

Overview of Administrative Investigation Procedures for Alleged Antitrust Cases [Reference Material for Business, etc.]

Introduction

December 2020

The Japan Fair Trade Commission

The purpose of the Antimonopoly Act (official name: the Act on Prohibition on Private Monopolization and Maintenance of Fair Trade) is to promote fair and free competition and secure the interests of general consumers, thereby promoting the democratic and wholesome development of the national economy by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, etc., eliminating unjust restrictions on business activity and taking other measures.

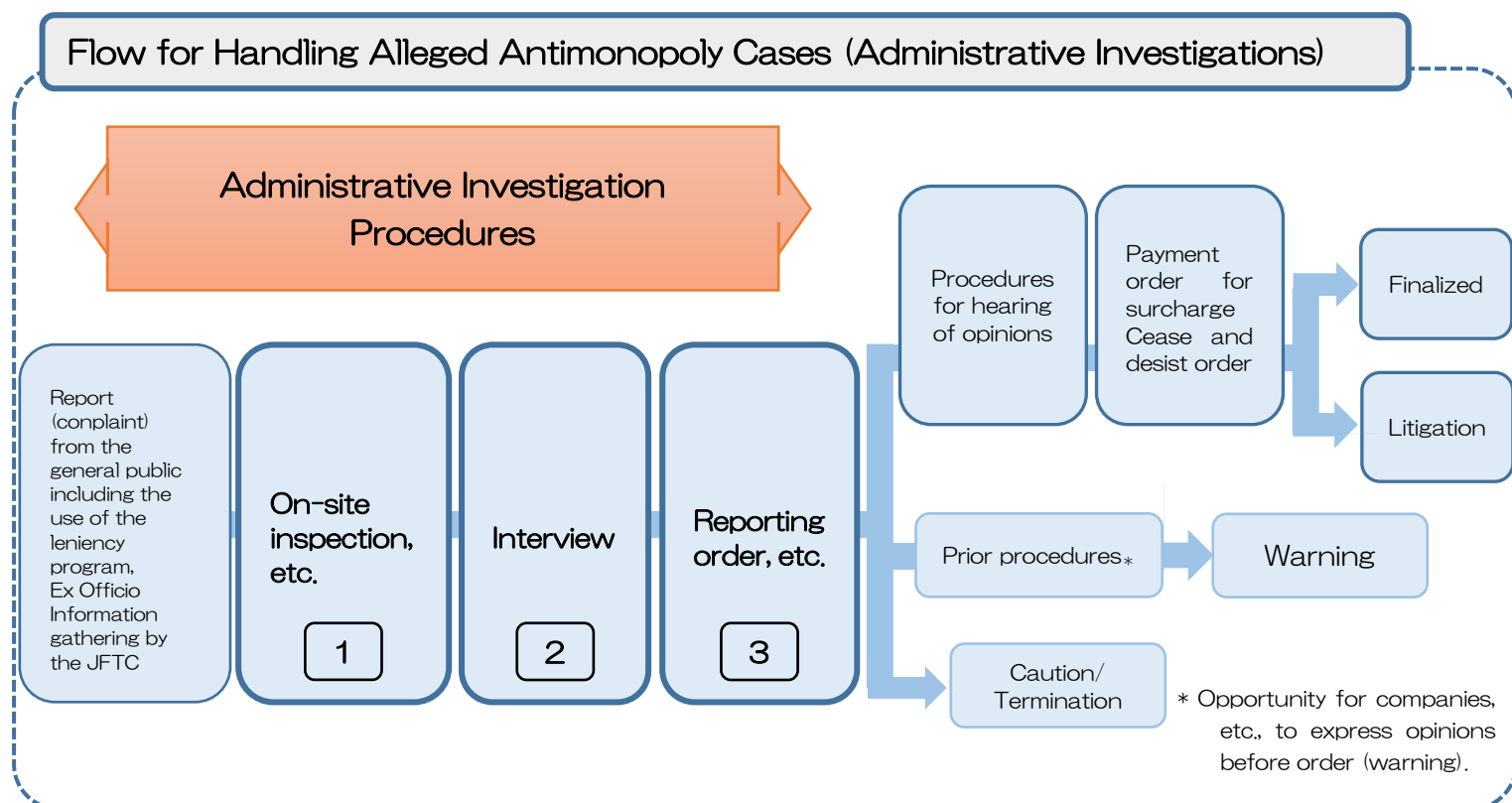
To achieve the purpose of the Antimonopoly Act, the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) was established and is expected to implement the Antimonopoly Act, which is the basic rule of the market, strictly and properly, and take measures to recover fairness of competition in the market quickly.

