Chapter 3 Comprehensive Review of Criminal Accusation Procedures and Penal Regulations

1 Review of Criminal Accusation Procedures

As described in Chapter 1 Section 2 above, the Antimonopoly Act enforcement systems continue to be centered on administrative sanctions as in the past, and maintaining the system currently in force in order to conduct criminal accusation is appropriate as long as there are heinous and serious incidents. When we compare the system with other specialized administrative institutions such as the National Tax Agency or the Securities and Exchange Surveillance Commission, however, the fact the current number of criminal accusation cases is relatively small is undeniable.

Accordingly, we believe it is necessary to pursue criminal accusations more aggressively, and necessary to continually revise the case examination organization and systems for this purpose. In conjunction with this, it will also be necessary to investigate the following legal system-related problems.

(1) Compulsory Measures for Criminal Investigation Process

A. Problem

The investigation procedure currently used by the JFTC is administrative investigation, which is not to be construed as a procedure granted for criminal investigations (Antimonopoly Act, Section 46-4). It has been noted regarding to this point that prosecuting cases based on the results of administrative investigations concerning unlawful conduct assuming the same structural requirements is a problem from the standpoint of due process of law (Antimonopoly Act Section 46-4 or evasion of the warrant doctrine (see Appendix 24). What's more, it has also been pointed out that gathering the evidence necessary to prove the facts constituting a crime is difficult even if a firm is accused and law enforcement authorities begin a criminal investigation after the JFTC has nearly completed an investigation.

B. Response

Based on this point, in order for the JFTC to openly and effectively conduct an investigation for the purpose of prosecuting a case, the preferable approach would be for the JFTC to use compulsory measures for criminal investigation like the National Tax Agency or the Securities

and Exchange Surveillance Commission.

The following points must be considered if the JFTC is to use compulsory measures for criminal investigation.

- ○ Introducing compulsory measures for criminal investigation will eliminate the problems from the standpoint of due process as described above (those pointed out regarding the Antimonopoly Act Section 46-4 or evasion of the warrant doctrine.
- ○ Introducing compulsory measures for criminal investigation will make it possible to transfer evidence gathered by the JFTC to the public prosecutor's office, enable authorities to carry out accusation procedures smoothly, and strengthen evidence gathering capabilities to clear up cases.

On the other hand, there is the issue of whether using compulsory measures for criminal investigation to conduct investigations that originate in evidence gathered by using administrative investigations will be a problem from the standpoint of due process of law in the event criminal investigation process is introduced. Nevertheless, with regard to this point we believe there will not be any problems assuming the system clearly outlines the decision criteria concerning cases suitable for criminal accusation within administrative institutions, and properly allocates cases the administrative investigation division has investigated to the criminal investigation division in accordance with relevant criteria.

Accordingly, introducing compulsory measures for criminal investigation is appropriate from the standpoint of due process of law and encouragement of more aggressive criminal accusation.

(2) Relationship with an Exclusive Accusation System

A. Problem

In the event the government introduces compulsory measures for criminal investigation, investigations conducted through collaboration between the JFTC and the public prosecutor's office from the stage prior to a criminal accusation, or investigations conducted by the public prosecutor's office on its own prior to accusation while continuing to collaborate with JFTC, can both be envisioned. One problem, however, is the question of whether the public prosecutor's office can conduct investigations prior to accusation while it maintains its own exclusive accusation system. There is also the point, first of all, whether it is appropriate for only the JFTC to possess accusation authority when the final victims to suffer from cartels and bid rigging are consumers.

B. Response

For crimes for which accusation by an administrative institution is a condition for indictment, conducting investigations through the public prosecutor's office or other authorities prior to accusation by an administrative institution is recognized by precedent. In addition, in light of the intent of the exclusive accusation system that the JFTC, with its specialized knowledge concerning economic structure or corporate activities, is the proper institution to make the decisions of whether to handle cases involving violations using administrative disposition only or to prosecute, maintaining the same system is appropriate.

(3) Exclusive Jurisdiction of the Tokyo High Court

A. Problem

In the event criminal accusation is pursued more aggressively through means such as the introduction of compulsory measures for criminal investigation, we believe it will be necessary to conduct another investigation concerning the existing situation, in which the Tokyo High Court has become the exclusive jurisdiction for the first hearing for criminal lawsuits, to discuss the pros and cons of ① concentrating criminal accusation in a specific court and ② skipping the trial at the courts of first instance (i.e., having the Tokyo High Court conduct hearings without carrying out hearings at the district courts).

