Report Issued by the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act

December 24, 2014

Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act

NOTE: This is a tentative translation. The authentic text is only available in Japanese.
See http://www8.cao.go.jp/chosei/dokkin/index.html for the authentic text.

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I. Introduction

1. Background on deliberations

In recent years, with the increased globalization of business activities by companies, economic activities are also becoming more and more diverse and complex.

The government states that as the stage on which we compete is an open world, Japan will aim to be "the easiest country worldwide in which to do business."[1] With progress in globalization, maintaining an environment in which businesses from home and abroad can exert their originality and ingenuity through fair and free competition in the Japanese market is vitally important for our market to win confidence both domestically and internationally. As stipulated in the provisions of Article 1 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the "Anti-Monopoly Act"), maintaining such a competitive environment will assure the interests of general consumers and promote the wholesome development of the national economy.

To maintain such a competitive environment, it is essential to ensure strict enforcement of the Anti-Monopoly Act, which stipulates the basic rules for economic activities. The Anti-Monopoly Act prohibits activities that impede competition, such as cartels, and to ensure its effectiveness, it includes administrative orders and criminal punishment against companies involved in an alleged violation and gives investigative authority[2] to the Japan Fair Trade Commission (hereinafter referred to as the "JFTC"). With an increased need to deal with international cartels caused by globalization, the role of the JFTC is becoming more and more significant. To strengthen enforcement of the Anti-Monopoly Act, a revision of the Anti-Monopoly Act has been made, including the expansion of the surcharge system, introduction of the leniency program, and introduction of compulsory investigation power.

Because of its role, the JFTC is strongly required to be fair and transparent in

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[1] Policy Speech by Prime Minister Shinzo Abe to the 183th Session of the Diet (February 28, 2013), Policy Speech by Prime Minister Shinzo Abe to the 185th Session of the Diet (October 15, 2013)

[2] There are methods for an investigation used in the JFTC's administrative investigation procedures, including on-the-spot inspection, order to submit documents, keeping submitted documents at the JFTC, order to appear and to be interrogated, and order to report (Article 47 of the Anti-Monopoly Act), which have authority with indirect enforcement to indirectly guarantee performance of an investigation by punishment (Article 94 of the Anti-Monopoly Act), as well as voluntary deposition, request to report and request to submit documents, which are not based on such authority with indirect enforcement.

enforcing and implementing the Anti-Monopoly Act. For the JFTC to be fair and transparent, it is important that a company involved in an alleged violation can defend itself sufficiently against the JFTC's administrative investigation. The Act amending the Anti-Monopoly Act in 2013 stipulates that the JFTC's hearing procedure for administrative appeals will be abolished as it was pointed out that it lacked the appearance of fairness, and that appeals against administrative orders by the JFTC will be heard at a court. The Act also stipulates that pre-order procedures[3] prior to issuing an administrative order by the JFTC shall be further improved and made more transparent. Meanwhile, the JFTC's administrative investigation procedures for alleged antitrust cases (fact-finding process) were not included in the main provisions of the Act because it was considered to be more important to abolish the hearing procedure for administrative appeal immediately. Instead, the issues of the JFTC's administrative investigation procedures are stipulated in Article 16 of supplementary provisions as follows.

> The investigation procedures of the JFTC will be considered from a point of view to ensure that a party concerned with a case defends itself sufficiently, in keeping with consistency with other administrative procedures in Japan. The government will aim at drawing the conclusion of the consideration within one year in principle from the promulgation of the amended act and will take appropriate measures as necessary.

2. Enactment of the Act amending the Anti-Monopoly Act in 2013

The Act amending the Anti-Monopoly Act that includes the abolition of the JFTC's hearing procedure for administrative appeals mentioned in the above 1 was enacted on December 7, 2013 and promulgated on December 13 through deliberations in the 185th session of the Diet (the extraordinary session). (Act No. 100 of 2013)

A supplementary resolution adopted by the House of Representatives' Economy, Trade and Industry Committee was attached to Article 16 of supplementary provisions of the Act. It states that "in order to allow companies to fully exercise the right to defense under interrogation and voluntary questioning by the JFTC, the government, referring to rules and practices in other jurisdictions, should positively consider implementing the presence of an attorney and the provision of copies of deposition records, in keeping with

[3] A procedure to grant an opportunity for the expected recipient of a cease and desist order to express its opinions and submit evidence before giving such orders.

consistency with criminal procedures and other administrative procedures in Japan.” (November 20, 2013)

3. Holding of the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act

Given supplementary provisions of the Act amending the Anti-Monopoly Act in 2013, the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (hereinafter referred to as the “Advisory Panel”) was held to report to the Minister of State for a particular field. Under the supervision of Minister of State for a particular field Tomomi Inada (from February to September, 2014) and Minister of State for a particular field Haruko Arimura (from September to December, 2014), the Advisory Panel has so far had fourteen meetings.

