Points at issue concerning the system for deterring undertakings from engaging in violations against the Antimonopoly Act

(Tentative Translation)

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Office of Antimonopoly Act Basic Study

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Contents

Introduction

The Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as "Antimonopoly Act") is an Act which aims to promote the development of the national economy, as well as protect the interests of the general consumer, by prohibiting cartels, bid-rigging, and other anti-competitive or unfair trade practices to maintain and promote fair and free competition. However, in view of the fact that acts violating the Antimonopoly Act are committed one after the other, the said Act was recently revised to intensify the enforcement power and legal deterrent effect (Act No. 35 of 2005, enacted in April 2005 and effective in January 2006; hereinafter referred to as "the 2005 Amendment Act"). The changes introduced by the 2005 Amendment Act can be summarized in four points as mentioned below. (1) Review of the surcharge system (Increase in the calculating rate of surcharge, expansion of the scope of acts against which the surcharge is imposed, and so on), (2) Introduction of a leniency program, (3) Introduction of powers of compulsory investigation, (4) Review of hearing procedures, etc.

A supplementary provision of the 2005 Amendment Act provides that taking into account the actual state of enforcement of the new law and changes in socioeconomic circumstances, the government shall examine the surcharge system, the procedures for cease-and-desist orders and the hearing procedures, and shall take the necessary measures based on the result of such examination within two years of enforcement of the 2005 Amendment Act (Article 13 of the Supplementary Provisions).

In accordance with the Supplementary Provision of the 2005 Amendment Act, "the Antimonopoly Act Study Group" (hereinafter referred to as "the Study Group") was held for the first time in July 2005 as a private discussion body of the Chief Cabinet Secretary, and has since been held 15 times, including hearing from learned persons[1].

The Study Group has decided to publicize "points at issue" (the responsibility for the wording lies with the secretariat), involving the points at issue discussed at those meetings being summarized to solicit public comment. "Points at issue" does not

[1] See http://www8.cao.go.jp/chosei/dokkin/index.html for details of the meetings of the discussion body (materials and minutes of the meetings, and others).

indicate a specific direction for the framework of the system for deterring undertakings from engaging in violations against the Antimonopoly Act but summarizes the points at issue, and aims to invite any opinion on the same, any information which should be referred to during future discussion or any points at issue to be added, which are not taken up in “points at issue”. The Study Group, taking into account any comments offered and observing carefully how the revised Antimonopoly Act is being executed, will continue to discuss the points at issue and are planning to proceed with the discussion and the work of reporting the discussion results.

1. Points of view and points to note upon examination

<Commentary>

(Ends and means of the Antimonopoly Act)

The Antimonopoly Act aims to assure the interests of general consumers as well as promote the wholesome development of the national economy by maintaining and promoting fair and free market competition.

In order to achieve such purpose of the Act, the Antimonopoly Act prohibits conduct restricting competition, such as cartels and similar, as conduct violating the Antimonopoly Act. Furthermore, in order to ensure effectiveness, the Antimonopoly Act provides that administrative measures and criminal punishments be imposed on undertakings having engaged in violations, and gives the Fair Trade Commission the power to investigate suspected offenders.

In view of the fact that the Antimonopoly Act is an act, as mentioned above, it has to be examined from the points of view mentioned below. (The opinions outlined by the heavy line are those which all members of the Study Group have accepted; hereinafter, the same in all items.)

(Members' opinions)

(1) To ensure sufficient deterrents to acts in violation.

Administrative measures or criminal punishments are imposed on undertakings having engaged in violations, but from the viewpoint of deterring violations, such measures or punishments must be effective enough to work as sufficient deterrents.

(2) To set up a system under which effective law enforcement is provided.

Even though appropriate measures or punishments may be imposed on undertakings having engaged in violations, if they are not actually implemented, they are ineffective as deterrents. It is important to set up a legal system under which effective law enforcement is provided.

(3) Upon administrative measures, the due process of law is guaranteed.

Antimonopoly Act enforcement is chiefly provided in the form of administrative measures, such as cease-and-desist orders and surcharge payment orders, which are issued by the Fair Trade Commission. Upon issuing such orders, fair and transparent procedures must also be taken.

(In relation to both (2) and (3))

An important viewpoint is how effectively law enforcement is provided, paying attention to the due process of law.

(4) To compare with other domestic and foreign legal systems.

It is useful to examine the system in comparison with other legal systems (the tax law and the securities exchange act) of Japan that one can refer to. Furthermore, it is also helpful to compare it with the legal systems of major overseas countries. When making such references, it is important to compare them, taking into account not only competition laws but also differences in the framework of the basic legal systems, such as the judicial system, and administrative proceedings in respective countries.

2. The system in general for deterring undertakings from engaging in violations against the Antimonopoly Act

<Commentary>

(Summary of violations against the Antimonopoly Act)

Article 3 of the Antimonopoly Act provides that no undertaking shall effect private monopolization or any unreasonable restraint of trade, and Article 19 of the said Act provides that no undertaking shall employ unfair trade practices. The violations against these provisions are summarized as follows.

