

Future Measures against Violations under the Act against
Unjustifiable Premiums and Misleading Representations (the
“Act”) Including Introduction of a Surcharge System, Etc. in
Order to Ensure the Effectiveness of Regulations over
Misleading Representations under the Act
(Replies to the Consultation)

June 10, 2014
Consumer Commission

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List of Members and Summary of Deliberations

1. Introduction

In the autumn of 2013, a series of inappropriate food labeling at hotels, department stores, restaurants and other establishments were uncovered. In the wake of those incidents, the Japanese government set up the “liaison meeting among relevant ministries, agencies, and other offices on food labeling and other issues.” On December 9, 2013, the liaison meeting determined the “measures for ensuring appropriate food labeling practices” that were designed to restore consumer confidence, for reasons that those inappropriate incidents might erode Japanese and foreign consumer confidence in “Japanese food.” One of these measures, the “proposal that new measures including the imposition of a surcharge or other punishment on violations be deliberated” under the Act against Unjustifiable Premiums and Misleading Representations (No.134 Act of 1962; hereinafter referred to as the “Act.” All references to the article numbers hereinafter refer to those of the Act). On the same day, the Consumer Commission was consulted by the Prime Minister with respect to the “future measures against violations under the Act against Unjustifiable Premiums and Misleading Representations including introduction of a surcharge system, etc. in order to ensure the effectiveness of regulations over misleading representations under the Act.”

In response to such consultation, the Consumer Commission recommended in its “Opinion as to ‘Measures to Secure Appropriate Food Labeling Practices’” published on December 17, 2013 that an expert panel be set up ... to discuss new measures including introduction of a surcharge or other punishment against inappropriate food labeling incidents under the Act with the cooperation of the Consumer Affairs Agency.” On the same date, the Consumer Commission set up the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act against Unjustifiable Premiums and Misleading Representations.

The expert panel held its first session on February 6, 2014, and the second and subsequent sessions were held at the same time as plenary sessions twelve times until June 10. Thus, a total of thirteen sessions were held for investigation and discussion. At a total of six sessions held in February and March, the members received briefings about the development of the revision bill of the Act which was submitted to the Diet in 2008 and was repealed later, and the results of deliberations at the Study Group for Administrative Methods for Consumer Property Damage (October 2011 to June 2013) at the Consumer Affairs Agency, as well as about the subsequent development of discussions, and conducted investigations and discussion about the need for introduction of a surcharge system and its purport and purpose, legal requisites, and other procedures, if introduced. Prior to entering into the full-scale discussions about each of the relevant issues, the expert panel conducted hearings from business operators twice and, at the same time, a hearing about the status of operations of the

existing surcharge systems¹ and other issues. Then on April 2, 2014, the expert panel once organized the progress of deliberations of each of the relevant issues and published it as the Interim Report. After that, they conducted investigation and discussion about the “future measures for damage recovery” and repeated discussions about the points of issue that would need continued discussion in the text of the Interim Report, and conducted hearings from business operators twice.

Based on such investigation and discussion, we deal with the future measures against violations including introduction of a surcharge system under the Act in the paragraphs that follow.

We expect the government to design the concrete system toward introduction of a surcharge system under the Act as the consumer law based on the approaches presented below.

2. Need for introduction of a surcharge system under the Act

(1) Reality of consumer damage caused by misleading representations

With respect to consumer damage caused by misleading representations or advertisement, the number of consultations about consumer damage received only by the National Consumer Affairs Center amounted to approximately 50,000 cases a year (according to the Annual Report on Consumer Affairs 2010 and the Annual Report on Consumer Affairs 2013, the number of consultations focusing on “representations and advertising” has exceeded 40,000 cases each year since FY2004, and amounted to 49,492 cases in 2012². Thus, the consultations about “representations and advertising” as a percentage of the total number of consumer consultations have been on the increase year by year (Appendix 1).

(2) Difficulty in damage recovery in the consumer damage caused by misleading representations

In consumer damage cases caused by misleading representations, it is difficult to establish a causal relationship between the subject representation and the resulting damage, or it is not necessarily clear what should in nature be considered as damage. For these reasons, those cases are often unfit

¹ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No.54 of 1947), Financial Instruments and Exchange Act (Act No.25 of 1948) and Certified Public Accountants Act (Act No.103 of 1948).

² In addition, the real cases were pointed out where the representations or advertising merely trigger choices of products and services by consumers and in actual consumer consultation, the subsequent method of distribution or any contractual issues or other issues with termination are mainly complained about, although it is triggered by misunderstanding caused by misleading representations or advertising and, as a result, such consultations will not be categorized into “representations or advertisement” in some cases. Especially in the type of transaction wherein consumers enter into a transaction after making decisions on products and services only based on advertising such as mail-order trading services, including Internet shopping services, of which users have been increasingly growing in recent years, the representations or advertising would quite substantially affect consumer choice. Given these situations, it is pointed out that there would be so many potential cases, among consumer consultations received by the National Consumer Affairs Center, which have not been categorized into misleading representations.

for civil litigations by their nature for the reason that it is difficult to calculate the amount of damages suffered by individual consumers or the amount, even if it can be calculated, is too small. The same is true in the cases under the Special Act on Consumer Court Proceeding³, and there are so many cases in which it is difficult for consumers to recover their damages once they have suffered such damages. Thus it is highly necessary to deter consumer damage caused by misleading representations in advance.

