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Advisory Panel on Basic Issues Regarding the Anti-Monopoly Act

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（1） Provision of copies at the time deposition records are drafted
（2） Presence of an attorney during a deposition
（3） Attorney-client privilege
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Introduction

The Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Anti-Monopoly Act”) is a basic act concerning economic activities that aims to ensure general consumer benefits and encourage democratic, sound development of the national economy by promoting fair and free market competition. In order to stimulate the national economy and promote innovation, it will be necessary to establish an economic society based on disciplined market mechanisms and the principle of self-responsibility that allow market functions to be sufficiently manifested through fair and free competition. In this context, the role of the Anti-Monopoly Act becomes increasingly important. Amid the continued advances of globalization and the breakdown of borders with respect to business activities, the global harmonization of competition policies is also important and efforts to ensure that the Anti-Monopoly Act in Japan is not inferior by international standards is required.

With this situation in mind, the Anti-Monopoly Act was amended in 2005 to encompass an increase in the surcharge (kacho-kin) calculation rate, the introduction of a surcharge (kacho-kin) reduction and waiver system, the introduction of powers of compulsory investigation, and a review of the hearing procedure system. These amendments became effective in January 2006. As there were persons who felt that there was a need for follow-up studies based on the status of implementation of the amended law and that further studies were required on the modality of basic systems consisting of the surcharge (kacho-kin) system and the administrative hearing procedure system, provisions calling for reviews were set forth in Article 13 of the Supplementary Provisions, which reads “The government shall consider the status of the implementation of the new law, any changes to socioeconomic conditions, and any other relevant factors in undertaking deliberation of the modality of the system with respect to the surcharge

(kacho-kin), the modality of procedures for mandating measures required to eliminate violations, and the modality of the administrative hearing procedures and implement the required measures based on the results thereof within two (2) years of the date on which this law shall be in full force and effect."

The Advisory Panel on Basic Issues Regarding the Anti-Monopoly Act (hereinafter referred to as "the Advisory Panel") hosts a series of round-table sessions organized by the Chief Cabinet Secretary and convened in light of the aforementioned provision. Since its inaugural session in July 2005, the Advisory Panel has convened thirty-five different sessions under the purview of Chief Cabinet Secretary Hiroyuki Hosoda (until October 2005), Chief Cabinet Secretary Shinzo Abe (from October 2005 to September 2006), and Chief Cabinet Secretary Yasuhisa Shiozaki (since September 2006).

On the inaugural session of the Advisory Panel, Secretary Hosoda stated:

> A wide-ranging study encompassing the points at issue with respect to administrative law, criminal law, and other relevant areas is needed when deliberating the modality of the Anti-Monopoly Act, which I liken to an "economic constitution," in that it functions as basic law governing business activities. In addition to issues relating to the modality of the surcharge (kacho-kin) system in terms of the legal character of the surcharge (kacho-kin) and its relationship to criminal penalties, the modality of measures with respect to unfair trade practices should be studied.

At the fifteenth session of the Advisory Panel, Secretary Abe stated:

> The deterrence of violations of the Anti-Monopoly Act and the implementation of improvements to the competitive environment in economic transactions is exceedingly important even when examined in terms of the thorough application of structural reforms as promoted

to date by the government. I hope that discussions will be held so as to induce growth in our economy and promote consumer benefits.

At the seventeenth session of the Advisory Panel, Secretary Shiozaki stated:

> The modality of enforcement of the law with regard to competition encompasses the difficult question of how we should reconcile harmonization with the laws adopted by other countries with our nation's independence. I hereby ask for instructive recommendations from the perspective of an ideal policy on competition as a foundation upon which the Japanese economy can grow in the future.

The Advisory Panel has obtained the opinions of experts, concerned bodies, relevant government ministries and agencies, and other parties and received reports on the status of the implementation of the revised law. In addition, points at issue concerning the system for deterring enterprises that would be in violations of the Antimonopoly Act were announced, and feedback from all walks of life was solicited. This report is the result of discussions based on the collection of opinions, reports, and feedback. We expect that the government will endeavor to take the required legislative steps and respond in operational terms with respect to the Anti-Monopoly Act based at length on this report.

(For more information on the organization of Advisory Panel sessions, materials, minutes, "points at issue," and opinions proposed for "points at issue," visit http://www8.cao.go.jp/chosei/dokkin/index.html.)

Basic frames of reference

A variety of frames of reference applies when deliberating the modality of the Anti-Monopoly Act, and it is required to harmonize appropriately these frames of reference. The Advisory Panel sought to shape a concrete system under the following basic frames of reference:

Ensuring Deterrence against violations, ensuring effective enforcement, and guaranteeing due process

The Anti-Monopoly Act prohibits from restricting competition and seeks to realize this goal by imposing penalties on violations of the Act. While the stipulation of measures that sufficiently deter violations that impede market functions is essential in order to achieve the objectives of the Anti-Monopoly Act, it is also important to ensure that the system enables effective enforcement against violations. Moreover, the Anti-Monopoly Act treats the imposition of penalties on enterprises that contravene this act as the main means of enforcement. It is thus necessary that the procedures that apply when imposing penalties comply with due process of law for which fairness and transparency have been secured.

While it is obvious that due process should be guaranteed when imposing penalties, the impairment of effective enforcement through excessive procedural guarantees is also not appropriate. The striking of an appropriate balance in designing and enforcing the Anti-Monopoly Act system in terms of guaranteeing due process and ensuring effective enforcement is important, and it is believed that the ability to shape the Anti-Monopoly Act into a set of rules that are collectively relied upon as the basic law governing economic activities will also lead to the attainment of the objectives of the law.

Comparison with other domestic systems and systems adopted by other countries

In deliberating the modality of the Anti-Monopoly Act system, it is

instructive to make comparisons with domestic systems (such as the tax laws and the Securities Exchange Law) that could conceivably be used as reference. Laws addressing competition are on the books in many countries, such that it would also be informative to compare the systems of major Western countries. Examination of global trends are also essential in light of the globalization of business. Most importantly, comparisons should also focus not only on laws with regard to competition but also on differences in the basic legal systems (judicial system and administrative procedures) adopted by each country. In addition, comparisons and studies should be carried out by noting the differences in substantive functions rather than just the formal differences that can be discerned between different systems.

Relationship with consumer policies

By permitting market mechanisms to function, the Anti-Monopoly Act seeks to ensure the availability of good quality, low-cost, diverse goods and services and to secure national economic growth and consumer benefits. In addition, while the Anti-Monopoly Act sets forth elements that *promote fair and free competition in the market* as measures, it is unique for its cross-sectional application across industries in contrast to the systems of consumer protection prescribed by the various industrial laws and ordinances.

The Consumer Fundamental Protection Act (enacted in 2004), which sets forth the basic provisions concerning consumer policies (comprehensive policies concerning the protection and promotion of consumer benefits through respect for consumer rights and support for consumer autonomy), (1) stipulates that consumer rights shall consist of the securing of opportunities for consumers to make independent, rational choices with respect to goods and services and further (2) stipulates that the state is responsible for promoting consumer policies.

In light of the aforementioned points, anti-monopoly policies (policies on

competition) play an important role in promoting consumer policies. On the other hand, the promotion of consumer policies also has the effect of contributing to the attainment of the objectives of the Anti-Monopoly Act. In other words, the development of an environment that allows consumers to make independent, rational choices will help to promote the provision of high-quality, low-cost, diverse goods and services and permit market mechanisms to function more effectively. In this way, consumer policies and anti-monopoly policies (competition policies) are inseparably linked, such that it is important to foster a perspective by which both sets of policies can be promoted in an integrated fashion.

System overview and items to be deliberated by the Advisory Panel

1 Overview of measures linked to the deterrence against violations (See Appendix 1 and 2 for an outline of the Anti-Monopoly Act and the situation of the implementation thereof. Japanese Only)

The Anti-Monopoly Act aims to prevent private monopolization, unreasonable restraint of trade, and unfair trade practices and sets forth administrative measures, cease-and-desist orders and surcharge (kacho-kin) payment orders in response to violators, criminal penalties, and civil measures. In addition, the law also sets forth provisions with respect to the administrative investigation and the administrative hearing procedure carried out by the Japan Fair Trade Commission (hereinafter referred to as JFTC) in order to investigate and conduct proceedings on violations.

A cease-and-desist order is an administrative measure that seeks to eliminate the state of competitive restrictions as a result of violations of the Anti-Monopoly Act and restore and maintain competitive order subsequent thereto through the issuance of orders for steps to cease the violation and prevent a recurrence. A violation of a stipulated cease-and-desist order will result in a fine of up to three hundred million (300,000,000) yen levied on a corporate offender. (The maximum fine was three million (3,000,000) yen prior to the 2005 revisions to the law.)

A surcharge (kacho-kin) payment order is an administrative order mandating the payment of money by the offending enterprise. Under the current law, surcharge (kacho-kin) payment orders can be applied against the unreasonable restraint of trade and private monopolization (controlling type) but not against private monopolization (exclusionary type) or unfair trade practices. The amount of the surcharge (kacho-kin) equals the amount of the sales of the goods and services linked to the violation multiplied by a legally stipulated assessment rate, which differs according

to the category and scale of the enterprise concerned.

The 2005 revisions to the law resulted in the following: (1) increases in the assessment rate, (2) an expansion and clarification of the scope of application of the surcharge (kacho-kin) (such as by subjecting private monopolization (controlling type) to the surcharge (kacho-kin)), (3) the introduction of a surcharge (kacho-kin) reduction and waiver system (a system under which the amount of the surcharge (kacho-kin) an offending business has to pay is reduced or waived where information about the violation is voluntarily provided by the offending business), and (4) the introduction of provisions allowing for the adjustment of amounts where a criminal penalty is concurrently levied (such that an amount equivalent to half of the applicable fine shall be deducted from the surcharge (kacho-kin) as otherwise calculated).

Criminal penalties can be applied against private monopolization and the unreasonable restraint of trade[1] but not against unfair trade practices. Civil measures that can be taken consist of the following: (1) a request for an injunction submitted by a party sustaining or at risk of sustaining serious damage from unfair trade practices (Article 24) and (2) a demand for indemnification for damages can be submitted by an injured party against a business that has engaged in private monopolization, unreasonable restraint of trade, or unfair trade practices (Article 25).