① Problems with concentrating cases at the Tokyo High Court only

Although the need to make expert, consistent decisions regarding cases involving the Antimonopoly Act has been cited as a reason for concentrating such cases at the Tokyo High Court only, when numerous defendants reside in jurisdictions other than the jurisdiction of the Tokyo High Court, we assume this will present problems from standpoints such as guaranteeing the defendants' rights and the efficiency of the hearings.

② Problems with skipping the trial at the courts of first instance

The demand for quick hearings is cited as the reason for conducting the first hearings at the Tokyo High Court. Unlike hearings to dismiss/overturn court decisions, however, even though the accusation will be conducted by the JFTC this does not mean that fact-finding based on hearings will be conducted first. Moreover, the only examples of accusation being omitted at other levels under other laws and ordinances are crimes of insurrection under the criminal law (including preparation and assistance for the crime). When this point is also taken into

consideration, it is doubtful whether using only the grounds stated above to deprive defendants of their right to a hearing at other levels is appropriate.

B. Response

In light of the above considerations, it would be appropriate to abolish the Tokyo High Court exclusive jurisdiction system and abolish the skip of trial at the court of the first instance. From the standpoint of ensuring uniformity of court decisions, however, it would be appropriate to grant jurisdiction to, the district courts located in the seat of each high court and the Tokyo District Court as well as district courts throughout Japan.

2 Review of Penal Regulations

In order to strengthen the enforcement powers and deterrence of the Antimonopoly Act enforcement systems, in addition to the measures described above, it will be necessary to study increasing penalties or introducing penalties with regard to ① penalties to back the investigation authority currently in force, (2) measures against non-observance of decisions (i.e., not acting in accordance with decisions to obey elimination measures by the JFTC after such decisions have been finalized) or unfair trade practices.

(1) Penalties Related to Measures for Criminal Investigation

A. Problem

Existing penalties related to obstruction of JFTC investigations are low, even by comparison to those under other economic laws and ordinances (see Appendix 25). Moreover, the only penalties against corporations are those for obstruction of investigations, and the amount of such penalties is also low.

B. Response

From the standpoint of strengthening the enforcement powers of the Antimonopoly Act, it would be appropriate to expand the types of unlawful conduct that will be subject to imprisonment and penalties against employers and employees, and to increase penalty amounts by referring to the provisions of other economic laws, in order to at least bring the powers in line with those of other economic laws and ordinances.

Furthermore, it has been noted that the introduction of warrant measures may be necessary, from the standpoint of ensuring the reasonableness of investigation process procedures, if a decision is made to introduce a supplemental calculation system together with raising the level of surcharges as described earlier, because socially this will result in the function as one type of sanction growing stronger. Considering that a sanction system after a comprehensive review will also be positioned as an administrative measure as in the past, however, and the consistency with the investigation process procedures for administrative measures such as heavy additional charges that possess other sanctions-like functions, we believe there is no need to introduce a warrant measures.

(2) Penalties Related to Non-observance of Decisions

A. Problem

Although firms normally engage in conduct in violation of the Antimonopoly Act as a business activity and gains from such activity are returned to the firm, with the exception of private monopolizations and unfair trade restrictions the penal regulations against corporations are identical to those against individuals and they lack sufficient deterrence power. Moreover, considering that the number of entrepreneurs that repeat unlawful conduct is not small, we believe there is a need to adequately ensure the effectiveness of elimination measures.

B. Response

From the standpoint of ensuring the effectiveness of elimination measures and strengthening Antimonopoly Act enforcement powers, it would be reasonable to introduce double punishment to corporations for non-observance of decisions and raise the level of fines by referring to the provisions of other economic laws and ordinances (see Appendix 26).

(3) Measures Against Unfair Trade Practices

A. Problem

It has been noted that because the only measures currently in force against unfair trade practices are elimination measures, the efficiency of provisions prohibiting unfair trade practices has not been sufficiently ensured.

B. Response measure

From the standpoint of ensuring the effectiveness of provisions prohibiting unfair trade practices, introducing criminal punishment is being considered. Concerning the proper approach to measures against unfair trade practices however, it would be possible to make the changes described below.