In February 12, 2014, a decision was made to hold the Advisory Panel and at the first meeting of the panel, then-Minister of State Tomomi Inada appointed Katsuya Uga, a professor at the University of Tokyo Graduate Schools for Law and Politics, as chairman of the Advisory Panel and Mr. Uga appointed Masayuki Funada, a professor emeritus at Rikkyo University, as acting chairman. (See Attachment 1 for the list of members of the Advisory Panel.)

At the second meeting of the Advisory Panel, then-Minister of State Tomomi Inada presented the following perspectives and points to note in proceeding with the study.

(i) It is important to secure the right to defense for those investigated in the JFTC’s administrative investigation procedure. It is also important to ensure strict enforcement of the Anti-Monopoly Act by the JFTC.

(ii) The Advisory Panel is required to balance the JFTC’s fact-finding ability with the right to defense for those investigated. It should also refer to other administrative procedures in Japan and rules and practices from foreign jurisdictions.

At the second through fifth meetings (four in total), a series of hearings were conducted to collect opinions of experts, relevant organizations, relevant ministries and agencies, etc. (See Attachment 2 for the participants in the hearings by the Advisory Panel.) Following discussions at the sixth meeting, in a period from June to July, 2014, “Summary of Issues for Administrative Investigation Procedures under the Anti-Monopoly Act” was published to solicit opinions and information (public comments) from people of a variety of sectors. As a result of the solicitation of opinions, a total of 72 opinions and inputs were received from various parties.

At the seventh to twelfth meetings (six in total), each issue was studied based on the results of the hearings and solicitation of opinions as well.

At the thirteenth meeting, discussions were held to draw up a draft incorporating the results of the study.

Following these activities, the Advisory Panel has compiled this report.

The Advisory Panel hopes that the government will take full account of this report to implement necessary measures and that after the implementation of such measures, the results will be published. The Advisory Panel also hopes that a follow-up study will be conducted after a lapse of a certain period of time from the above publication, followed by the publication of the results of the follow-up study.

In addition, if enhancement of the right to defense is studied, it is desirable that the issue be discussed in greater depth, based on the results of the study at the Advisory Panel shown in this report.

(For more information on the details of the Advisory Panel meetings held, distributed materials, minutes of meetings, overview of agendas, results of soliciting opinions, etc., see http://www8.cao.go.jp/chosei/dokkin/index.html.)

II. Issues to be studied

The JFTC's administrative investigation procedures for alleged antitrust cases are classified into two categories: administrative investigation procedures (investigation procedures taken with the possibility of issuance of administrative orders in mind) and compulsory investigation procedures [4] (investigation procedures taken with the possibility of conducting a prosecution to seek criminal punishment in mind).

The JFTC in principle takes the approach that it handles alleged antitrust cases by following administrative investigation procedures. In light of factors such as the current situation where a large proportion of actual alleged antitrust cases are handled through administrative investigation procedures, the Advisory Panel studied the JFTC's administrative investigation procedures.

However, although the Advisory Panel did not study compulsory investigation procedures, it proceeded with the study with the possibility in mind that a case that is first handled by administrative investigation procedures might become subject to compulsory investigation procedures in the process.[5]

Note that in the course of the study on administrative investigation procedures, the Advisory Panel decided to discuss the strengthening of investigation powers, if necessary.[6]

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[4] The JFTC has a policy of actively conducting a prosecution to seek criminal punishment on the following cases:

- Vicious and serious cases which are considered to have wide spread influence on people's livings, out of those violations which substantially restrain competition in certain areas of trade such as price-fixing cartels, supply restraint cartels, market allocations, bid-rigging, group boycotts, private monopolization and other violation.
- Among violation cases involving those firms or industries who are repeat offenders or those who do not abide by the elimination measures, those cases for which the administrative measures of the JFTC are not considered to fulfill the purpose of the Act.

The JFTC conducts compulsory investigation on alleged antitrust cases for which there are enough and reasonable grounds to suspect that such cases fall under the above cases. (See "The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations" [the JFTC, Oct. 7, 2005].)

[5] At the first meeting, this point became the subject of debate and at the second meeting, relevant matters were compiled by Chairman Uga and the arrangement was approved by the Advisory Panel.

[6] Id.

III. Perspectives and points to note for the study

Based on viewpoints presented in supplementary provisions of the revised Anti-Monopoly Act and the supplementary resolution as well as perspectives and points of view presented by then-Minister of State for a particular field Tomomi Inada at the second meeting, the Advisory Panel conducted the study with the following perspectives and points to note in mind.

1. Ensuring that a party concerned with a case defends itself sufficiently

The administrative investigation procedures of the JFTC were considered from a viewpoint of ensuring that a party concerned with a case defends itself sufficiently.

2. Ensuring the fact-finding ability of the JFTC

When discussing defense of a party concerned, it is necessary to make sure that the JFTC's fact-finding ability is not impaired. Strengthening investigation powers was studied, if necessary, so that the JFTC's fact-finding ability is not affected.