(3) Need for introduction of a surcharge system

In contrast with these realities and characteristics of damages, the cease and desist orders under the current Act that address such damages would not be sufficient as incentives to deter violations in advance, as it is intended to stop violators from making misleading representations toward the future and to prevent damage from spreading and recurring.

More specifically, the fact that it is difficult for consumers to recover damages means that business operators that made misleading representations continues to retain unfair profits generated from sales they earned through misleading representations. By contrast, the current cease and desist order does not deprive violators of their unfair profits and would not effectively operate to deter the violations from an economic standpoint. The introduction of a surcharge system wherein economic disadvantages will be imposed on violators would deprive business operators that have gained customers through misleading representations of their unfair profits. Such deterrent force would not only work well to prevent consumer damage from occurring but also have the effect of constructing a healthy and sound consumption market by ensuring the impartiality with business operators that comply with laws, regulations and ordinances.

Therefore, it is highly necessary, as measures to deter misleading representations in advance, to introduce a surcharge system to impose economic disadvantages on violators and discourage their incentives for the violations, in addition to the current cease and desist order.

3. Purport and purpose of the surcharge system, if actually introduced

The purpose of a surcharge system is to deter misleading representations in advance in order to protect consumer benefit.

With respect to the surcharge system covering misleading representations, the “Bill for the Act on Partial Revision of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade

³ “Act on Special Provisions to the Civil Court Proceedings for Collective Recovery of Consumer Property Damage” (Act No. 96 of 2013).

and the Act against Unjustifiable Premiums and Misleading Representations” (Appendix 2; hereinafter referred to as the “revision bill of 2008”) was decided at the Cabinet meeting in 2008 and was submitted to the Diet. This revision bill, however, was repealed later. As the jurisdiction over the Act was transferred to the Consumer Affairs Agency, the legal system of the Act was changed from the competition law system intended to secure fair competition to the consumer law system intended to secure general consumers’ voluntary and reasonable choice-making. As a result, in order to introduce the surcharge system into the Act, it was found appropriate to consider measures to reinforce the deterrent power of potential violations when comprehensive discussions about the victim relief system take place after the inauguration of the Consumer Affairs Agency.

The purpose of the current Act is to secure voluntary and reasonable choice-making by consumers, and the purpose of the surcharge system to be introduced into the Act should be considered to be to effectively deter misleading representations that would inhibit such voluntary and reasonable choice-making by consumers in order to secure such purpose of the current Act.

Thus, the direct “purpose” of the surcharge system is not to recover consumer damage. However, in light of the purpose of the Act as the consumer law, it is important to consider that this system will contribute to consumer damage recovery, especially given that it is highly necessary to deter misleading representations through introduction of a surcharge system because of the difficulty of damage recovery in the misleading representation cases and further that unfair profits of violators to be deprived are generated from payment by consumers. To this end, attention was paid to the consumer damage recovery when the conditions and other procedures of the surcharge system were deliberated.

4. Conditions for imposition of a surcharge

(1) Surchargeable cases

(i) Surchargeable acts⁴

- A. Representation of the better quality (Article 4, paragraph (1), item (i) and representation of the more advantageous quality (item (ii), *ditto*)

Misleading representation of the “much better quality” and misleading representation of the

⁴ If it is determined that there is more than one entity making misleading representations, you should consider that more than one entity will be subject to imposition of the surcharge. The current misleading representation regulations apply only to entities who have participated in the decision-making of details of the misleading representations, regardless of whether such decision is made by a single entity or more than one entity. When a surcharge is imposed, the need for deterrence of misleading representations will never differ depending on whether such misleading representations were made by a single entity or more than one entity. If by more than one entity, each of them would separately enjoy unfair profits caused by the misleading representations and imposition of a surcharge on each of them would not constitute double imposition.

“advantageous quality” are the basis of the misleading representation regulations under the Act, and make up most of the past cases to which the cease and desist orders were issued (Appendix 3). These representations substantially need to be deterred and should be subject to imposition of a surcharge.

B. Representation designated by public notice (Article 4, paragraph (1), item (iii))

Representation designated by public notice is the one designated by the Prime Minister as the “representation which is likely to be misunderstood by consumers” and would have been subject to the cease and desist order as part of the policy-making process from a preventive standpoint. However, it is unnecessary to consider it to be surchargeable under the present circumstances, as there has been a relatively small number of cases dealt with in the past cases in which the cease and desist orders were issued (Appendix 3).

