



**The Second ACPF Forum (2)**

**The Contents of the Amended Anti-Monopoly Act and Issues in Practice**

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This is the second part of the lecture continued from the ACPF Mail Magazine No. 3

**4. Amendment Point 2. New System of Reduction and Exemption of Surcharge**

**(1) Problems of the current system of reduction and exemption of surcharge**

① In the current system of reduction and exemption of surcharge, the ratio of reduction and exemption are evenly and uniformly determined, and the degree of cooperation of the entrepreneurs applying to clarify the facts of the case, excluding the first applicant before the investigation, did not reflect the decision of the ratio of reduction of the amount of money for applicants. Therefore, entrepreneurs who had assured the order of their application did not cooperate for the investigation of the Fair Trade Commission.

② Because of the limitation of the number (five at maximum) of the applying entrepreneurs, those entrepreneurs which have identified a violation of the Act and want to cooperate with the investigation of the Fair Trade Commission through internal investigation of their companies could not efficiently utilize the reduction and exemption of surcharge system due to the fact that application quotas were filled soon after the date of the Fair Trade Commission's investigation.

**(2) New System of Reduction and Exemption of Surcharge**

The new system comprises a two-pronged approach: the ratio of reduction and exemption ratio (fixed) in proportion to the application order and the ratio of reduction in proportion to the degree of cooperation of the entrepreneur for clarifying the facts of the case.

(Slide 3)

**Two stories**

New System of Reduction and Exemption of Surcharge

	Order of Application	Reduction and Exemption Ratio by the Order of Application	Reduction and Exemption Ratio in Proportion to Cooperation	Total Reduction and Exemption Ratio
Before the investigation	1 <sup>st</sup>	Exemption of all the surcharge	—	Exemption of all the surcharge
	2 <sup>nd</sup>	20 %	Maximum +40%	Maximum 60%
	3 <sup>rd</sup> to 5 <sup>th</sup>	10 %		Maximum 50%
After the investigation	6 <sup>th</sup> ~	5 %	Maximum +20%	Maximum 45%
	3 corporates at most (Note)	10 %		Maximum 30%
	4 <sup>th</sup> ~	5 %	Maximum 25%	

(Note) Only for within the 5<sup>th</sup> both before and after the investigation

- ① In the amendment, the ratio of reduction pursuant to the application order and the ratio of reduction in proportion to the degree of cooperation of the violating entrepreneur for clarifying the facts of the case are added.

Please refer to Slide 3. The disposition for the first applicant before the investigation is exemption of surcharge, which is the same as in the preceding Act. However, the second applicant may obtain a reduction ranging from 20% to a maximum of 40% in proportion to the degree of the cooperation with the investigation, which amounts to a 60% reduction in total.

So, it can be expected that the amendment will encourage the violating entrepreneurs applying for reduction and exemption to continuously cooperate during the whole period until the administrative monetary penalty payment order is issued.

- ② The amendment abolished the maximum limit of applicants for reduction and exemption. Under the old Act, the entrepreneurs which application

orders were in the fourth and more were not available to apply for reduction and exemption even if they had significant evidence and desired to cooperate with the investigation. The amendment allows these entrepreneurs to obtain a 5% reduction within the application of the deadline and maximum 20% reduction at maximum in proportion to the degree of the cooperation with the investigation, a 25% reduction in total.

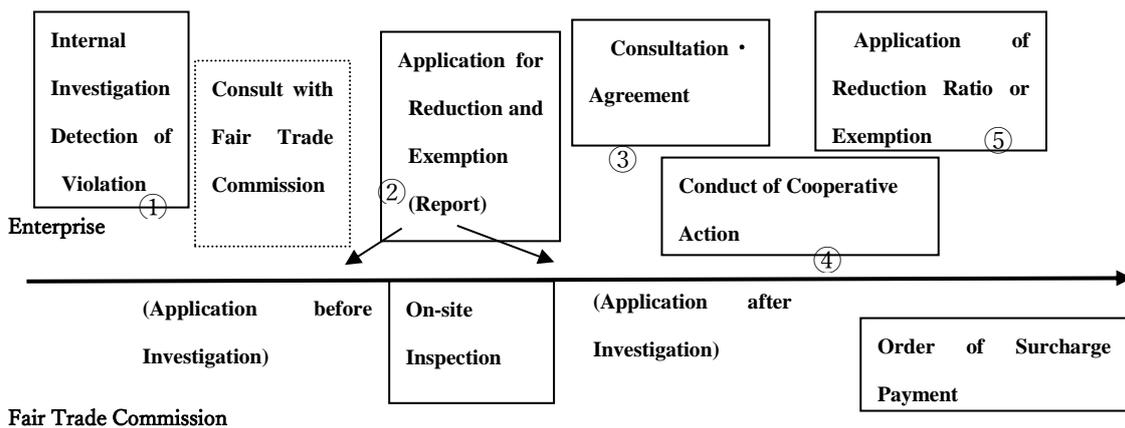
The amendment provides all the violating enterprises, including those which knew the possibility of violation by the commencement of the investigation, with opportunities of self-motivating cooperation which win the incentives.