3. Consistency with other administrative investigation procedures and criminal procedures in Japan

The JFTC's administrative investigation procedures were considered, with consistency with other administrative investigation procedures and criminal procedures in Japan.

4. Comparison with systems, structures and practices in foreign jurisdictions

The JFTC's administrative investigation procedures were studied, referring to examples in other jurisdictions, including those legal systems and the procedures and actual state of investigations by the competition authorities.

5. Ensuring the appropriateness and transparency of administrative investigation procedures

Administrative investigation procedures were studied, keeping in mind that the appropriateness and transparency of the procedures need to be ensured.

IV. Issues considered and results of the study

The Advisory Panel conducted the study by dividing into issues related to on-the-spot inspections and issues related to depositions (see page 24) based on the flow of administrative investigation procedures of the JFTC.

In addition, of issues related to on-the-spot inspections, the issue of so-called attorney-client privilege (see page 17) was studied separately from the other issues.

In the following sections, these three major issues are mainly discussed. For each issue, points that the Advisory Panel noted in summarizing the issue are described first and, for each matter considered, the overview of discussions and the summary prepared by the Advisory Panel are followed in a manner indicated below.

Further, as for the issue of strengthening investigation powers pointed out in the course of discussions, relevant issues are described in a separate section.

1. Issues related to on-the-spot inspection

(Summary of conclusion)

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

(b) As to copying materials to be submitted on the day of an on-the-spot inspection, the Advisory Panel concluded that it is not appropriate to recognize such copying as a right of companies, and that it is appropriate to allow companies to copy materials which are deemed necessary for their daily business activities as long as it does not affect the smooth implementation of the on-the-spot inspection. With regards to copying seized materials on the following day of an on-the-spot inspection or later, the Advisory Panel concluded that it is desirable to make clear that it is possible to use electronic devices such as scanners, to copy the materials smoothly, and to consider introducing paid copy machines to copy the materials at the JFTC.

(c) Regarding on-the-spot inspection, the Advisory Panel concluded that it is appropriate to clarify the following matters in manuals or guidelines (hereinafter referred to as “guidelines, etc.”) and make such matters public so that information is widely shared. Likewise, with regards to matters which should be made clear to companies concerned, the Advisory Panel concluded that it is appropriate to inform the companies of such matters in

appropriate circumstances such as when the JFTC initiates an on-the-spot inspection, by use of written documents or other means.

- Legal foundation and nature of the on-the-spot inspection
- The company concerned may have an attorney present during the on-the-spot inspection.
- The company concerned may not refuse the on-the-spot inspection on the grounds that the attorney has not arrived.
- The company concerned may copy materials to be submitted which are deemed necessary for their daily business activities on the day of the on-the-spot inspection as long as it does not affect the smooth implementation of such on-the-spot inspection.
- The company concerned is allowed to copy seized materials at the JFTC office on the following day of the on-the-spot inspection or later.

(Overview of discussions)

(1) Presence of an attorney during on-the-spot inspection

(i) The current practices in Japan, etc.

On-the-spot inspections by the JFTC are divided into the non-forcible ones and the ones based on authority with indirect enforcement (where the JFTC enters a place of business of a party concerned and conducts inspection in accordance with Article 47, paragraph 1, item 4 of the Anti-Monopoly Act and rejection of the inspection and other behaviors are subject to punishment). Normally, on-the-spot inspections based on authority with indirect enforcement are conducted instead of non-forcible ones (“on-the-spot inspection” used hereinafter means on-the-spot inspection based on authority with indirect enforcement).

There are no legal provisions recognizing or not recognizing presence of an attorney at the request of a company concerned with a case during on-the-spot inspection by the JFTC.

The JFTC allows an attorney to be present as long as the on-the-spot inspection is not disturbed, but in this case it starts on-the-spot inspection without waiting for an attorney to arrive.

Note that a tax accountant (including attorneys registered as a tax accountant and other similar persons) who is delegated authority to act as a representative for tax purposes (Article 2, paragraph 1, item 1 of the Certified Public Tax Accountant Act) is allowed to be present during tax

investigation pursuant to the Act on General Rules for National Taxes[7]. As for investigation of transactions in accordance with the Financial Instruments and Exchange Act, there are no legal provisions regarding presence of an attorney during on-the-spot inspection, and in principle, such presence of an attorney is not allowed in practice. Also, in criminal procedures, at the request of an attorney for acceptance of his/her presence during the search and seizure process, the Public Prosecutor's Office allows the request in practice, but the criminal procedures are not applied in a manner so that the search and seizure are not commenced unless the attorney is present.

Turning to examples of the U.S. and Europe, like in Japan, the presence of an attorney is allowed in the U.S., but procedures are not implemented in a manner so that search is not commenced until an attorney arrives. Also, in the EU, presence of an attorney is recognized in practice but is not a prerequisite for on-the-spot inspection.

