

Cabinet Decision on the Antimonopoly Act Amendment Bill  
(Tentative Translation)

March 12, 2019  
Japan Fair Trade Commission

The Cabinet today made an approval on the amendment bill of the Antimonopoly Act (AMA) (hereinafter referred to as “the Bill”). The purpose of the Bill is to deter “unreasonable restraint of trade”, etc. effectively, invigorate the economy, and enhance consumer interests by fair and free competition, through increasing incentives for enterprises to cooperate in the JFTC’s investigation and imposing an appropriate amount of surcharges according to the nature and extent of the violation.

1 Outlines of the Bill (See Attachment1)

(1) Amendment of leniency program

Introducing a system which allows the JFTC to reduce the amount of surcharges when enterprises submit information and documents that contribute to the fact finding of the case, in addition to the reduction according to the order of application.

Abolishing the current limit on the number of applicable enterprises in the leniency program

(2) Revision of the calculation methods

Addition of the basis of calculation of surcharges, and extension of the calculation term, etc.

(3) Revision of Penal Provisions

Raising the limit of the amount of criminal fine for juridical person charged with the offense of obstructing investigation

(4) Making other necessary revisions

2 Effective date

The amendment shall come into effect on the date specified by Cabinet order within a period not exceeding one and a half years from the date of the promulgation of the Bill (with a few exceptions).

3 Others (See Attachment1 and 2)

As an approach to so-called “attorney-client privilege”, rules pursuant to the provisions of Article 76 of AMA, and guidelines shall be established by the effective date of the Bill from the perspective of making the new leniency program more effective, protecting confidential communication regarding legal advice, etc. between an enterprise and independent attorneys substantially and ensuring the appropriateness of administrative investigation procedures.



# The Outline of the Antimonopoly Act Amendment Bill

-the direction of the revision of the surcharge system-

March, 2019  
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# Challenges with the current system and the direction of the revision

- Challenges** Due to the current system of surcharges that are calculated and imposed uniformly and impartially,
- ❑ The JFTC cannot consider the degree of the enterprise's cooperation for JFTC's investigation, when making decisions on the reduction of the amount of surcharges.
  - ❑ The JFTC cannot calculate or impose an appropriate amount of surcharges according to the nature and extent of the violation.

## The direction of the revision

- The AMA shall be amended to introduce the system which increases incentives for enterprises to cooperate in JFTC's investigation, which will promote efficient and effective fact findings and investigation process by enhancing the cooperative relationships between enterprises and the JFTC, and allow the JFTC to calculate and impose an appropriate amount of surcharges according to the complicated economic environments.

## Outcome of the revision

- Enterprises and the JFTC will cooperate each other, not standing in opposition, to eliminate the infringements of the AMA.
- The deterrence against infringements will be strengthened by imposing necessary and sufficient surcharges according to the complicated economic environments.
- Promoting fair and free competition will invigorate the economy and enhance consumer interest.

## Reference : Related Cabinet Decisions, etc.

The "Action Plan for Strengthening Industrial Competitiveness" (2018) (approved by the Cabinet on February 6, 2018)

- ...to further enhance the effectiveness of law enforcement and to deter violations, the government will review the surcharge system and take necessary measures intending to submit a bill to amend the Antimonopoly Act.

Report of the Study Group on the Antimonopoly Act (April 25, 2017)