The JFTC may conduct on-the-spot investigations and administrative hearings involving the enterprise concerned (exercise the powers of

[1] Charges brought by the JFTC are a requirement for indictments. The JFTC clarified its policy for bringing criminal charges in aggravated and serious cases believed to have a broad impact on the lives of citizens and in cases of repeat violations for which it is believed that the objectives of the Anti-Monopoly Law cannot be attained through the imposition of administrative measures (“Policy of the JFTC in respects of criminal complaints and compulsory investigations concerning violations of the Anti-Monopoly Law” October 7, 2005).

administrative investigation based on indirect enforcement)[2] in order to carry out the necessary investigations and, where violations have occurred, impose elimination measures or surcharge (kacho-kin) payment orders after preliminary procedures (entailing the provision of an explanation of order proposals by the JFTC, a statement of opinions by the addressee enterprise, and the granting of an opportunity to submit evidence) have been held. In the event of an objection against the imposition of a cease-and-desist order or a surcharge (kacho-kin) payment order, the affected enterprise may request administrative hearing procedures. (Prior to the 2005 revisions to the law, administrative hearing procedures were conducted before the imposition of a cease-and-desist order.)

2 Items to be deliberated by the Advisory Panel

While the Advisory Panel has discussed a broad range of points at issue with respect to the modality of measures for deterring violations of the Anti-Monopoly Act and the procedures applicable to the implementation of such measures, the points at issue have been narrowed down in this report to focus on issues related to the modality of the surcharge (kacho-kin) system and the modality of hearing procedures and investigations in accordance with the aims of a review provision in the supplementary provisions of the revised Anti-Monopoly Act and a supplementary resolution (see Appendix 3, Japanese only) adopted by the Committee on Economy and Industry of both houses of the Diet concerning the revised law . With respect to the surcharge (kacho-kin) system, the points at issue were narrowed down to the following:

① Which is more appropriate, a mechanism under which a surcharge (kacho-kin) and a criminal penalty coexist and are concurrently imposed (concurrent imposition approach) or a mechanism under which a monetary penalty measure is integrated with the surcharge (kacho-kin) (consolidated approach)? How should the relationship

[2] The authority for compulsory investigations was introduced in the 2005 revisions to the law.

between either of these possibilities and the rules prohibiting double jeopardy, which is banned under the constitution, be reconciled?

② How should the level and calculation method of the surcharge (kacho-kin) be defined?

③ Should the scope of the applicability of the surcharge (kacho-kin) in terms of types of violations under the existing law be expanded to encompass private monopolization (exclusionary type) and unfair trade practices?

④ How should the relationship between the surcharge (kacho-kin) and compensation for damages (breakup fee) be reconciled?

These points have been consolidated in Section III.

Moreover, the term "*ihan-kin*" will be used in this report with respect to "an administratively financial negative disposition imposed to deter violations" in order to facilitate an investigation that is not bound to the current surcharge (kacho-kin) system. (When referring to the current system, use may be made of the terms "surcharge" and "current surcharge.")

With respect to the administrative hearing procedure and investigative procedure, the points at issue were narrowed down to the following:

① How should the administrative hearing procedure system be positioned (ex-post hearing or ex-ante hearing)?

② How should evidence be presented to hearing examiners in the context of hearing procedures?

③ How should procedures governing administrative investigations (reviews) be defined?

④ How should announcements of alerts issued by the JFTC be organized?

These points have been consolidated in Section IV.

Moreover, reference has been made to the modality of the system of civil lawsuits with respect to violations of the Anti-Monopoly Act and the modality of public procurement as matters that, while not constituting directly relevant deliberating issues undertaken by the Advisory Panel, do constitute issues that the government would like to explore. (See Section V)

The modality of the system for ihan-kin

1 The modality of ihan-kin and criminal penalties

The utilization of the effectiveness of (the existence of) criminal penalties against the corporations concerned and the drafting and functional imposition of ihan-kin *are effective in terms of deterring violations under current circumstances. To continue to maintain a system under which a surcharge (kacho-kin) and a criminal penalty coexist and are concurrently imposed is appropriate.*

(1) Double jeopardy as barred by the constitution (See Appendix 4 for more information on judicial precedents and doctrines on double jeopardy. Japanese only)

The latter part of Article 39 of the Constitution of Japan reads: "No person shall … be placed in double jeopardy for the same criminal offence." In this connection, the relationship between the concurrent imposition of an administratively imposed monetarily adverse disposition and a criminal penalty and the constitutional ban against double jeopardy is an issue. While no decision by the Supreme Court has directly touched on the current surcharge (kacho-kin) in anti-trust cases, the Court did rule, in tax cases, with respect to the concurrent imposition of an additional tax and criminal penalty by pronouncing that an (administrative) additional tax imposed to positively promote tax payments by self-assessment has the aspect of a negative sanction but differs in terms of its essential nature from a criminal penalty imposed on the basis of a focus on the antisocial or immoral aspects of the violations perpetrated by a tax evader, such that the concurrent imposition thereof shall not be construed as a case of double jeopardy banned under the Constitution.[3]

[3] Page 938, No. 6, Volume 12, *Supreme Court Civil Decisions Reporter*; ruling of the Supreme Court handed down on April 30, 1958. According to High Court decisions, (1) with respect to the concurrent imposition of a surcharge under the pre-revised

In deliberating this point at issue, it is possible to refer to the relevant provision of the United States Constitution, which stipulates "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." This provision guarantees that no individual shall be subject twice to a criminal penalty for the same criminal offence. The issue can thus be phrased as a question: where can the courts look in order to help them determine whether a civil measure can be regarded substantively as a criminal penalty?

With respect to this point, the Supreme Court of the United States indicated in its ruling in the *Hudson* case[4] (1997) that, in principle, the concurrent imposition of a civil penalty, statutorily enacted by legislators in

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Anti-Monopoly Law and a criminal penalty, the surcharge constituting an administrative measure enforced to secure social fairness, deter violations, and ensure the effectiveness of provisions prohibiting cartels differs from criminal penalties imposed to focus on and serve as a sanction against the antisocial or immoral aspects of cartels in terms of, among others, its aim, objectives, and procedures; the concurrent imposition thereof was determined to be not in violation of Article 39 of the Constitution (Page 108, No. 2, Volume 46, *High Court Decisions Reporter*; ruling of the Tokyo High Court handed down on May 21, 1993), (2) (even as this decision constituted a decision in a case involving a request for the recovery of unjust enrichment) to order the payment of a surcharge shall be construed as a violation of Article 39 of the Constitution if the order in question is tinged with the characteristics of a sanction (Page 96, No. 1742, *Reports of Precedents*, ruling of the Tokyo High Court handed down on February 8, 2001), (3) with respect to the concurrent imposition of a heavy penalty levied for tax underpayments and a fine, the concurrent imposition of an administrative disposition with an intended sanctioning effect and a criminal penalty was determined to be not in violation of the Constitution (Page 3427, No. 212, Tax Materials, ruling of the Tokyo High Court handed down on September 6, 1995). (Each of these decisions is now a settled point of law.)

[4] 552 U.S. 93. This was a case in which three directors of a bank were ordered (actually, subject to a consensual order) to pay civil penalties and be occupationally debarred for violations of statutes by the United States Office of the Comptroller of the Currency and criminally indicted for the same conduct three years later, as a result of which the petitioners asserted that they should not be held criminally liable by arguing that criminal prosecution in this case was constitutionally barred by the invocation of double jeopardy. The bank directors lost this case when the Court ruled that double jeopardy was not invoked. This decision explicitly revised the most recent decision in which the constitutional ban on double jeopardy was deemed to apply and was seen as a departure from prior Supreme Court precedents for cases in which it is difficult to state that a non-criminal measure is limited to the objective of providing relief to a victim and in which the primary objective thereof is to impose a penalty or provide a deterrence effect.

that matter and a criminal penalty would not be in contravention of the constitutional ban on double jeopardy. The Hudson case ruling set forth a number of conditions, as follows, to be satisfied in order for the measure in question to be construed substantively as the nature of criminal punishment, irrespective of the intent of legislators in enacting a civil penalty: (1) whether it has historically been regarded as a punishment, (2) whether the sanction involves an affirmative disability or restraint (3) whether it comes into play only on a finding of scienter, (4) whether the behavior to which it applies is already a crime, and (5) whether its operation will promote the traditional aims of punishment—retribution and deterrence (as both criminal and civil measures function to deter actions, the mere fact that the objective of a measure is to deter is not sufficient to deem the measure a form of criminal punishment). In light of this test, an administratively financial negative disposition used to deter violations cannot be described as a form of criminal punishment even if sanctioning effects are brought to bear on the party subject thereto as long as the measure in question, at the very least, has no required element of intent nor punitive objective.

With respect to the 2005 revisions to the Anti-Monopoly Act, the government further strengthened the administrative sanctions of the surcharge (kacho-kin), for which the calculation rate was raised, but explained that the legal nature of the administrative measure by which monetary penalties are imposed by relevant government agencies in order to deter violations has not changed.[5] While this issue has not always been discussed broadly in theoretical terms to date, the question as to whether imposing an "administrative" measure corresponds to changing violators

[5] "While the reviewed surcharge system has been strengthened in terms of its function as an administrative sanction by rendering it into a framework for collecting money in excess of the amount of the unjust enrichment in question, the legal character thereof to date remains unchanged after the latest review in terms of the imposition of monetary penalties on violating businesses by administrative agencies to prevent violations (November 4, 2004; explanation given by the Chief Cabinet Secretary before the House of Representatives).

"criminally" (as a form of criminal punishment) is determined on the basis of the nature of the sanction in question rather than on the degree thereof. An administrative measure should be classified according to whether it is "imposed as a sanction that is wielded with a focus on the antisocial or immoral aspects of the violation in question." Constitutional guarantees do not disappear simply because the ban against double jeopardy does not apply. There are still restrictions based on the principle of proportionality (principle of proportionality between the crime and the punishment imposed).[6]

Based on the aforementioned trends in judicial precedents, legislation, and theory, the Advisory Panel decided to explore the modality of ihan-kin and criminal penalties in terms of legislative policy arguments with respect to administratively financial negative dispositions that are imposed to deter violations. This exploration shall be based on the understanding that even if such negative disposition may bring to bear a sanctioning effect on the relevant parties, its objective is not to morally reproach like a criminal penalty, and even if such negative disposition are concurrently imposed with a criminal penalty, that is not subject to the constitutional ban on the double jeopardy clause. As a matter of course, decisions on legislative policies must consider the principle of proportionality and avoid strengthening systemic commonalities in the objectives of both ihan-kin and criminal penalties to the extent that it risks invoking the ban on double jeopardy.