(ii) Deliberation

As reasons and grounds for recognizing an attorney to be present during on-the-spot inspection as the right of a company concerned, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) It is important for an attorney to be present during on-the-spot inspection and check what documents the JFTC will seize or if it seizes more than necessary.

(b) Legal advice from an attorney is necessary to deal with legal questions, such as to confirm permissible limit for on-the-spot inspection.

Meanwhile, as reasons and grounds for postulating that it is not appropriate to recognize the presence of an attorney as the right of a company concerned and that as in the past, such presence should be permitted as a matter of practice for the purpose of implementing the inspection procedures, other panel members primarily expressed the following opinions from the perspective that such right might hamper the JFTC's fact-finding ability.

[7] An attorney who is not registered as a tax accountant but permitted to engage in the business of tax accountants by notifying the director of the regional taxation bureau to that effect is also allowed to be present (Article 51, paragraph 1 of the Certified Public Tax Accountant Act).

(a) Evidence could be destroyed while waiting for an attorney to arrive.

(b) It would not be reasonable if on-the-spot inspection cannot be started before an attorney arrives.

In addition, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments provided opinions on practice of the inspection such as: “A JFTC investigator rejected a request for a phone call to an attorney;” and “I could not call for an attorney because of uncertainty about whether the presence of an attorney is recognized or not.” Therefore, some panel members expressed their opinions that the JTFC should draw up guidelines, etc. stating that the presence of an attorney is recognized and a company concerned should be notified to that effect at the time of on-the-spot inspection.

Meanwhile, other panel members stated that because the presence of an attorney is not recognized as the right of a company concerned, it might be excessive to oblige the JFTC to notify the company that it might call for an attorney.

(2) Copying materials to be submitted (at on-the-spot inspection)

(i) Current practices in Japan, etc.

There are no legal provisions recognizing or not recognizing copying of materials subject to submission by a company concerned during on-the-spot inspection. The JFTC allows a party concerned to read and copy materials to be submitted that are deemed necessary for daily business operations as long as the smooth implementation of the on-the-spot inspection is not disturbed. There is a provision in the Rules on Administrative Investigations by the Fair Trade Commission (Fair Trade Commission Rule No.5 of 2005; hereinafter referred to as “Investigation Rules”) stating that materials seized already may be read and copied on the following day of on-the-spot inspection or later (Article 18).

Note that in practice, the JFTC allows a company concerned not only to bring copy machines to the JFTC office and copy the materials but also to use scanners, digital cameras and other electronic devices.

(ii) Deliberation

Some panel members expressed their views that as for materials the JFTC requires to be submitted, it is necessary for a company concerned to copy such materials on the day of on-the-spot inspection because of its

ordinary business operations and its preparation for its possible application for the leniency program.

Meanwhile, other panel members expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing copying materials to be submitted on the day of on-the-spot inspection as the right of a company concerned, or that such right should not be recognized.

(a) To apply for a leniency program, all a company concerned has to do is to confirm and report the outline of violations on its own. Therefore, even if copying is permitted, it is sufficient to permit the copying of materials necessary for such application.

(b) Because it is permitted to read and copy seizure materials at the JFTC office on the following day of on-the-spot inspection or later, a ground is not clear for arguing that all materials subject to submission must be copied on the day of on-the-spot inspection.

In addition, the following opinions on on-the-spot inspection practices were provided: an investigator rejected the request of a company concerned for copying materials subject to submission on the day of on-the-spot inspection; it is difficult in copying at the JFTC office on the following day of on-the-spot inspection or later because there are no copy machines available at the JFTC office and a company concerned must arrange and bring copy machines there; and it is required to wait for a couple of weeks after requesting for copying. It was also argued that the range of materials allowed to be copied and practice related to copying are not clear, and some panel members expressed their opinion that the JFTC should draw up guidelines, etc. regarding copying of materials to be submitted and notify companies of such matters while making clear that scanners and other electronic devices can be used at the JFTC office, and introducing paid copy machines there on a permanent basis, so that companies concerned can use.

The Advisory Panel asked the JFTC for opinions on this regard and the JFTC delivered their opinion that there are some limitations in ensuring smooth copying operations, such as limitation to its office space for installing copy machines and the need for presence of a JFTC official during the copying of materials to be submitted.

(3) Descriptions in guidelines, etc. regarding on-the-spot inspection and provision

of information to companies

(i) Current practices in Japan, etc.

The JFTC conducts on-the-spot inspections as follows.

- In conducting on-the-spot inspection, investigators of the JFTC, to persons in charge of companies to be inspected, (a) present their identification cards (Article 47, paragraph 3 of the Anti-Monopoly Act), (b) issue a notification that includes the case name, an outline of the alleged facts and relevant laws and provisions (Article 20 of Investigation Rules), and (c) explain provisions that stipulate the on-the-spot inspection, specifics of the on-the-spot inspection and the possible imposition of a legal sanction in case of an inspection being refused.
- In conducting on-the-spot inspection, the JFTC orders persons to submit materials that the JFTC considers are necessary for its investigation. (Article 47, paragraph 1, item 3 of the Anti-Monopoly Act) A written submission order includes a list of the materials to be submitted.