If it is suspected that an act violating the Antimonopoly Act is committed, the JFTC is authorized to investigate companies, etc., involved in an alleged violation and, in its administrative investigation procedures, take measures such as on-site inspection, order to submit documents, retention, order to appear and to be interrogated, order to report, based on the JFTC’s authority with indirect enforcement which indirectly guarantees performance of investigation by punishment, while ensuring the appropriateness of the procedures in accordance with the applicable laws and regulations in order to clarify whether the Antimonopoly Act is violated or not and to issue an order to take necessary measures to eliminate violations. In addition, the JFTC conducts administrative investigations of alleged antitrust cases (hereinafter referred to as “Case Investigations”) by means of interviews, requests to report based on voluntary cooperation from companies, etc., involved in an alleged violation.

From the perspective of further ensuring the appropriateness of administrative investigation procedures, the JFTC decided to ensure that standard steps and key points to note in the JFTC’s administrative investigation procedures are clarified in the Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (hereinafter referred to as the “Guidelines”) taking the past practices into account, and inform officers engaged in Case Investigations of the Guidelines. In addition, from the same perspective as above, in order to enhance transparency of the JFTC’s investigation procedures and contribute to the smooth implementation of Case Investigations, the JFTC decided to formulate and publish the Guidelines so

that their content is shared widely among the public (The Guidelines are posted at <https://www.jftc.go.jp/dk/guideline/unyoukijun/shinsashishin.html>).

In line with this, this material explains the standard steps, etc., in implementing the JFTC's administrative investigation procedures for alleged antitrust cases for companies and other parties in an easy-to-understand manner, taking into account the content of the Guidelines.



*For the overview of each procedure other than administrative investigation procedures, please refer to *Shitte Nattoku Dokkinho* (Knowing and Understanding the Antimonopoly Act) (booklet for companies) (<https://www.jftc.go.jp/houdou/panfu.files/dokkinpamph.pdf>).

1. On-site inspection, etc.

* Refer to Appendix “Flow for On-site Inspection in Administrative Investigations of Alleged Antitrust Cases”

(1) Legal grounds (Refer to Clause II, 1, (1) of the Guidelines)

The JFTC has a power to enter a business office of companies, etc., involved in an alleged violation or other necessary sites to inspect conditions of their business operation and property, books, documents, and other materials in accordance with Article 47, Paragraph 1, Item 4 of the Antimonopoly Act (hereinafter referred to as the “On-site Inspection”). Further, in accordance with the provisions of Item 3 of the same paragraph, the JFTC has a power to order the person who holds books, documents and other objects which are deemed necessary for Case Investigations to submit such materials and a right to retain them at the JFTC.

If companies, etc., involved in an alleged violation refuse, obstruct or evade the On-site Inspection or do not submit materials without justifiable reasons, penal provisions of Article 94 of the Antimonopoly Act may apply. As seen above, a person subject to Case Investigations is obligated to accept the On-site Inspection and other dispositions which an investigator ^(Note 1) conducts under Article 47 of the Antimonopoly Act. Therefore, in the context that punishment may apply, such dispositions are not of a nature that allows companies, etc., involved in an alleged violation, at their own discretion, to decide whether or not to cooperate with the investigation, but if the party concerned willingly refuses to accept the investigation, the JFTC is not able to directly or physically exercise its power to conduct the investigation.