(2) Comparing legislative policies in terms of the imposition of

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[6] Hitoshi Saeki, "Revisions to the Anti-Monopoly Law and the issue of double jeopardy" Japan Association of Economic Law, Annual Report No. 26, p. 47 (2005). In addition, Professor Kazuyuki Takahashi at the 16th conference of the Advisory Panel on Basic Issues Respecting the Anti-Monopoly Law indicated with respect to the question as to whether the concurrent imposition of administrative sanctions and criminal penalties invoked double jeopardy that a decision should be made based on whether the administrative sanction entails the assumption of criminal responsibility, the criteria for which is the existence of moral reprobation.

concurrent penalties versus consolidated penalties

Even if the concurrent imposition of fines and criminal penalties does not contravene the constitutional ban on double jeopardy, there are cases in which administratively financial negative dispositions and criminal penalties are not concurrently imposed in response to violations of laws regarding competition in major Western countries (see Appendix 5), as well as those who believe that the overlap of administratively financial negative dispositions and criminal penalties should be avoided as a matter of legislative policy.

However, it is not the case that the concurrent imposition of administratively financial negative dispositions and criminal penalties is itself prohibited in major Western countries.[7] Even if criminal penalties and administratively financial negative dispositions are not concurrently imposed in actual practice, this does not by itself mean that the adoption of a concurrent approach is not appropriate for our country. In addition, the concurrent imposition of administratively financial negative dispositions and criminal penalties, such as with respect to heavy penalties levied for tax underpayments, is permitted and have been incorporated into other legal systems in Japan, such that a more effective mechanism ought to be adopted for the Anti-Monopoly Act from the viewpoint of deterring violations.

There are those who believe that deterrence can be strengthened by

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[7] While criminal penalties are primarily applied against the formation of cartels in the area of law with regard to competition (antitrust law) in the United States, there are examples in which criminal penalties and civil penalties coexist and are concurrently imposed for violations of other economic laws.

In the United Kingdom and France, while administratively imposed financial penalties are imposed on enterprises that have committed violations of laws on competition, the application of criminal penalties is also theoretically possible (according to a report presented by specialist Takeyoshi Imai at the 13th conference of the Advisory Panel).

In the EU, there is in principle no authority to impose criminal penalties, not just in the area of law with regard to competition but in general, as a result of which no reference value can be derived for the purpose of this investigation.

adopting the consolidated penalties approach (which involves the elimination of criminal punishments imposed on corporations and the integration of monetarily adverse dispositions imposed on corporate offenders with ihan-kin) based on the argument that higher fines can be levied in cases in which criminal ihan-kin have historically been imposed and that more efficient enforcement can be facilitated by focusing administrative resources on the imposition of ihan-kin, provided that the level of ihan-kin is raised by an amount corresponding to the elimination of criminal penalties imposed on corporate offenders. Furthermore, some believe that even if the concurrent imposition of criminal penalties and the surcharge (kacho-kin) does not give rise to double jeopardy concerns, an approach that allows concurrent imposition to be avoided while achieving the same objectives would be more compatible with the aims of the constitution. After all, a criminal punishment imposed on a corporation has the effect of holding the corporation responsible for liabilities arising from negligence in terms of the appointment and supervision of employees (dual liability). Opinions were also offered that cast doubt on the way in which such a form of punishment is thus structured.

As a result of careful deliberation upon due consideration that the consolidated penalties approach is also an option in terms of legislative policy, the Advisory Panel concluded, based on the following reasons and under the present set of circumstances, that the concurrent imposition approach should be maintained, the levying of ihan-kin allows for more flexible handling, and the division of roles by which criminal penalties can be imposed, especially for aggravated or serious cases, is effective from the standpoint of providing a deterrence to violations. In other words:

① While both criminal penalties and administratively financial negative dispositions constitute forms of social dishonor, criminal penalties result in morally stigmatizing the corporation concerned as a wrongdoer of a crime deserving of moral reprobation. Thus, the implications of the stigma arising from a

criminal penalty differs from that of dishonor arising from an administratively imposed disposition, such that the deterrence attributed to criminal provisions targeting corporations is believed to be significant. In particular, criminal offenses against violations of the Anti-Monopoly Act are typical examples of corporate crimes. Given the flurry of cases in which criminal penalties have been applied to corporations in recent years, the elimination of criminal provisions targeting corporations could send a message that violations of the Anti-Monopoly Act do not constitute criminal offenses deserving of moral reprobation as a matter of legislative policy of our country. For this reason, the elimination of criminal provisions targeting corporations is not considered an appropriate idea.

② On the other hand, criminal penalties against cartels and other violations will not necessarily be imposed each time. In addition, the fact that the maximum amount of any criminal penalties that can be imposed on a corporation is five hundred million (500,000,000) yen per case means that criminal penalties alone cannot suffice and that a prompt, efficient response entailing the use of cease-and-desist orders and payment orders is also required.

(3) Adjustment provisions applicable when concurrent penalties are imposed

In the event that a criminal penalty is concurrently imposed along with a current surcharge (kacho-kin), an amount equivalent to half of the applicable criminal penalty amount is deducted from the surcharge (kacho-kin) as otherwise calculated (or refunded where the surcharge (kacho-kin) has been paid in advance as a result of the binding adjudication of the criminal penalty amount). This provision was established as a legislative policy decision based on the fact that the surcharge (kacho-kin) and the criminal penalty share a commonality in that they both function to

deter violations. (It was not established to provide a mechanism for adjustments to skirt concerns about double jeopardy stemming from the concurrent imposition of a surcharge (kacho-kin) and a criminal penalty.[8]) However, the surcharge (kacho-kin), which is imposed to attain an administrative purpose, and the criminal penalty, which serves to express moral reprobation against antisocial acts, differ in terms of their aims and objectives. Given that they are independent systems, it is conceivably not always necessary to adjust both amounts. With respect to this point, some were of the opinion that the practice of adjusting the amounts of the fine and criminal penalty should be eliminated while others were of the opinion that the total amount of the criminal penalty should be deducted from the fine in each case.[9]

2 Level of ihan-kin and the method of calculation with respect to the unreasonable restraint of trade and private monopolization (controlling type)

As ihan-kin is a measure for deterring violations, it should be set to a level sufficient to "deprive one of the motivation to engage in a violation." *The method by which ihan-kin is calculated should be, as with surcharges (kacho-kin), relatively concise. The base amount shall equal the amount of the sales of the goods and services related to the*

[8] "While the concurrent imposition of a surcharge and a criminal penalty in this bill is unlikely to give rise to an issue of double jeopardy, we have determined, in light of the existence of common functional elements of both types of sanctions for preventing violations, that it would be appropriate in terms of policy considerations for half the amount of the penalty to be deducted from the surcharge amount as an adjustment in respects of the common elements of both types of sanctions where both types of sanctions are to be concurrently imposed." (November 4, 2004; explanation given by the Chief Cabinet Secretary before the House of Representatives).

[9] With respect to the concurrent imposition of a surcharge and a criminal penalty pursuant to the Securities Exchange Law, there are items for which (1) only amounts equivalent to the amount of forfeiture or additional collection shall be deducted; no adjustments are made with respect to the amount of the criminal penalty itself (such as for insider trading), (2) no adjustments are made (for breaches of the issue disclosure duty), (3) an amount equivalent to the fine shall be deducted (full adjustment) (for breaches of the ongoing disclosure duty) (see Appendix 6).

violation in question multiplied by a legally stipulated calculation rate, and it would be appropriate to ensure a mechanism by which the amount can be increased or decreased where stipulated consideration factors are satisfied.

(1) Level of ihan-kin

As ihan-kin constitute an adverse disposition by which monetary payments are ordered to be paid from the general assets of the offending business, it is thought that the ability to provide a reasonable explanation regarding the setting of the level of ihan-kin is required. While the current level of surcharge (kacho-kin) is set to *(no less than) an amount equivalent to the amount of unjust enrichment (obtained by legal fiction)*, this should not be construed to mean that rational explanations based on factors not corresponding to *an amount equivalent to the amount of unjust enrichment* are rejected. As ihan-kin constitute a measure for deterring violations, they should be set to a level sufficient to *deprive one of the motivation to engage in a violation*. It is essential that the level of ihan-kin be set to no less than "an amount equivalent to the amount of unjust enrichment" (obtained by fiction) if no forfeiture or supplementary collection shall be demanded as an accessory penalty attached to the criminal penalty imposed for a violation of the Anti-Monopoly Act. An appropriate level of ihan-kin should be set to prevent businesses from believing, based on the probability of being caught and other variables, that "it is worth the risk of being caught" and that "they will be none the worse for wear if they are caught."

The 2005 revisions to the law resulted in higher surcharge (kacho-kin) calculation rates for unreasonable restraint of trade, such that a large company should be subject to a surcharge (kacho-kin) payment order of ten (10) percent of the sales of the goods and services related to the violation in question, and would be subject to an additional rate of fifty (50) percent if such company had been subject to a surcharge (kacho-kin) payment order within the last ten (10) years. In examining administratively financial

negative dispositions ("fines") imposed for violations of the EC law on competition, EC guidelines on fines say that the basic amount will be related to the proportion (in cartel case, generally 30%) of the value of sales and services multiplied by the number of years of the violation. In addition, irrespective of the duration of the violation, an amount equal to 15% to 25% of the yearly relevant sales will be added to the basic amount calculated above. While generalizations cannot be made with respect to the EC fine as the exercise of broad discretion in terms of increases or decreases to the amount to be imposed, the level of ihan-kin in our country is still regarded as lower than the level of fines in the EU, even after taking into account the possibility that a criminal penalty equal to a maximum of five hundred million (500,000,000) yen may be concurrently imposed along with ihan-kin.[10] Some feel that the mitigation rate based on business category and scale as incorporated into the current surcharge (kacho-kin) mechanism does not have a rational basis. In contrast, others feel that the level of ihan-kin since the revision to the law is such that the calculation rate provides a sufficient deterrence, and as for the idea of further increasing the ihan-kin, investigations should be undertaken on the assumption that violations subject to the revised calculation rates will remain unending in light of the situation since the revision to the law, and the stipulation of mitigation rates will be reasonable given the differences between small to medium-sized companies and large companies in terms of their respective profit margins and other considerations.

In light of international comparisons and the need for deterrence, consideration must be paid not only to the calculation rate but also to the assessment duration[11] and the statute of limitations[12] with respect to the

[10] With respect to criminal fines in the United States, fifteen (15) to eighty (80) percent of the amount of the transactions affected by the violation in question can be imposed (sentencing guidelines). The maximum amount of fines that can be imposed on a corporation is the higher of one hundred million (100,000,000) dollars or the amount equal to double the amount of enrichment or incurred damages attributed to the violation in question (see Appendix 8, Japanese only).