(ii) Deliberation

Panel members who consider that the JFTC should notify companies of the content of guidelines, etc. regarding on-the-spot inspection expressed the following opinions.

(a) Since it is difficult to know whether on-the-spot inspection and relevant procedures such as deposition and submission of materials are voluntary or indirectly enforceable, the JFTC should notify companies of whether respective procedures are voluntary or indirectly enforceable.

(b) Necessary information from the descriptions of guidelines, etc. need to be communicated by the JFTC to companies in writing.

(c) Proper communication of necessary information from the descriptions of guidelines, etc. to companies in writing contributes to smooth implementation of inspection and does not aim to disturb inspection.

Meanwhile, other panel members who consider that the JFTC need not communicate the content of guidelines, etc. to companies or that the methods for such communication should not be limited expressed the following opinions.

(a) It is sufficient to describe the basis and details of authority of investigators in guidelines, etc. drawn up by the JFTC and to notify companies of such information.

(b) As the content of guidelines, etc. does not describe what acts constitute a violation but how investigation on an alleged violation is proceeded, it is excessive to make sure any notifications should be made in writing without fail.

(4) Other issues

As for depositions taken by the JFTC from employees of a company (involved in an alleged violation) on the day of on-the-spot inspection, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments expressed the following opinions.

(a) A deposition should not be taken on the day of on-the-spot inspection because such deposition taking hinders a company from applying for leniency.

(b) From the viewpoint of application by companies for leniency, consideration should be given to, for example, enabling a company to secure time for interviews with the employees concerned.

Meanwhile, other panel members who consider that there is no need to refrain from taking a deposition on the day of on-the-spot inspection with consideration given to possible application by companies for leniency expressed the following opinions.

(a) Disturbing inspections by the JFTC for the convenience of application for the leniency program is like putting the cart before the horse.

(b) Providing for “consideration should be given” in guidelines, etc. leads to obligating the JFTC to give consideration to companies, which is not appropriate.

Other than the above, at the time of the hearings by the Advisory Panel, the JFTC expressed the following opinions: depositions taken from employees (involved in an alleged violation) immediately after the initiation of on-the-spot inspection are an important opportunity to obtain statements based on memories of the employees; and the application for the leniency program should be made in advance when a violation is discovered in an in-house investigation and investigations by the JFTC should not be restricted for the convenience of such application.

In addition, some panel members expressed the opinion that guidelines, etc.

should state that consulting with an attorney by phone or other means at any time before the attorney arrives during on-the-spot inspection is not obstructed.

Meanwhile, in this regard, other panel members expressed the opinion that because the JFTC does not recognize presence of an attorney as the right but does not obstruct such presence, whether or not consulting with an attorney by phone or other means is allowed should be determined according to the on-site circumstances and need not be stated in guidelines.

(Conclusion by the Advisory Panel)

(1) Presence of an attorney during on-the-spot inspection

As a result of discussions, the Advisory Panel reached the conclusion that presence of an attorney during on-the-spot inspection should not be recognized as the right of companies concerned. The ideas behind the conclusion was that measures to, for example, destroy evidence could be taken before on-the-spot inspection is started and that on-the-spot inspection cannot be started before an attorney arrives if such right is recognized, which creates a concern that the JFTC's fact-finding ability could be impaired.

Meanwhile, the Advisory Panel reached the conclusion that it is reasonable to recognize the presence of an attorney in practice because such recognition conforms to practices by the JFTC on the condition that non-arrival of an attorney does not enable a company to refuse on-the-spot inspection.

Refer to (3) below regarding descriptions in guidelines, etc. and provision of information to companies.

(2) Copying of materials to be submitted (at on-the-spot inspection)

As a result of discussions, the Advisory Panel reached the conclusion that copying materials to be submitted on the day of on-the-spot inspection should not be recognized as the right of companies. The reason for the conclusion was that from the legal perspective there is little need to allow all materials to be submitted to be copied on the day of on-the-spot inspection, given that in practice the JFTC allows materials to be submitted deemed necessary for daily business activities to be copied on the day of on-the-spot inspection as long as such copying does not affect the smooth implementation of the on-the-spot inspection, and given that seized materials are allowed to be read and copied at the JFTC office on the following day of on-the-spot inspection or later.

In addition, the Advisory Panel reached the conclusion that as for copying of seized materials on the following day of on-the-spot inspection or later, from the perspective of ensuring smooth copying operations, it is desirable for the

JFTC to make clear that it is possible to use electronic devices, such as a scanners and to consider introducing paid copy machines to copy the materials at the JFTC.

Refer to (3) below regarding descriptions in guidelines, etc. and provision of information to companies.