C. Representation regulated as unproved advertisement (Article 4, paragraph (2))

It is highly necessary to consider the representation regulated as unproved advertisement⁵ to be surchargeable. The act of a business operator that enters into transactions by inducing customers with any representation that is highly likely to constitute the representation of the better quality without any reasonable supporting materials is malicious *per se* and it is strongly requested to deprive the business operator of unfair profits earned by it from such transaction by way of a surcharge. On the other hand, it is not appropriate to impose excessive burden of proof on the administrative agency from a standpoint of securing flexible and effective law enforcement especially with respect to the representation of effectiveness and efficacy.

However, the cease and desist order is intended to remove the current dangerous condition in response to the urgent need, and also is a tentative action in the sense that it is permissible to reshow the representation at issue by preparing reasonable supporting materials *ex post facto*. By contrast, the surcharge imposes economic disadvantage on the past act, and is different in nature from the cease and desist order in that the former has no implication referring to an interim action.

Therefore, attention should be paid to this difference in adopting the method for the representation regulated as unproved advertisement in the punishment in the form of a surcharge, and a surcharge should be imposed separately from the provision regarding the cease and desist order in Article 4, paragraph (2) unless the business operator submits reasonable supporting materials concerning the

⁵ In order to enable the cease and desist order to be issued promptly from a standpoint of preventing consumer damage from spreading, representation of effectiveness or efficacy will be considered to be the representation of the better quality and be subject to the cease and desist order if the relevant business operator fails to submit materials that support any reasonable grounds supporting the representation within a certain period of time.

representation about the effectiveness and efficacy within a certain period of time. Given the above, it is advisable to establish the procedural provisions setting forth, from a standpoint of protecting justifiable interest of the entity on which the surcharge is imposed, that the entity can challenge the imposition of the surcharge by producing reasonable supporting materials in the subsequent litigation to establish that the representation at issue is not misleading⁶.

As a matter of practice, in light of the cases involving the representations regulated as unproved advertisements to which the cease and desist order has ever been issued, it is difficult to consider that there would not be so many cases where the violators could have supplement reasonable supporting materials in the repeal litigations, and the enforceability of the surcharge system would be sufficiently secured by the above-mentioned provisional structure.

Even if it is permissible for violators to choose to challenge the imposition of the surcharge by supplementing reasonable supporting materials *ex post facto*, such reasonable supporting materials should have primarily been retained from the beginning of the representation⁷, and there is no need to award any special time grace to violators to supplement them when the surcharge is imposed.

D. Others

Whether or not it falls within any of the surchargeable acts should be considered so that business operators will not be unnecessarily intimidated, as necessary, by taking steps including clarification of the judgment criteria for the applicability of the requirements⁸.

(ii) Subjective factor

A. Whether or not subjective factors are necessary

Consumers may suffer damages through misleading representations, regardless of whether or not it is caused by the willful misconduct or negligence of the violator, and the inappropriate misleading should be corrected regardless of whether or not it is caused by willful misconduct or negligence.

⁶ Should the provision having the similar effect to that in Article 4, paragraph (2) be set forth with respect to the surcharge, it would be impossible for the violators, even if they could prepare reasonable endorsing materials after the issuance of the order for payment of a surcharge, to insist on the repeal of such order depending on those materials in the relevant litigation. In this regard, a surcharge would be imposed simply by treating the representation made without any reasonable endorsing materials that would support the representation as misleading representation. In that case, however, it is necessary to add a new category of misleading representation and it would be difficult to directly organize how the nature of a surcharge and the procedure for imposing it under the Act should be thought of.

⁷ In the judicial precedent, it is held that the “business operator should make the representation after retaining in advance reasonable endorsing materials that would support such representation, and must not sell the products with the presentation without such materials” (November 26, 2010 judgment of the Tokyo High Court).

⁸ In this regard, many emphasized the need for securing the clarity in hearings from business operators, offering opinions calling for the formulation and communication of administrative guidelines, and the establishment of a consultation desk for business operators.

However, in cases where it objectively constitutes the misleading representation even though the business operator has exercised sufficient care, the deterrent of a surcharge would not work and would not lead to the achievement of the goal of the system.

On the other hand, merely because the misrepresentation of the better quality (Article 4, paragraph (1), item (i)) or the misrepresentation of the more advantageous quality (item (ii), *ditto*) should be recognized based on the requirement that it is “much” better or “much” more advantageous, many of the relevant cases would have been caused by the willful misconduct or a remarkable lack of objectively reasonable care. If any subjective factors should be added to the requirements in addition to the objective violation, it is necessary to consider that there will be the burden of enforcement for such recognition.

