

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN
PROCEDURAL FAIRNESS AND TRANSPARENCY**

-- Japan --

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The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 October 2011.

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1. Introduction

1. The Antimonopoly Act sets down basic rules concerning economic activities carried out amid complicated and wide-ranging economic conditions that are continually undergoing changes. Whether an economic activity of an enterprise is in violation of the provisions of the Antimonopoly Act will be decided after individually and specifically judging the effects of the concerned act on market competition. Therefore, the Antimonopoly Act needs to be implemented continuously in a specialized and consistent manner by a neutral and fair institution free from political influence. Accordingly, the Antimonopoly Act provides that the chairman and the commissioners of the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) shall be appointed among persons who have knowledge and experience in law or economics (Article 29), the independence of the performance of authority of the chairman and the commissioners shall be secured (Article 28), and the Antimonopoly Act shall be applied through decisions made with the concurrence of all commissioners and the chairman (Article 34). With respect to legal procedures concerning acts in violation of the Antimonopoly Act, a special procedure has been established in consideration of the JFTC’s specialization.

2. In part II and III below, we will introduce (i) the characteristics of the administrative lawsuit to rescind a decision of the hearing procedures and (ii) the characteristics of civil actions relating to acts in violation of the Antimonopoly Act, while paying attention to the relationship between the courts and the JFTC.

3. Furthermore, part IV explains the revision of the procedure for reviewing business combinations by the JFTC in response to recent requests to improve its speediness and transparency.

2. Characteristics of the suit to rescind a decision (cf. Annex 1)

2.1. Outline

4. The JFTC inspects cases through on-the-spot inspections and other measures. When it is found that an activity has indeed violated the provisions of the Antimonopoly Act, the JFTC will impose an administrative disposition, such as a cease and desist order and a surcharge payment order, after carrying out an advance procedure that allows an opportunity for stating opinions and providing evidence.

5. In the event of an objection to an administrative disposition imposed by an administrative agency, the person subject to the measures may, in general, submit an action for the declaration of nullity in accordance with the Administrative Case Litigation Act, which is a general law. It is not always necessary for the motion to be preceded by a request for an administrative review (Article 3 (3) of the Administrative Case Litigation Act) as provided in the main clause of Article 8 (1) of the Administrative Case Litigation Act. However, under the Antimonopoly Act, cease and desist orders and surcharge payment orders, which are issued by the JFTC, are preceded by a hearing (principle of being preceded by petitioning the administration for redress of a grievance). In addition, several exceptions, which differ from normal administrative litigations, are provided, such as the adoption of a scheme under which a decision which is made after an examination in a hearing will become the object of an action for revocation of administrative disposition (decision principle). Major exceptions are as follows.

2.2. *Exceptions to the Administrative Case Litigation Act*

2.2.1. *Grant of the jurisdiction of the first instance to the Tokyo High Court*

6. Under the Administrative Case Litigation Act (and the Court Act), in principle, an action for the revocation of an administrative disposition should be brought to a district court with jurisdiction over the location of an administrative agency.

7. However, under the Antimonopoly Act, the Tokyo High Court shall become the court of the jurisdiction of the first instance for the action for the judicial review of an administrative disposition (Article 3 (1) of the Administrative Case Litigation Act) as provided in Article 85 (i) of the Antimonopoly Act. Accordingly, when a concerned party has a grievance against the decision of the JFTC, the concerned party should bring an action for the revocation of administrative disposition to the Tokyo High Court.

2.2.2. *Substantial evidence rule and restriction on the submission of new evidence*

8. The Antimonopoly Act provides that the facts found by the JFTC shall, if supported by substantial evidence, be binding in a court (Article 80 (1)). Hence, a court should examine whether it is reasonable to find facts based on the evidence examined in a hearing and judge whether the requirements provided in the Antimonopoly Act have been satisfied on the premise of the facts found by the JFTC if such findings of the facts are recognized as reasonable.

9. Concerning the submission of new evidence relevant to the facts found by the JFTC at the court, the party cannot submit such evidence unless the JFTC fails to adopt the evidence without justifiable grounds or unless it was impossible for the party to submit the evidence at the hearing of the JFTC and there was no gross negligence on the part of the party in failing to submit such evidence (Article 81 (1)).