(3) Descriptions in guidelines, etc. regarding on-the-spot inspection and provision of information to companies

At the time of on-the-spot inspection, the JFTC provides explanation about the inspection to companies, but as described above, it is also true that issues relating to the presence of an attorney, copying of materials to be submitted and others were pointed out by companies.

Therefore, the Advisory Panel reached the conclusion that it is appropriate for the JFTC to clarify the following matters in guidelines, etc. and make such matters public so that information is widely shared. Likewise, with regards to matters which should be made clear to companies the Advisory Panel concluded that it is appropriate to inform the companies of such matters in appropriate circumstances such as when the JFTC initiates an on-the-spot inspection, by use of written documents or other means.

- Legal foundation on on-the-spot inspection
- Legal nature of on-the-spot inspection (obstructing the investigation may be subject to punishment)
- The company concerned may have an attorney present during the on-the-spot inspection.
- The company concerned may not refuse the on-the-spot inspection on the grounds that the attorney has not arrived.
- The company concerned may copy materials to be submitted which are deemed necessary for their daily business activities on the day of the on-the-spot inspection as long as it does not affect the smooth implementation of such on-the-spot inspection.
- The company concerned is allowed to copy seized materials at the JFTC office on the following day of the on-the-spot inspection or later.

(4) Other issues

Since depositions need to be taken from employees involved in an alleged violation on the day of on-the-spot inspection in order for the JFTC to conduct fact-finding activities, the JFTC's investigation should not be disturbed by an attempt of a company to apply for the leniency program. Therefore, the

Advisory Panel reached the conclusion that it is not necessary to give consideration to a company's application for the leniency program by not taking depositions from employees on the day of on-the-spot inspection.

2. Attorney-client privilege

Note: In this report, “attorney-client privilege” is defined as the right of a client company to refuse to disclose or submit certain communications with an attorney in administrative investigation procedures.

(Summary of conclusion)

(a) While not a few panel members understood that attorney-client privilege has a certain significance, the Advisory Panel concluded 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.

(b) The Advisory Panel does not completely deny the attorney-client privilege and the system is well worth considering, along with the issue of strengthening of the JFTC’s investigative powers. So it is desirable to deepen discussions on the privilege further as an issue to be considered in the future so that concerns and questions raised by the Advisory Panel can be addressed.

(Overview of discussions)

(1) Current practices in Japan, etc.

There are no legal provisions recognizing or not recognizing attorney-client privilege in the JFTC’s administrative investigation procedures for alleged antitrust cases. The JFTC does not recognize attorney-client privilege in practice and communications between an attorney and a client can be subject to an order to submit as with other information. The same applies to investigation of transactions pursuant to the Financial Instruments and Exchange Act, tax investigation pursuant to the Act on General Rules for National Taxes, and criminal procedures.

In the United States and Europe, attorney-client privilege is guaranteed under judicial precedents (common law) (and also guaranteed in fields other than competition laws), but the scope of the guarantee varies depending on jurisdictions.

(2) Deliberation

As reasons and grounds for introducing attorney-client privilege, some panel members, participants in the hearings by the Advisory Panel and persons who

responded to the solicitation of public comments primarily expressed the following views.

(a) Introduction of attorney-client privilege will enable companies to consult with an attorney at ease and without holding back any information, which allows companies to obtain legal advice from an attorney based on accurate information. As a result, compliance of companies is expected to improve.

(b) If an attorney is consulted by a company, the attorney plays a role in contributing to fact-finding activities by, for example, making an internal investigation report according to a request by the authorities and by encouraging the company to apply for a leniency program.

(c) If a company submits materials to the JFTC voluntarily or according to an order to submit, or submits the materials in a hearing or other procedures, the company could be considered to have waived an attorney-client privilege that is effective overseas (jurisdictions where attorney-client privilege is guaranteed).

(d) If communications between an attorney and a client company are made open to the JFTC which conducts investigation and are used as evidence against the company, this may cause a chilling effect on it, hindering it from consulting with an attorney thoroughly and receiving advice from him/her.

(e) The right of an attorney to keep professional secrets is originally for protecting a client, and if a client tells the attorney that he/she may disclose the secrets, the attorney may do so. In that sense, attorney-client privilege is fundamentally similar to the right to keep professional secrets combined with the right of refusal to testify.

(f) Keeping secret the content of consultation between those to whom disposition will be imposed by the state power and an attorney is considered as fundamental value in the light of the Constitution of Japan.

(g) According to the JFTC, there are no cases where a document that could be subject to an attorney-client privilege has constituted conclusive evidence to prove violations, so the introduction of attorney-client privilege might not impair the JFTC's fact-finding ability.

(h) Attorney-client privilege is the issue of balancing the attorney system including the significance of existence of attorneys and the ethics of attorneys with the JFTC's fact-finding ability.

Meanwhile, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about granting attorney-client privilege or that such privilege should not be granted.

(a) Consulting with an attorney about past violations might not improve company compliance.