Therefore, with respect to whether or not any subjective factor is necessary as the requirement for imposition of a surcharge, a surcharge will be imposed, in principle, on any misleading representation, based on the basic recognition that a subjective factor is necessary by which a surcharge should be imposed on the violator in light of the purpose of the system that is to deter misleading representations. Only if the violator who did not intentionally make the misleading representation presents any reasonable counterevidence that it had exercised the certain duty of care, it would be sufficient to exceptionally refrain from imposing a surcharge.

B. Details of the duty of care

Details of the duty of care that a business operator should exercise would differ depending on its size and category of business. The manners of misleading representations vary from case to case, and there are a wide variety of forms in the duty of care it should exercise in making the representation. So it is difficult to set up a uniform standard to judge that the business operator has exercised the duty of care depending on how much investigations it conducted.

Therefore, details of the duty of care that a business operator should exercise so that a surcharge may not be imposed on it should be considered based on the circumstances in individual cases (such as the magnitude of an impact that the manners of misleading representation would have on consumers, and the size of the inspection and verification duties of a business operator), as well as on whether it has exercised the duty of care as required when it makes the representation (such as a certain action in which it is found reasonable for it to believe in information obtained from other entities)⁹.

⁹ In this regard, the revision bill of 2008 (Appendix 2) requires the existence of willful misconduct or negligence (“provided that such business operator does not know throughout the whole period from the day on which it did such act until the day on which such act ceased to exist that the representation resulting from such act fell under any one of the following, and it is believed that such failure to know was not due to the substantial lack of reasonable care”), and the business operators presented their opinion in their hearings that the requirements in the revision bill of 2008

(iii) Criteria based on size

There is an issue of whether or not the surcharge of which amount is less than a certain amount should be excluded by so-called “cutback.” Based on the purpose of the system that is to protect consumer interest by deterring misleading representation in advance, if a business operator has caused consumer damage by misleading representation, such business operator would normally be subject to imposition of a surcharge, regardless of the size of such damage. Misleading representations are often made by small-sized business operators. In order to trap such violations, it can be considered that a surcharge should be broadly imposed without any criteria based on size.

However, if law enforcement is not enough despite the increase in the number of surchargeable cases, no deterrent effect of misleading representations can be secured.

For this reason, a certain cutback is necessary in order to make the surcharge system effective, given the burden of enforcement.

With respect to the base amount of cutback, it is necessary to consider establishing appropriate requirements by taking, among other issues, the possible effects of the violation on consumers and the possible effect of the imposition of a surcharge on the relevant business operator¹⁰ into account after examining the past cases to which the cease and desist orders were issued, from a standpoint of securing the deterrent effect of the surcharge system.

(iv) Statutory exclusive period

In order to decide whether the applicable period should be restricted if a reasonable period of time elapses after the violation occurs, it is necessary to consider the burden of law enforcement authority resulting from dissipation of materials necessary for the calculation of the amount of a surcharge, as well as the burden of the relevant business operator. Accordingly, there should be a certain reasonable period of time based on the statutory exclusive periods under the existing surcharge

should be followed, alleging that the surcharge system should be applied only to highly malicious cases.

However, there are many cases in which it is difficult to identify the negligence as minor or gross even in the civil litigation practice. If the entity that identifies it is the administrative agency and gross negligence is a requirement in the imposition procedure that needs to be dealt with promptly, it would be difficult to impose a surcharge. Moreover, what will become a problem when the violator could not identify any error in the information provided by its supplier is whether or not there was the negligence, not gross negligence. If the violator was misled even though it checked with the supplier as necessary in light of common sense, there would have been no minor negligence. Thus, drawing a line by gross negligence would substantially be nonsense.

¹⁰ As described below, the amount of surcharge was calculated based on the amount of sales from the products and services in question under the revision bill of 2008 (Appendix 2). Following this, the cutback would be based on the size of sales from the products and services in question, not the size of the relevant company.

systems.

(2) Calculation of surcharge amounts

(i) Basic concept

It is considered that the amount of a surcharge necessary to secure the deterrent effect of violations through a surcharge should be larger than the unfair profits earned by the violator in case of the violation due to willful misconduct. However, given that it is difficult to establish whether or not the violation was due to the violator's willful misconduct, the amount of a surcharge should be calculated based on the amount equal to the unfair profits earned by the relevant business operator, regardless of the violator's subjective view.

The "amount equal to unfair profits" as used herein should be calculated, without exception, using a certain formula, not using a separate method of calculation on a case-by-case basis. The manners of misleading representations vary from case to case, and unfair profits earned by violators would differ depending on the transaction covered by the relevant case, profitability ratio and other factors. In addition, it is remarkably difficult to strictly calculate "unfair profits" in individual cases. As a result, if the amount of a surcharge is to be calculated in each case, it would take time to conduct investigations necessary for enforcement, which would make it impossible for the law enforcement authority to impose a punishment promptly.

