Individual Opinions
of Members of the Advisory Panel

NOTE: This is a tentative translation. The authentic text is only available in Japanese.
See http://www8.cao.go.jp/chosei/dokkin/index.html for the authentic text.

Mr. Masaru OIKAWA

(1) General Remarks

The report is disputable in terms of objectivity as it describes that “the Advisory Panel concluded” concerning the issues on which the Advisory Panel members, despite thorough discussion with one another, did not reach a unanimous agreement of the Advisory Panel. The companies’ right to defense incidental to the repeated increase in the amount of surcharge since 2005 is an issue of the right which should be discussed in connection with the JFTC as the confronting government authority rather than in connection with the consumers considered as the victims. While the number of specific complaints made by small and medium enterprises does not decrease at all in the existing circumstances, opinions against introduction of the right to defense based on the abstract reasons that the introduction is likely to impede the fact-finding ability of the JFTC and such culture does not exist are expressed to propose on the contrary that the investigation powers should be strengthened. The panel should have had constructive discussions to resolve promptly the problems with which small and medium enterprises face.

(2) Matters to be informed to companies and means thereof (in connection with Items 4-1 and 4-3 of the Report)

The Report makes proposals concerning explanation to companies at site during the on-the-spot inspection and deposition. Many of the complaints made by small and medium enterprises are derived from the fact that it is neither transparent for nor understood by the companies and their testifying parties what they can do to defend themselves during the unanounced administrative investigations. In this sense, any matters included in the Conclusion by the Advisory Panel should be subject to explanation and be conveyed clearly in writing, from the viewpoint of informing the parties concerned without fail. Useless dispute of whether or not the information has been conveyed by means other than in writing should be avoided. It puts only a small burden on the investigators and contributes to smooth inspection at site to list what the companies are allowed to do and what they are not, and to distribute the list uniformly to them.

(3) Improving deposition process (Recording of the deposition process and note taking) (in connection with Item 4-3 of the Report)

The Report denies the introduction of recording and note taking of the process of deposition on the grounds that the fact-finding ability of the JFTC may be affected by such introduction. However, the problems lie in the circumstances where descriptions of statements not matching the intent of the testifying parties have been

prepared as deposition records of the investigators and adopted as evidence in spite of the provisions of the Rules on Administrative Investigations by the JFTC, which state that errors, if any, in the deposition records can be corrected. This must be a starting point for discussion. Accordingly, the audio recording of the process which is less costly to small and medium enterprises should be allowed promptly to prevent unreasonable deposition process and to enable subsequent verification thereof. Measures to cope with the chilling effects on testifying parties can be taken by recording or disclosing in accordance with whether the testifying parties themselves wish or by devising other suitable steps. There cannot be any hindrance to the introduction of recording to the extent the deposition process is currently conducted in a fair manner. Furthermore, it is unreasonable that introduction of the note taking is denied without verifying how seriously the fact-finding ability of the JFTC will be disturbed by the note taking in comparison with other means while the testifying parties will be increasingly required to take notes of statements when the system for enabling companies to express complaints is established.

(4) Entity for follow-up in the future (in connection with Item 4-4 of the Report)

From the viewpoint of ensuring the neutrality, it is necessary that follow-up study on the implementation based on the Report of the Advisory Panel is verified by a party other than the JFTC.

Ms. Yasuko KOUNO

I would like to express my approval for the conclusions of this Report, and add my opinions on certain parts of them.

It is consumers and citizens that suffer from the Anti-Monopoly Act violations by the companies. It is equivalent to the loss of security of the rights of consumers and citizens to strengthen only the companies' right to defense, which result in the impairment of the fact-finding ability of the JFTC. Compared with the U.S. and Europe, the level of sanctions under the Japanese Anti-Monopoly Act is low and investigation powers of the JFTC cannot be considered strong. While it is important to secure due process, the fact-finding ability of the JFTC against cartels and other violations committed in secrecy should not be allowed to become weaker than its current state. Companies are required not to commit violations and, when they detect any violations, to cooperate with the JFTC in its investigation. It disturbs fact-finding activities of the JFTC to introduce a right to defense not indispensable and to excessively protect companies involved in alleged violations. It is a different story if an abuse of human rights including violent act and intimidation has been committed during the JFTC investigation and the right to defense is needed to prevent recurrence thereof, but no problems of such kind have been pointed out. Companies are apparently not satisfied with the contents of the deposition records, but it is only natural for companies to become dissatisfied when their employees make statements of the facts disadvantageous to the companies, and this apparently is an issue that should be contended in an administrative hearing or a litigation.