(b) With no incentives for companies to cooperate in the JFTC's investigation (disincentives not to cooperate in the investigation) in the current situation, there is much apprehension that companies will claim an attorney-client privilege in terms of a variety of aspects including materials concerning facts necessary to prove violations and other documents, and that an attorney-client privilege will be abused. In addition, insufficient sanctions can be imposed against the abuse and there is also a difficulty in imposing sanctions.

(c) The concept of attorney-client privilege has been formed and accepted in the United States and Europe over a long period of time. On the other hand, the perception that attorney-client privilege improves society and a cultural background for accepting the privilege does not yet exist in Japan. Thus, the privilege should not be introduced by going out of our way to ignore such background and other factors.

(d) If it is argued that attorney-client privilege contributes to the public interest, whether to introduce it should be studied taking account of the impact of such introduction not only on the Anti-Monopoly Act but also on other legal fields.

(e) As far as investigation by the JFTC is concerned, it is not possible to argue that the right of companies to appoint an attorney is guaranteed under the Constitution of Japan, and whether an attorney-client privilege should be granted is a policy debate. Determination should be made by weighing the need to recognize the privilege (the need to guarantee the right of companies to defense) against negative effects caused by such

recognition (effects on JFTC's fact-finding ability).

(f) When the JFTC requests a company to submit materials that could be subject to attorney-client privilege in the U.S., and if the company refuses to do so, the JFTC will issue an order to submit which clearly states that non-compliance with the order is subject to criminal punishment. If this information is described in guidelines, etc., the concern that the U.S. authorities might deem attorney-client privilege to be waived in the discovery (disclosure of evidence) procedure could be remedied.

Other than the above, the JFTC expressed its opinion in the hearings by the Advisory Panel that although a document that may be subject to an attorney-client privilege could be evidence to prove violations, being unable to use the document as evidence will impair the fact-finding ability of the JFTC.

In addition, panel members who are positive about introduction of attorney-client privilege suggested that with reference to the decision[8] that dispositions under Article 47 of the Anti-Monopoly Act may not be refused without good reason, communications with an attorney should be interpreted as fitting into "good reason" for companies to refuse to submit and that if the following mechanism is provided for in the JFTC Investigation Rules or other regulations, the fact-finding ability might not be impaired.

- Materials to be protected (submission of which is refused for good reason) are limited to legal questions from a company to an attorney and legal advice from an attorney to a company. However, any descriptions of facts integrated into the above questions or advice are also protected.
- A company beforehand makes a list of materials subject to attorney-client privilege and stores them separately from other documents.
- At the time of on-the-spot inspection, the investigation staff can take a cursory look at documents that may be subject to protection in order to determine whether there is a good reason for refusing to submit.
- If the investigation staff reasonably judges that a company may destroy or hide documents it refuses to submit, the investigation staff issues a submission order to the company, seals off the submitted documents and passes them to another investigation staff (hereinafter referred to as the "Inspector") who is not involved in the investigation of the case.
- The Inspector investigates documents (including the submitted

[8] Case of Morinaga Shoji Co., Ltd. (No. 2 of 1966 (Ruling) JFTC Decision of October 11, 1968)

documents mentioned above) for which there is a conflict as to whether they are subject to protection, and determines whether there is a good reason for refusing to submit them. The Inspector returns to the company the documents for which he/she judges there is such a good reason (documents subject to attorney-client privilege) and delivers the other documents to the investigation staff as evidence.

- As for facts that are included in questions from the company to an attorney and that support violations by the company, if information on such facts cannot be obtained by other means (such as deposition) but is essential to prove the violations, the Inspector deems that there is no good reason for refusing the order to submit, and delivers such information to the investigation staff as evidence.

Meanwhile, other panel members expressed the following view on the above suggestion.

(a) Under the positive law of Japan, there is a conflict as to whether attorney-client privilege should be granted and there are no judicial precedents that granted it. Under these circumstances, it is not necessarily reasonable to, without accumulation of legislation and precedents, hastily establish a provision of the JFTC Investigation Rules on the premise that an attorney-client privilege is granted under positive law.

(b) Basically, attorney-client privilege is not an issue of interpretation of existing laws but a debate on whether to introduce it as a new system and it might be difficult to implement the procedure for attorney-client privilege based on the interpretation of “good reason”.

(c) I generally agree on the introduction of attorney-client privilege, but with no sufficient measures to prevent the abuse and establish incentives for not concealing information, granting the privilege will cause great negative effects.

(d) As for attributes of attorneys who communicate with a company, in-house attorneys are not separated from external attorneys in the above suggestion. In EU, however, protection by attorney client privilege is limited to communications with external attorneys and the scope of protection in the above suggestion might be too large compared to that in EU.

(e) If facts to support violations are included in legal questions and

legal advice, it is extremely difficult to distinguish between them. If attorney-client privilege is granted, there is a concern that all information on the facts is protected by attorney-client privilege when contained in the questions and advice.