The revision bill of 2008 defined the calculation rate based on the operating profit ratio of each business operator and provided that the amount of a surcharge should be calculated by multiplying the amount of sales from products and services subject to the violation by such profit ratio (Appendix 2). However, the calculation rate should be adequately defined after examining the past cases to which the cease and desist orders were issued, in order to give incentives necessary and sufficient to deter misleading representations in advance, so that violators no longer retain unfair profits at hand.

(ii) Addition to the surcharge, subtraction from the surcharge or exemption of the surcharge

Additions to the amount calculated pursuant to item (ii) above deserve proactive consideration, as it raises the deterrent effect of violations. Additions would include, for example, those for repeated violators. In designing the system in the future, this should be considered in parallel with verification of whether it is necessary, also in light of the fact that there has been so many repeated violators in the past cases in which the cease and desist orders had been issued¹¹.

¹¹ Additions would include those by reason of cover-ups of violations (including cover-ups of whistleblowing). However, in these cases, the amount of a surcharge would be added based on how the violation occurred and the

Moreover, subtraction from the surcharge or exemption of the surcharge also deserve consideration as measures to prevent damage from spreading by urging violators to voluntarily declare violations to detect misleading representations early, as well as to encourage business operators to build up their voluntary compliance systems, through which the deterrent effect of violations in advance will be increased¹².

(iii) Applicable period

The applicable period for which the amount of surcharge is to be calculated should be restricted to a certain reasonable period of time, in light of the burden of enforcement for which the amount of surcharge is calculated.

Such period should be adequately defined as the period that would be reasonable to attain the purpose of the system of deterring violations, after examining the past cases to which the cease and desist orders were issued¹³.

(3) Whether or not the administrative authorities should have discretionary power

Which system should be chosen—the system in which the competent administrative authorities have the discretion as to the application of law or the non-discretionary and standardized system—should be considered based on characteristics of a surcharge that is to impose economic disadvantage and the general principle of administrative disposition that fairness and transparency should be secured.

The situation in which the burden of law enforcement will be increased as a result of the introduction of the surcharge system, which will, in turn, adversely affect the current enforcement by issuing cease and desist orders, should be avoided. For example, it is often inappropriate to impose a surcharge in some specific cases, such as immaterial cases. If the administrative authorities have the discretionary power, it is possible to exclude such cases from the imposition of a surcharge. Such cases can also be dealt with by restricting the surchargeable cases to a certain extent by setting up the cutback or other requirements.

Therefore, in introducing the surcharge system into the Act at this point of time, the system should

circumstances after the violation occurred, not the relevant misleading representation *per se* and the situations vary from case to case. Therefore, it is necessary to consider whether or not the system can be designed in which additions due to such cover-ups are to be made.

¹² However, with respect to subtraction from the surcharge or exemption of surcharge, it is necessary to consider the relationship with the purpose of the surcharge system that is to deter violations by depriving violators of their unfair profits.

¹³ The revision bill of 2008 stipulated that the applicable period was three (3) years (Appendix 2).

not be designed in such a way that the administrative authorities may have the discretion.

5. Procedures for imposition of a surcharge

With respect to the procedure for imposition of a surcharge against a violation, the business operators presented their opinions in their hearings, asking for procedural security such as giving of an opportunity to give explanations in advance. The revision bill of 2008 provided that the advance procedures are the same as those for the cease and desist orders, and gave the opportunity to give explanations in advance. Based on this, business operators should consider any similar procedural security as that under the cease and desist order.

The collection procedure should be designated in accordance with the existing surcharge systems, as it is to be the procedures necessary and appropriate for the execution of a disciplinary action to impose economic disadvantage.

With respect to enforcement, it is pointed out that it is necessary to further discuss the role-sharing and collaboration between the national government and prefectural governments¹⁴, based on the measures for strengthening of administrative monitoring and guidance under the Act for Partial Revision of the Act against Unjustifiable Premiums and Misleading Representations which was submitted to the 186th session of the Diet and was enacted on June 6, 2014.

6. Future measures for damage recovery

(1) Damage recovery mechanism and its methodology

Given the background to the repeal of the revision bill of 2008 because it was difficult to recover damage in the misleading representation cases, and it is appropriate to discuss the introduction of the surcharge system into the Act when the victim relief system is comprehensively discussed, the mechanism for promoting consumer damage recovery should be introduced in designing the surcharge system.

To this end, in issuing a surcharge payment order, a system should be adopted in such a way that a certain amount will be deducted from the surcharge amount, taking voluntary actions taken by the violator, such as reimbursement to consumers. Unfair profits of the violator that should essentially be deprived through a surcharge should be refunded to the victims. If the violator voluntarily refunds unfair profits earned by it to consumers, it should be reflected in the imposition of a surcharge. By

¹⁴ This would include, if it is assumed that the national government will issue a surcharge payment order in a case in which the prefectural government has already issued the cease and desist order, consideration of the procedure for such issuance.

doing so, it would be possible to promote damage recovery, while maintaining the deterrent effect of the surcharge system.