[11] There are no restrictions on the number of years under EU law.

ihan-kin. (For how long after the end of the violation in question can a violator be ordered to pay ihan-kin?) (Currently, the surcharge (kacho-kin) assessment duration is no longer than three (3) years and the statute of limitations is three (3) years.) With respect to the assessment duration and the statute of limitations, the principle of proportionality and comparisons with major Western countries should be considered.

(2) Method by which ihan-kin is calculated

(i) Basic point of view

While various options are available with respect to possible methods of calculation of ihan-kin, depending on the extent to which consideration factors (factors for increasing or decreasing the amount of the ihan-kin) are adopted and depending on the range of discretion that will be granted to the JFTC, an effective system should be designed from the standpoint of deterrence in accordance with the assumption that a mechanism for the concurrent existence and imposition of criminal penalties and ihan-kin will be established.

While criminal penalties and ihan-kin share a commonality in that they both possess a deterrence for violations, criminal penalties are a means by which the violation in question is clarified as a criminal offence through a criminal proceeding and are imposed after consideration of the maliciousness of the offence. In contrast, ihan-kin may also function as a form of sanctioning, but they are a monetarily adverse disposition imposed to attain the administrative objective of deterring violations. Based on the roles of both criminal penalties and ihan-kin as discussed above, it would be appropriate to have the system of ihan-kin secure a deterrence effect and be relatively concise to enable orders of payments to be promptly and efficiently made based on the sales of goods and services related to the violation in question.

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[12] In the United States, the statute of limitations is five (5) years. In the EU, the statute of limitations is a maximum of ten (10) years in total: five (5) years up to the start of investigations and another five (5) years from the start of investigations.

Specifically, the following points are believed to be appropriate: (1) as with the current surcharge (kacho-kin), the basic amount shall equal the amount of the sales of the goods and services related to the violation (depending on the assessment duration and other factors, it is also possible that the method involves multiplying the amount of sales made by the enterprise during the last full business year of violation by the duration of the violation multiplied by the calculation rate); (2) with respect to the applicable factors (factors for increasing or decreasing from the basic amount), the relevant factors shall be specified as those that contribute to the deterrence of violations as a result of adapting relevant factors and to those that contribute to the effectiveness of enforcement (assessments of the maliciousness of the violation shall be reflected through the imposition of criminal penalties), and it must be clearly stipulated that such relevant factors shall enhance the predictability of enforcement and shall not place an excessive burden on the JFTC with respect to enforcement; and (3) as with the surcharge (kacho-kin) system, ihan-kin levied against the unreasonable restraint of trade and private monopolization (controlling type) shall be automatically imposed (discretion to impose a ihan-kin or not is not granted to the JFTC).

(ii) Prospective relevant factors

Under the current surcharge (kacho-kin) system, while a different calculation rate from the regular calculation rate is applied in the event of repeated violations or an early disengagement from violations, if based on the basic arguments outlined in (i) above, the relevant factors with respect to the ihan-kin can be organized as follows

① Repeated violations (increasing factors) and early disengagement from violations (decreasing factors):

Requirements can be clarified; these factors can contribute to deterrence by taking into account relevant factors.

② Leading role played in violations (increasing factors)

This factor can contribute to deterrence by assessing as an increasing factor (clarification of requirements is needed).

③ Cooperation in the investigation (decreasing factor)

By considering the provision of information, other than facts already known to the JFTC, as a decreasing factor, it is believed that this will help to secure effective enforcement. (A punitive clause is stipulated to thwart an official examination, such that it would be inappropriate to consider the pursuant provision of information as a decreasing factor within the scope of the legal obligation to cooperate.) As the application of this decreasing factor would overlap any reduction based on leniency application after the commencement of an investigation, it will be necessary to discuss in conjunction with the leniency system.

Moreover, initiatives to enhance mechanisms as part of the efforts for a compliance program by enterprises from the standpoint of preventing violations of the Anti-Monopoly Act help to deter violations of the Anti-Monopoly Act by preventing their occurrence. The development of compliance programs on the part of an enterprise is also requested for other areas of law, such that the development of such a program for the Anti-Monopoly Act should also be recommended.

Consequently, in the event that an enterprise can present evidence that it had been endeavoring to develop an effective compliance program, some believe that it should be considered a decreasing factor with respect to the ihan-kin. As a result of discussions on this matter by the Advisory Panel, it was concluded that it would not be appropriate to consider the development of a compliance program as a decreasing factor for the following reasons:

While the development of a compliance program is welcome, the endorsement of a legislative incentive in the form of a reduction in the amount of the ihan-kin despite the actual occurrence of a violation would not be appropriate.

The cost of enforcement to determine whether the development of a

compliance program was substantial would be high. In addition, any decision to necessitate such a determination as to whether the development of a compliance program was substantial would not be suitable where a relatively prompt and efficient ihan-kin system is to be adopted for incorporation into a system that provides for the concurrent imposition of penalties.[13]

3 Deliberating the question of whether private monopolization (exclusionary type) and unfair trade practices should be subject to ihan-kin

> *It would be appropriate to make private monopolization (exclusionary type) subject to* ihan-kin*. Views on unfair trade practices are divided, with some persons of the opinion that it would be inappropriate to have unfair trade practices subject to* ihan-kin *and others of the opinion that it is not the case that unfair trade practices cannot be made subject to* ihan-kin *and that, where necessary, certain unfair trade practices should in fact be subject to* ihan-kin.

(1) Private monopolization (exclusionary type)

(i) Arguments with respect to making private monopolization (exclusionary type) subject to ihan-kin

Private monopolization (exclusionary type) requires the presence of *substantial restrictions on competition in any particular field of trade*, and it would be appropriate to subject such private monopolization to ihan-kin if done so based on the degree to which competition is impeded. In addition,

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[13] Even in the guidelines for fines by the EU, which recognizes a large number of aggravating and mitigating factors to consider, no stipulations explicitly have been made in terms of the relevant factors for the development of a compliance program system. In the United States, the question as to whether there is an effective compliance program in place is treated as a mitigating factor upon considering the degree of culpability when determining criminal penalties (sentencing guidelines). Provided, however, that there have been no case examples to date in which such factors have been considered with respect to violations of antitrust laws (see Appendix 9, Japanese only).

doing so would be consistent with unreasonable restraint of trade and private monopolization (controlling type), which likewise require the presence of *substantial restrictions on competition in any particular field of trade,* and are subject to a surcharge (kacho-kin) in the current system.

Moreover, in contrast to unreasonable restraint of trade and private monopolization (controlling type), the exclusionary type of private monopolization can present difficulties for enterprises in terms of distinguishing between acceptable competitive behavior and violations. For this reason, some believe that attention should be paid to securing predictability by clarifying requirements through the drafting of guidelines and other such measures and that the relevant system and enforcement should be such that they have a chilling effect on business activities. In contrast, some are of the opinion that since cease-and-desist orders have already been issued in response to violations under the current law, there would be no additional problems in ordering the payment of ihan-kin.

(ii) With respect to the imposition of ihan-kin for private monopolization (exclusionary type)

In the event that private monopolization (exclusionary type) is subject to ihan-kin, whether or not any types of illegal exclusionary conduct should be subject to the imposition of ihan-kin is an issue.[14] As it is problematic, the fact that private monopolization (exclusionary type) has a negative effect on the market, some believe that ihan-kin should, in principle, be imposed in response to any types of exclusionary violations. In contrast, others believe that some sort of statutory specification should be set forth in the event of differences in the need for deterrence based on a combination of a cease-and-desist order and ihan-kin imposed for certain actions

[14] With respect to the unreasonable restraint of trade and private monopolization (controlling type), the applicability of the imposition of ihan-kin is limited by statutory provisions to “items in respect of value” and items coming within this limitation shall be automatic subject to the imposition of ihan-kin

corresponding to private monopolization (exclusionary type) or in the event of the determination that it would be appropriate to institute types of conduct that are (or not) subject to the imposition of ihan-kin as a matter of legislative policy (for example, by limiting the acts that are subject to the imposition of ihan-kin for the purpose of predictability of enforcement).

Apart from the issue of legislative specification, some believe that discretion should be granted to the JFTC with respect to determining whether to order a party to pay ihan-kin or not. Provided, however, that the unreasonable restraint of trade and private monopolization (controlling type), which are subject to the current surcharge (kacho-kin), impose ihan-kin whenever these violations are found subject to the compulsory imposition of fines [see 2. (2) (i)]. If discretion on whether to impose or not is newly introduced at the same time, this will mean that the ihan-kin system will comprise both compulsory imposition and discretionary imposition operating in tandem. Thus, it is necessary to focus on the question as to whether a reasonable explanation can be provided for the parallel existence of these different types of ihan-kin.

(iii) Method of calculating ihan-kin

With respect to the method of calculating ihan-kin (basic amount) levied against private monopolization (exclusionary type), the amount of the ihan-kin shall conceivably equal, as with the unreasonable restraint of trade and private monopolization (controlling type), the amount of the sales of the goods and services related to any violation multiplied by a certain calculation rate. It is thought that the question as to whether to set the calculation rate and other variables in such cases to be equivalent to those that apply to the unreasonable restraint of trade and private monopolization (controlling type) should be determined as a matter of legislative policy based on the precise nature of past violations. (As with ihan-kin imposed for the unreasonable restraint of trade and private monopolization (controlling type), the ability to provide a reasonable

explanation for the method of calculation is necessary. This is not to say that reasonable explanations based on factors not corresponding to *an amount equivalent to the amount of unjust enrichment* should be excluded.)

(2) Unfair trade practices

(i) Arguments with respect to making unfair trade practices subject to ihan-kin

The following points were made from the standpoint that making unfair trade practices subject to ihan-kin would be inappropriate: (1) (some) unfair trade practices constitute preventive regulation which requires the ”tendency to impede *fair competition*”; (2) the distinction between fair competitive behavior and violations is difficult for enterprises, such that there is a risk of causing a chilling effect on enterprises as a result of making unfair trade practices subject to ihan-kin; (3) the imposition of ihan-kin for conduct that any particular field falls short of reaching “substantially restricting competition in any particular fields of trade” lacks consistency with the current surcharge (kacho-kin) system, such that deliberation that takes into account the system of law from an overall perspective is required if ihan-kin is to be imposed on a specified subset of unfair trade practices; and (4) it cannot be said the current system that cease-and-desist order and its punitive clauses will always bring about obstacle in terms of deterrence effect. In addition, by making private monopolization (controlling type and exclusionary type) subject to ihan-kin, a deterrence effect can also be expected for conduct that falls under the category of (some) unfair trade practices as preventive controls.

