods or services within the range subject to the basic agreement is being requested, are consistent with the original intent of the surcharge system.

B. Response

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. Moreover, even assuming the parties that would ultimately receive the orders for each separate good or service within the range of the goods or services subject to the fundamental agreement was not clearly determined, we believe this does not change the fact that coordination based on a fundamental agreement took place and that the fundamental agreement including this situation was in fact functioning. 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.

(2) Problems Related to Final Year of a Cartel Enforcement Period

A. Problem

The calculation period for the surcharge amount has been set as a period of three years, counting backwards from the final date of unlawful conduct for each entrepreneur that violated the law. This means that the JFTC can assess a three-year period surcharge against entrepreneurs that had halted their unlawful conduct prior to a cartel itself being terminated for reasons such as on-site inspections by the JFTC, just as with entrepreneurs that had continued their unlawful conduct until the very end. We believe this approach makes it difficult for the incentive to quit unlawful conduct to function, and also presents a problem from the standpoint of fairness.

B. Response

We believe it is appropriate to make the end of the calculation period for the surcharge amount the point in time when the cartel itself ended (normally the point in time when the JFTC began its examination), rather than the point in time when each individual entrepreneur terminated its unlawful conduct. Not only will this increase the incentive for entrepreneurs to quit unlawful conduct, by excluding from the period subject to the surcharge calculation the time period after entrepreneurs halted their unlawful conduct and exited the cartel prior to this date, it will also ensure fairness between those entrepreneurs who continued their unlawful conduct until the point in time when the JFTC began its investigation and those entrepreneurs that had halted their unlawful conduct at an earlier date.