(2) Deductible voluntary action system

(i) Reimbursement to consumers

Deductible “voluntary action” should basically take the form of a reimbursement to consumers who have purchased the subject products and services and have lost unfair profits that the violator retains at hand. Voluntary reimbursement to consumers is what damage recovery should essentially be, and is an action that will help the violator to restore its brand value and reputation. Promotion of such reimbursement would benefit both consumers and business operators.

The scope of the amounts of deductible reimbursement should not be limited to those relating to the surchargeable act of representation, given the fact that reimbursement by business operators to consumers is often made without restricting the model numbers and sale period of the relevant products to the scope of the act of representation subject to the surcharge, and should extend to reimbursements that would be considered to form an integral part of them from common sense.

The amount to be deducted should be the entire amount to be refunded (up to the amount of prices), and should not be restricted to the amount equal to the price multiplied by the surcharge calculation ratio, from a standpoint of promoting voluntary reimbursement by business operators.

As the deduction system is a mechanism to urge violators to help consumers to recover their damage, the deductible reimbursement needs to be voluntary. Therefore, if the violator has been passively compensated for damage under the judgment or other decree of a civil litigation, such amount should be excluded, in principle, from the deduction¹⁵.

Moreover, the amount of reimbursement made properly and equally should be deducted. The system should be designed in such a way that the amount of reimbursement not made properly and equally may not be deducted. For example, as it is inappropriate to deduct the amount of the surcharge based on the reimbursement made only to any particular consumers, it should be one of the conditions for being accepted as the reimbursement made properly and equally for business operators to appropriately communicate the reimbursement to consumers.

¹⁵ If, however, the violator making voluntary reimbursement has made payments under the judgment or other decree in a litigation brought by some of victims, it should exceptionally be permitted to deduct it from the amount of voluntary reimbursement.

(ii) Donation

In addition to the reimbursement to consumers as the deductible “voluntary action,” it would often be practically difficult to make reimbursement to consumers due to the factors other than the existence of misleading representation (such as the characteristics and manner of sale of the relevant products and services, and amount of damage), and a donation mechanism should be permitted as a form of refinement of unfair profits earned by the violator to consumers, from a standpoint of the equality between business operators.

However, a donation should consistently be positioned to supplement reimbursement to consumers. In order to prevent the violator from easily choosing to make a donation to evade cost of reimbursement to consumers, a mechanism should be adopted in the cases where reimbursement is permissible to consider measures to restrict the period during which a donation of which amount is deductible is permissible to the final phase of the period during which the violator can make reimbursement, and to enable the administrative government to individually and concretely judge whether the donation has been properly made.

Receivers of donation or the purpose of use of donation should be defined in a limited extent, in part because the surcharge is imposed due to the violation and does not offer broad options to evade payment of surcharge to violators and in part because the deduction system is structured to promote consumer damage recovery. In order to make any donation deductible, those who will receive the donation will be limited neutral organizations or groups that will not engage in any activity for which the donation is to be used (except for the administration and management of the amount of donation), and discussions should be made to design a system under the purpose of use and method of administration of the amounts of donations made will be properly utilized for activities, etc. that will contribute to consumer damage recovery.

- End -

Appendix 1
 Excerpt from Handout No.6 provided at the 1st session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act against Unjustifiable Premiums and Misleading Presentations

○Number of consumption life consultations by category/year

Year \ Category	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Contracts and cancellations	375,716	461,341	640,834	1,244,569	1,646,361	1,086,432	918,997	855,872	761,630	705,962	675,299	616,790	601,443
Sales methods	217,680	270,273	361,562	650,923	872,671	583,342	480,369	426,138	369,053	344,088	369,986	401,553	403,279
Prices and fees	80,763	100,561	130,810	159,208	131,508	144,760	155,049	163,332	151,326	150,259	173,799	162,707	146,440
Quality, functions and service quality	88,788	87,217	95,029	83,617	79,261	89,128	90,531	104,472	102,765	111,313	116,839	124,610	118,882
Politeness to customers	54,296	56,404	66,557	65,152	64,176	81,804	86,876	101,125	99,876	115,088	121,222	126,507	128,246
Representation and advertising	15,948	21,356	28,689	32,006	47,090	45,229	41,492	45,360	41,820	41,503	46,083	50,916	49,492
As a percentage of the total number of consumer life consultations (%)	2.9	3.3	3.3	2.1	2.5	3.5	3.7	4.3	4.4	4.6	5.2	5.9	5.9
Laws, regulations and standards	17,324	20,789	30,074	37,019	37,520	43,430	41,312	39,823	36,120	32,378	37,625	34,732	32,373
Safety and sanitation	18,029	16,709	20,318	16,958	16,641	24,701	24,571	31,259	30,237	33,214	30,203	33,998	29,139