Private monopolization: Private monopolization is classified into two types — the type that excludes competitors (excluding type) and the type that controls the market (controlling type). The former means such business activities, by which any influential

undertaking in the market excludes new entrants or existing undertakings from the market, thereby causing substantial restraint of competition in the market. The latter means such business activities, by which any dominant undertaking in the market controls the business activities of other undertakings or distributors to restrict the prices and trading volume in the market, thereby causing substantial restraint of competition in the market.

Unreasonable Restraint of Trade: The term "unreasonable restraint of trade" means such business activities, by which any undertaking, by entering into a contract or an agreement in conjunction with other undertakings, mutually restricts their business activities to fix prices or to limit production or sales volume. Such agreements or arrangements, according to their object of the collusion, are called the pricing cartel, quantity cartel, market division cartel, bid rigging and so forth.

Unfair Trade Practices: The term "unfair trade practices" means such business practices as designated by the Fair Trade Commission out of those which tend to impede fair competition. This designation is classified into two types — "the general designation" which shall apply to all kinds of business and "the specific designation" which shall apply to a specified kind of business. 16 types of conduct, designated under a general designation, such as refusal to deal, unjustly low price sales, restrictions on resale prices, deceptive customer inducement, tie-in sales, abuse of one's dominant bargaining position and so forth.

(Measures against conduct in violation of the Antimonopoly Act)

The Fair Trade Commission may, if it deems that there exists any violation against the Antimonopoly Act, order to cease and desist from the act concerned, including the injunction, or order the payment of any surcharge (except for cases of private monopolization (excluding type) and unfair trade practices) (administrative measures)[2]. Moreover, the Fair Trade Commission may bring criminal charges against an undertaking (the corporation) or individual who has actually committed a violation (except for cases of unfair trade practices) to impose the criminal punishment on them

[2] Criminal punishments are inflicted on persons having engaged in acts violating elimination measures orders. In cases where an offender fails to pay surcharges no later than the due date (excluding a period of hearing procedures), compulsory collection may be conducted, applying mutatis mutandis the procedure for national tax delinquency.

(the criminal measures). Moreover, the private individuals, etc., who have sustained any loss or damage by the violation against the Antimonopoly Act, may file a request for an injunction suit against the undertaking (limited to cases of unfair trade practices) or a damages suit by way of the civil law suit.

(Other measures)

In addition to enforcement under the Antimonopoly Act, the competent supervising government office may make the supervisory disposition under an individual law such as ordering the suspension of business. Furthermore, in the case of bidding concerning public procurement, although it is not under the law or regulations, the designation may be suspended by a person who places a procurement order (meaning an action of not designating the improper undertakings during a certain period upon competitive bidding) or in some case any penalty may be claimed under the provisions of the procurement contract.

(1) Diversity of means of law enforcement

(Members' opinions)

(i) In order to deter undertakings from engaging in violations, it is effective to have various means of law enforcement leading to deterrence.

(ii) In addition to law enforcement measures taken under the Antimonopoly Act, actions as mentioned below are taken against undertakings having engaged in violations. In other words, claims for the indemnification of damages or for returning unjust enrichment by a person who has suffered any damages from the violation concerned, sanctions by the competent supervising government office, and the suspension of designation or claim for penalties by a person who places a procurement order. By taking into account these actions, the overall deterrent system should be devised to inflict punishments on offenders according to the degree of severity or seriousness of the cases.

(2) Surcharge system

<Commentary>

(Surcharge system)

The amount of surcharge imposed on undertakings having engaged in violation against the Antimonopoly Act, such as cartels, is calculated by multiplying the relevant turnover by the rate prescribed (the calculating rate). The 2005 Amendment Act increases the calculating rate of surcharge to be imposed on large enterprises from 6 % to 10 % (in the case of manufacturers). The calculating rate of surcharge was previously set up to collect the amount which was deemed unjust enrichment. However, the 2005 Amendment Act provides that an amount exceeding that equivalent to unjust enrichment shall be imposed[3].

In addition to the above, the 2005 Amendment Act provides that the additional rate be imposed on undertakings having repeatedly engaged in violations and the mitigating rate on those having ceased to engage in violations in the short period prior to initiation of the investigation.

(A Leniency Program)

The 2005 Amendment Act introduced a leniency program. This program is intended to reveal, eradicate, or prevent cartels or other violations by reducing or exempting surcharges in cases where the undertakings involved in violations have voluntarily informed the Fair Trade Commission of the violations. A reduction or exemption of surcharges is permitted for a maximum of three undertakings. Such a leniency program has already been introduced in major countries in Europe and North America.

(Financial penalty on undertakings having engaged in violation against the competition law in major countries)

Under the EC competition law or that of major European countries, the competition authority may determine, at its statutory discretion (for example, within 10 % of an undertaking's global turnover), the amount to be imposed, based on the guidelines, and taking into account the degree of severity or seriousness of the cases. In the United

[3] "Under the revised surcharge system, administrative sanctions have been intensified by collecting an amount more than that equivalent to unjust enrichment. The purport of the existing system was to prevent acts in violation by imposing financial penalties on undertakings having engaged in such acts of violation by the competition authority. This purport remains unchanged, even after the Amendment. It is considered appropriate to retain the scheme of surcharges." (Reply of the Chief Cabinet Secretary at the plenary session of the House of Representatives held on November 4, 2004)

States, criminal punishments are imposed on both employees having engaged in violations of committing a crime and his or her employer.