- ○ Creating fair trade discipline based on a flexible action by the JFTC is required because the determination of whether an activity corresponds to an unfair trade practice varies according to factors such as market commercial practices or economic structure, and frequently calls for specific action in each individual case.
- ○ Viewed internationally, many countries levy criminal penalties against conduct that corresponds to unfair trade practices in Japan.
- ○ From the standpoint of consumer protection, we believe unfair trade practices such as those causing pronounced injury and substantially obstructing competitive discipline as a result of unlawful conduct can also properly be made subject to criminal penalties.

When we consider the above points, we do not believe it would be appropriate to introduce penalties against all unfair trade practices. We do, however, believe that some unfair trade practices can appropriately be made subject to criminal penalties by further restricting the requisite conditions.

Accordingly, from the standpoint of consumer protection it would be appropriate to investigate introducing criminal penalties that are limited to specified types of conduct such as those causing pronounced injury and substantially obstructing competitive discipline as a result of unlawful conduct, while continuing to maintain the enforcement measures currently in force against unfair trade practices in order to respond flexibly in response to economic and social changes.

Chapter 4 Comprehensive Review of Hearing Procedures

In the event a decision is made to increase the level of surcharges or introduce a supplemental calculation system and leniency program from the standpoint of ensuring the efficiency of the surcharge system as described above in Part 2 Section 2, given that even now the number of hearings is increasing sharply and many cases involve hearings that take longer to complete, a further jump in the number of hearings and an increase in the length of hearings is foreseeable. Moreover, as the function of the surcharge system as sanctions when viewed socially grows stronger, it will be necessary to also consider reasonable procedures for hearing procedures overall.

Accordingly, it will be necessary to review hearings and other procedures from the standpoint of promptness and efficiency and ensuring due process.

1 Hearings Related to Exclusion Measures and Hearings Related to Surcharge Payment Orders

(1) Time Period for Exclusion Measures and Surcharge Payment Orders

A. Problem

Presently, the majority of hearing cases are related to surcharge payment orders. Of these, many involve firms that consent to recommendations but register objections concerning the surcharge payment order. Should a supplemental calculation system or leniency program be introduced into the surcharge system based on the current review, not only will investigating the supplement prerequisite facts intimately related to the criminal facts during the surcharge payment order investigation stage after confirmation of the facts of the crime be inefficient, conducting a hearing on whether there are supplement prerequisite facts intimately related to the criminal facts at a surcharge payment order–related hearing is likely to create an excessive procedural burden on the parties subject to the hearing. In addition, should a supplemental calculation system or leniency program be introduced, it can be anticipated that demands by parties subject to such systems to be quickly informed of the surcharge amount will increase further.

B. Response

From the standpoint of making hearing procedures more efficient, it would be appropriate to

issue recommendations (elimination measures) and surcharge payment orders in the same time period, and provide for unification of both sets of procedures.

Furthermore, along with issuing elimination measures and surcharge payment orders in the same time period, it would be appropriate to make the time limit by which the JFTC can order elimination measures, which currently is one year from the date a firm ended its unlawful conduct, identical to the three-year time limit by which the JFTC can issue surcharge payment orders. Finally, when calculating surcharges it would be appropriate to calculate the surcharge amount by regarding the time period until the start of an investigation as the implementation period, so that the implementation period is fixed.

(2) Unification of Disposition by Making Elimination Measures and Surcharge Payment Orders Effective Simultaneously

A. Problem

Because surcharge payment orders are a form of administrative sanctions, but recommendations are not, in the event a decision is made to issue elimination measures and surcharge payment orders in the same time period, it will be necessary to unify these two measures into one alternative or the other.

B. Response

When investigating which alternative to use to unify recommendations and administrative sanctions surcharge payment orders, it will be necessary to carefully note the fact that ① recommendation procedures currently in force have become a system somewhat lacking in flexibility, because an objection by even a part of the recommendation results in non-consent and ② for administrative sanctions surcharge payment orders, opportunities exist for prior notification, tendering opinions and submitting evidence prior to an order and preliminary procedures have been ensured.

When this point is considered, it would be appropriate to issue elimination measures orders as well as administrative sanctions, after having provided an opportunity to tender opinions and submit evidence, in a process identical to that for surcharge payment orders, and set up a system to decide on whether to begin hearings for situations where there is an objection.

2 Lapse of Surcharge Payment Orders

(1) Problem

As described above, currently the number of hearing cases related to surcharge payment orders is growing sharply. We believe that under the system currently in force, parties that have received a surcharge payment order will request the start of hearing procedures with the goal of delaying the need to procure funds for the surcharge payment amount, because the surcharge payment order will lapse with the start of hearing procedures. We also believe the existing system makes it difficult for parties to have any desire to accelerate hearings.