In addition, the JFTC may visit a business office of companies, etc., involved in an alleged violation or other places to request them to, for example, submit materials based on their voluntary cooperation, instead of conducting an indirectly enforceable On-site Inspection under Article 47 of the Antimonopoly Act.

(Note 1) In accordance with Article 47, Paragraph 2 of the Antimonopoly Act, the JFTC appoints its official as an investigator to investigate cases. The officials of the JFTC who are engaged in Case Investigations, including the investigator, are hereinafter referred to as the “investigator, etc.”

(2) Implementation of On-site Inspection

(i) Explanation at the time of commencing On-site Inspection (Refer to Clause II, 1, (2) of the Guidelines)

At the time of an On-site Inspection, the investigator shall present his or her identification card to a person in charge of the place subject to On-site Inspection and then deliver a notification that contains provisions that authorize the administrative investigation (Article 47 of the Antimonopoly Act), the title of

a case, main point of the alleged fact of violating provision of the Act, applicable provisions of the Act, etc. and make a request for cooperation to ensure smooth implementation of inspection. Further, the investigator shall explain to the person in charge that if the party concerned refuses to cooperate with the inspection, punishment may be imposed.

Note that when an investigator, etc. visits a business office of companies, etc., involved in an alleged violation or other places, and makes a request to submit materials with the consent of the party concerned, the investigator, etc. shall first present his or her identification card, etc. to the person in charge and convey the purpose of the relevant investigation to the person in charge and explain that the investigation is not based on Article 47 of the Antimonopoly Act but on voluntary cooperation from the party concerned, and then conduct the investigation after obtaining the consent of the party concerned.

(ii) Scope of On-site Inspection (Refer to Clause II, 1, (3) of the Guidelines)

On-site Inspection is conducted at a place that the investigator reasonably considers to be necessary for Case Investigations, regardless of the name of the place such as the sales department, accounting department, etc. of the company, etc., involved in an alleged violation. Thus, even a residence of its employee becomes subject to an On-site Inspection if materials related to alleged violation are suspected to be present there and the investigator reasonably considers it necessary for Case Investigation.

(3) Submission and retention of materials (Refer to Clause II, 1, (4), (i), (iii) and (iv) of the Guidelines)

After giving the company, etc., involved in an alleged violation an order to submit, the investigator keeps (retains) materials that are reasonably considered to be necessary for Case Investigations as a result of On-site Inspection. In the case of giving an order to submit, the originals of relevant materials are ordered to be submitted on an as-is basis. As for electronic data stored on a server, client's PC, etc. (including data such as emails), the investigator will order to be submitted those that are copied and stored on recording media (including client's PC itself as necessary).

Any submitted material that no longer needs to be held shall promptly be returned (Note2).

(i) Scope of materials ordered to be submitted

An order to submit materials is given to the extent that the investigator reasonably considers such materials are necessary for Case Investigations. Thus, even goods that are generally considered highly private, such as personal belongings (day planner, mobile phone, etc.) are ordered to be submitted if such goods are suspected to contain information useful to prove an alleged violation

and the investigator reasonably considers it necessary for Case Investigation.

(ii) Checking the list of materials

When an order to submit materials is given and materials are retained, the investigator, etc., shall prepare a list of the retained materials and attach it to a writ of submission and notice on retained materials. Such list shall contain the titles, etc. of accounting books, documents and other materials with the information specified by the locations where they were present, the persons who held or managed them, etc. In the case of retention, the investigator shall show each item to a person in charge, etc. of the site subject to On-site Inspection and all the materials shall be checked against the descriptions in the list.

(Note 2) For information on the determination procedure (a procedure under which, in the course of the JFTC's administrative investigation, materials submitted pursuant to an order for submission that record the contents of confidential communications between a company and its attorney regarding legal advice on an act alleged to be a violation to which the leniency program may apply are promptly returned to the company without the investigator having access to the contents thereof, where it is confirmed that they satisfy certain conditions), please refer to <https://www.jftc.go.jp/dk/seido/hanbetsu/index.html>.