In contrast, the following points were made from the standpoint that having ihan-kin applicable (to required types of conduct) (that it would not be impossible to make conduct corresponding to unfair trade practices subject to ihan-kin as a result of deliberating on the specification system by the JFTC, and, where necessary, reviewing it) would be appropriate: (1)

while some types of unfair trade practices constitute preventive controls against private monopolization, the mere occurrence of unfair trade practices (even where such practices fall short of satisfying the conditions for constituting private monopolization) may actually have a negative effect on competition in the market (with many cases also involving damage caused to consumers); (2) for certain types of unfair trade practices that cannot be positioned as preventive controls against private monopolization, no deterrence can be expected even where private monopolization is subject to the imposition of ihan-kin, such that it is possible that it would be appropriate to impose on the said practices; and (3) as a cease-and-desist order can be issued even under the current law, the introduction of payment order would not cause an additional chilling effect affecting normal business. As it is important that violations with respect to unfair trade practices be eliminated rapidly and precisely, some believed that the conduct subject to these controls should be clarified through legal means by way of the use of specification systems by the JFTC and the drafting of guidelines.

(ii) Types of unfair trade practices that should be considered with respect to making them subject to ihan-kin

Based on the considerations corresponding to both positions set forth above, some have suggested that deliberation should be focused on the propriety of specifying the types of conduct that do not constitute preventive controls against private monopolization and for which deterrence through the imposition of ihan-kin is highly required rather than have all types of unfair trade practices (including types of conduct as preventive controls against private monopolization; namely, unjust low price sales, discriminatory treatment, and resale price maintenance) subject to ihan-kin even where deliberation are conducted with respect to the hypothetical idea of imposing ihan-kin unfair trade practices.

Based on this standpoint, deceptive customer practices and the abuse of a

dominant bargaining position cannot be used as preventive controls against private monopolization. In addition, the probability that unjust enrichment will accrue to the violator is high. In particular, as many violations in the form of abuse of a dominant bargaining position are detected, deliberation should be conducted into the necessity of promoting deterrence effect through the imposition of ihan-kin in addition to cease-and-desist order.

On the other hand, there are no cases with respect to deceptive customer practices as a violation set forth in the Anti-Monopoly Act, such that it is necessary to focus on the fact that this issue has been handled by enforcement of the Premiums and Representations Act. Relating to this point, some were of the opinion that the idea of misrepresentation as set forth in the Premiums and Representations Act to ihan-kin should be deliberated[15] while others were of the opinion that it would be sufficient if the Premiums and Representations Act and the enforcement thereof were strengthened. Some believe that where a violation of the abuse of a dominant bargaining position, the affected party of such violation, the amount of damages sustained, and other details can be clarified, it would be more appropriate to have the economic enrichment directly returned to the injured party. The question as to whether such types of conduct should be subject to ihan-kin should be determined based on such focus points and the points outlined in (i) above.

[15] The current Law for Preventing Unjustifiable Extra or Unexpected Benefit and Misleading Representation has been enacted as a special law concerning the Anti-Monopoly Law (with respect to deceptive customer practices) and, as matters stand now, there is the issue of legislative difficulties in having misrepresentation subject to fines.

(iii) Imposition of ihan-kin and its calculation

Even in the event that deceptive customer practices and the abuse of a dominant bargaining position are subject to ihan-kin, there is still a need to prescribe a reasonable method of calculation. For example, estimates could be made, based on data corresponding to past cases, of the amount of exploitation from deceptive customer practices or the abuse of a dominant bargaining position and of the increase in value of sales owing to such conduct. Based on such estimation, a calculation rate appropriate for deterring violations could then be set.

In the event that there are differences in the degree to which deterrence against violations obtained through the imposition of ihan-kin is needed or in the event that it is determined, as a matter of legislative policy, that it would be appropriate to set forth types of violations that would be subject (or not subject) to ihan-kin, it can be suggested that some sort of legal specification should be instituted or that, apart from the issue of legislative specification, discretion should be granted to the JFTC for determining whether or not to order a party to pay ihan-kin.

Based on the standpoint that it is not the case that unfair trade practices cannot be subject to ihan-kin, it is expected that further deliberation will be conducted and conclusions reached with respect to the need to make policy-based and law-making technique-based decisions. Moreover, although there is the point at issue as to whether unfair trade practices should be subject to criminal penalties (direct punishment), the Advisory Panel deliberated the propriety of creating fines for unfair trade practices.

4 Relationship between ihan-kin and compensation for damages (breakup fee)

In order to deter violations, it would be effective to have various enforcement measures linked to deterrence, such that it is expected that the functions of each measure will be fulfilled. Individual measures differ in terms of their respective aims and objectives, such that there is no need to endeavor to reconcile ihan-kin with civil compensation payments for damage from an institutional standpoint.

The enterprise infringed may, in addition to being subject to enforcement of the Anti-Monopoly Act, become monetarily disadvantaged through a claim for damages, a claim for the recovery of unjust enrichment made by a party injured by the violation, or a claim for penalties made by the ordering government agency. Furthermore, it should be noted that a suspension of designation by the ordering government agency or a supervisory disposition by the supervisory authority (such as an order to suspend business operations) may also be effected. In order to deter violations, it would be effective to have the means of enforcement contributing to deterrence, such that it is expected that the functions of each means will be fulfilled.

Individual measures differ in terms of the respective aims and objectives, and while they share a commonality in that enterprises violating the Anti-Monopoly Act are disadvantaged. However, it does not follow that reconciliation among these measures is obviously required (for example, by reducing the amount of ihan-kin by the amount paid as compensation for damages or as breakup fee). (For more information on the relevant circumstances in major Western countries, see Appendix 10, Japanese only)

While it is conceivable that circumstances (including the level of penalty sums involved, the situation with respect to actual claims and payments, the situation with respect to the use of damage suits, and the operational

state of the suspension of designation) will be comprehensively considered when reviewing the level of ihan-kin, deliberation of the ihan-kin will be primarily undertaken from the perspective of deterrence, given that ihan-kin is an administrative measure used to deter violations.

Administrative hearing procedures and administrative investigation procedure

1 The modality of the administrative hearing procedure system

It would be appropriate to maintain the system of administrative ex-post hearing procedures introduced in the 2005 revisions for the foreseeable future given that it appears to have yielded certain results, such as in terms of earlier disposition and a reduction in the number of cases involving hearing procedures. However, as administrative hearing procedures are undertaken in an effort to guarantee due process of law and the quick, specialized resolution of disputes achieved by adopting quasi-judicial procedures and granting sufficient opportunities to the enterprise concerned to state their opinion and provide evidence in the administrative process, it would be appropriate to newly adopt the administrative ex-ante hearing procedure system when certain conditions have been satisfied.

(1) Considerations with respect to the establishment of the administrative hearing procedure system

While the administrative hearing procedures in general mean the mechanisms by which the administrative agency applies the law through quasi-judicial procedures, variety can be seen in terms of the specific procedures to be applied, the modality of the organ conducting the administrative hearing procedures, and the effects of decisions issued after the said hearing procedures have been completed (see Appendix 11, Japanese only). The specifics of the administrative hearing procedure system under the Anti-Monopoly Act include procedures corresponding to court-like procedures—such as the advocacy-based format according to which arguments are asserted by respondents and investigators and the production of evidence—and the particular effects of its decisions made after the administrative hearing procedures have been completed (the

exclusive jurisdiction of the Tokyo High Court for decision revocation cases, the substantial evidence rule, and restrictions on the production of new evidence).

Where the administrative hearing procedure system is to be set up when implementing administrative measures under the Anti-Monopoly Act, there is (1) the administrative ex-post hearing procedures based on a request filed by the enterprise concerned in the event of dissatisfaction with a cease-and-desist order or surcharge (kacho-kin) payment order issued by the JFTC (current law), and (2) the administrative ex-ante hearing procedure system before the cease-and-desist order or surcharge (kacho-kin) payment, and based on the statement of cases and the submission of evidence by investigators and respondents (old law). In contrast, if the enterprise concerned is dissatisfied with the measure issued by JFTC, there is also the option of having revocation suits brought directly before a district court without establishing an administrative hearing procedure. (For background on the state of this issue in major Western countries and other details, see Appendix 12, Japanese only)

The system of bringing a revocation suit directly before a district court is based on the following views: (1) given that doubts cast in terms of fairness in the minds of outside observers by the exercise of both investigative function and review function by the JFTC (such that the roles of both the prosecutor and judge would be filled by staff of the JFTC) cannot be dispelled (improvements over this issue, if feasible, will be limited), (2) the enterprises concerned should be able to seek a judicial review promptly where there is dissatisfaction with the measure, and (3) executory orders cannot be issued promptly under the administrative ex-ante review hearing procedure system, thus efforts should be made to restore competitive order as soon as possible.

The Advisory Panel has concluded that it would be appropriate to set up

the administrative hearing procedure system for the following reasons:

Enforcement and decisions based on advanced expertise are required with respect to the Anti-Monopoly Act. The administrative hearing procedure system accompanied by the so-called substantial evidence rule can secure enforcement and decisions based on advanced expertise and facilitate the prompt resolution of disputes through factual findings by the JFTC operating as a quasi-judicial organ.

The role fulfilled to date by such a hearing procedure system in forming legal interpretations of the Anti-Monopoly Act through the accumulation of decisions informed by expert knowledge is significant, and the further expansion of this role can be expected against the backdrop of a transition from a society in which ex ante regulations are applied to a society in which after-the-fact regulations are applied for increasingly complex economic activities.

In enforcing the Anti-Monopoly Act, independence and impartiality are important, and it is necessary to focus on the fact that the status of the JFTC as an independent administrative organ has contributed significantly to the entrenchment of the competition policy. The ability to exercise quasi-judicial functions is one of the primary bases upon which the independence of the JFTC is recognized.

While a given measure will be no more than revoked in a revocation suit where a discretionary right has been abused by a government agency,[16] the adoption of a system of administrative review hearing procedures will facilitate the securing of a more appropriate measure, since a broad range of matters, including the question as to whether the original measure was suitable for restoring competitive order, will come within the scope of the reviews, such that any review that is conducted will not be limited to the issue of the abuse of a discretion.

[16] A discretionary disposition imposed by a government agency may be revoked by a court only in the event that the scope of the discretionary right was exceeded or the discretionary right was abused (Article 30, Administrative Case Litigation Law).

Following deliberation shall be conducted with respect to the modality of a desired system concerning the administrative ex-post hearing procedure system or the administrative ex-ante review hearing procedure system in accordance with the perspective by which due process and deterrence of violations is to be secured.