A. Deterrence of surcharges (the calculating rate, etc.) under existing law

(Members' opinions)

(i) It is considered that an increase of the calculating rate of surcharges, which was introduced by the 2005 Amendment Act, contributes to improved deterrence. The calculating rate is at sufficiently high levels, in view of corporate profitability, and so forth.

(ii) The increase of the calculating rate of surcharges is insufficient. It is unreasonable that the lower calculating rate be set according to the business scale or line of business.

(iii) It is improper to set the maximum period of the relevant turnover for calculating surcharges to three years.

B. Types of violation of the Antimonopoly Act, which are subject to surcharge payment orders (in relation to the later 4 mentioned)

(Members' opinions)

(i) Concerning private monopolization (excluding type) as well as unfair trade practices, which are currently not subject to surcharge payment orders, any surcharge should be imposed.

(ii) In view of the fact that it is difficult to distinguish private monopolization (excluding type) and unfair trade practices from fair acts of competition, and in view of their modest effect on competition, decisions on whether to subject such to surcharge payment orders should be thoughtfully judged.

C. The leniency program

(Members' opinions)

(i) It seems unnecessary to apply the leniency program to no more than three undertakings. Furthermore, it also seems unnecessary to allow for any reduction of surcharges, even to persons having reported to the Fair Trade Commission, after commencement of the investigation.

(ii) There do not seem to be justifiable reasons why the number of undertakings to which the leniency program is applicable should be limited to three.

D. Legal nature of surcharges, the method of calculation (whether the calculation of the amount of surcharge should be based on unjust enrichment) and so on

(Members' opinions)

(i) The calculation of the amount of the existing surcharge is based on unjust enrichment. However, without being bound by such a mindset, the amount of surcharge should be determined at a level effective in deterring undertakings from violations.

(ii) In many countries the competition authority may determine the amount of surcharge based on the actual state of the case, without resorting to the concept of unjust enrichment, and may impose, at its discretion, financial penalties. The surcharge system under the Antimonopoly Act should also be shifted to such a system. By doing so, it would be possible to impose surcharges against violations which are currently not subject to surcharge payment orders. Furthermore, the competition authority may issue both a cease and desist order and a surcharge payment order in a single decision and may flexibly utilize a leniency system, like those in Europe and North America.

(iii) If the amount of surcharge is not calculated based on unjust enrichment, because the surcharge is administrative, rather than criminal punishment, it seems that reasonable grounds for calculating surcharges are needed.

(iv) There is the concern that even if the discretionary surcharge system were introduced, if excessive discretion were left in the hands of the competition authority, the law enforcement would be hindered. Recently, the Supreme Court[4]

[4] The surcharge system as provided for in the Antimonopoly Act strives to reduce the incentive for collusive practices by disadvantages caused by the revelation of a cartel and enhancing preventive effects to deter cartels in addition to the existing criminal punishment (Article 89 of the Antimonopoly Act) and the indemnification of damages for the purpose of recovering damage sustained by a cartel (Article 25 of the Antimonopoly Act). The surcharge system is implemented promptly in the form of administrative measures for ensuring the effectiveness of prohibition of a cartel. The amount of surcharge is calculated by multiplying the turnover of goods and services, which are subject to the cartel during the period of the same, by the calculating rate prescribed. Because the surcharge system is an administrative measure, it is desirable to clarify the criterion for calculation. Furthermore, it has to be possible to easily calculate the amount of surcharge in order to ensure the effectiveness of deterrence by maintaining the surcharge

held that the surcharge system be evaluated as an administrative measure in terms of the prompt operation of the system.

(v) It is necessary to thoroughly investigate the advantages and disadvantages of the respective systems regarding the existing surcharge and financial penalty, which are implemented in major countries, and to examine the framework of the desirable surcharge system from the viewpoint of deterrence.

(vi) When introducing such a financial penalty system involving the amount of surcharge being increased or reduced, according to the degree of severity or seriousness of the case into Japan, it is necessary to examine the legal nature of such a financial penalty system and whether or not there are any significant or fundamental restrictions to its introduction.

(vii) When setting up a financial penalty which is not based on unjust enrichment, it is necessary to examine the position it should be assigned within the existing legal system of Japan.

E. To consider the factor of the extent to which the undertaking has tackled the compliance program in calculating the amount of surcharge.

<Commentary>

The existing surcharge system is not arranged to reduce the amount of surcharge by evaluating efforts which an offender has made to enhance the compliance program. Some major countries, upon calculating the amount of financial penalty for violations, introduce evaluation of such efforts into the respective competition law as a factor of reducing[5], but some others do not.