2.3. *Revision of judicial review of the orders of the JFTC*

10. As to the above hearing procedures, it has been pointed out that a system under which the JFTC—the institution that imposes an administrative disposition—judges the appropriateness of that very administrative disposition is considered to be lacking in fairness.

11. With a view to respond to such criticisms concerning the procedural fairness, a bill for the amendment of the Antimonopoly Act, including the abolition of the hearing procedures, was submitted to the 174th ordinary session of the Diet in March 2010¹. If the bill is passed, the systems mentioned in 2.1. and 2.2., which are premised on the hearing procedures, will be abolished. The above bill was determined in the 177th ordinary session on August 31, 2011 to remain under deliberation while the Diet is closed.

3. *Characteristics of civil actions brought against violations of the Antimonopoly Act*

3.1. *Outline*

12. An act that violates the provisions of the Antimonopoly Act infringes upon not only free competition but also certain interests of consumers and enterprises under private laws. However, an administrative disposition by the JFTC will not necessarily result in the recovery of such interests under private laws. Therefore, under the Antimonopoly Act, any person whose interests under private laws are likely to be infringed are granted the right to request an injunction and the right to claim compensation for damages to prevent such infringements and recover the infringed interests. However, even if the

¹ Refer to the documents submitted to the meeting held in June 2010.

requirements for requests based on the Antimonopoly Act are not satisfied, a claim, such as for damages, may be brought forward based on the Civil Code.

3.2. Request for injunction based on Article 24 of the Antimonopoly Act

3.2.1. Outline

13. Under the Antimonopoly Act, a person whose interests are infringed upon or likely to be infringed upon, due to unfair trade practices, and who is thereby suffering or likely to suffer extreme damages as a result, is entitled to seek the suspension or prevention of such infringements from the enterprise, etc. who infringed or is likely to infringe the interests. This system was introduced through the law for the amendment of the Antimonopoly Act in 2000 with the purpose of improving the methods of offering relief to victims and strengthening deterrence to performing acts in violation of the Antimonopoly Act.

3.2.2. Relationship between the courts and the JFTC

A. Court's notice to the JFTC

14. When a request for an injunction is submitted, a court shall notify the JFTC to that effect (Article 83-3 (1)). This will enable the JFTC to be provided with the information on acts in violation of the Antimonopoly Act.

B. System to ask for voluntary opinions

15. When a request for an injunction is submitted, a court may ask for the opinion of the JFTC with respect to the application of the Antimonopoly Act for the case concerned and other necessary matters (Article 83-3 (2)). The reasons for this are as follows: (i) a private person's request for injunction against acts in violation of the Antimonopoly Act will serve not only as a means of offering relief to victims but also as a realization of a public benefit—the maintenance and promotion of fair and free competition. Therefore, it is appropriate for the JFTC, tasked with realizing such public benefits, to be involved in the request in one way or another. (ii) If the court takes into account the opinions of the JFTC, with its knowledge and experience as an administrative organization specializing in the Antimonopoly Act, it would be beneficial in terms of judicial economy. (iii) The system would prevent and rule out the possibilities that inconsistencies will arise in the standards for judgment of illegality among the courts or between the courts and the JFTC, which might result in confusion in the interpretation and application of the Antimonopoly Act and repress the business activities of enterprises. For a similar reason, the JFTC may, with the permission of a court, state an opinion to the court on the application of the Antimonopoly Act and other necessary matters (Article 83-3 (3)). However, the opinion of the JFTC is not binding on courts.

3.3. Claim for damages based on the Antimonopoly Act and the Civil Code

3.2.1. Claim for damages based on Article 25 of the Antimonopoly Act

A. Outline

16. Under the Antimonopoly Act, any enterprise or trade association that has committed a certain act in violation of certain provisions of the Antimonopoly Act shall be liable for damages suffered by another party (Article 25 (1)), who will be known as the plaintiff. No enterprise or trade association that has committed the above act may be exempted from the liability for the damages by proving the non-existence of intention or negligence on its part (Article 25 (2)). These provisions appear to be designed for increasing

the deterrent effect against acts in violation of the Antimonopoly Act by imposing heavier responsibilities than under a tort liability system.