(2) Features of the administrative ex-post hearing procedure system and the administrative ex-ante hearing procedure system

(i) Administrative ex-post hearing procedure system

The features of the administrative ex-post hearing procedure system are as follows: (1) in the event that a violation is determined to have occurred as a result of an investigation conducted by the JFTC, prompt restoration of competitive order is enabled since cease-and-desist orders are issued through preliminary procedures (with the effect that hearing procedures are bypassed); (2) since the payment of fines is ordered along with the imposition of cease-and-desist orders and late payment penalties are incurred during hearing procedures, no incentive to engage in a dispute during the hearing procedures in order to delay paying ihan-kin arises; and (3) since dispositions in cases of bid rigging are effected the administrative hearing procedures under circumstances where the suspension of designation by an ordering government agency is commonly tied to dispositions imposed by the JFTC, no incentive to engage in a dispute (by not accepting the recommendation under the old law) during the administrative hearing procedures in order to control the timing of the suspension of designation arises.

(ii) Administrative ex-ante hearing procedure system

The features of the administrative ex-ante hearing procedure system are as follows: (1) since a disposition is effected by allowing the enterprise (where desired) to present its own opinion, produce its own evidence, and issue rebuttal arguments and evidence within adversary proceeding, due process can be better guaranteed, and the truth is more effectively clarified than under the administrative ex-post review hearing procedure system; and (2) if a general survey of administrative and judicial processes were to be undertaken, the administrative ex-ante hearing procedure system would be found to be more in line with the fundamental functions of the administrative hearing procedure system that seeks to achieve a prompt, expertise-based resolution of a dispute than the administrative ex-post

hearing procedure system.

（３） Indicated issues and considerations with respect to the administrative ex-post hearing procedure system

The following issues have been indicated with respect to the administrative ex-post hearing procedure system: (1) the preliminary procedures before the administrative ex-post hearing procedure system are simpler than the administrative ex-post hearing procedures and the more that deterrence of violations are strengthened, the less one is able to describe such procedures as being adequate in terms of the securing of the due process of law; and (2) for institutions that take on administrative reviews, the adoption of a third-party stance is important. Consequently, it is difficult to conceive of a situation in which a decision on a disposition that has already come into effect will be overturned through an administrative review via hearing procedures of the JFTC, which is the party that determined the original measure; for this reason, the administrative hearing procedures appear to an outside observer to be lacking in the impartiality and fairness that are highly desired.

(i) Indication of issues from the perspective of due process of law

Upon comparing the preliminary procedures in the current administrative ex-post hearing procedure system and the administrative ex-ante hearing procedures, the following differences can be identified: (1) whereas the former is the procedure involving both investigators and a given enterprise, the latter is procedures involving the added participation of hearing examiners where all parties operate within an adversary proceeding; (2) whereas the administrative hearing procedures permit the repeated issuance of rebuttal arguments and evidence in response to the opinion and evidence presented by the other party, preliminary procedures are established to be completed in a relatively short time frame; and (3) the scope of discovery in preliminary procedures may narrow in comparison with the scope of discovery in the administrative hearing procedures, which are conducted within an adversary proceeding and which also provide for the power to subpoena documents and records.

With respect to (1) and (2), some argues that it is possible to attempt to secure due process for even the administrative ex-post hearing procedure system by bringing the preliminary procedures within an adversary proceeding headed by a public hearing officer in order to have such procedures correspond to those of a public hearing. With respect to (3), if evidence is to be presented upon the commencement of hearing procedures after a request for hearing procedures is received, and since there should be no impediment to the submission of evidence even at the time of the preliminary procedures, it should be possible to have the scope of discovery in the preliminary procedures be the same as the scope of discovery for the hearing procedures even for the administrative ex-post hearing procedure system.

With respect to this idea, establishing the role of a public hearing officer for the preliminary procedures and having the preliminary procedures correspond to those of a public hearing, as well as having the scope of

discovery for the preliminary procedures be the same as the scope of discovery for the hearing procedures while adopting an administrative ex-post hearing procedure system (1) are contrary to the aims of an administrative ex-post hearing procedure system under which promptness is valued and are not appropriate in light of the fact that duplications in procedures will arise as the preliminary procedures are similar to the applicable after-the-fact hearing procedures and (2) are not required since the securing of due process can be comprehensively assessed not only with respect to the preliminary procedures but also with respect to the ex-post hearing procedures. In other words, the option of placing greater weight on the preliminary procedures within the administrative ex-post hearing procedure system is not appropriate, such that a choice should be made between an administrative ex-post hearing procedure system under which the preliminary procedures are maintained in their present form and the administrative ex-ante hearing procedure system.

(ii) Doubts about conducting administrative reviews of own dispositions that are already in effect

Having adopted an administrative ex-post hearing procedure system that conducts administrative reviews of its own dispositions that are already in effect, the belief that there will be a reduced likelihood that decisions can be overturned when compared to the administrative ex-ante hearing procedure system arises; in addition, the adoption of such a system cultivates mistrust in the system. On the other hand, the current administrative ex-post hearing procedure system was introduced to resolve outstanding issues in the administrative ex-ante hearing procedure system under the old law. Some are also of the opinion that the cease-and-desist order used in the administrative hearing procedures as set forth in the current law does not substantially differ from that of the recommendations that were set forth in the old law. (The issuance of decisions that differ from cease-and-desist orders can be expected to occur at approximately the same rate as the issuance of decisions that differed from the

recommendations.) In order to maintain the administrative ex-post hearing procedure system and resolve the indicated points at issue with respect to the administrative ex-post hearing procedure system, the credibility and transparency of the administrative hearing procedures need to be enhanced (See IV 2 for more information on specific policies.)

(4) Indicated issues and considerations for the administrative ex-ante hearing procedure system

The following issues have been indicated for the administrative ex-ante procedure system: (1) cease-and-desist order cannot be ordered until a decision has been issued (competitive order cannot be restored promptly); (2) since the payment of ihan-kin is ordered through the administrative hearing procedures, the incentive to engage in a dispute during the administrative hearing procedures in order to delay paying ihan-kin arises;[17] and (3) since dispositions in cases of bid rigging are effected prior to the administrative hearing procedures under circumstances where the suspension of designation by an ordering government agency is commonly tied to dispositions imposed by the JFTC, the incentive to engage in a dispute (by not acceding to a recommendation under the old law) during the administrative hearing procedures in order to control the timing of the suspension of the designation arises.

(i) Indication of points with respect to the inability to promptly restore competitive order

The following points were indicated with respect to the inability to promptly restore competitive order: (1) the need to effect dispositions more promptly should be addressed by accelerating hearing procedures essentially; and (2) once investigations are commenced by the JFTC, the

[17] Under the current law (administrative ex-post hearing procedures system), a delinquent charge is added to the surcharge amount from the day following the payment deadline irrespective of whether the hearing procedures are still ongoing.

violations often cease at the time.[18] In the event that they do not cease, administrative interim injunctions should be used. (For more information on administrative interim injunctions, see Appendix 13, Japanese only) Moreover, in some opinions, if the current administrative interim injunctions do not function, then the adoption of a system that permits the JFTC, where certain conditions are satisfied, to issue an injunction against violations or otherwise order a measure required to restore competitiveness even during the course of the administrative hearing procedures should be considered.

On the other hand, there are those who believe that: (1) current administrative interim injunctions do not adequately function due to the requirement of urgency and subject to the scope of restrictions[19] in the orders with which demands can be made; and (2) in deliberating whether to adopt the administrative ex-post hearing procedure system or the administrative ex-ante hearing procedure system, it will be necessary to also focus on the reduction in the number of the administrative hearing procedures cases and in the ongoing establishment of the administrative ex-post hearing procedure system in practical terms, as well as on the rendering of prompt dispositions since the enactment of the revised law, under which the administrative ex-post hearing procedure system was adopted.

(ii) Indication of the incentive to engage in a dispute during the

[18] In examining with respect to legal measures rendered in the last three (3) years, while violations ceased by the time cease-and-desist order were ordered in most cases in which a surcharge was imposed (normally by the time an investigation was commenced), violations conversely persisted as of the time cease-and-desist order were ordered in most of the cases in which violations did not cease by the time cease-and-desist order were ordered.

[19] For example, there will be no amelioration in the difficulties preventing new entries to a market unless clients are notified that that there will be no refusal to deal even if transactions are conducted with one's own competitors in a case in which new entries have been obstructed due to arrangements made with clients not to engage in transactions with one's own competitors as an example of a refusal to deal if transactions are ever conducted with one's own competitors.

administrative hearing procedures in order to delay paying a fine

With respect to the indication of the incentive to engage in a dispute during the administrative hearing procedures in order to delay paying ihan-kin, some state that it will be necessary, as with (i) above, to also focus on the reduction in the number of the administrative hearing procedures cases and in the ongoing establishment of the administrative ex-post hearing procedure system in practical terms, as well as on the rendering of prompt dispositions since the enactment of the revised law under which the administrative ex-post hearing procedure system was adopted. On the other hand, some argues that it is difficult to conceive of parties actually engaging in disputes in order to delay paying ihan-kin when one contemplates the considerable financial and labor cost required for participation in hearing procedures and the current interest rate situation.

Some indicated that it might be better to address the issue by setting up a framework under the administrative ex-ante hearing procedure system in which inducements to engage in a dispute during the administrative hearing procedures in order to delay paying ihan-kin will not arise (for example, by treating violations of the Anti-Monopoly Act in a manner similar to how unlawful civil offences are treated and having ihan-kin held in arrears after the passage of a fixed period of time once the administrative hearing procedures commence). In relation to this point, some were also of the opinion that it is not appropriate to have the interest rate in arrears that arise after the deadline for payment set at half the regular rate in the event that a surcharge (kacho-kin) payment order is disputed during the administrative hearing procedures under the current administrative ex-post hearing procedure system.

(iii) Indication of the incentive to engage in a dispute during the administrative hearing procedures in order to control the timing of the suspension of designation

The suspension of designation is brought into play based on the judgment of

an ordering government agency as one of the parties to an agreement and is typically invoked along with a disposition by the JFTC for violations of the Anti-Monopoly Act. Given this context, it is thought to be extremely difficult to set up a framework in which incentive to engage in a dispute during the administrative hearing procedures in order to control the timing of the suspension of a designation do not arise while having adopted the administrative ex-ante review hearing procedure system.

With respect to this point, some believe that it is not necessary to consider suspensions of designation in designing a hearing procedure system rather than a system operating under the Anti-Monopoly Act. On the other hand, some also believe that any possibility that another system will negatively affect the enforcement of the Anti-Monopoly Act should be removed as much as possible and that they cannot overlook any increase in the burden on investigators in handling hearing procedures, impediments to review activities for violations, and obstructions to the effective enforcement of the law in light of the fact that the administrative resources of the JFTC are limited. Moreover, some were of the opinion that it is difficult to conceive of businesses actually engaging in disputes in order to control the timing of the suspension of a designation when one takes into account the considerable cost and labor required to participate in hearing procedures.