(Members' opinions)

(i) From the viewpoint of promoting the compliance program by undertakings, the

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system positively and efficiently. Accordingly, it is considered improper to calculate economic earnings for each case. To this end, the aforementioned calculation method has been adopted and maintained. If so, there is no reason why the amount of surcharge should conform to that of unjust enrichment having actually been obtained by the cartel. (The Supreme Court Judgment of September 13, 2005)

[5] The Federal Sentencing Guideline of the United States that efforts toward compliance are an element of reducing the culpable score, but there have been no cases in which it was admitted concerning a violation of the Anti-trust law. The guideline for calculation of the financial penalty in the United Kingdom mentions that it is an element to be considered when reducing the fine, whereas the guideline for calculation of EU fines makes no mention of it.

introduction of the evaluation of such efforts toward compliance should be taken into account as a factor for reducing the amount of surcharge.

(ii) If the compliance program functioned perfectly, no violation would take place. Accordingly, it is unreasonable to take any efforts toward compliance into account as a factor for reducing the amount of surcharge.

(iii) When taking into account efforts toward compliance as a factor for reducing the amount of surcharge, it would be meaningless to evaluate efforts by perfunctory investigation and exhaustive examination would be required. Conducting such exhaustive examinations in each case leads to effective law enforcement being hampered. Therefore, it would be improper to take efforts toward compliance into account as a factor for reducing the amount of surcharge.

(iv) Efforts toward compliance should not be taken into account as a factor for reducing the amount of surcharge but they should be conditions for the application of the leniency program.

(v) It seems admissible to take into account an undertaking's voluntary cooperation in the investigation as a factor for reducing the amount of surcharge.

(3) Criminal punishment

(Commentary)

(Concurrent imposition of surcharge and criminal punishment)

In addition to administrative measures, such as cease and desist orders and payment orders, the Fair Trade Commission may bring accusations against an undertaking having committed a violation against the Antimonopoly Act to the Public Prosecutor General in the event of the case being vicious and serious. In such cases, through accusations and criminal actions, a criminal punishment (fine not exceeding ¥ 500 million on a corporation) may be imposed on both the undertaking (the corporation) and the individual having engaged in the criminal violation. Accordingly, the surcharge and criminal punishment may be concurrently imposed on an undertaking having engaged in the violation against Antimonopoly Act, such as cartels and others.

(Adjustment of the surcharge to the criminal punishment)

The revised Antimonopoly Act provides that, in cases where a surcharge and criminal punishment are concurrently imposed on a corporation, an amount equivalent to half that for the criminal punishment shall be deducted from that of the surcharge from the viewpoint of policy-oriented considerations[6].

A. Concurrent imposition of surcharge and criminal punishment, and the double jeopardy prohibited by the Constitution

<Commentary>

The second sentence of Article 39 of the Constitution of Japan provides that no individual shall be placed in double jeopardy. Concerning this double jeopardy, the Supreme Court held that there are no problems concerning the concurrent imposition of surcharge and criminal punishment, according to the provisions of the Antimonopoly Act prior to the 2005 amendment[7].

(Members' opinions)

(i) The concurrent imposition of criminal punishment and surcharge on a corporation having engaged in a violation against the Antimonopoly Act does not constitute double jeopardy, as held by the Supreme Court.

(ii) The Supreme Court Judgment concerns an individual case, and there is doubt as to whether or not the concurrent imposition constitutes double jeopardy in general terms.

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[6] "There is not basically considered to be a problem of potential double jeopardy occurrence in the concurrent imposition of surcharge and criminal punishment in the bill. Both surcharges and criminal punishments have, in common, the function of preventing undertakings from engaging an act in violation. We have judged that it is proper as a matter of policy to reduce by half the equivalent amount to the fine from the amount of surcharge as adjustment for the common part between surcharges and criminal punishments." (Reply of the Chief Cabinet Secretary at the plenary session of the House of Representatives of November 4, 2006)

[7] "Concerning a cartel act in this case, if the punishment by fine imposed on an appellant becomes final and conclusive in the case of violation of the Law relating to Prohibition of Private Monopoly and Methods of Maintenance of Fair Trade and moreover if the government has instituted a civil suit against the appellant asking for return of unjust enrichment, it is clear that it is not in violation of Articles 39, 29 and 31 of the Constitution to order the appellant to pay surcharges by reason of a cartel act in this case under the provision of Paragraph 1 of Article 7-2 of the law in light of the purport of the Supreme Court judgment (o) No. 236 of 1954 and Page 938 of Civil Law Report Volume 12 No. 6 of the Grand Bench of the Supreme Court of April 30, 1958." (The Supreme Court Judgment of October 13, 1998)

B. The concurrent imposition of surcharge and criminal punishment and other issues

(Members' opinions)

(i) Even if any problem of the joint imposition on a corporation of surcharge and criminal punishment does not arise as a matter of the Constitution, from a global perspective, such legislation is rare in the field of competition law and the concurrent imposition thereof should be dissolved by any method. Specifically speaking, the following three methods could be considered, that is, (a) in case of imposing surcharges and criminal punishments on the same corporation, to deduct the amount of the latter from that of the former, (b) to determine which punishment should be exclusively imposed for each case, and (c) to abolish imposition on a corporation of criminal punishments (to maintain imposition on an individual of criminal punishments).