I believe it is one of the great achievements of the Advisory Panel that the JFTC draws up guidelines, etc. to secure transparency of the procedures to mitigate uneasiness of the employees undergoing the investigation. It is not appropriate, however, that the guidelines, etc. restrict the investigation by the JFTC and impede its fact-finding ability. In my understanding, there are no problems in the current deposition processes and the Report demands clarification of implementation of the current processes in the guidelines, etc. rather than numerical restrictions on the time and frequency of the deposition and longer or more frequent breaks than at present.

In my opinion, it contributes to effective and early restoration of competition and also desirable from the viewpoint of secunirng due process if the antagonistic structure existing between the companies and the JFTC is resolved by introduction of the discretionary surcharge system and commitment/settlement procedures and cases are processed by both sides in a cooperative manner.

When strengthening the right to defense is to be considered in the future, I believe that it should be premised on an institutional change to secure sufficient incentives to cooperate. I also believe that introduction of the discretionary surcharge system should not be followed necessarlily by introduction of the right to defense. I recognize that the

Advisory Panel, after considering existence and degree of necessity to introduce various kinds of rights to defense, has concluded the necessity of introduction under the current system is not great and that the introduction is not reasonably allowed even at the cost of obstacles posed to the fact-finding ability. In my understanding, necessity of introduction of presence of an attorney during the deposition process has been determined low, on the grounds that deposition is not an investigation to seek criminal responsibility of the testifying parties, who are rather required only to state the facts they have experienced as they remember. Necessity of introductuion of audio/video recording and attorney-client privilege have also been determined low, due to respective reasons that no cases of false accusation involving unrelated persons have occurred, and that it is an issue which should be discussed in the entire legal system. Issuance of copies of deposition records, note taking and privilege against self-incrimination have, in my understanding, been denied or found questionable in terms of necessity in the opinions of many panel members, due to the reasons respectively that the disclosure of evidence in pre-order procedures is sufficient to the extent copies of the deposition records are allowed to make an appropriate claim or objection, note taking is not necessary in making statements of experienced facts as they remember, and that deposition is not to seek criminal responsibility of the testifying party. I expect that the above views will be considered carefully as they are deemed important when the prerequisite conditions are satisfied and necessity of introducing the right to defense and its impact on the fact-finding ability of the JFTC are to be reviewed in the future.

Ms. Miki SAKAKIBARA

General Remarks

Given the supplementary provisions of the Act amending the Anti-Monopoly Act in 2013 and supplementary resolution adopted by the House of Representatives' Economy, Trade and Industry Committee in the National Diet, consideration of the question of whether to expand the right to defense is a task imposed on the Advisory Panel. Furthermore, expansion of the right to defense has been strongly requested by business circles and attorneys from Japan, the U.S. and Europe in hearings and other discussions of the Advisory Panel and public comments. Nevertheless, the Advisory Panel has, without even addressing the question of whether investigation is excessive, summarized its views so as to reject arguments justifying an expansion of the right to defense on the grounds that a number of members of the Advisory Panel simply disagreed. The Advisory Panel did not even agree to a compromising proposal submitted by me.

(1) Introduction of attorney-client privilege (in connection with Item 4-2 of the Report)

The attorney-client privilege recognized in the U.S. and Europe should be introduced also in Japan quickly as an institution. The necessity of allowing communications between attorney and client to be kept confidential has not been opposed strongly in the Advisory Panel meetings while concerns about hampering the fact-finding ability of the JFTC can be solved sufficiently in other ways, depending upon the institutional design. Discussion about how to balance reasonable rights to defense and the need for the fact-finding ability of the JFTC should be undertaken without undue delay and the JFTC should give certain consideration to not seizing or using documents subject to attorney-client privilege until the new system has been introduced.

(2) Improving deposition process (in connection with Item 4-3 of the Report)

Business circles have continuously pointed to the unreasonable investigation of the JFTC including depositions expected to conform to stories made up by the JFTC, as well as the fact that the deposition process cannot be examined afterwards, and no attorney being present or an audio/video recording being made of the deposition. Neither of these requests, however, has been accepted by the Advisory Panel even partially and the problems remain utterly unsolved.

An attorney has to be present during the deposition and provide adequate legal advice to ensure protection against unreasonable investigation and to ensure that the contents of the statements are described accurately in the deposition record. Also, it is necessary that the deposition process can be audio/video recorded and

examined afterwards to prevent unreasonable methods of investigation and ensure that the evidence is given in a genuinely voluntary and so secure the trustworthiness of the deposition records. The concern about chilling effects on employees can be resolved by having an attorney representing that an individual employee present during the deposition and introducing rules on methods of storage and disclosure of audio/video recordings to reduce the risks of abuse. The JFTC should put an end to the history of depositions taken behind closed doors, which cannot be accepted as "voluntary" for citizens in general, and introduce a new system with rules in place to ensure fair and proper procedures, so that the evidence is given in a genuinely voluntary way and that the deposition records are reliable and valid.