The deadline of application for reduction and exemption after the date of commencement of investigation is stipulated as 20 business days after the date of commencement of the investigation (Regulations of Reduction and Exemption of Surcharge, Article 8). Therefore, enterprises which discover possible violations by the commencement of investigation should quickly conduct their internal investigations and swiftly decide if the enterprise would apply for reduction and exemption.

**(3) Flow Chart of Procedures of the New System of Reduction and Exemption of Surcharge**

General Flow Chart of Application for Reduction and Exemption of Surcharge

(Chart 1)



○ **Opportunities to Apply for Reduction and Exemption (Chart ①)**

Many enterprises start to consider applying for reduction and exemption of surcharge when they notice that they are suspected to have engaged in the unreasonable restraint of trade. Top executives decide whether they will apply for reduction and exemption or not, through the assistance of the officer in charge of legal affairs, consulting with attorneys at law with expertise in the Anti-Monopoly Act, considering whether the facts amount to a violation or not, and consulting (consultation prior to the application) with an officer in charge of the Fair Trade Commission.

○ **Application for Reduction and Exemption (Chart ②)**

In the application for reduction and exemption, the violating enterprises are requested to report the facts relevant to the involved violation and submit documents (report etc.)

○ **Reporting Enterprises**

The applicants for reduction and exemption who report violations, excluding the first applicant to report the violation, are called “reporting enterprises”. Reporting enterprises can apply for consultation (Chart ③). When the application is submitted, the Fair Trade Commission is obliged to address the consultation.

○ **Consultation between the reporting enterprise and the Fair Trade Commission (Chart ③)**

During the consultation, the reporting enterprise and the Fair Trade Commission discuss the scope of cooperation by the reporting enterprise and the reduction that the Fair Trade Commission will give in return. The procedures to calculate reduction ratios are done in two ways: the first is to seek “consent on a specified proportion” and the second is to seek “consent on both the upper limit and the lower limit”. The details are explained in (4).

○ **Agreement on the Contents of Cooperation and the Reduction Ratio (Chart ③)**

There are two procedures for reaching consent on the amount of the reduction: “consent on the specified proportion” and “consent on both the upper limit and the lower limit”. The details are explained in (4).

○ **Implementation of Cooperative Acts by the Reporting Enterprise (Chart ④)**

The reporting enterprise shall implement the report based on the agreement until the date decided in the agreement. If the enterprise does not implement it by the