(2) Response

To ensure the hearing system functions smoothly, establishing a system under which surcharge payment orders do not lapse even when hearing procedures are begun should be considered. Because surcharge payment orders are administrative sanctions, and normally administrative sanctions are assumed to not lapse from the submission of objections, establishing a system where payment orders do not lapse with the start of hearings is possible.

Accordingly, it would be appropriate to introduce a system where surcharge payment orders do not lapse even if hearing procedures are started, and entrepreneurs are made to pay the surcharge or place the payment amount in escrow.

3 Proper Approach to Implement Procedures Based on the Review Described Above

In the event recommendations are converted to elimination measures orders (administrative measures) and a system is established so surcharge payment orders do not lapse with the start of hearing procedures, the hearing procedures against businesses that object to orders will become procedures to conduct a second hearing of the initial order. The following should be considered when conducting an investigation of the legal position of the hearing procedures in this situation, from standpoints such as guarantee of the proper procedures (see Appendix 27 for a flowchart of the new hearing procedures that also take the following investigation into consideration).

(1) Position of Hearing Procedures and Assurance of Appropriate Procedures

Even if hearing procedures are positioned as procedures to conduct a re-examination of an initial order, the hearing procedures will have as their main purpose the discovery of the true

facts of the case and will be started based on a hearing initiation determination that records the facts and application of laws and ordinances that served as grounds for the initial order. To provide for the sanction's fairness and protection of the related parties' interests, in addition to a hearing concerning the facts of the crime and the application of laws and ordinances there will be no change to conducting prudent hearings to exhaust every attack and defense of the entire case including whether the sanctions are justified, just as under the system currently in force. On the other hand, if one also considers that initial findings have been revised under the system currently in force, as a result of giving the parties subject to a hearing ample opportunity to dispute or disprove a finding if the JFTC has determined there was unlawful conduct and issued a recommendation and an objection was raised, we believe there will not be any problems from the standpoint of due process of law even assuming the position of hearing procedures is changed.

Furthermore, we believe positioning hearing procedures as procedures to conduct a second examination of an initial order will not present any problems concerning the guarantee of proper procedures, because preliminary procedures will be enhanced along with this comprehensive review and because it will be possible to improve hearings by looking at the entire administrative process in conjunction with the procedures after the fact.

Finally, because the hearing procedures are positioned as quasi-judicial procedures, the need to create a stronger examination and hearing system has also been pointed out, and it will be necessary to investigate this sufficiently from the standpoint of ensuring impartiality and fairness.

(2) Ensuring Promptness and Effectiveness in New Hearing Procedures

A. Preliminary hearings when considering eliminations measures orders

Considering the intent of the Administrative Procedures Law, providing notification in advance and offering an opportunity for parties to submit opinions in writing and present evidence is appropriate when issuing administrative measures elimination measures orders. We believe there will also be instances where it will be possible to ensure the promptness by reducing the points of disputes in a case through this approach.

B. Ensuring the promptness of elimination measures

Considering the intent of elimination measures is to restore competitive discipline quickly by issuing elimination measures orders and surcharge payment orders in the same timeframe, it will be necessary to set up a system that can ensure promptness of elimination measures.

For this reason it will be appropriate to establish a system to ① ensure elimination measures are accepted in situations where there are objections to only the surcharge payment orders (accordingly, this assumes the facts of crimes related to elimination measures orders are indisputable in these situations) and ② reach a decision in advance concerning only the facts of the crime and the application of laws and ordinances related to elimination measures order, by making reference to the provisions of the Code of Civil Procedure when there are objections to either elimination measures orders or surcharge payment orders.

C. Review of the Consent Decision System

The consent decision system currently in force assumed situations in which the parties subject to an examination have acknowledged all of the facts and applications of laws and ordinances stated in the hearing initiation decision documents. The system lacks flexibility in some respects because it does not make any assumptions that provide for the use of the facts or other information brought to light by the hearing process.

It would thus be appropriate to study the introduction of a system to enable parties to initiate a consent decision, even in situations where the parties subject to the hearing have acknowledged the majority of the facts of the crime brought to light by the hearing process, in order to be able to provide for the use of the consent decision system in situations where early settlement of a case has been determined to be appropriate.