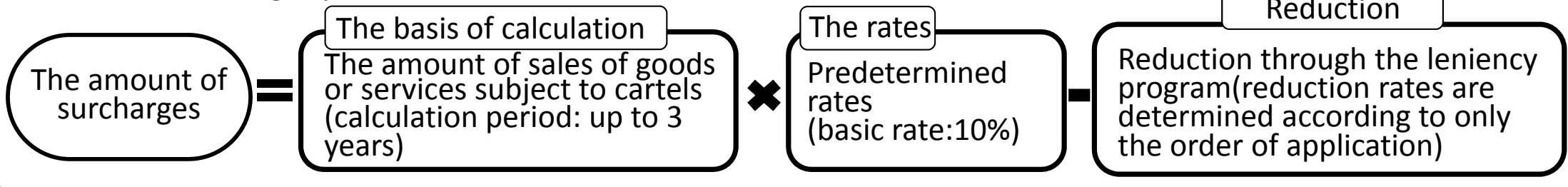
- ...It is appropriate to revise the current rigid surcharge system in which surcharges are calculated and imposed uniformly and impartially pursuant to the stipulated and objective methods for calculation/imposition, and make the surcharge system flexible to some degrees, in order to handle the growing globalized, diversified and complicated business activities and corporate structures of enterprises, and the constant change of economic and social environments, and to give incentives for enterprises to cooperate in investigation.

\*The Study Group held 15 meetings from February, 2016 to March, 2017. The study group consists of Chairman (Daitaro KISHII (Professor of Law, Faculty of Law, Hosei University)) and the 15 experts from academics, business associations, consumer associations, bar associations, etc.

# The Outline of the Revision of the Surcharge System



The current surcharge system (in case of unreasonable restraint of trade)



## The basis of calculation

- Extension of the calculation period, etc.
  - Establishing the calculation period as “being traceable back to 10 years from the date on which the JFTC started to investigate” (current period is 3 years), and extending the statute of limitation to 7 years (current period is 5 years).
  - Introducing the estimation provision which allows the JFTC to estimate the basis of calculation when the part of the amounts of sales is unknown due to the dissipation of relevant documents, etc.
- Addition of the basis of calculation
  - Adding the following unjust gains due to the infringements to the basis of calculation of the surcharges
    - ✓ the financial gains as a reward for not supplying the goods or services subject to cartels
    - ✓ the amount of sales of the business related to goods or services subject to cartels (e.g. subcontract)
    - ✓ the amount of sales of the certain enterprises that belong to the same group as the violators and receive the instructions or information from the violators
- Imposition of the surcharges on the violator’s subsidiaries that have succeeded to the business related to the infringements before the JFTC starts the investigation (the current system stipulates only the succession the day and after the investigation starts)

## The calculation rates

- Small and Medium-sized Enterprise calculation rate
  - Limiting the application of the SME calculation rate only to the enterprises that can be deemed substantially as an SME
- Calculation rates by type of business
  - Abolition (unification to the basic calculation rate)
- Reduced calculation rate
  - Abolition of the reduced calculation rate for early withdrawal from the infringement
- Increased calculation rates
  - Adding the following act to the increased calculation rate applied ones for leading roles in infringements
    - ✓ Requiring others to obstruct the investigations
  - Revision of the scope of the increased calculation rate application for repeated infringements
    - ✓ The increased calculation rate shall not be applied to the case that enterprises had committed two infringements and had ceased one before they were imposed the surcharge payment order on in relation to the other.
    - ✓ Application the increased calculation rate to the infringements by the enterprises whose subsidiaries have been imposed the surcharge payment order on within the past 10 years and by the enterprises which have succeeded to the business of the enterprises that violate the law within the past 10 years.

\* The amendments of the surcharge system for private monopolization and unfair trade practices shall be made in correspondence with those of the surcharge system for unreasonable restraint of trade such as the extension of the calculation period and the abolition of the calculation rates by type of business.