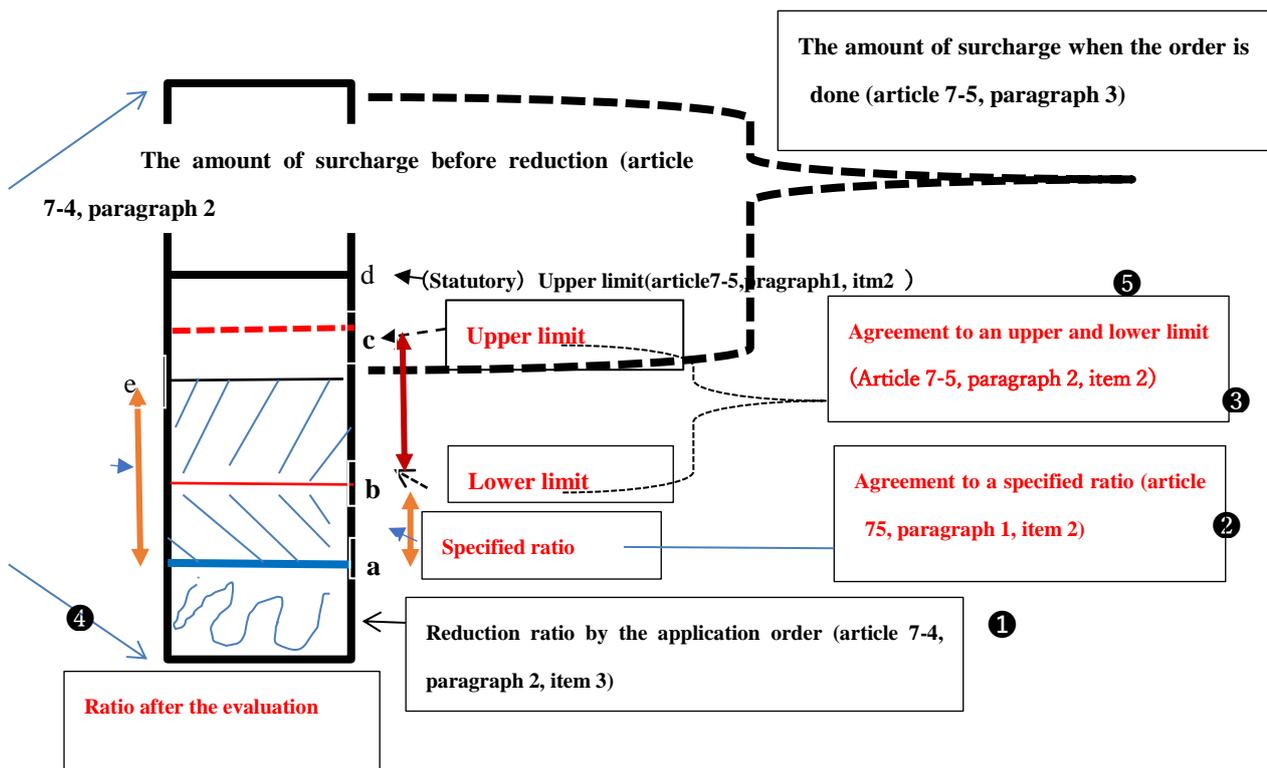
deadline, it is disqualified from participation in the system of reduction of the surcharge.

○ Application of Reduction Ratio in the Order of Payment of the Surcharge (Chart ⑤)

In the order of payment of the surcharge, reduction ratios in accordance with the application order and in proportion to the cooperative degree in clarifying the real situation shall be calculated. A detailed explanation will be revealed in (4).

**(4) Detailed explanation of the decision of reduction and exemption ratio and calculation procedures by the Fair Trade Commission**

(Chart 2 )



**A) Reduction Ratio pursuant to the Application Order**

The reduction ratio pursuant to the application order is determined by the order only notwithstanding the existence of consultation or agreement (Chart ① [Reduction ratio by the application order, Article 7-4, paragraph 3, item 3])

**B) Reduction Ratio Pursuant to the Degree of Cooperation for Clarification of the Facts of the Case**

The calculation ratio is set through the consultation between the Fair Trade Commission and the reporting enterprise. During the consultation, the reporting enterprise summarizes the scope of cooperation (documents to be submitted ) after the agreement, the Fair Trade Commission considers whether it should agree or not from the viewpoint of whether the cooperation will be of help clarifying the facts of the case, and if the Fair Trade Commission enters into an agreement, it sets the reduction rate by evaluating the degree of cooperation, and informs the enterprise of the proposed rate and asks the enterprise for its agreement.

**a) If the Commission requests “the consent of a specified ratio” in regard to the reduction ratio (the Act article 7-5, paragraph 1, item 2)**

When the reporting enterprise understands the nature of the information it will be required to provide after consent, it can explain the contents of the involved documents, and the Fair Trade Commission can also notice and evaluate the contents of the involved documents. The Fair Trade Commission can, then, set the “specified ratio” ( $a \Leftrightarrow b$  in the Chart 2) as the reduction ratio. The reduction ratio is then presented to the reporting enterprise, which is requested to consent to the amount of the reduction. This is called “agreement regarding a specified ratio” in the above Chart ②.

For example, when the reporting enterprise conducts interviews with corporate officers and informs the Fair Trade Commission of the results, the enterprise explains the contents of the hearing result and its attitude to be able to submit the result report immediately after the consent, and the Commission evaluates the contents, sets the reduction ratio, and presents the rate to the reporting enterprise.

**b) If the Commission requests “the consent of the upper limit and the lower limit” in regard to the reduction ratio (the Act, article 7-5, paragraph 2, item 2)**

The reporting enterprise may ask the Commission during the consultation to take into consideration new facts and documents which are expected to be submitted after the consent in setting the reduction ratio, after explaining the documents which can be immediately submitted after the consent.

For example, the reporting enterprise may explain that it can obtain certain documents which can more directly prove the violation because it will conduct interviews of retired core officers and will provide the results of the

interviews to the current officers.