Source: National Consumer Affairs Center, "Annual Report on Consumer Affairs 2010" and "Annual Report on Consumer Affairs 2013"

*Multiple answers for category of consultations

Bill for Partial Revision of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade and the Act against Unjustifiable Premiums and Misleading Representations
(169th session of the Diet, No.73 Bill Submitted by the Cabinet) (Excerpt)

Article 6-2. (Surcharge Payment Order)

- (1) In the case that any business operator effects any act that constitutes a breach of the provisions of Article 4, paragraph (1) (limited to those which fall under item (i) or (ii) of the said paragraph), the Fair Trade Commission shall order the said business operator to pay to the national treasury a surcharge of an amount equivalent to an amount calculated by multiplying the sales amount of the relevant goods or services calculated pursuant to the method provided by a Cabinet Order for the period from the date on which the business operator effected the said act to the date on which it is no longer considered that the representations relating to the said act would be likely to induce customers unjustly or impede fair competition (in the case that the said period exceeds three years, it shall be the three years preceding the date on which it is no longer considered that the representation relating to the said act would be likely to induce customers unjustly or impede fair competition) by three percent; provided, however, that in the case that the said business operator does not know during the whole period from the date on which the said business operator effected the said act to the date on which the representations relating to the said act were discontinued that the representation relating to the said act falls under either of the following items and such failure to know is considered to result from the fact that the said business operator had substantially failed to exercise due care, or the amount so calculated is less than three million yen, the Commission may not order the payment of such a surcharge.
- (i) Any representation by which the quality, standard or any other matter relating to the substance of goods or services is shown to be much better than the actual one, or to be, contrary to fact, much better than those of other business operators who compete with the said business operator; and
- (ii) Any representation by which price or any other trade terms of goods or services is shown to be much more advantageous to the counterparties than the actual one, or to be, contrary to fact, much more favorable to the counterparties than those of other business operators who compete with the said business operator.

(2) and (3) (Omitted)

(Reference) Act against Unjustifiable Premiums and Misleading Representations (No.134 Act of May 15, 1962) (Excerpt)

Article 4. (Prohibition of Misleading Representations)

- (1) No business operator shall make such representation as provided for in any one of the following items in connection with transactions of goods or services which it supplies:
- (i) Any representation by which the quality, standard or any other matter relating to the substance of goods or services is shown to general consumers to be much better than the actual one, or to be, contrary to fact, much better than those of other business operators who supply the same kind of or similar goods or services as those supplied by the business operator concerned, and thereby which tends to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making; and
- (ii) Any representation by which price or any other trade terms of goods or services will be misunderstood by general consumers to be much more advantageous to the general consumers than the actual one or than those of other business operators who supply the same kind of or similar goods or services as those supplied by the business operator concerned, and thereby which tends to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making.

Appendix 3

Excerpt from Handout No.4 provided at the joint meeting of the 156th plenary session and the 10th session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act against Unjustifiable Premiums and Misleading Representations

○ Status of application of each item of Article 4 of the Act against Unjustifiable Premiums and Misleading Representations in the cases to which cease and desist orders were issued on account of misleading representations

	FY2009 (from Sep. 2009)	FY2010	FY2011	FY2012	FY2013	Total
Item (i) (representations of better quality)	5	16	19	29	41	110
Article 4, paragraph (2) applied (representation regulated as unproved advertisement)	0	0	3	5	22	30
Item (ii) (representation of advantageous quality)	0	6	11	9	4	30
Item (iii) (representation designated by public notice)	1	2	0	2	3	8
Total	6	24	30	40	48	148

Note: The total of this table does not meet the total of the cases to which the cease and desist orders were actually issued (136 cases), as some of those cases related to more than one item of Article 4.

List of Members

The members, etc. who participated in the deliberations of the Replies to the Consultation are as follows:

○ Members of the Consumer Commission

Chairperson	Shoji KAWAKAMI	Professor at the Graduate Schools for Law and Politics, University of Tokyo
Acting chairperson	Yutaka ISHITOYA	Lawyer
	Ryozo AKUZAWA	Dean of the Faculty of Applied Life Science, Nippon Veterinary and Life Science University
	Kimie IWATA	President of Japan Institute of Workers' Evolution
	Norimichi SAITO	Professor at the Faculty of Law, Doshisha University
	Nobuko TAKAHASHI	Freelance Journalist
	Satoko NATSUME	Director-General of the National Federation of Regional Women's Organizations
	Tomoko HASHIMOTO	Head of the Hokkaido Consumers Association
	Ryuji YAMAMOTO	Professor at the Graduate Schools for Law and Politics, University of Tokyo
	Taeko YUINE	Director of the Nippon Association of Consumer Specialists

○ Consumer Commission

Members of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act against Unjustifiable Premiums and Misleading Representations