(ii) The competition authority promptly deals with violations to impose surcharges in principle and concerning vicious and serious cases, concurrently imposes surcharges and criminal punishments. In this way, the role sharing between surcharges and criminal punishments functions properly under existing law.

(iii) There is a stigma effect in criminal punishments, and it is improper to accuse an employee of criminal responsibility alone by abolishing criminal punishments to be imposed on a corporation. The criminal punishments to be imposed on a corporation should be maintained.

(iv) The purport of punishment for employers (the provision that when an employee has committed a violation with regard to the business of his or her employer, not only the employee having committed a violation but also his or her employer shall be punished) is that in cases where an employee has engaged in a violation, his or her employer shall be accused of the liability arising from negligence in employing and supervising an employee. Therefore, it is open to question whether or not the said provision is sufficient as punishment to impose on a corporation.

(v) In cases where a surcharge and criminal fine have been concurrently imposed on a corporation under existing law, half of the amount of the criminal fine will be deducted from that of the surcharge. This means that the surcharge, which is an administrative measure, provides adjustments on the judicial judgment and is not a proper action. It is proper to determine the criminal punishment; taking into

account the content of the administrative measures.

(vi) It is considered unnecessary to make such adjustment as mentioned in the previous section (v).

(vii) Just as criminal punishments and surcharges are concurrently imposed on a person who has failed to comply with the duty of continuous disclosure under the Securities Exchange Act, the full amount of the fine should be deducted from that of the surcharge.

(viii) In cases where criminal proceedings are underway, the competition authority should suspend the procedure for administrative measures and await the result of criminal punishment.

(ix) In some cases, without awaiting the criminal punishment, it is proper to promptly inflict the administrative measures according to the occasion.

(4) To impose stiffer sanctions on a representative of a corporation having engaged in a violation.

<Commentary>

In cases where violations against the Antimonopoly Act exist, in addition to the corporation and individual having actually engaged in the violation, a representative of a corporation, who was aware of the violation but took no measures to prevent the violation, may also be subject to criminal punishments (Article 95-2). However, there have been no cases, to date, in which any criminal punishment was imposed on a representative of a corporation under this provision.

(Members' opinions)

(i) In order to effectively deter a violation, it seems that a criminal punishment by fine should be imposed on a representative of a corporation by reason of criminal negligence.

(ii) Even if no criminal punishment is imposed on an individual having engaged in a violation, it seems to be an effective measure to prohibit the appointment of such individual as a director or officer. It should be considered that in cases where any punishment by fine was imposed on a corporation, no representative of the corporation can be appointed as a director or officer for a prescribed period.

(iii) The existing law stipulates punishments by fine against a representative of a corporation and there are no problems in the status quo.

(5) Making use of civil suits

<Commentary>

A private individual, who suffered any damage or loss from a violation against the Antimonopoly Act, may institute a suit against an undertaking having engaged in a violation claiming indemnification of damages. Furthermore, the said person may institute an injunction suit on unfair trade practices.

(Members' opinions)

(i) An injunction suit or damages suit, as instituted by a private individual, constitutes an important part of the system for deterring undertakings from engaging in violations, and so all required measures should be taken to ensure these suits function effectively. Specifically speaking, all relevant measures as mentioned below should be taken. (a) To extend the type of violation against which an injunction suit may be instituted to other violations against the Antimonopoly Act, as well as to unfair trade practices. (b) To relax the requirements necessary to institute an injunction suit ("significant damage requirement"). (c) To introduce an association action system (a system under which a qualified association could be allowed to institute a suit for the interests of a larger group). (d) To relax the requirements for the document submission order in an injunction or damages suit relating to a violation against the Antimonopoly Act, as in a suit launched under the Unfair Competition Prevention Law or the Patent Law.

(ii) In order to attempt to deter violations as well as relieve aggrieved persons, any scheme under which funds collected as surcharges can be efficiently utilized as remedies payable to a person aggrieved be devised.

(iii) Consumers could suffer any damage from an undertaking's violation against the Antimonopoly Act. Accordingly, the scheme, under which the competition authority may order offenders to return unjust enrichment, for the purpose of protecting the interests of consumers and to make use of funds collected for the

benefit of the same, should be devised. Furthermore, the establishment of consumer's right to cancel a purchase contract should be taken into consideration.

3. Examination and hearing procedures (Procedures in the Fair Trade Commission)

<Commentary>

(Review of procedures for cease and desist orders and surcharge payment orders)

Concerning the basic procedures to be taken upon administering the administrative measures, the Antimonopoly Act before the 2005 Amendment provided that the Fair Trade Commission may order elimination measures under decisions rendered by hearing procedures. Furthermore, from the viewpoint of improving efficiency in dealing with cases of violation, a recommendation system was set up under which, in the case where an undertaking accepted the recommendation, the Fair Trade Commission had the power to render the decision (recommendation decision) without engaging in the hearing procedures.

