

# Outlines of the Report of the Study Group on the Antimonopoly Act

April, 2017

# Outline of the Study Group on the Antimonopoly Act

## Purpose

- About 40 years has passed since the surcharge system introduced
- In the meantime, business activities and corporate structures have been growingly globalized, diversified and complicated
- Reconsideration of the surcharge system to keep up with the constant change of economic and social environments

## Agendas

- 15 meetings were held from February 2016 to March 2017
  - The 2<sup>nd</sup> to the 5<sup>th</sup> meeting: Hearings from experts, related organization, etc.
  - The 6<sup>th</sup> meeting: Sorting out of the issues  
(on July and August 2016, invited public comments to the issues)
  - The 7<sup>th</sup> to the 11<sup>th</sup> meeting: Examination of the individual issues
  - The 12<sup>th</sup> to the 15<sup>th</sup> meeting: Examination of the draft of the report

## Members

- 16 members consisted of external experts from Japan Business Federation, National Federation of Small Business Association, Japan Association of Consumer Affairs Specialists, Law firms, Economists...

# The Main Points of the Report

## Revision of the Rigid Calculation and Imposition Method

### 1 Measures against the issues caused by the rigid calculation method

- Imposing appropriate amount of surcharge that corresponds to the complicated economic circumstances, for example, imposing surcharges on the foreign violators that have no sales in Japan (International market allocation cartels, etc.)

### 2 Introduction of the systems to enhance incentives to cooperate in investigations

- Expanding the area where the JFTC finds efficient and effective solutions or handling of cases in cooperation with enterprises by for example, enabling more cooperative leniency applicants to get more reduced calculation rate.

## Revision of the Due Process

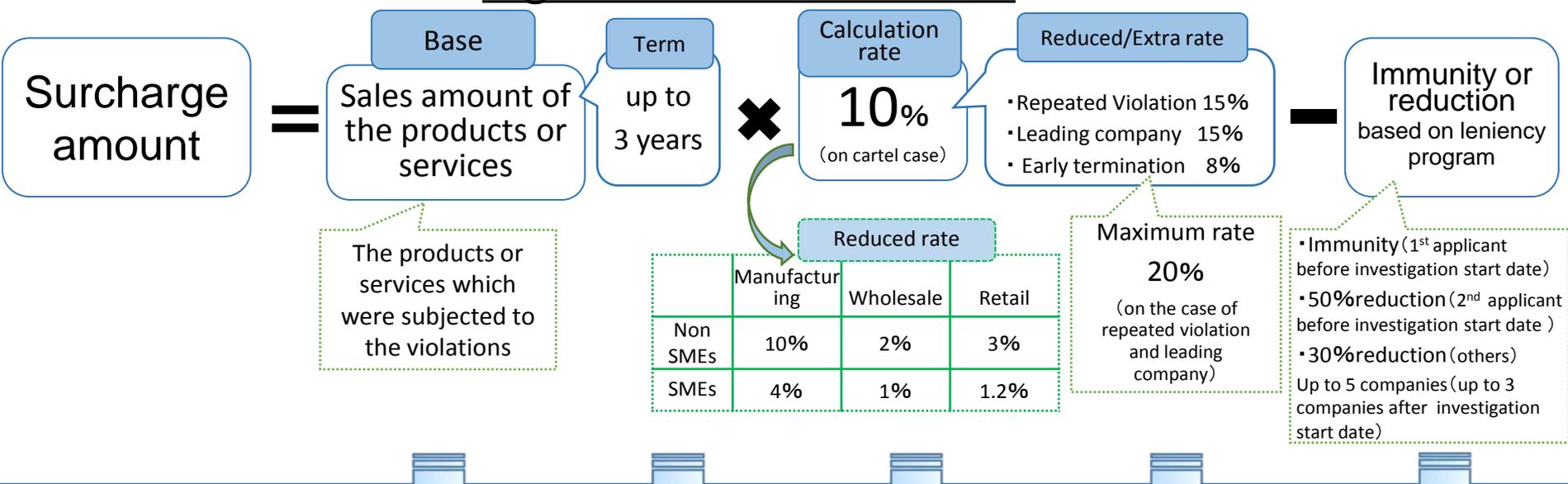
### 3 Due process for making the new revised system work more effectively

- Consideration to privilege\* under the operation as far as the communication regarding the use of new leniency program between attorney and enterprises

\* In this sentence, "privilege" means so called attorney-client privilege that a client can refuse disclosure to the investigation authority regarding certain communication between the attorney and the client.

# Current Systems and Conclusions of the Report for the Systems

◆ On the current surcharge system, the JFTC calculates and imposes surcharges uniformly and impartially in accordance with prescribed calculation rates (= Rigid calculation method)



## Main Conclusions of the Report

➤ Methods for violators who have no sales in Japan such like foreign companies on international market allocation cartels

➤ Abolition or extension of the maximum calculation period

➤ Abolition of the industry-classified calculation rate  
➤ Adjustment of applicable companies of the SMEs rate

➤ Introduction of the system for adding extra charges to obstruction of investigations

➤ Expanding the leniency program for enhancing incentives of cooperation in investigations

# Conclusions of the Report about the Main Issues

## The direction and policy of revision of the surcharge system

- It is appropriate to 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.
- 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.

## Legal nature of the current surcharge system

- The surcharge system is “a system for the administrative agency to impose monetary disadvantage more than the amount corresponding to unjust gains on violators for the objective of deterring infringements“, and it is evaluated that the direction of revision indicated in the report is within range of object and effect of the current system.
- 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.

# Conclusions of the Report about the Main Issues

## Basic framework of the method of surcharge calculation and imposition

- Revision of the amount of sales serving as basis for calculation of surcharges
  - The basic amount of sales shall be established as a new basis for calculation of surcharges to operate swiftly and efficiently
  - 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 on each type of infringement shall be stipulated by law
    - In order to deal with unpredictable types of infringements in advance, the provisions shall be stipulated by 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
- Abolishment or extension of the current 3years upper limit on the calculation period, The revision of the basic calculation rate
- Abolishment of the calculation rates by type of business, Determination of appropriate subjects for the application of the calculation rates for small and medium-sized enterprises
- The current higher calculation rate for repeated infringements and leading roles of infringements may be appropriate to maintain the current system, Abolish the reduced calculation rate for early withdrawal
- Maintaining compulsory surcharge imposition methods , etc.

## System for enhancing incentives of cooperation in investigations

- Expanding the current leniency program
  - Abolishment of limit on applicable enterprises in the leniency program (currently, up to five enterprises) and the application term (currently, twenty business days starting from the date on which the JFTC started to investigate)
  - individual mitigation rate shall be determined by the JFTC according to the value of proof which applicants have voluntarily submitted
  - Introduction of the obligations of applicants to cooperate continuously with investigations (to submit all the information promptly to the JFTC that they have and are able to obtain pertaining to infringements, and etc.)
- A predetermined rate shall be added to the amount of surcharges for cases of obstruction of investigations by enterprises, directors, employees, or representatives, etc.

## Due process under the new revised system

- The JFTC takes care of the only communications between attorneys and their clients (enterprises) related to the use of the new leniency program to the extent that the fact-finding ability of the JFTC should not be impeded, on the premise of establishing measures to prevent adverse effects such as concealing evidence, etc.

※ The specialized knowledge of the JFTC may be used only for the underlined parts.