(5) Conclusion

Three systems were deliberated as conceivable options in terms of legislative policy by the Advisory Panel: the administrative ex-post hearing procedure system, the administrative ex-ante hearing procedure system, and judicial review system directly before a district court. First, the establishment of the administrative hearing procedure system was thought to be appropriate based on the reasons consolidated in (1). Next, a comparative deliberation focusing on the administrative ex-post hearing procedure system and the administrative ex-ante hearing procedure system was conducted and the following conclusion was reached.

Specifically, it would be appropriate to maintain the current administrative ex-post hearing procedure system based on the following: (1) the administrative ex-post hearing procedure system adopted under the current law was introduced in consideration of delays in the imposition of dispositions and the administrative ex-ante hearing procedures that are inconsistent with the aims of the system within the preliminary review hearing procedure system under the old law, the concern that the securing of a sufficient deterrence for violations would be compromised by an increase in the number of hearing procedure cases and the fact that prompt dispositions and effective enforcement are sought amid an unending stream of violations. From the time of introduction to the present, it has been determined that dispositions are being rendered promptly and the number of hearing procedure cases is declining, such that definite results can be discerned; (2) there is the possibility of practical confusion from once again revising the system at the present time when only one year has passed since the date of introduction; and (3) since the administrative ex-post hearing procedure system cannot be described as being in direct contravention of the constitutionally required due process of law, it is thought that it would be appropriate to maintain the current administrative ex-post hearing procedure system.

However, doubts exist as to the propriety of the administrative ex-post hearing procedure system as a permanent system for the following reasons: (1) it cannot be said that the administrative ex-post hearing procedure system is the only option for addressing the issues indicated with respect to the administrative ex-ante hearing procedure system; (2) on the other hand, the adoption of the administrative ex-ante hearing procedure system is believed to be most desirable for addressing the issues indicated with respect to the administrative ex-post hearing procedure system; and (3) moreover, the administrative hearing procedure system (under which first instance hearings are bypassed and the substantial evidence rule is

applied) inherently guarantees due process by adopting quasi-judicial procedures in the administrative process and granting sufficient opportunities to the enterprise concerned to present its opinion and submit evidence. In addition, if a general survey of administrative and judicial processes were to be undertaken, it is clear that the hearing procedure system was conceived to achieve prompt, expertise-based resolutions of disputes.

Accordingly, it would be appropriate to once again adopt the administrative ex-ante hearing procedure system in consideration of the situation concerning the implementation of practical preventive measures for bid-rigging cases, which constitute most violations of the Anti-Monopoly Act, provided that measures to inhibit an increase in hearing procedures that are not in line with the acceleration of hearing procedures and the aims of the system are implemented. In order to accelerate the administrative hearing procedures, it is also important that the government promote cooperation and a greater understanding of the aims of the system on the part of all parties in addition to bolstering the organizational framework of the JFTC. Based on the standpoint of streamlining procedures, the concurrent imposition of a cease-and-desist order and surcharge (kacho-kin) payment order should be permitted (in contrast to the situation under the old law) and, with respect to the authorized combination or separation of the administrative hearing procedures (Article 64 of the Anti-Monopoly Act), hearing procedures shall be combined in principle and separated where necessary.

2 Securing the credibility and transparency of the administrative hearing procedures

From the viewpoint of further increasing the credibility of the administrative hearing procedures, it would be appropriate to implement the required measures in the composition of hearing examiners and the handling of decision drafts produced by hearing examiners.

The issue posed by the exercise of both investigative function and reviewing function by the JFTC cannot be avoided in the event that the administrative hearing procedure system is adopted. While it is unavoidable that these functions cannot be fully separated, efforts have been made to the extent possible to separate both functions by securing the independence and impartiality of hearing examiners within the framework of the current system and implementation from the point of view of securing the credibility and transparency of hearing procedures (see Appendix 14, Japanese only). It is believed that demands calling for the greater credibility and transparency of hearing procedures will intensify if the function of ihan-kin as a sanction is reinforced. In the event that the administrative ex-post hearing procedure system is maintained, it is believed that such demands for the securing of credibility and transparency will further intensify.

To accommodate such demands, the following policies can be considered: (1) while hearing examiners even now consist of a fairly large number of qualified legal professionals appointed from outside the JFTC, the number of outside appointees should be no less than a given quota; (2) in the event that the decision that substantially differs from a decision draft produced by hearing examiners is to be rendered, the reason for the difference should be explained or the decision should be rendered through the administrative hearing procedures carried out by the Commission; and (3) the recusing of

a person with ties to a respondent as a designated hearing examiner for the case in question shall be statutorily clarified and defined.

3 The modality of discovery in the administrative hearing procedures and preliminary procedures

With respect to the modality of discovery in the administrative *hearing procedures and preliminary procedures conducted by the JFTC, it would be appropriate to maintain the current system and approach to implementation in light of the need for consistency with other similar systems and the acceleration of procedures.*

With respect to the modality of discovery in the administrative hearing procedures and preliminary procedures, deliberation would be appropriate based in part on other similar systems. In other words, the objectives of the following should be taken into consideration: the system of perusing documents and other materials in the administrative hearing procedures as governed by the Administrative Procedures Act, the system of document subpoenas in civil lawsuits, and the system of evidence disclosure at criminal trials. The disclosure of documents and evidence is permitted under these systems where prescribed conditions have been met in order to ensure the credibility of the procedures in the eyes of parties engaged in the procedures by way of ameliorating the situation under which evidence (including documents) is liable to be unevenly distributed between parties and in order to realize substantial equality between the parties engaged in the procedures. On the other hand, requirements with respect to the disclosure of documents and evidence are strictly set forth irrespective of the applicable system as a means of indicating that the use of these systems is approved as long as any risks prejudicial to other important interests are not significant. Based on such viewpoints, the following considerations have been obtained upon investigating the ideal means of conducting discovery in the administrative hearing procedures and preliminary procedures.

With respect to the conducting of discovery in the administrative hearing

procedures, *evidence recognized as necessary for the* administrative *hearing procedures in the case* shall be submitted by investigators pursuant to Article 39 of the Regulations Governing the Hearing Procedures of the JFTC, and other evidence shall be disclosed pursuant to a subpoena issued by hearing examiners upon receiving a motion submitted by a respondent pursuant to Article 46 of the Regulations Governing the Hearing Procedures of the JFTC. The Advisory Panel indicated the following: evidence not recognized as necessary by investigators shall, at the very least, not be submitted from the outset to the hearing; since respondents do not know what sort of evidence is in the possession of investigators, there is a limit even with respect to the use of document subpoenas; disclosure that encompasses evidence in the possession of investigators is required; cease-and-desist orders and surcharge (kacho-kin) payment orders constitute dispositions that impose a significant penalty; and discovery procedures (according to which document perusal is permitted) should at the very least conform to hearings organized under the Administrative Procedures Act if the situation with respect to discovery in European Commission and other competition authorities is taken into consideration.[20]

With respect to these points, it was concluded that there are no issues with implementation pursuant to current regulations governing the administrative hearing procedures for the following reasons:

> In the event that materials in the possession of investigators are to be disclosed to a party subject to disposition, it is conceivable that materials on competitors and clients of the party subject to disposition will be redacted (blacked out) as required upon verifying whether corporate secrets are contained therein and otherwise

[20] In the EU, documents obtained, produced, or gathered in the process of conducting case investigations (not including documents returned to detained business representatives where the documents in question have no connection to suspected facts) are, with the exception of, among others, internal documents and documents containing business secrets, made available for perusal by respondents after a notice of a statement of objections is submitted (see Appendix 15, Japanese only).

coordinating with all concerned competitors and clients. However, it cannot be said that disclosure is necessary to the point where such costs are incurred if one takes into account the fact that there are many cases in which most of the materials held by investigators consist of materials on competitors and clients.

In Japan, there are no examples of administrative procedures setting forth the disclosure of evidence by other regulatory authorities.

Discovery procedures (according to which document perusal is permitted) required for hearing procedures under the Administrative Procedures Act also correspond to *records pertaining to investigations conducted with respect to the case in question and other materials that attest to facts constituting a cause of the adverse disposition in question* and are believed to be comparable to evidence submitted by investigators to establish the existence and other details of a violation.

With respect to the ideal means of discovery during preliminary procedures under the administrative ex-post hearing procedure system, we believe that there are no issues with current implementation as based on the reasons consolidated in IV 1 (3) (i). Moreover, such means of conducting discovery are not an impediment to flexible implementation by the JFTC in individual cases.

4 Modality of administrative investigation procedures

While the current system shall be maintained with respect to the modality of administrative investigation procedures, such procedures shall be implemented by also taking into account the procedural protection of businesses.

Compared with the Income Tax Law and Securities and Exchange Law, while provisions in the Anti-Monopoly Act relating to investigation procedures are distinctive with respect to the drafting of interrogation records and deposition records, they share essential features with Japanese administrative investigation procedures. Moreover, with respect to legislation on administrative investigations, there was a decision handed down by the Supreme Court in which a request was made to balance the necessity of an administrative investigation with the individual interests of the other party with respect to the authority to inquire and inspect under the Income Tax Law.[21] As a matter of general theory, such requests are not only appropriate in terms of the exercise of the right to engage in an administrative investigation under the Anti-Monopoly Act but should also be referenced as legislative policy.

The Advisory Panel also deliberated the modality of investigation procedures under the Anti-Monopoly Act by referring to the overall situation with respect to the aforementioned legislation on administrative investigation procedures in Japan and to the state of legislation in other countries. Among the many points at issue, with respect to the relationship

[21] "Particulars of implementation not specifically set forth in positive law terms, such as in respects of the scope, degree, timing, or location of an inquiry or inspection, … shall be understood to have been entrusted to the reasonable selection of an authorized tax official as long as such an inquiry or inspection comes within generally-accepted limits in terms of the balance between the necessity of the inquiry or inspection in question and the individual interests of the other party" (Page 1205, No. 7, Volume 27, Collection of Supreme Court Cases (Criminal Matters); ruling of the Supreme Court handed down on July 10, 1973).

between administrative investigations and compulsory investigations, the modality per se of compulsory investigations submitted during that time, we refrained from intrusive deliberation due to the short period of time that had passed since the introduction of the right to compulsory investigations and thus examined three controversial issues about administrative investigations per se, namely the provision of copies when deposition records are drafted, the presence of an attorney during a deposition, and the introduction of attorney-client privilege. In addition, we decided to indicate the points to keep in mind with respect to the implementation of administrative investigation procedures in general.