17. However, to allege the above right of claim for damages in a court, the cease and desist order (Article 49 (1)) (in the case that no such order is issued, the surcharge payment order (Article 50 (1)) or the declaration of illegality by a decision (Article 66 (4)) (hereinafter referred to as “the orders, etc.”) shall be required to be firmly determined (Article 26). It is considered that this determination will have effects to alleviate a plaintiff’s burden of proof.

B. Relations between the courts and the JFTC

- System to ask for voluntary opinions

When a suit for damages has been filed based on Article 25 of the Antimonopoly Act, the court may ask for the opinion of the JFTC with respect to the amount of damages caused by such violations as provided in the said article (Article 84).

This system of asking for the opinion of the JFTC will alleviate the burden of proof of a plaintiff in a suit. However, the opinion of the JFTC is not binding on courts.

- Grant of the jurisdiction of the first instance to the Tokyo High Court

The Tokyo High Court shall become the court of the jurisdiction of the first instance for any suit concerning compensation for damages based on Article 25 of the Antimonopoly Act. A panel of judges invested with the authority to exclusively hear the cases concerning the Antimonopoly Act shall be established within the Tokyo High Court (Article 85 (ii) and Article 87)².

This system appears to allow one court to concentrate on the hearing and judgment, which would enable the victims of the violation to be compensated more quickly. It is based on the premise that the suit is brought after the determination by the JFTC relating to an act in violation of the Antimonopoly Act which requires specialized and standardized judgment.

3.3.2. *Claim for damages based on Article 709 of the Civil Code*

18. As stated above, based on Article 25 of the Antimonopoly Act, any enterprise or trade association that has committed an act in violation of certain provisions of the Antimonopoly Act shall be liable for no-fault compensation for damages suffered by another party. However, the right of claim for damages based on the said article may not be exercised for a suit unless the orders, etc., have become final. But, even if the orders, etc. do not exist or have not become final and binding, compensation for damages may be claimed against a party who has committed an act in violation of the Antimonopoly Act based on Article 709 of the Civil Code.

3.3.3. *Support by the JFTC in the above suits for damages*

19. If requested by a court or by parties to a lawsuit, the JFTC will provide the material as shown below to make effective use of the damage suit system based on Article 25 of the Antimonopoly Act and serve for a suit for damages based on Article 709 of the Civil Code.

² However, if the bill mentioned in II-3, this system, which is premised on the hearing system, also will be abolished.

A. Provision of material after orders, etc. have become final

- Procedure before a damage suit is brought to court

20. When a cease and desist order or a surcharge payment order (hereinafter referred to as “the Order”) has become final and binding without a hearing procedure and if the provision of material relating to the final and binding Order is requested by the plaintiff or a lawyer representing the plaintiff, the JFTC shall provide the authenticated transcript or extract of the written cease and desist order or the written surcharge payment order related to the violation.

21. When the Order has become final and binding through a decision or the declaration of illegality has become final and binding by a decision after the initiation of a hearing procedure, a written decision shall be provided in addition to the above documents. Furthermore, if requested as provided in Article 70-15 of the Antimonopoly Act, the inspection or the copy of the records of cases will be accepted.

- Procedure after a damage suit is brought to court

22. When a damage suit is brought to court with respect to a violation for which the final and binding orders, etc. exists, and the court in charge of the case requests the sending of documents based on Article 226 of the Code of Civil Procedure, (i) material relating to the proof of existence of a violation³ and (ii) material relating to the proof of a relation or a causal relationship between a violation and damages as well as the amount of damages⁴ shall be submitted to the court.

23. However, divulging any of the “secrets of enterprises”⁵ that come to the knowledge in the course of duties is prohibited under Article 39 of the Antimonopoly Act. When material, including “secrets of enterprises,” is submitted to a court, the JFTC shall pay attention to their confidentiality. This will similarly apply to cases in which, if the source of provision of material is made clear, the provider of the material will receive disadvantageous treatment, thereby hinder the handling of the case, or cases in which matters infringing upon individual persons’ privacy are included.