Chairperson	Mitsuo KOBAYAKAWA	Professor at the Seikei University Law School
Acting chairperson	Tadashi SHIRAISHI	Professor at the Graduate Schools for Law and Politics, University of Tokyo
	Naoko KANO	Professor at the Keio University Law School
	Toshihiro KAWAIDE	Professor at the Graduate Schools for Law and Politics, University of Tokyo
	Miki NAGATA	Deputy Director-General of the National Federation of Regional Women's Organizations
	Etsuko MASUDA	Executive Director of the Japan Association of Consumer Affairs Specialists
	Akira MIYAGI	Lawyer

○ Observer	Mieko TANNO	Executive Vice President of the National Consumer Affairs Center of Japan
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Summary of Deliberations

		Description of the Meetings	
		Date of the meeting held	Agenda
1.	Joint meeting of the first session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act against Unjustifiable Premiums and Misleading Representations (the “Act”)		
	Thursday, February 6, 2014	<ul style="list-style-type: none"> ● Status of deliberations made so far at the Consumer Affairs Agency ● Future plans for investigation and discussion 	
2.	Joint meeting of the 142nd plenary session and the second session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act		
	Thursday, February 13, 2014	<ul style="list-style-type: none"> ● Need for introduction of the system ● Purport and purpose of the system to be introduced (such as viewpoint of damage recovery) ● Organization of the points of issue to be deliberated 	
3.	Joint meeting of the 144th plenary session and the third session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act		
	Tuesday, February 25, 2014	<ul style="list-style-type: none"> ● Hearings from the economic associations <ul style="list-style-type: none"> • KEIDANREN (Japan Business Federation) • Central Federation of Societies of Commerce and Industry • Japan Association of Corporate Executives 	
4.	Joint meeting of the 146th plenary session and the fourth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act		
	Tuesday, March 11, 2014	<ul style="list-style-type: none"> ● Hearings about the existing surcharge systems <ul style="list-style-type: none"> • Antimonopoly Act (Japan Fair Trade Commission) • Financial Instruments and Exchange Act, Certified Public Accountants Act (Financial Services Agency) ● Hearings from the trade associations <ul style="list-style-type: none"> • Japan Food Service Association • Japan Ryokan & Hotel Association ● Revision bill for the Act 	
5.	Joint meeting of the 148th plenary session and the fifth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act		
	Tuesday, March 18, 2014	<ul style="list-style-type: none"> ● Deliberations about the legal requisites and other procedures (1) 	

	Description of the Meetings	
	Date of the meeting held	Agenda
		<ul style="list-style-type: none"> • Surchargeable cases (surchargeable acts, subjective factors, criteria based on size, statutory exclusive period)
6.	Joint meeting of the 149th plenary session and the sixth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Thursday, March 20, 2014	<ul style="list-style-type: none"> • Deliberations about the legal requisites and other procedures (2) • Surchargeable cases (statutory exclusive period) • Calculation of surchargeable amount (basic concept; addition to the surcharge, subtraction from the surcharge or exemption of the surcharge; applicable period) • Discretionary power • Investigation power, procedural security, collection procedure
7.	Joint meeting of the 151st plenary session and the seventh session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Tuesday, April 1, 2014	<ul style="list-style-type: none"> • Interim report
8.	Joint meeting of the 153rd plenary session and the eighth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Wednesday, April 16, 2014	<ul style="list-style-type: none"> • Future schedule of investigation and discussion • Future measures for damage recovery
9.	Joint meeting of the 154th plenary session and the ninth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Tuesday, April 22, 2014	<ul style="list-style-type: none"> • Deliberations about the legal requisites and other procedures (3)
10.	Joint meeting of the 156th plenary session and the tenth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Thursday, May 1, 2014	<ul style="list-style-type: none"> • Hearings from the economic associations <ul style="list-style-type: none"> • KEIDANREN (Japan Business Federation) • Central Federation of Societies of Commerce and Industry • The Japan Chamber of Commerce and Industry • Deliberations about the legal requisites and other procedures (4)
11.	Joint meeting of the 157th plenary session and the eleventh session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	

Description of the Meetings		
	Date of the meeting held	Agenda
	Wednesday, May 7, 2014	<ul style="list-style-type: none"> ● Hearings from trade associations <ul style="list-style-type: none"> • Japan Chain Stores Association • The Japan Direct Marketing Association ● Free discussions (exchange of opinions for discussions for finalization of the Replies to the Consultation)
12.	Joint meeting of the 161st plenary session and the twelfth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Wednesday, May 28, 2014	<ul style="list-style-type: none"> ● Future measures for damage recovery (2) ● Discussion for finalization of the Replies to the Consultation
13.	Joint meeting of the 162nd plenary session and the thirteenth session of the Expert Panel for Surcharge System, etc. against Misleading Representations under the Act	
	Tuesday, June 10, 2014	<ul style="list-style-type: none"> ● Discussion about the draft Replies to the Consultation