(4) Perusal and copy of submitted materials (Refer to Clause II, 1, (4), (iii) of the Guidelines)

On the day of an On-site Inspection, the investigator shall permit copies to be made of materials considered necessary for their ordinary business operations of companies, etc., involved in an alleged violation as long as it does not affect the smooth implementation of such On-site Inspection in the investigator's judgment. The companies, etc., involved in an alleged violation that received an order to submit materials may peruse and copy submitted (retained) materials at a place designated by the JFTC on or after the day following the date of the On-site Inspection with a schedule adjusted to the extent that it does not affect the Case Investigation. In adjusting the schedule, the investigator shall make efforts to enable the companies concerned to peruse and copy the relevant materials as soon as possible.

Note that not only a copier owned by a company, etc., involved in an alleged violation but also a digital camera, scanner or other electronic devices may be used to make copies.

(5) Presence of an attorney during On-site Inspection (Refer to Clause II, 1, (5) of the Guidelines)

During an On-site Inspection, the investigator shall have a person in charge of the place subject to an On-site Inspection be present and allow the company's

attorney to be present as long as it does not affect the smooth implementation of the On-site Inspection. However, since such presence of an attorney is not a requirement for On-site Inspection, a company, etc., concerned may not refuse an On-site Inspection due to the reason that their attorney has not arrived.

2. Interview

(1) Legal grounds (Refer to Clause II, 2, (1) of the Guidelines)

Interviews are classified into voluntary ones and interrogations based on authority with indirect enforcement: voluntary interviews are conducted with voluntary cooperation from testifying parties; and in the case of interrogations, in accordance with Article 47, Paragraph 1, Item 1 of the Antimonopoly Act, an order to appear is issued to testifying parties before an interview is taken from them. Under normal conditions, interviews are conducted voluntarily.

As for interrogations, a testifying party who fails to appear or make statements without justifiable reasons or makes false statements may be subject to punishment under Article 94 of the Antimonopoly Act.

(2) Procedures for interviews (Refer to Clause II, 2, (2) of the Guidelines)

(i) Voluntary interview

- (a) The investigator, etc., confirms the schedule of testifying parties in advance, explains in each case that the interview is based on voluntary cooperation and then obtains the consent of the party before the interview.
- (b) When taking a voluntary interview (for the first time), the investigator, etc., initially presents his or her identification card to a testifying party and explains to them that the interview is taken on a voluntary basis. However, even in the case of voluntary interviews, as the testifying party needs to testify facts based on their experience and recognition so that the facts of relevant cases can be found, the investigator, etc., shall ask for their cooperation. In addition, if the testifying party does not cooperate with a voluntary interview, an interrogation procedure may be initiated.

(ii) Interrogation

- (a) If in accordance with Article 47 of the Antimonopoly Act, an interrogation is conducted by issuing an order to appear to testifying party, a writ of appearance shall be sent to the party in each case. The writ of appearance shall contain relevant provisions of the Act, the date and place of appearance, and punishment imposed if the testifying party disobey the order.
- (b) When conducting an interrogation, the investigator initially presents his or her identification card to testifying party and explains to them about the fact that the interrogation is based on Article 47 of the Antimonopoly Act and that

if the party refuses to make statements or makes false statements, punishment may be imposed.

- (iii) Documents that record statements (records) may be subject to perusing and copying in procedures for hearing of opinions (under Article 49 of the Antimonopoly Act, etc.) (Note 3).

(Note 3) If companies, etc., may possibly treat employees of the company unfavorably by, for example, imposing disciplinary action against them or may take actions such as pursuing retaliation against another company based on the content of records of statement, etc. viewed or copied in procedures for opinion hearing, such treatments and actions fall under “likely to infringe on the interests of a third party or there are any other justifiable grounds” (Article 52 of the Antimonopoly Act) and the JFTC has a power to refuse their request for perusing and copying of such records, etc. As seen above, if companies, etc. that receive a notice of the hearing procedures peruse and copy records, etc. and use them for purposes other than the hearing procedures or preparation for litigation against a cease and desist order, etc., such companies are deemed to have used them for purposes other than the intended purpose. Therefore, an application form for viewing and copying contains a sentence pledging that the applicant agrees not to use records, etc. for purposes other than the intended purpose.