(1) Provision of copies when deposition records are drafted

With respect to deposition records, some were of the opinion that if desired by concerned parties at the time deposition records are created, copies of deposition records should be provided to the testifying party because of following reasons: (1) it is difficult to conceive of any particular adverse effects arising even where records containing the contents of one's own deposition are provided to concerned parties; (2) if an enterprise can come to know the contents of depositions from concerned parties, unnecessary disputes concerning the understanding of facts between an enterprise and the JFTC can be avoided; and (3) given that such a practice is also accepted in the United States and in the EU. With respect to these points, it was concluded that there are no issues with the current system or manner of implementation based on the following reasons:

In Japanese criminal procedures, the provision of copies of deposition records in the criminal investigation stage is, in principle, not permitted according to the court case non-disclosure rule in Article 47 of the Criminal Procedure Code. In addition, the provision of copies of deposition records even in other administrative investigations is also not accepted.

Depositions are taken in pursuit of discrepancies with physical evidence and inconsistencies with testimony. At such times,

information obtained through investigations is sometimes presented to a testifying party, and there is the possibility that clarification of the truth will be impeded as the provision of copies of deposition records helps to simplify the destruction of evidence, such as by facilitating prior arrangements made among enterprises concerned to tell the same story.

In the event that it is possible to obtain copies of deposition records, there will be a risk that the deposition will become known to an enterprise (company) when one considers the relationship between the enterprise and its employees and other parties. Testifying parties (such as employees) may be reluctant to testify as to the truth, such that there is the possibility that clarification of the truth will be impeded.

There are overall differences in the modality of administrative systems, including administrative investigations and judicial systems, including authority and methods with respect to investigations in the West (United States and EU) and Japan. To adopt only the provision of copies at the time deposition records are drafted calls for prudence. (Such a viewpoint also applies to investigations as to the acceptance of the presence of an attorney during a deposition and attorney-client privilege as outlined below.)

(2) Presence of an attorney during a deposition

Some are of the opinion that the presence of an attorney during a deposition should be accepted based on the following reasons: (1) disputes over the trustworthiness of the depositions during the administrative hearing procedures can be avoided; (2) the transparency of the process of taking depositions can be secured; and (3) the idea is also accepted in the United States and EU.

With respect to these points, it was concluded that there are no issues with

the current system or manner of implementation based on the following reasons:

The presence of an attorney during a deposition is not accepted in criminal procedures or other administrative investigation procedures in Japan.

In the event that no distinction is made as to whether the request for the presence of an attorney during a deposition is made by a company or by an individual, a chilling effect on employees will result if an attorney requested by the company is present, such that there is the possibility that clarification of the truth will be impeded.

(3) Attorney-client privilege[22]

With respect to attorney-client privilege, some are of the opinion that attorney-client privilege should also be introduced to administrative investigation procedures under the Anti-Monopoly Act for the following reasons: (1) legal advice can be provided by attorneys based on the truth when accepting this right; (2) there is the possibility of particular inconveniences in international cases owing to differences in systems, given that this right is accepted in the United States and EU.

With respect to these points, it was concluded that it would not be appropriate to introduce this notion at this time based on the following reasons:

Attorney-client privilege is not accepted in criminal procedures or other administrative investigation procedures in Japan.

In the United States and EU, the acceptance of attorney-client privilege is backed by an extensive accumulation of judicial precedents. To incorporate this right immediately into Japan

[22] Attorney-client privilege is a special right permitting a client of an attorney to refuse to submit evidence or disclose in discovery in interactions conducted between the client and his or her attorney when the client is seeking legal counsel from his or her attorney.

against a backdrop of attempts to clarify the scope of such precedents would be difficult.

(4) Considerations pertaining to implementation applicable to administrative investigation procedures

It would be desirable to see matters pertaining to implementation considered with respect to administrative investigation (review) procedures in order to allow enterprises to appropriately exercise the right to a defense. (For example, attention shall be paid to prevent misunderstandings from arising in businesses with respect to the differences between compulsory investigations, administrative investigations through indirect enforcement, and voluntary investigations. A deadline for the submission of opinions shall be appropriately set to enable businesses to secure the time required for consideration based in part on the fact that explanations of evidence are undertaken for the first time during preliminary procedures, explanations of order proposals are carried out in detail during preliminary procedures, and the section on an order document where reasons are presented shall be specifically filled out upon taking into sufficient account important opinions submitted as a result of an opportunity given to submit opinions.)

5 Modality of alerts and announcements

While we believe that it would be appropriate to continue to maintain a system of alerts and announcements based on the viewpoint of deterring violations, it would be appropriate to endeavor to improve regulations governing the main constituents, requirements, and form of and hearing mechanism used with alerts operating under the Anti-Monopoly Act and optimize the system of alerts and announcements in order to resolve the concerns of enterprises subject to such a system.

In the event that the JFTC has not obtained sufficient evidence to impose

cease-and-desist order or any other legal measures in a case but has determined that there has been behavior corresponding to a suspected violation, instructions may be issued through “alerts” to urge the enterprise in question to take corrective measures. In addition, the contents of the alert, including the name of the enterprise in question, will be disclosed through a public announcement.[23]

While alerts are a type of administrative guidance, the fact that an alert, including the name of the enterprise in question, are publicly announced means that the rendering of an alert constitutes a risk of tangible and intangible disadvantages to an enterprise subject to an alert given that the name of the enterprise is publicly disclosed in cases for which no more than a determination of a suspected violation exists and for which evidence to support the imposition of a legal measure is lacking. Moreover, there is an issue in that no recourse to appeal an alert has been secured. On the other hand, by publicly disclosing the name of the business in question, the type of action that is potentially an issue under the Anti-Monopoly Act is specifically clarified, which allows implementation of preventive measures for a violation and which contributes to drawing the attention of consumers and enterprises to the actions of the enterprise in question.

While we believe that it would be appropriate to maintain a system of alerts and announcements based on the viewpoint of deterring violations, it would be appropriate to endeavor to improve regulations governing the main constituents, requirements, and form of the hearing mechanism used with alerts operating under the Anti-Monopoly Act and optimize the system of alerts and announcements in order to resolve the aforementioned concerns as much as possible.[24]

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[23] Public announcements are publicly disclosed pursuant to the provisions of Article 43 of the Anti-Monopoly Act (“The Fair Trade Commission may, in order to ensure proper enforcement of this Act, make public any appropriate matters with the exception of the trade secrets of businesses”).

[24] At present, a conference of the Administrative Review System Investigation

Other points

1 Modality of system of civil lawsuits brought with respect to actions constituting violations of the Anti-Monopoly Act

The functions of civil lawsuits with respect to violations of the Anti-Monopoly Act can contribute to the provision of relief to victims and supplement the enforcement efforts of the JFTC to buttress the deterrence effect against violations. Accordingly, it will be necessary to eliminate any factors impeding the appropriate use of civil lawsuits.

In particular, while the injunction request system provided under the Anti-Monopoly Act (see Appendix 17, Japanese only) was introduced in the 2000 revision to the law, it cannot be said that there has been many lawsuits brought before the courts since that time. The financial and time burdens of suits may possibly be hindering the launching of lawsuits by private persons acting in their capacity as individuals (especially consumers). The following suggestions were made as specific measures to address this point: a system of class-action suits should be introduced, special rules governing document subpoenas as set forth in the patent law and other statutes should be introduced,[25] the types of actions subject to injunction request suits should be expanded from unfair trade practices to include other types of actions, and the term “serious” should be removed

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Commission is being held under the purview of the Ministry of Public Management, Home Affairs, Posts and Telecommunications and investigations are being conducted with a view to bringing certain administrative guidance within the scope of administrative review applications (see the interim summary of the conference of the Administrative Review System Investigation Commission, April 5, 2007).

[25] While documents in respects of technological or occupational secrets and personal use documents, among others, are not subject to document subpoenas under the Code of Civil Procedure, which outlines general principles, special rules are set forth in the patent law and other statutes that expand the scope of disclosure to encompass all documents with the exception of documents whose owners have rational reasons for exclusion. The question as to whether there are rational reasons for exclusion shall be determined upon comprehensively taking into account the *drawbacks from non-disclosure* and the *drawbacks from disclosure* pursuant to in camera procedures as circumstances demand.

from the requirement for invoking injunctions when “serious damages” are incurred (as a result of a violation).

On the other hand, some were of the opinion, based on a standpoint of with respect to the unrestricted business activities of an enterprise, that more rigid requirements are demanded of injunction request suits than damage suits and that there is no need to expand the scope of activities subject to injunction request suits given the current situation in which it cannot be said that injunction requests are being actively brought with respect to unfair trade practices.[26]

With respect to the system of class-action suits, deliberation of the propriety of introducing such a system has already been commenced by the JFTC pursuant to a basic consumer plan endorsed by the Cabinet in April 2005. It is hoped that a conclusion based on the appropriate functioning of civil lawsuits, including with respect to the introduction of special rules governing document subpoenas, will be reached.

2 Modality of public procurements

While there are no direct deliberation issues with the modality of public procurements addressed by the Advisory Panel, the fact that many violations of the Anti-Monopoly Act in Japan consist of bid-rigging cases involving public procurements is a cause for concern. There is a shared understanding as to the fact that the strict enforcement of the Anti-Monopoly Act and the amelioration of factors promoting bid rigging in

[26] In contrast to the unreasonable restraint of trade and private monopolization, the following points can be made about unfair trade practices: (1) many cases involve damages directly caused to specific private individuals, as a result of which it is easy to state a cause of action in injunction request suits used as a means of remedying such damages, (2) parties with whom transactions are conducted are often the victims, as a result of which the ascertainment of or collection of materials related to the facts is easy and evidence can be easily produced, (3) it is easy to identify the perpetrator. For these reasons, unfair trade practices came to fall within the scope of injunction request suits when the injunction request suit system was introduced in 2000.

public procurements are important issues. With respect to the modality of public procurements, recent circumstances have been the basis on which the so-called Law for the Prevention of Collusive Bidding at the initiative of government agencies has been amended (as a result of which criminal penalties have been introduced), and deliberation are proceeding to review the ordering methods applicable to the expansion of general competitive bidding and of the modality of the public service system concerning the so-called golden parachute issue, which constitutes a background factor to collusive bidding at the initiative of government agencies and officials. Through such efforts, it is believed that immediate environmental improvements to allow fair and transparent procurements to take place will contribute to a reduction in violations of the Anti-Monopoly Act, and it is hoped that this outcome can be realized.