However, the recommendation system involved a problem that in cases where an undertaking did not accept the recommendation, until the decision was rendered through the hearing procedures, the means to deal with the violation was limited to urgent injunctions (When there is urgent necessity, orders may be issued by the Tokyo High Court at the request of the Fair Trade Commission). To this end, and from the perspective of improving efficiency in dealing with cases or promptly recovering competition, the 2005 Amendment Act provides that, in the case where the result of examining the case highlights the existence of any violation, the Fair Trade Commission may issue a cease and desist order, which is one of the administrative measures (abolition of the recommendation system), and that in the case where an undertaking is dissatisfied with the order concerned, a request for hearing procedures shall be made and the Fair Trade Commission shall commence the hearing procedures as the administrative appeal. Furthermore, the 2005 Amendment Act provides that the Fair Trade Commission shall afford the said undertaking the opportunity to state his/her opinion and shall present the evidence to the same as part of the prior

procedures preceding the order (Paragraph 3 of Article 48) and shall describe the evidence necessary to support the findings regarding the facts made by the Fair Trade Commission (Articles 24 and 29 of the Rules concerning Examination by the Fair Trade Commission).

The pre-amendment Antimonopoly Act provided that in the case where the elimination measures recommendation was not accepted, unless the hearing procedures involved in the elimination measures concerned has been finished, no surcharge payment order can be issued. The 2005 Amendment Act, however, provides that the Fair Trade Commission may, upon completion of prior procedures, issue a cease and desist order and surcharge payment order at the same time and may try the hearing procedures involved in both orders concurrently.

(Hearing procedures by the Fair Trade Commission)

In cases where an undertaking, who has received a cease and desist or surcharge payment order, is dissatisfied with the order concerned, the undertaking shall initially request commencement of the hearing procedures to the Fair Trade Commission, which is an independent specialized commission set up to enforce the Antimonopoly Act. The Fair Trade Commission may conduct the hearing procedures by itself or may entrust a hearing examiner in the General Secretariat to conduct the hearing procedures, excluding the decision. In such cases, the hearing examiner draws up a draft of the decision and the Fair Trade Commission renders the same, taking into account the undertaking's direct statement to the Fair Trade Commission and the motion(s) for objections against the draft of the decision submitted by either or both of the hearing examiner and/or undertaking. It is usual and commonplace for the hearing procedures to be conducted by a hearing examiner. In order to ensure the fairness of hearing procedures, provisions are laid down to enable a hearing examiner[8] to maintain independence and neutrality.

The prescribed number of hearing examiners was increased from five to seven in

[8] A hearing examiner shall be assigned to the General Secretariat, but shall not be subject to the direction of the Secretary General of the General Secretariat (Paragraph 3 of Article 35). A hearing examiner shall not take charge of hearing procedures of a case in which he or she became involved as a hearing examiner (Article 56). A hearing examiner shall carry out his or her duties fairly, promptly and independently (Article 13 of the Hearing Procedures Rules).

2006, of which three hearing examiners are currently qualified as attorneys.

(Judicial review of the decision)

A person who has a complaint on decisions rendered by the Fair Trade Commission may institute a suit for revocation of the decision in the Tokyo High Court (Subparagraph 1 of Article 85, a first instance court is omitted). In a suit for revocation of the decision, the findings concerning facts made by the Fair Trade Commission shall, if supported by substantial evidence, be considered conclusive before the court (Article 80, the substantial evidence rule).

(The Fair Trade Commission's power of investigation)

The Fair Trade Commission may, if it deems any violation to exist and if deemed necessary for examination, designate a hearing examiner to have him or her conduct the necessary investigation. A hearing examiner may interrogate persons connected with the case, examine witnesses, order the submission or impoundment of accounting books, documents and other matters, or conduct on-the-spot inspections (the power of administrative investigation). Criminal punishments are imposed on those who fail to comply with such dispositions (indirect enforcement).

From the perspective of taking reasonable procedures and filing a criminal accusation positively, the 2005 Amendment Act gives the power of compulsory investigation to the Fair Trade Commission (the power of compulsory search and seize; a warrant for search and seizure issued by a judge is needed.)

(1) Hearing examiners.

(Members' opinions)

(i) In the hearing procedures, fact-finding supported by evidence is important. It is desirable that a hearing examiner be qualified as an attorney.

(ii) It is important also that a hearing examiner has knowledge about the actual state of the economy, business activities, and the Antimonopoly Act.

(iii) Based on preserving independence and neutrality of a hearing examiner, it seems to be necessary to consider how the personnel management should be.

(iv) It seems to be necessary to discuss whether a judge system, such as the Administrative Law Judge of the United States, should be introduced.

(v) It seems that any measures should be taken for keeping a hearing examiner independent of the Fair Trade Commission during a period of drawing up a draft of a decision.

(vi) It seems to be necessary to establish the procedures for exclusion or challenge of a hearing examiner.

(2) To change the procedures to administer measures through the hearing procedures to those to try the hearing procedures as the administrative appeal after the measures has been administered.

(Members' opinions)

(i) As compared with the pre-amendment Antimonopoly Act, in which the hearing procedures were tried prior to administrative measures, there are some problems in the revised Antimonopoly Act, in which the hearing procedures are tried after the administrative measures has been administered in terms of the due process of law.