(3) Points to note in an interview (Refer to Clause II, 2, (3) of the Guidelines)

Presence of third parties including an attorney during an interview (except for an interpreter, attorney, etc. that the investigator, etc. requests from a view point of securing the appropriate and smooth implementation of the interview), audio / video recording of the process of taking an interview and note taking by testifying parties during an interview (excluding brief minute taking by testifying parties as permitted by the investigator, etc. from a perspective of securing the appropriate and smooth implementation of the interview) will create a concern that the JFTC’s fact-finding ability could be impaired, and therefore are not permitted (Note4). For the same reason, the copy of records at the time of their preparation will not be delivered.

(Note 4) When the testifying party is an officer or employee of the company that has applied for the leniency program, the investigator, etc. shall, upon their request, allow the testifying party to take notes of the statement immediately after the interview, and respond to questions from the testifying party to the extent necessary for the purpose of taking such notes.

(4) Length of interview and break times (Refer to Clause II, 2, (4) of the Guidelines)

- (i) As a general rule, an interview shall not span more than 8 hours (excluding breaks) per day and if the interview exceeds 8 hours per day, the consent of the

testifying parties shall be obtained. In addition, unless there is an unavoidable reason, the investigator, etc. shall not allow the interview to continue until late at night (after 10:00 pm).

- (ii) If an interview continues for long hours, the investigator, etc. shall ensure that testifying parties have a break time appropriately and in a timely manner, considering the party's physical condition, etc.

As a general rule, during the break time, the investigator, etc. shall not impose any restriction on activities of testifying parties, and shall not prevent the testifying parties from making contact with their attorneys and other external persons or taking notes based on their memories during the designated break time. However, for example, in the case of taking an interview from multiple parties concerned at times of the same day that are close to each other, if there is a possibility that a testifying party may contact other parties concerned and make arrangement to tell the same story, etc. the investigator, etc. shall accompany the parties concerned during the break time on an exceptional basis.

Further, if there is a relatively longer break time for such as for meals, as long as it does not hinder the interview, the investigator, etc. shall properly ensure that during such break time the testifying parties may consult with their attorney, etc. if necessary.

(5) Procedures for preparing records and affixing signatures and seals (Refer to Clause II, 2, (5) of the Guidelines)

- (i) When a testifying party makes a voluntary statement, the investigator, etc. shall prepare records of statement, if he/she deems it necessary to do so. In addition, when interrogating a testifying party in accordance with Article 47 of the Antimonopoly Act, the investigator must prepare records of interrogation.
- (ii) To clarify the facts of an alleged violation, the investigator, etc. shall accurately record the content of statements given by a testifying party that are related to the relevant case and are deemed necessary, and shall prepare records of statement or records of interrogation, taking into comprehensive consideration various material evidence and statements, etc. that have been collected so far. It is not necessary to record the contents of statements given by a testifying party word by word, as in the case of shorthand notes.
- (iii) When preparing voluntary records of statement or records of interrogation, the investigator, etc. shall read out the records to the testifying party or have the party read them and ask the party whether the records contain any errors. If the party confirms that there is no error, the investigator, etc. shall have the party affix his/her signature and seal on the records to complete them. Then, if there is an error, the testifying party may request that the statement be added to, deleted or changed. When the party makes a request, the investigator, etc.

shall confirm the intent of the party properly and then record the content as the party requests or modify relevant portions and then have the party affix his/her signature and seal on the records.

3. Order to report, etc.

(1) Legal grounds (Refer to Clause II, 3, (1) of the Guidelines)

In accordance with Article 47, Paragraph 1, Item 1 of the Antimonopoly Act, the JFTC has a power to order companies, etc., involved in an alleged violation to report information necessary for Case Investigation (hereinafter referred to as the “Reporting Order”). If a company, etc., involved in an alleged violation disobeys the order and fails to make a report or makes a false report, punishment under Article 94 of the Antimonopoly Act may be imposed.