B. Provision of material before the orders, etc. have become final and binding

24. Under the condition where the orders, etc. have not yet become final and binding, such as the cases in which a hearing procedure related to the Order is being carried out, a suit to rescind the decision is being brought, etc., if the provision of material is requested by the victims, etc. of the violation as necessary for filing a suit for damages or by the plaintiff or lawyer representing the plaintiff after a lawsuit is brought to court, the authenticated transcription or extract of the written cease and desist order, the written surcharge payment order, or the written decision shall be provided. In addition, if requested as provided in Article 70-15 of the Antimonopoly Act, the inspection and copy of the records of cases will be accepted.

C. Under the above framework, the JFTC provides support to the parties concerned, including the courts and local public entities.

³ For example, material supporting the recognition of a fact in the Order

⁴ For example, material concerning products, service transactions, distribution practices, etc. that are the object of a violation

⁵ The secret of enterprises denotes a fact that (i) is not publicly known, (ii) is desired to be secret by concerned enterprises, and (iii) can be objectively determined to have sufficient reasons for being described as secret. Such items as manufacturing costs and the purchase price of individual products as well as business know-how fall into this category.

4. Recent efforts aimed at improving procedural fairness and transparency (review of investigation procedures for business combination (see exhibit 2))

25. The JFTC reviewed the business combination regulations in accordance with “the New Growth Strategy,” which was approved at a Cabinet meeting on June 18, 2010. Based on the result of these reviews and to further improve the swiftness, transparency, and predictability of business combination investigation while enhancing international conformity, the JFTC published and requested public comments on a draft for the partial amendment, etc. of the Fair Trade Commission Rules on March 4, 2011. The JFTC carefully reviewed all comments and partially amended the draft based on this review. The JFTC, on June 14, 2011, published⁶ that the Fair Trade Commission Rules would be partially amended, and put them into effect on July 1, 2011.

26. Main points of the amendments are as follows.

4.1. Abolition of Prior Consultation

27. Before the amendments, for any prior consultation which has been brought to the JFTC regarding whether or not a specific business combination plan will raise any problems with regard to the stipulations of the Antimonopoly Act, the JFTC has responded pursuant to the “Prior Consultation Response Policy” and provided its judgment under the Antimonopoly Act. However, the competition authorities in Europe and the US do not respond with judgment under their competition laws in their pre-notification consultations. Furthermore, the significance of the prior consultation system for obtaining judgment of the JFTC has declined because the prior notification became required for acquisitions of shares like other business combinations (e.g., mergers) as a result of the amendment of the Antimonopoly Act in 2010. In light of these situations, the judgment by the JFTC with regard to the notified business combination will be indicated in the procedures following the submission of the notification. And if the notifying company desires so, it can voluntarily consult the JFTC regarding the method of completing the notification form before reporting, etc.

4.2. Enhancement of communications between the notifying company and the JFTC

- On the grounds that more detailed investigation (Second Phase Investigation) is needed, when the JFTC requests reports, etc. as stipulated in the Antimonopoly Act from the notifying company, the reason why the reports are being requested will be indicated in the request for the reports, etc.
- When a request has been made by the notifying company or when it is necessary during the review period, the JFTC shall provide an explanation of the issues in the business combination plan at that point in time.
- The notifying company may submit opinions or relevant documents it considers to be necessary (including proposals for remedial measures for resolving the problems) to the JFTC at any time during the Review Period.