(ii) It is understood that the 2005 Amendment Act reviews the procedures in order to design the new system from the viewpoint of harmonizing two requests, namely, guaranteeing the due process of law and ensuring the effectiveness of law enforcement. However, it seems that the procedures should be comprehensively reviewed, including not only the ex ante, but also the ex post hearing procedures.

(iii) The ex ante procedures overlap considerably with the ex post hearing procedures. Therefore it is feared likely to take a long time until decisions are rendered, which would lead to an increase in the burden of the Fair Trade Commission and the respondent.

(iv) It seems that the ex ante procedures are simple procedures which afford the opportunity of stating the opinion and presenting the evidence, and do not overlap with the ex post hearing procedures. It is necessary to monitor how the revised Antimonopoly Act will be operated.

(v) There is a possibility of an increase of surcharge causing significantly increased disadvantage to undertakings, which would have an effect on hearing procedures.

(3) Administrative appeal

(Members' opinions)

(i) In major countries, the competition law does not provide a system under which the competition authority conducts the administrative appeal by itself, pursuant to the hearing procedures concerning measures it has taken against offenders. Furthermore, the distrust of such system cannot be removed. Accordingly, the system should be revised so that the cease and desist order and surcharge payment order are disputed not by the hearing procedures but via judicial suits for revocation.

(ii) A system would be considered, under which a choice may be made by an undertaking, between requesting hearing procedures to the Fair Trade Commission or instituting a suit for revocation in the court.

(iii) Without introducing such a choice system as mentioned in the above (ii), all administrative reviews should be conducted in the form of either a suit for revocation or through hearing procedures.

(iv) Taking into account the purport of establishing the Fair Trade Commission as an independent administrative body, it seems to be an appropriate measure to give the Commission the opportunity of commanding expert knowledge to cautiously render the decision.

(v) Concerning bid-rigging cases, which account for the vast majority of cases in violation of the Antimonopoly Act, fact-finding, such as assessing whether violations existed, is an important task. Practical expertise in competition policy, such as definitions of the relevant market, cannot be said to be required to deal with these cases.

(4) Cease and desist orders and payment order

(Members' opinions)

(i) It is usual for a cartel to be broken up upon commencement of the investigation. In such cases, it is unnecessary to issue the cease and desist order.

(ii) It seems that the cease and desist order and the surcharge payment order have something in common in terms of fact-finding and the application of law. It is

unnecessary to separately establish such procedures.

(iii) The 2005 Amendment Act is intended to maximize consolidation of the procedures for cease and desist order and those for surcharge payment order, which have been separately provided for. However, individual and specific information, such as turnover, is required in the hearing procedures related to the surcharge payment order. Therefore, it seems difficult to perfectly consolidate these two procedures into one. What should initially be done is to watch over how the revised Antimonopoly Act will be operated.

(5) Investigation, hearing procedures and ensuring the due process of law

(Members' opinions)

(i) The procedural rights of persons connected with a case at the investigative stage should be ensured. For example, in cases where an investigator interviews a person connected with a case, he or she should be permitted to have an attorney in attendance.

(ii) During the hearing procedures, the respondent may request an investigator to submit documents to a hearing examiner. However, the kind of evidence or documents the investigator has obtained, other than those used for proof in court, is unknown to the respondent. Therefore, there seems to be some problem in the hearing procedures in terms of disclosure of evidence.

(iii) There are cases where the surcharge amounts exceed the criminal fines. Therefore, it is necessary to discuss whether the existing surcharge payment order procedures are proper from the point of view of the due process of law.

(iv) Many investigating procedures or hearing procedures are provided for in the Fair Trade Commission Rules. Therefore, issues of these procedures are matters for the practical implementation of rules rather than those of the legal system.

4. Measures against unfair trade practices

<Commentary>

Unfair trade practices mean such business practice as designated by the Fair Trade Commission out of those endangering fair competition and coming under any one of

Subparagraphs of Paragraph 9 of Article 2. This designation is classified into two types – "the general designation" which shall apply to all kind of business and "the specific designation" which shall apply to a specified kind of business[9].

The provisions prohibiting unfair trade practices are interpreted as preventive and supplementary regulations for those provided for in Article 3 (Prohibition of private monopolization and unreasonable restraint of trade).

The Fair Trade Commission may issue the cease and desist order to undertakings having engaged in unfair trade practices, but unfair trade practices are not subject to the surcharge and the criminal punishment; provided, however, that in case of failure to comply with the ascertained cease and desist order, criminal punishment is imposed on such offenders.

Measures against unfair trade practices (whether unfair trade practices should be subject to surcharges or criminal punishments)

(Members' opinions)

(i) It seems proper that unfair trade practices also be subject to the financial penalty generally introduced in Europe, which is applied flexibly according to the actual state of a case.

(ii) It seems proper to set up a financial penalty against unfair trade practices, which the Fair Trade Commission may enforce by itself and have an upper limit like a civil fine (*karyo*).