Note that the JFTC may request a company, etc., involved in an alleged violation to make a report based on voluntary cooperation from the company, rather than issuing an indirectly enforceable Reporting Order under Article 47 of the Antimonopoly Act.

(2) Procedures for an order to report (Refer to Clause II, 3, (2) of the Guidelines)

If the JFTC orders a company, etc., involved in an alleged violation to make a report in accordance with Article 47 of the Antimonopoly Act, it shall do that by serving a writ of report. This writ of report shall be attached with a report (response) form and contain relevant provisions of the Act, the reporting deadline, and punishment imposed if the company disobeys the writ.

Note that if the JFTC requests a company, etc., involved in an alleged violation to make a report based on voluntary cooperation from the company, it shall generally take measures such as sending documents (e.g., a written request for report containing the reporting deadline, attached with a report (response) form).

Motion for objection against measures taken by the investigator and complaint about voluntary interview

If a party who has been subjected to an On-site Inspection, interrogation or other measures taken by the investigator in accordance with Article 47 of the Antimonopoly Act is dissatisfied with the relevant measures, the party may make a motion for objection to the JFTC within one week after the measures were taken by a document stating the grounds. (Section 22 of the Rules on Administrative Investigations by the Japan Fair Trade Commission).

In addition, if a party subject to voluntary interview or other parties argue that the language and behavior of the investigator, etc. went against “II. 2. Interview” of the Guidelines during the interview process, such party may make a complaint in writing to the JFTC within one week of the date of the interview (For the complaint filing system for voluntary interviews, please refer to https://www.jftc.go.jp/houdou/pressrelease/h27/dec/151225_2.html).

In addition to the procedures described above, if the division in charge of the case receives requests concerning investigation methods or opinions regarding the case under investigation, the JFTC will respond to them in good faith.

Flow for On-site Inspection in Administrative Investigation Procedures for Alleged Antitrust Cases

Appendix

Visit to the business office, etc., of companies, etc.

OFor On-site Inspection, an official from the JFTC (the investigator, etc.) enters the business office and other sites of a company, etc., involved in an alleged violation, inspects accounting books, documents and other materials and collects objects that are deemed necessary for Case Investigations.

Notification of the alleged fact of violating a provision of the Act to the person in charge

OTo the person in charge of the place subject to On-site Inspection, the investigator will

- present its identification card.
- deliver a notification that contains provisions that authorize the administrative investigation, the title of a case and main point of the act suspected of violating the Act (the alleged fact of violating a provision of the Act).
- explain that if the party concerned refuses to cooperate with the inspection, punishment may be imposed.

Implementation of On-site Inspection

OAt the place that the investigator reasonably considers to be necessary for Case Investigations, such as the sales department and accounting department, the investigator inspects accounting books and other materials in the presence of the person in charge of the place subject to On-site Inspection.

Order for submission of materials and checking

OThe investigator will give an order to submit materials that are reasonably considered to be necessary for Case Investigations (including electronic data). At that time, the investigator will prepare a list of the materials and attach it to a writ of submission.

OThe investigator will show each item to the person in charge, etc., of the site subject to On-site Inspection, and all the materials will be checked against the descriptions in the list.

OThe investigator will grant a request to copy materials that are deemed to be necessary for the daily business activities of the company, etc., as long as it does not affect the smooth implementation of On-site Inspection.

Retention of materials

OThe investigator keeps the materials that have completed the checking with the list on an as-is basis, and the JFTC retains them. At that time, the investigator delivers a notice on retained materials.

OThe materials retained by the JFTC are able to be perused and copied at a later date.

ONot only a copier owned by the company, etc., but also a digital camera, scanner or other electronic device may be used to make copies.

Completion

* As the investigator will allow an attorney to be present as long as it does not affect the smooth implementation of the On-site Inspection, please ask the investigator.

* This material describes the general flow for the On-site Inspection. If you have any questions about the details, etc., please ask the investigator.