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The Efforts of the JFTC Toward
Promoting Procedural Fairness
and Transparency in the
Investigation Proceedings

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I. HOW DOES THE CASE INVESTIGATION PROCEDURE OF THE JFTC ENCOURAGE TRANSPARENCY?

A. The JFTC provides the investigated parties with the proper opportunity to express their views and to be informed of the relevant evidence by the investigators in the process of a case investigation.

Specifically, investigated parties can submit to the Investigation Bureau of the JFTC their opinions in the form of written statement. This statement expresses their views on the alleged violation and the evidence, which sustains their views at any time of the investigation process.

Also, if necessary, investigators of the JFTC sometimes explain the relevant evidence on the investigated case, after hearing the parties' views on the case, mid-course in the investigation process.

B. Additionally, the JFTC holds a hearing procedure at the final phase of investigation before issuing administrative orders.

The hearing procedure will be presided over by an independent hearing officer and the investigators of the JFTC will explain to the parties concerned the contents of the draft orders and the main evidence supporting the draft order.

Following the investigators' explanation, the parties concerned may ask questions, present their arguments, and submit relevant evidence.

C. Besides, when issuing a cease and desist order and/or a surcharge payment order after a hearing procedure, the JFTC makes its orders and the relevant information public (excluding confidential information), to the extent necessary for ensuring the proper and transparent application of the Anti-Monopoly Act.

II. WHAT ARE THE KEY PROCEDURAL STAGES BUILT INTO THE JFTC'S CASE INVESTIGATION PROCEDURE?

A. The key procedural stage of the JFTC's investigation process is a newly introduced hearing procedure, which occurs before issuing administrative orders.

To enhance due process, an amendment of the AMA of 2013—which took effect on April 1, 2015—has introduced a new hearing procedure before issuing orders in which a hearing will

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be presided over by an officer designated by the JFTC who is independent from the Investigation Bureau.

At the new hearing procedure, a designated hearing officer will make the investigators for the case explain to the parties concerned the contents of the draft orders, including the facts found by the JFTC and the main evidence supporting them. The parties concerned may, following the investigators' explanations, raise questions to the investigators (if any), present their arguments, and submit relevant evidence.

The designated hearing officer will prepare the report describing the issues raised at the hearing and submit it to the Commission.

The Commission is to give due consideration to this report in making its final decision.

B. Also, the amendments of the AMA of 2013 have expanded the coverage of evidence that the party concerned may inspect and copy.

The party concerned may, between the time when notice of a hearing is given and the time when the hearing is concluded, submit a request to the JFTC to inspect or copy the evidence that proved the facts found by the JFTC with respect to the case for hearing.

Copying is limited to a copy of what was submitted by the said party concerned, or its employees, or the records of the statements of the said party concerned or its employees.

III. HAVE THERE BEEN ANY CHANGES IN THE LAST FIVE YEARS IN THE JFTC'S APPROACH TO TRANSPARENCY AND DUE PROCESS?

A. The amendments of the AMA of 2013 abolished the JFTC's *ex-post* hearing procedure for administrative appeals and entrusted the Tokyo District Court with appeals against the JFTC's administrative orders.

Also, as already mentioned, from the perspective of enhancing due process, the amendments of 2013 introduced a new hearing procedure before issuing orders.

These amendments responded to criticism that the JFTC's *ex-post* hearing procedure for administrative appeals lacked the appearance of fairness because the entity that made a decision also determined whether such decision was appropriate or not.

B. Since it is essential for the JFTC to maintain public confidence in its investigations and decisions, the abolition of the *ex-post* hearing procedure is sure to dissolve the criticism about the appearance of fairness.

C. In order to ensure the expertise of the court, the amendment of 2013 makes any appeal concerning the JFTC's administrative orders subject to the exclusive jurisdiction of the Tokyo District Court, in which a panel comprising three or five judges will hear the case.

IV. WHAT CHALLENGES DOES THE JFTC FACE TOWARD GREATER TRANSPARENCY AND STRONGER PROCEDURAL STRUCTURES?

A. Greater transparency and stronger procedural structures are beneficial in making case investigations more legitimate and keeping public confidence in the JFTC.

B. On the other hand, in order to ensure legitimacy of agency decisions, it is of vital importance for the agency to be able to perform any fact-based investigation thoroughly and evaluate any facts with flawless precision.

Otherwise, agencies cannot reach legitimate conclusions based on the realities of violating activities and their actual harm on the markets.

C. In order to implement legitimate, publicly confident, and fact-based investigations, it is essential for investigators to be able to gather necessary information through having enough communication with the parties concerned and other relevant parties.

To make such an opportunity to communicate with investigators more effective, the parties are also expected to express their views on an honest and fact-based basis.

D. The JFTC's approach of introducing a hearing procedure before issuing orders is expected to contribute to the promotion of communication between agencies and the parties concerned.

E. Another effective way to establish such communication is to adopt a system in which agencies can communicate with the parties in the course of investigation and subsequently voluntarily conclude its investigation process by consensus between the parties and agencies. These systems could include commitments, settlements, or consent orders, although the JFTC does not have any system like that at present.

V. FROM THE STANDPOINT OF BUSINESS PLANNING, WHAT DO DOMESTIC AND INTERNATIONAL FIRMS SEEK IN TERMS OF PROCEDURAL FAIRNESS IN JAPAN?

A. In Japan, under the name of promoting procedural fairness in the investigation process, business circles have been seeking—as part of the right to a defense—the presence of an attorney during on-the-spot inspections and depositions, attorney-client privilege, audio/video recording of the process of taking depositions, issuance of copies of deposition records when deposition records are taken, etc.

B. Against this background, the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (Advisory Panel) was established at the Cabinet Office, with members consisting of representatives from business, the bar, academies, labor unions, consumers, and media.

An Advisory Panel meeting was held 14 times in 2014, after which it reported to the Minister of State.

C. The Advisory Panel has discussed the rights to defense for investigated parties during the investigative process, in consideration of the necessity of ensuring strict enforcement of the AMA by the JFTC, as well as the balance between the JFTC's fact-finding ability and the right to defense for investigated parties, while also referring to other administrative procedures in Japan and practices in foreign jurisdictions.

D. In December 2014, the Advisory Panel compiled and made public its report on administrative investigation procedures under the Anti-Monopoly Act.²

In this report, the Advisory Panel concluded that the introduction of the rights to defense mentioned above are not appropriate at the present stage because their introduction could impede the fact-finding ability of the JFTC; however, it also concluded that it is appropriate to continue discussions and consider the necessity and advisability of introducing such rights to defense.

For example, concerning issues related to on-the-spot inspections, the report says that:

Companies may have an attorney present during an on-the-spot inspection. However, the presence of an attorney is not recognized as a right of companies concerned, and it is appropriate to understand that companies may not refuse an on-the-spot inspection on the grounds that the attorney has not arrived.

As for Attorney-Client Privilege, the report says that:

It is not appropriate to introduce attorney-client privilege at the present stage, because the grounds and scope of the privilege are not clear and it could not dispel concerns that the fact-finding ability of the JFTC would be impeded as a result of introducing such privilege.

The report concluded that it is appropriate for the JFTC to draw up and make public guidelines, etc. regarding standard administrative investigation procedures for the JFTC's investigation on alleged violating cases.

E. Following the conclusion of the report, the JFTC has prepared draft guidelines on the investigation procedure of the Anti-Monopoly Act and on June 30, 2015, the JFTC made it public and requested for public comments by July 29.³

² See <http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf>.

³ See <http://www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/150630.pdf>
<http://www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/Attachment.pdf>