

## Client Alert

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## Latest Developments in Discussions on the Reform of the Surcharge System: Publication of the Antimonopoly Act Study Group Report

### Summary of the Report

The Antimonopoly Act Study Group (the "Study Group") convened by the Japan Fair Trade Commission (the "JFTC") released its report on the administrative surcharge system (the "Report") in April 2017. The following changes were recommended in the Report: (i) revision of the surcharge calculation method; (ii) incorporation of a new system to promote cooperation with investigations; and (iii) addressing proportionality and other due process concerns. The following article outlines the Report's indications as to the direction the revisions to the surcharge system can be expected to take in the future.

It is important to note that the Report does not contain specific details regarding the amendments of the Antimonopoly Act, and that its contents may not reflect the final form of the amendments. Nonetheless, the JFTC has been preparing its draft amendments based on the contents of the Report for submission to the ordinary session of the Diet in 2018.

### Revision of the surcharge calculation method

#### Revision of the basis for the calculation

Under the current system, only the sales amounts for goods and services subject to mutual restraint through infringements. However, this system is no longer adequate. The Report suggests abolishing the current calculation method. The Report states the surcharges should be assessed on the total sales amount for the targeted products relevant to the illegal conduct ("**Basic Sales Amount**"), and then make the total sales as the basis for the calculation of the surcharge. Moreover, the Report states that surcharges should be assessed on the Basic Sales Amount related to the illegal conduct regardless of whether the restriction on competition affected the market.

This new calculation method would also address the inability to impose surcharges on, for example, foreign participants in international market dividing cartels which have no revenues in Japan. The Report suggests that surcharges be imposed in such cases as well. In addition, when calculating surcharges for enterprises which have no revenues in Japan, the Report suggests stipulating the certain amounts for the basic calculation of the surcharges in law based on the economic gains obtained from the illegal conduct ("**Basic Gains**") in order to sufficiently deal with such companies

#### Adjustment of the Basic Sales Amount

The Report further provides that where the Basic Sales Amount exceeds the required amount calculated on the basis of the purported surcharge system and its characteristic as a result of setting a uniform standard for the basic calculation method of the surcharge, there should be a provision by law



authorizing the JFTC to use its discretion to deduct certain amounts from the Basic Sales Amount.

Elimination of the calculation period limit and change in the approach to the starting and ending dates of the calculation period

The calculation period is currently limited to a maximum of three years. However, it has been suggested that continuous illegal conduct periods currently average four years, and that this three year limit is thus inadequate as a preventative measure. The Report suggests either eliminating the limit or extending it to, for example, 10 years, and further suggests changing the time units used to calculate the starting and ending times of the illegal conduct from days to months.

### **Increase in the basic calculation rate**

The basic calculation rate for surcharges was increased from 1.5% to 6% in 1991 and then to 10% in 2005. The Report states that the current rate is inadequate to prevent illegal conduct but stops short of strongly arguing to increase it. Among other reasons, this is because the other proposed revisions are expected to increase surcharges to a preventative level if enacted. The future debate on the revisions to the Antimonopoly Act should therefore be followed closely to determine whether the basic calculation rate should be increased.

Under the current Antimonopoly Act, different surcharge calculation rates are applied to specific industries on the basis of their profit margins. For example, in cartel cases involving the manufacturing industry, the surcharge calculation rate is 10%, while it is set at 3% for the retail industry and 2% for the wholesale industry. The Report suggests eliminating this industry-based system. The revisions may introduce a uniform calculation rate for all industries.

### **Amendment to the leniency program: cooperative investigation system**

#### **Rigidity of the current leniency program**

The current leniency program provides each applicant with a set reduction rate established under the Antimonopoly Act in accordance with the order in which its application is submitted which is subject to the successful completion of certain legal requirements. However, this rigid system does not allow for incentives to be provided to enterprises that are not among the first five companies to apply for leniency or that are unable to submit applications by the deadline (20 business days after the commencement of the investigation). At the same time, enterprises receive a certain surcharge reduction rate even if they do not actively cooperate with an investigation if they met certain criteria. It has been suggested that the current system does not give wrongdoers an incentive to cooperate after a certain point.

#### **Increasing the incentive to cooperate with an investigation**

The Report points out the above problems with the current system. In order to increase the incentive for enterprises to actively cooperate with investigations, the Report advocates eliminating the limit on the number of applicants that can receive a reduction in the surcharge. It also supports extending the leniency



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application deadline provided that it would not prejudice the first applicant's immunity. The JFTC should also be given greater discretion to determine precise reduction rates based on its evaluation of the evidence voluntarily submitted by the applicants.

### Detrimental effect on those who do not cooperate

The Report mentioned that enterprises should have an ongoing responsibility to cooperate and that failing to do so should result in disqualification from the leniency program. The Report also suggests introducing a system to increase surcharges where an enterprise, its executive officers, employees or agents interfere with an investigation based on the extent of such interference

### Due process

#### Possible addition of attorney-client privilege

The Study Group discussed the addition of attorney-client privilege to the new system but did not conclude that it should be introduced. It is worth noting that the Report was receptive to the introduction of attorney-client privilege for communications concerning the new leniency program, and stated that doing so should not impede efficient fact-finding.

### Conclusion

The Study Group's discussions and Report only indicate the direction of the amendments. The extent to which the Report's recommendations will be incorporated into the new surcharge system remains unclear. However, the Report cannot be dismissed out of hand. Although many issues remain unclear, the Report will be extremely important in shaping the debate over the future surcharge system. Thus, it is vital that close attention be paid both to the Report's contents and to the development of future discussions.

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