# The Outline of the Revision of the Surcharge System



## The Leniency Program

### ● After the revision

The date of application	The order of application	Reduction rate according to the order of application	Reduction rate according to the degree of cooperation
Before the Investigation Start Date	1 <sup>st</sup>	100%	+ up to 40%
	2 <sup>nd</sup>	20%	
	3 <sup>rd</sup> -5 <sup>th</sup>	10%	
	6 <sup>th</sup> and after in order	5%	
After the Investigation Start Date	Up to 3*	10%	+ up to 20%
	Other than the above	5%	

### 【References】 the current system

The date of application	The order of application	Reduction rate according to the order of application
Before the Investigation Start Date	1 <sup>st</sup>	100%
	2 <sup>nd</sup>	50%
	3 <sup>rd</sup> -5 <sup>th</sup>	30%
	6 <sup>th</sup> and after in order	
After the Investigation Start Date	Up to 3*	30%
	Other than the above	

- Adding the reduction rate according to the degree of the enterprise's cooperation for JFTC's investigation (the value of proof which the enterprise submits voluntarily) to the rate according to the order of application.
- Abolishing the current limitation on the number of applicants (currently, up to five enterprises can apply). (all the enterprises under the investigation will have the opportunity of cooperating in JFTC's investigation voluntarily)
- Conferring between the enterprises and the JFTC on the content of enterprise's cooperation and JFTC's addition of the reduction rate.

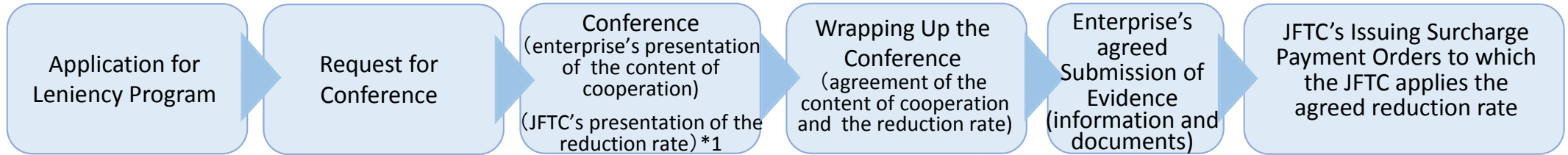
- An enterprise which has applied for the leniency program can acquire a uniform rate if it meets some predetermined requirements, regardless of the degree of the enterprise's cooperation for JFTC's investigation.
- The number of applicants is limited to 5.

\* They can acquire the reduction rate on condition that the total number of applicants (the applicants who apply before the Investigation Start Date are included) is 5 or less.



## The Leniency Program

### ● The Outline of the Conference



\*1 When enterprises and the JFTC have not reached agreement, the JFTC shall not use records which the enterprises have presented in the conference, even if the JFTC has recorded the enterprise's explanation about the information during the conference.

\*2 When enterprises cooperate in JFTC's investigation as agreed, the JFTC applies the agreed reduction rate (when enterprises fall into the disqualified, the reduction rate according to the order of the application as well as the rate according to the degree of cooperation for JFTC's investigation shall not be applied.)

### ● Introducing the guideline concerning the methods of evaluating evidence (information and documents) enterprises submit to the JFTC voluntarily

#### The direction of the guidelines

- ❑ Stating that the JFTC evaluates enterprise's cooperation from the viewpoint of how much the submitted evidence contributes to fact finding.
- ❑ Stating the information which the JFTC evaluates (ex. the goods or services subject to cartels or bid-rigging, rule to decide the winner of bid, participants, the period of implementation, implementation status, etc.), and that the JFTC determines the reduction rates according to the content of the information.

## The other amendments

- Lowering the rate of delinquency charges
- Raising the limit of the amount of fine for juridical person charged with the offence of obstructing investigation
- Introducing procedures for gathering electronic record in the investigation of criminal cases, etc.