(3) Points to note for future studies (in connection with Item 4-5 of the Report)

The Advisory Panel was established with the purpose of strengthening the rights to defense to prevent unreasonable investigations. Discussions concerning strengthening the powers of investigation and the conclusion that the powers of investigation should be strengthened if the rights to defense is to be strengthened deviate from the intent of the commitment by the National Diet. From now on, sufficient consideration should be made in the first place to secure the rights to defense comparable to the extensive powers of investigation currently held by the JFTC, which is based on the history of continuous expansion of its powers including the introduction of the leniency system.

Mr. Fumio SENSUI

(1) Report as a whole and “5. Future studies”

The Advisory Panel did not come to a conclusion that attorney-client privilege and presence of an attorney during the deposition process should be allowed under the current system. This is mainly due to the reason that an impact on the fact-finding ability of the JFTC is apprehended under the current system, and a conclusion was not reached that the privilege and presence of an attorney should be allowed in comparison with the existence and degree of necessity of securing due process. I agree with this result.

What is missing in the current system is a mechanism related to incentives for cooperation in JFTC investigation (disincentives for non-cooperation), and introduction of this mechanism is a pressing issue for the Anti-Monopoly Act of our country. It is desirable from the viewpoint of securing due process that an environment is developed where cases are processed under the cooperation between companies and the JFTC by introducing the discretionary surcharge system and settlement/commitment procedures, and I strongly agree with the idea.

With respect to introduction of discretionary surcharge system, it is not enough to maintain current surcharge amounts as a ceiling, as the level of surcharge in our country is lower and the period subject to calculation for surcharge is shorter than those in the U.S. and Europe. The system should be introduced with a sufficiently high ceiling as those in EU. When such system is introduced and sufficient incentives for cooperation in JFTC investigation is secured, it will be possible in my opinion to review the right to defense, whose introduction has been decided to postpone this time.

Introduction of the settlement/commitment procedures should be considered immediately as it is easier to introduce than the discretionary surcharge system and gives a significant merit to companies.

With respect to the leniency program, it should be made easier to cooperate in JFTC investigation by assessing higher the value of evidence submitted in deciding the order for leniency application.

(2) “3. Issues related to deposition”

From the viewpoint of securing transparency of deposition, it is desirable in terms of securing due process to draw up and disseminate the guidelines, etc. and I agree with the idea. While the Report refers to an argument that a limit should be set for the time of deposition per day and the number of sessions of deposition per case and says “Indicate the approximate time length of the deposition,” the guidelines, etc. should not contain limits to the time and number of sessions of deposition, for

example, in specific figures, for deposition for a lengthy period of time is not currently conducted and proper breaks are secured, time required for deposition and number of sessions thereof vary depending upon the roles of parties and the number of evidence involved in the case and the limits are likely to hinder the fact-finding ability of the JFTC. At the same time, the guidlines, etc. should also refer to the practice to the effect that deposition is conducted normally during business hours and extension of deposition for unavoidable reasons is subject to consent of the testifying party.

Mr. Masahiro MURAKAMI

With respect to the enforcement of the Anti-Monopoly Act, introduction of discretionary surcharge system with a ceiling of an amount is a pressing task. Accordingly, a discretionary surcharge system with a ceiling of the surcharges currently in effect should be introduced with the priority given to its feasibility. In other words, it is appropriate to establish rules against cartels which introduce discretionary surcharges with a ceiling of an amount derived by applying a calculation rate of 20% to related sales turnover and lay down a method for calcurating the amount of surcharges to maintain the level of surcharges currently imposed. Against unreasonable restraint of trade other than cartels and private monopolization (private monopolization of exclusionary type and control type), it is appropriate to establish rules which introduce discretionary surcharges with a ceiling of an amount derived by applying a calculation rate of 6% to related sales turnover and list factors to be considered in relation to calculation of the amount of surcharges. In addition, it is desirable to make the abuse of superior bargaining position subject to the discretionary surcharge system with a ceiling in the amount.

The current surcharge system against trade associations should be abolished, or a new system should be established in which the JFTC orders trade associations to pay surcharges (on security of their assets) in view of the fact that, under the current system, it is against the fundamental principles of penalty for constituent companies to be ordered to pay surcharges against violations committed by trade associations.