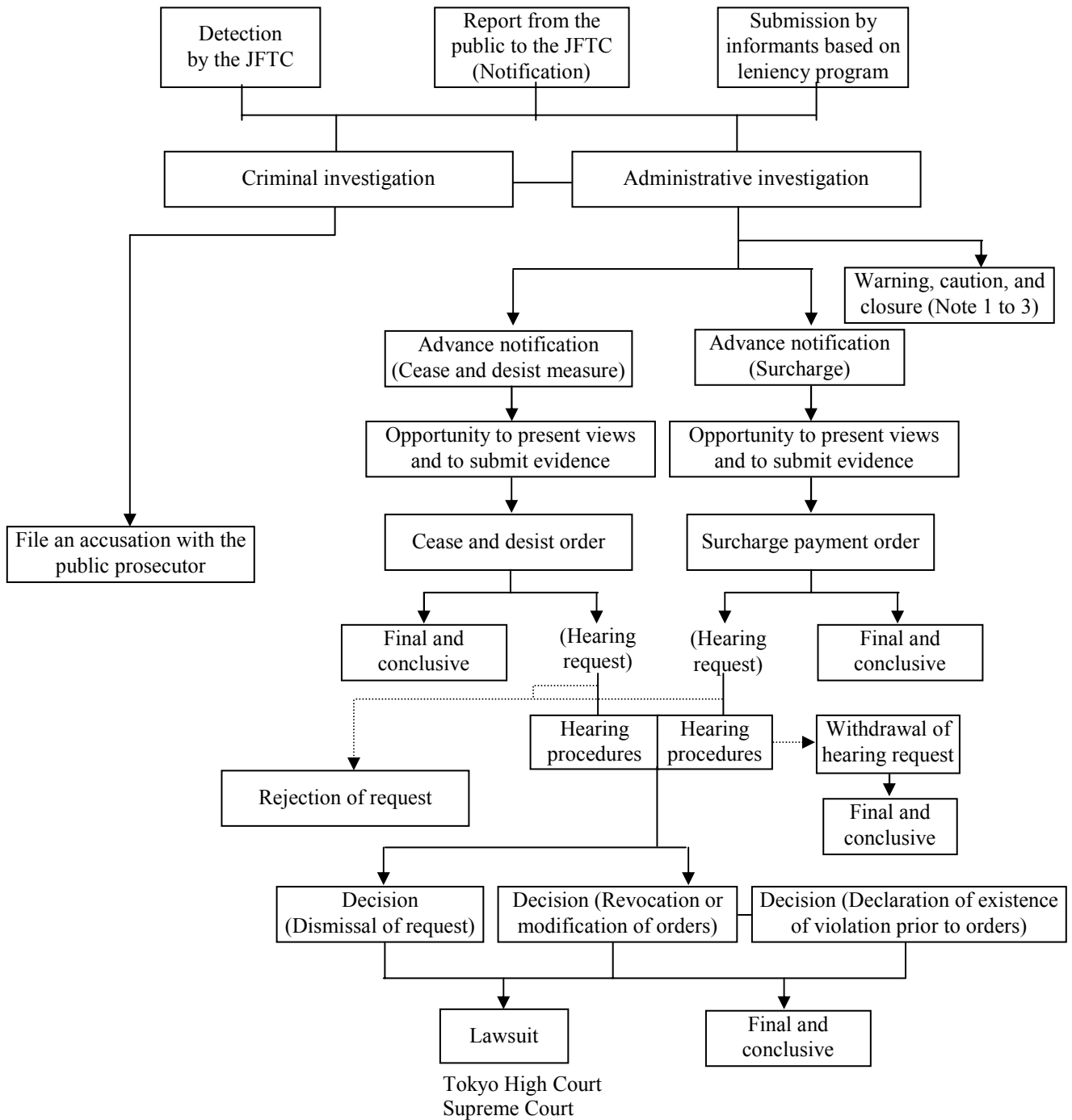
4.3. Improvement of procedures at the end of the business combination review

- For cases where there are no problems under the Antimonopoly Act and where no requests for reports, etc. are to be made, written notice is to be provided for stating that no cease and desist order will be given.

⁶ <http://www.jftc.go.jp/en/pressreleases/archives/individual-000432.html>

- For cases where the JFTC has made requests for reports, etc. and judges that there are no problems under the Antimonopoly Act, the JFTC shall notify the notifying company in writing that no cease and desist order will be given and the review results will be provided including the reasons for the results.
- The JFTC publicly announces the cases mentioned in 4.2. above and any other cases which will be of reference to other business operators.
- Cases where the waiting period will be shortened are to be expanded.

ANNEX 1: PROCEDURE ON INVESTIGATION AGAINST ANTICOMPETITIVE CONDUCT



- Note 1. Warning: A case where there is no evidence to take a legislative measure but where there is a suspicion of violation
- Note 2. Caution: A case where there is no evidence to suspect the existence of violation but where there is a possibility that could lead to violation in the future
- Note 3. Closure: A case where the investigation is terminated because there is no conduct violating the Antimonopoly Law

ANNEX 2: FLOWCHART OF BUSINESS COMBINATION REVIEW