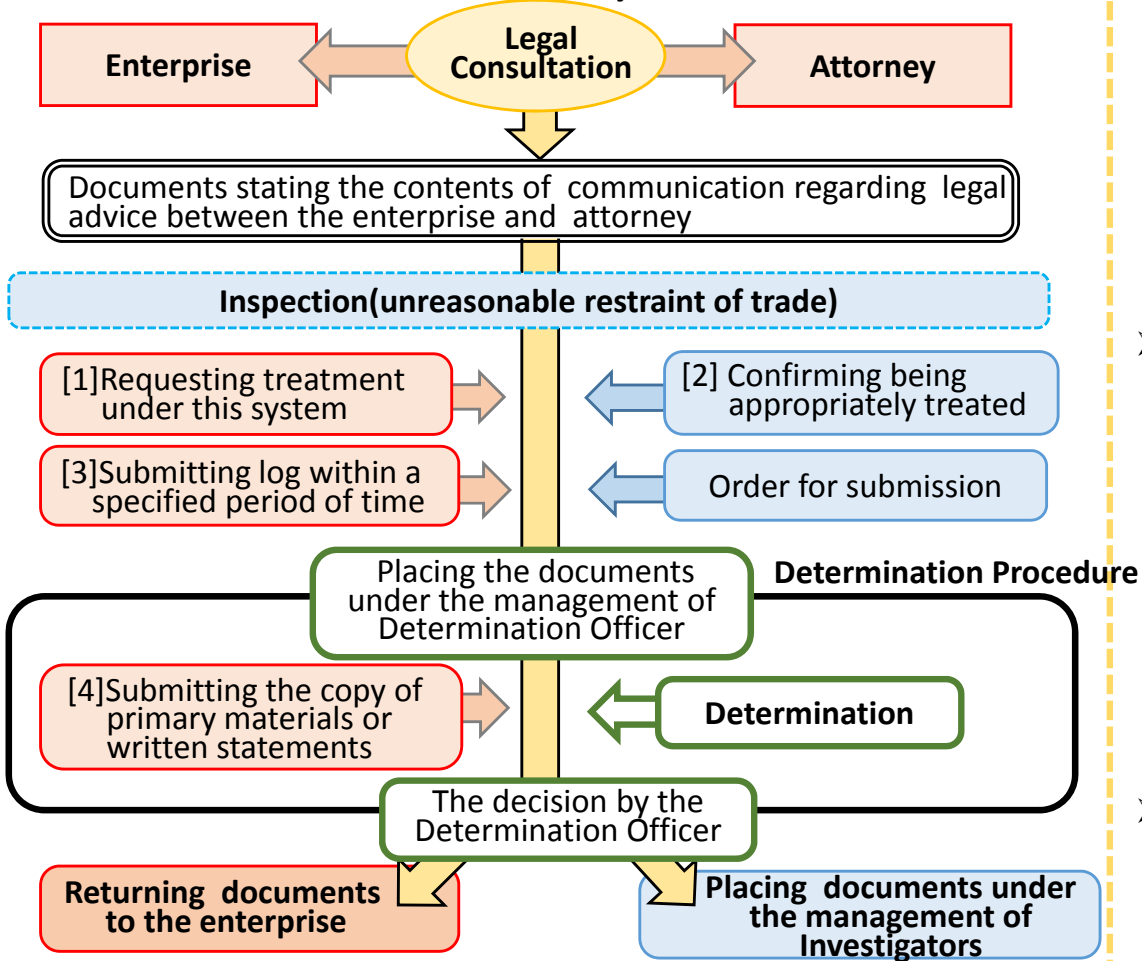


# Methods of Making the New Leniency Program More Effective

## Approach to so-called “Attorney-Client Privilege”

In relation to administrative investigation procedures regarding unreasonable restraint of trade prohibited in the Article 3 of AMA, JFTC shall establish rules pursuant to the Article 76 of AMA and guidelines as below from the perspective of making the new leniency program more effective, protecting confidential communication related to legal advice, etc. between an enterprise and independent attorneys substantially and ensuring the appropriateness of administrative investigation procedures.

### The Flow of the System



### ➤ The Outline:

- If the documents stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade is confirmed to be met with the requirements[1]-[3] as below, they shall be promptly returned without Investigators’ access.
- Pre-existing materials before consulting the attorney, materials indicating facts underlying confidential communication regarding legal advice between the enterprise and attorney : so-called primary materials/fact finding materials are out of scope.