My interpretation of current Articles 47 and 94 of the Anti-Monopoly Act is that presence of an attorney cannot help but be allowed. In other words, when a witness appearing in response to a voluntary request or under an order to appear refuses to be questioned without presence of an attorney or insists on making statements with presence of an attorney (and cannot be persuaded to do so by the JFTC investigator), the investigator cannot enforce or press questioning of a closed-door type deposition. If such is the case, the investigator will be compelled to allow presence of an attorney to the extent it intends to question the witness. Furthermore, even if it is possible to impose a criminal punishment on refusal to make a statement during an interrogation, the JFTC cannot impose a criminal punishment on the witness as above conducts by the witness do not fall under the category of refusing to make a statement (“failure to make a statement”) according to Article 94 of the Anti-Monopoly Act.

Accordingly, administrative investigation of the Anti-Monopoly Act cases should be switched, by realizing the discretionary surcharge system and presence of an attorney during the deposition process, from the current administrative investigation modeling after criminal investigation placing an excessive importance on deposition records, to an administrative investigation of Civil Law type (European style) putting an emphasis on an order to companies to report.

Mr. Kimitoshi YABUKI

(1) In General

I disagree with the Report in which the Advisory Panel has concluded that the attorney-client privilege, presence of an attorney during the deposition process and audio/video recording thereof, which were the main issues for deliberations by the Advisory Panel, will not be introduced. I hope that these systems will be realized quickly in the sessions of the National Diet or other appropriate opportunities. The reasons for the above are that the conclusion mentioned above (i) is against the instructions of the organization representing the people (the National Diet) to the government to “take appropriate measures” and “positively consider,” under the supplementary provisions of the Act to amend the Anti-Monopoly Act in 2013 and the supplementary resolution adopted by the House of Representatives' Economy, Trade and Industry Committee respectively, (ii) has failed to respond to a large number of the feedbacks to the public comments to which the Cabinet Office referred the issue which point out specific problems of the current systems and ask for creation of new systems, and the fact that a number of the expert witnesses pointed out issues in the current practice and expressed opinions to ask for improvement thereof, (iii) is apprehended to delay development of the practice under the Anti-Monopoly Act in Japan by denying introduction of the systems recognized under the global standard, and (iv) has failed to resolve the problems of deposition that conform to a story produced by the investigation officials, which is rather likely to hinder fact-finding activities (see the material that I submitted to the twelfth meeting of the Advisory Panel). My opinions on the individual issues are as described below.

(2) Introduction of attorney-client privilege (Item 4-2 of the Report)

As shown in the opinion submitted by the Japan Federation of Bar Associations (“JFBA”) in the public comments, and in the JFBA’s explanation of systems in other jurisdictions (see the material I submitted to the ninth meeting of the Advisory Panel), Japan should introduce, as a part of the institutional reform of this time, the above system which has been recognized in many jurisdictions. For further details of the system, the draft of guidelines that I prepared and submitted jointly with Miki Sakakibara (see the material submitted to the eleventh meeting of the Advisory Panel) would be helpful as reference. In my opinion, however, it would be acceptable to implement the system at the discretion of the JFTC in the initial stage with due consideration over the attorney-client privilege.

(3) Improving deposition process (in connection with Item 4-3 of the Report)

Presence of an attorney during the deposition process and audio/video recording

of the deposition process should be introduced as a part of the institutional reform of this time because the issue involves the problem of deposition conforming to a story produced by the investigation officials as pointed out in the criminal procedure based on the experience in the Muraki case and is rather likely to hinder the fact-finding activities. There are concerns about the chilling effect, but they can be dealt with properly by devising appropriate measures, which include that the attorney allowed to be present during the deposition will be limited to an attorney for an individual employee and the scope of audio/video recording will be limited to the timing when the deposition record is read to the testifying party.

Furthermore, since there is no legal ground to prohibit testifying party from taking notes at least during the voluntary deposition, the testifying party should be allowed to take notes to the extent it does not hinder the deposition.

(4) Points to note for future studies (in connection with Item 4-5 of the Report)

While introduction of the discretionary surcharge and other systems is deliberated in the Report, I am against the argument to postpone introduction of systems to protect the right to defense of persons concerned with a case, which the Advisory Panel is originally expected to discuss and consider for the reason that introduction of the discretionary surcharge and other systems must be considered at the same time. The discretionary surcharge system and the system to protect the right to defense should be discussed separately. It is very regrettable that the Advisory Panel has failed to devise measures as it is expected to institutionalize the system to protect the right to defense under the current legislation.