(iii) An element constituting unfair trade practices is defined using the comprehensive and unclear term "tends to impedes fair competition". If criminal punishments or surcharges are imposed, there is a risk of threatening the freedom of business activity as guaranteed by the Constitution. Furthermore, because the definition of elements constituting unfair trade practices is ambiguous and unclear, it is likely

[9] Concerning the purport of the system under which unfair trade practices are designated by the Fair Trade Commission, the decision of October 11, 1968 concerning the Morinaga Trading Co. case mentions that unfair trade practices are economic phenomena taking place in complicated and changeable transactions. In order to regulate such transactions, it is necessary that such regulations be applied as flexibly as possible. To the end, it is necessary that the Fair Trade Commission, which is one of the administrative agencies, grasp the actual state and change of economy to which regulations are applied, and establishes and revises the criterion for regulations in conformity with such economic change. It is due to such purport that the provision of Paragraph 7 of Article 2 of the Antimonopoly Act is set.

to be against the legality principle of crimes and punishments (nullum crimen sine lege) as provided for in the Constitution.

(iv) Even if a specified act were regulated, it would still be possible to compete by any other means. It does not seem plausible to claim that such regulation infringes the freedom of business activity.

(v) Some commentators describe the definition of unfair trade practices as abstract, but it appears clearer when compared with that in other foreign countries.

(vi) There are no other countries in which elements constituting unlawful acts are defined specifically by the competition authority. From the viewpoint of the legality principle of crimes and punishments, it is considered problematic to impose criminal punishments or surcharges against unfair trade practices. Therefore, the unfair trade practices should not be designated by the Fair Trade Commission but rather defined by the Act.

(vii) It would not always be problematic to introduce criminal punishments or surcharges against unfair trade practice if the designation by the Fair Trade Commission provided for the specific requirements after the general framework of unfair trade practices was defined by law.

(viii) The acts that must be regulated as those under unfair trade practice vary according to social and economic changes. Therefore, the judgment of the Fair Trade Commission should be respected.

(ix) Any unfair trade practices are recognized to be in violation at the stage of tending to impede fair competition. Accordingly, it seems unreasonable to impose criminal punishments or surcharges against unfair trade practices.

(x) The existing framework, whereby criminal punishments are imposed against violations against the ascertained cease and desist order, seems appropriate.

(xi) There is a structure whereby competition is becoming increasingly intense and price reductions are frequently requested of small and medium enterprises, which leads to unfair trade practices. However, it is difficult to judge what act violates the Antimonopoly Act and comes under unfair trade practices. It is necessary to set up detailed guidelines, which are easy to understand.

(xii) From the viewpoint of protecting consumer interests, it is necessary to maintain strict control over deceptive consumer inducement, such as misleading labeling.

(xiii) There are various types of acts in unfair trade practices. After classifying unfair trade practices into two categories – acts against which criminal punishments or surcharges should be imposed and those against which neither criminal punishments nor surcharges should be imposed, it seems to be necessary to discuss such matters.

(xiv) When an unfair trade practice would be subject to regulation, the definition of elements constituting the said unfair trade practice should be discussed.

5. Others

(1) Problems of bid-rigging in the public procurement

(Members' opinions)

(i) In order to ensure the effectiveness of the Antimonopoly Act, it is necessary not only to ensure the deterrent of the Antimonopoly Act but also to recognize the existence, as a issue requiring improvement, of structural problems involved in public procurement, such as a procurement system, budget system, discipline of governments or governmental agencies placing orders and so on, because many cases which are revealed as violations against the Antimonopoly Act are those involving bid-rigging upon public procurement.

(ii) It is necessary to improve structural problems related to bid-rigging upon public procurement, but coupled with the implementation of the revised Antimonopoly Act, revelation of bid-rigging is proceeding, and efforts to reform the bidding system are underway. For the time being, it would be appropriate to continue monitoring how situation develops.

(2) Warning and caution as given by the Fair Trade Commission

<Commentary>

In the case where no evidence sufficient to take legal action has been obtained but some doubt about violation still remains, the Fair Trade Commission may provide guidance to an undertaking so as to take corrective measures (warning). The Fair Trade Commission makes it a rule to release cases in which it issued warnings to

undertakings[10].

Furthermore, in cases where no evidence sufficient to suspect the existence of a violation has been obtained but an act likely to lead to a violation was found, the Fair Trade Commission may issue a "caution" based on the viewpoint of deterring undertakings from engaging in such violations.

(Members' opinions)

(i) Despite the fact that there is no explicit legal provision, it seems problematic that the Fair Trade Commission issues a warning and publicizes cases including the undertaking's name.

(ii) There is also a problem of a lack of means to dispute the warning, which is given as administrative guidance.

(iii) Warnings and cautions are also effective in terms of prevention of a violation.

(iv) Warnings and cautions should be discussed as general problems of administrative guidance, including dealing with prior consultation. In general, they should also be maintained as one of the means, including administrative guidance, of deterring undertakings from engaging in violations.

[10] In major countries such as the United States, the United Kingdom, France, Germany and EU, no examples were found whereby competition authorities publicized such administrative guidance as "warnings".