### ➤ Requirements:

- [1] The enterprise shall request treatment under this system at the time of order for submission.
- [2] The documents shall be treated appropriately.
- [3] Submission of lists (the “Log”) stating the time and date of preparation of the documents, name of the person preparing the documents, names of persons with whom the documents was shared, attributes and the summary, etc. for each documents that the enterprise is seeking treatment under this system, shall be performed within a specified period of time after the order for submission.
- [4] If out of scope documents are included, report all of their contents to the JFTC.

### ➤ Measures for Prevention of Abuse(Determination Procedure)

The Determination Officer shall confirm whether the documents that the enterprise requested treatment and submitted to the JFTC under this system satisfy the requirements above (especially above [3] and [4]).

## Noting Down after the Completion of Interrogation Conducted by Investigators

The JFTC shall add to the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” (December 2015) that employees, etc. of the applicant for the leniency program may note down on the spot after the completion interrogation conducted by investigators.

## Treatment of confidential communication between an enterprise and attorney

## 1. Purpose

If the leniency program unique to the Antimonopoly Act is revised for the purpose of enhancing the incentive for enterprises to voluntarily cooperate with investigations by the Fair Trade Commission so that the amount of reduction of surcharge corresponds to the degree of voluntary cooperation by enterprises with such investigations, the need by enterprises to consult with independent attorneys to effectively cooperate with the investigation is likely to increase. This system is being established from the perspective of making the new leniency program more effective and protecting confidential legal advice, etc. related to such consultations substantially, ensuring the appropriateness of administrative investigation procedures.

## 2. Summary

A system setting forth that the investigators will not access documents stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act), if certain conditions are confirmed to be met pursuant to prescribed procedures

## 3. System

## (1) Format/Legality

- Main items to be prescribed in rules based on the provisions of Paragraph 1 of Article 76 of the Antimonopoly Act
- Detailed rules to be prescribed in the Guideline
  - ❖ The rules will be prescribed the approach on exercise of authority by the Fair Trade Commission or its investigators against specific objects under Article 47 of the Antimonopoly Act

## (2) Procedures subject to this system

- Administrative investigation procedures regarding cases involving unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act)
  - ❖ The procedure of compulsory investigation of criminal cases are out of scope of this system

## (3) Objects subject to this system

- An object stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act)

## &lt;Applicable Objects&gt;

- Consultation documents from the enterprise to the attorney
- Responding documents from the attorney to the enterprise
- Reports stating the legal advice based on the internal investigation performed by the attorney



- Minutes of internal meeting stating the discussion with the attorney on the legal advice at an internal meeting attended by the attorney, etc.

<Out of Scope Objects>

- Materials indicating facts forming the base of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act): so-called primary materials/fact finding materials
- Materials stating contents such as legal advice on provisions of the Antimonopoly Act other than the unreasonable restraint of trade, or on other laws and regulations

<Requirements>

- The enterprise shall request treatment under this system at the time of order for submission.
- The documents shall be treated appropriately (title of the document, place of storage, maintenance of confidence, etc.) .
- Submission of lists stating the time and date of preparation of the object, name of the person preparing the object, names of persons with whom the object was shared, attributes (letter, memorandum, internal investigation report, minutes of internal meeting, etc.) and the summary, etc. for each object that the enterprise is seeking treatment under this system, shall be performed within a specified period of time.
- If an out of scope object is included, submit a copy of such object or report its contents to the Fair Trade Commission.
- It shall not have illegal purposes.