In this case, the Commission does not know if it can obtain the new documents (the interview results for retired officers in the above case) and does not know the contents of the documents before it can obtain them. Therefore, the Commission cannot evaluate the value of the evidence and cannot set the reduction ratio as a specified ratio.

In the amended Act, the Commission can set the lower and upper limit of the reduction ratio (setting of reduction ratio “with latitude” by replacing the fixed specified ratio, and request the enterprise to consent to the upper limit and lower limit (Chart ③)).

When the agreement is reached, the Commission can decide the final “reduction ratio in proportion to the degree of the evidence provided”. This is called the “ratio after the evaluation (Chart ④)” based upon the evaluation of the contents of the documents which the enterprise additionally submits before the Commission orders payment of the surcharge.

By taking the above example, when “the consent of the upper limit and the lower limit” is made, the Commission checks if the interviews of retired officers have been conducted or not, and evaluates the value of the evidence, and accordingly calculates a proper reduction ratio.

**c) If the Commission requests “consent of upper limit and lower limit” instead of “consent of the specified ratio”**

The Commission can request “consent of upper limit and lower limit” instead of “consent of the specified ratio”. The amended Act stipulates that “the circumstances are admitted that report of the involved facts and documents takes for a certain period after the involved consent is agreed, in case that the enterprise deems to have high plausibility that the enterprise will comprehend new facts and documents in the involved case after the consent” (the Act, article 7-5, paragraph 2, introductory clause).

I commented in the presentation that since the hurdle for “the consent of upper limit and lower limit” was more or less high, an abstract explanation that the enterprise can obtain proof after consent would not cause the Commission to make a consent request.

However, according to draft guidelines of the Fair Trade Commission published on 2 April 2020 (since the public comments are being arranged with the

deadline of 15 May 2020, the finalized draft will be published soon.), since consideration of the reduction of the surcharge based on the scope of cooperation after the consent should be beneficial even for the enterprise, the Commission will be able to offer “consent of upper limit and lower limit” to enterprises promising cooperation after the consent. (Draft guidelines 3, (2), b). Therefore, even if the contents are abstract, if the enterprise offers application of the reduction ratio by taking consideration of the cooperation (submission of documents and others) promised by the enterprise, the Commission will request “the consent of the upper limit and lower limit”. I would like to revise this point.

#### **d) How to set the upper limit and the lower limit**

Even if the Commission requests “the upper limit and the lower limit”, the enterprise can explain the contents of the documents which will be submitted immediately after agreement is reached. The Commission should be able to evaluate and set “the specified ratio”. Therefore, the lower limit is calculated from the “specified ratio” (Chart b, above).

The upper limit is set by adding a proportion of the cooperative ratio in clarifying the facts of the case for which it is expected that the enterprise will uncover new facts (Chart c, above) (the Act, article 7-5, paragraph 2, item 2). The upper limit is prohibited to exceed the maximum limit of the legal reduction ratio (Chart d, above).

Since “the consent of upper limit and the lower limit” can be obtained even if they are abstract, how to decide the upper limit is up for debate. The Commission comments in the published administrative guidelines state that since it is difficult for the Commission to precisely judge at the time of consent what kinds of facts the enterprise is aware of and will report after consent, the legal maximum reduction shall be set as the maximum ratio. For example, the upper limit shall be set as a 40% reduction for enterprises which submit applications before conducting interviews, and as a 20% reduction for enterprises which submit applications after the interview.

### **C The Reduction Ratio Applied in the Order of the Payment of the Surcharge**

The Commission sets the amount of surcharge (“The amount of surcharge in the order” in the above Chart ⑤) in the order of the payment of the surcharge and by considering both the amount of the reduction ratio according to the application order (Chart ①, above) and the reduction ratio in proportion to the degree of cooperative acts of the enterprise to clarify the facts of the case.

As a review, we reconfirm that the reduction ratio in proportion to cooperative acts to clarify the facts of the case means “the involved specified ratio” when the enterprise makes “the above a) consent in specified ratio” (Chart ②, above). The reduction ratio in above b) “consent in the upper limit and the lower limit” (Chart ③, above) means that the reduction ratio which the Commission which actually receives the reports on the facts and documents of the enterprise evaluates the substantial degree of contributions to clarifying the facts of the case and decides in proportion to the degree of cooperative acts of the enterprise.

The calculation of “the ratio after the evaluation” (chart ④, above) will be done at the discretion of the Fair Trade Commission.

(To be continued)