(4) Scope of legal professionals

- An attorney as prescribed in the Attorney Act, who engages in legal practices independently from the enterprise (does not have employment relationship with the enterprise)
- ❖ So-called in-house attorneys and foreign attorneys (including Registered Foreign Lawyers) shall be treated as follows (to be expressly stated in Guidelines):
  - In-house attorneys shall be included within the scope of Legal Professionals if it is clear that, as triggered by the discovery, etc. of violating facts the attorneys will get out of the directions, orders and supervision in accordance with the instruction from the enterprise who is the employer and that the attorneys will engage in legal practices independently.
  - With respect to international cartel related to an alleged violation case, objects stating the contents of consultation between the enterprise and foreign attorney regarding response to foreign competition laws (excluding so-called primary materials/fact finding materials in (3) above) shall not be subjected to submission order under Article 47 of the Antimonopoly Act.

(5) Determination procedure (measures for prevention of abuse)

- Determination procedure by the Fair Trade Commission

- With respect to objects that have been requested to be treated under this System, the investigator shall order the submission of the object, keep a seal, and place under the management of the Determination Officer.
- Determination Officer shall confirm whether the object satisfies the conditions for inclusion within the scope of this system.

(6) Return

- Objects confirmed to be within the scope of this system as a result of the determination procedures shall be promptly returned. However, the Determination Officer shall transfer objects that could not be confirmed to satisfy the requirements of this system under the management of the investigators.

(7) Measures to secure confidentiality in determination procedure

- Place in an envelope, etc. and seal at the time of submission order.
- Determination Officer shall be appointed at the Secretariat (a bureau different from the Investigation Bureau).
- The object shall be managed under the Determination Officer who performs the determination procedures.

(8) Measures to block influence on other administrative investigations

- For administrative investigation procedures regarding unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act) by an act of violation jointly conducted by multiple enterprises in secret that lacks material evidence clearly indicating the presence of such act, voluntary cooperation by enterprises under the new leniency program is extremely important for detection and solution of such acts of violation. Thus, this system is being designed to ensure more effective implementation of the new leniency program.  
In light of the unique circumstances of unreasonable restraint of trades and the purpose of this system, it is clear that the System cannot be introduced to other administrative investigation as is, and will not have influence on other administrative investigations. Consequently, provisions on measures to block influence is unnecessary.

(9) Relationship between the use of the System and aggravation or mitigation of surcharge

- Under the new leniency program, whether or not this system is being used shall not be an item for evaluation of degree of cooperation with the investigation.
- New sanctions against abuse of this system itself shall not be established. In case an abuse of this system falls under the crime of obstruction of inspection (Article 94 of the Antimonopoly Act), etc., relevant provisions shall be applicable.

(10) Application of the system in the process of interview

- The subject of this System shall be objects, and is not applicable to deposition (interrogation and voluntary interview).
  - ❖ From the perspective of making the new leniency program more effective (perspective of ensuring that employees do not hesitate to provide attorneys with facts), the Guideline shall be prescribed expressly that in principle, no questions will be asked on the communication between employees and attorneys stated in the object within the scope of this system.

(11) Litigation/Objections regarding determination procedure

- Decision of the Determination Officer has no feature as a disposition, and itself shall not be the subject of litigation or filing of an objection; however, an objection pursuant to the provisions of Article 22 of the Rules on Investigations by the Fair Trade Commission as well as an action for the revocation pursuant to the provisions of the Administrative Case Litigation Act may be filed with respect to the disposition by the Fair Trade Commission.
- To clarify that the order for submission is made under this system, the Fair Trade Commission will prepare a format for submission order under this system.

○ Other

- The revision of Antimonopoly Act including the review of the administrative surcharge system, etc. does not add new investigation authority.
- The Fair Trade Commission shall add to the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” (December 2015) that employees, etc. of the applicant for the leniency program may note down on the spot after the completion of interrogation conducted by investigators.
- The Fair Trade Commission will immediately consider the expansion of the scope of administrative investigation procedures subject to this system, such as inclusion of alleged violation cases of Antimonopoly Act related to alleged violation cases of competition laws in other countries. When considering it, the Fair Trade Commission is required to note that it needs to take into account how this system is implemented and should not lead to any regime that puts small- and medium-sized enterprises at undue disadvantages and affects other Japanese laws and regulations.