The Advisory Panel asked the JFTC for opinions on this regard and the JFTC delivered their opinion that there are the following problems.

(a) If a wide range of information on facts necessary for investigation is protected by attorney-client privilege, there is a possibility that the admissibility of evidence may be denied in a litigation by the court eventually, which in itself impairs the fact-finding ability of the JFTC.

(b) In judging whether information is protected by attorney-client privilege and essential to prove violations, such judgment need to be made very carefully, taking into account the possibility of such judgment being challenged in litigation for rescinding a JFTC decision.

(c) Whether some information is essential to prove violations cannot be determined at an early stage of investigation, and it could be even more difficult for the Inspector who is not involved in the investigation to make such highly-advanced judgment.

(d) Even if such judgment is made, there will be a problem that information on facts included in materials subject to attorney-client privilege cannot be used as evidence until near the end of investigation when other evidences are on the table.

(Conclusion by the Advisory Panel)

As a result of discussions, from the perspective of securing the right of companies to defense, not a few panel members expressed their understanding of a certain significance of attorney-client privilege to protect certain communications between a company and its attorney. However, the ground for granting attorney-client privilege and the scope to which the privilege needs to be applied are not clear and a concern was expressed that the introduction of the privilege might impair the fact-finding ability of the JFTC. Even with the suggestion made by members of the Advisory Panel, the concern was not dispelled. Therefore, the Advisory Panel concluded that it is not appropriate to introduce attorney-client privilege at the present stage.

Meanwhile, it was the first time that a meeting body like this Advisory Panel discussed attorney-client privilege in earnest in Japan and the discussion itself

was valuable. However, there still remain many unclear matters.

The Advisory Panel does not completely deny the attorney-client privilege and the system is well worth considering, along with the issue of strengthening of the JFTC's investigation powers. So it is desirable to deepen discussions on the privilege further as an issue to be considered in the future so that concerns and questions raised by the Advisory Panel can be addressed.

3. Issues related to deposition

Note: In the course of discussions, some panel members expressed the opinion that depositions are classified into voluntary ones and interrogations based on authority with indirect enforcement (In accordance with Article 47, paragraph 1, item 1 of the Anti-Monopoly Act, an order to appear is issued to employees of a company involved in an alleged violation or other parties and depositions are taken from them in an interrogation where false statements are subject to punishment) and it would be appropriate to discuss them separately. Unless otherwise specifically noted, the following discussions cover both voluntary depositions and interrogations, and when referring to both of them, they are simply called “deposition(s)”.

Similarly, records that record statements of testifying parties are simply referred to as “deposition records” hereinafter when referring to both of records of voluntary depositions (voluntary deposition records) and records prepared in an interrogation (interrogation records).

(Summary of conclusion)

(a) The Advisory Panel did not come to the conclusion that the presence of an attorney during deposition as well as audio/video recording of the process of taking depositions should be allowed under the current system.

However, some panel members were of the opinion that such measures should be allowed. The Advisory Panel thus concluded that it is appropriate to continue discussions on the necessity and advisability of introducing such measures when considering measures which will not impede the effectiveness of the fact-finding ability of the JFTC.

(b) As for issuing of copies of deposition records to testifying parties when deposition records are taken, note taking by testifying parties during a deposition, and the privilege against self-incrimination, the Advisory Panel did not come to the conclusion that such measures should be allowed.

(c) The Advisory Panel concluded that the JFTC should clarify the following matters in the guidelines, etc. and make such matters public so that information is widely shared. With regards to matters which should be made clear to testifying parties, the Advisory Panel concluded that it is appropriate to inform testifying parties of such matters in appropriate circumstances such as before taking a deposition, by use of written documents or other means.

- Make clear to testifying parties whether the deposition is voluntary or an interrogation based on authority with indirect enforcement.

- Indicate the approximate time length of the deposition.
- Properly ensure breaks, such as mealtimes, making sure that testifying parties may consult with their attorney during such breaks as long as it does not affect the deposition. Make clear to testifying parties that they are not prevented from communicating with their attorney or third parties or taking notes based on their memory during breaks.
- Make clear to the testifying party that the investigation staff shall ask, at the stage of reading of deposition records, the party whether it contains any errors, and if the party makes a request to add, delete or change the records, include such statement in the records.
- Establish a system, within the JFTC, to receive complaints if testifying parties are not satisfied with the handling of the deposition by the investigation staff. In doing so, give consideration to the independence and neutrality of the system. Likewise, make public the grounds for complaints and how such complaints were processed in a classified manner.

(Overview of discussions)

(1) Presence of an attorney during deposition

(i) Current practices in Japan, etc.

Depositions taken by the JFTC are classified into voluntary ones and interrogations and the JFTC relies on voluntary depositions rather than interrogations in many cases.

Depositions of employees of a company involved in an alleged violation[9], employees of a client company and government officials placing an order are often taken.

There are no legal provisions recognizing or not recognizing presence of an attorney at the request of testifying parties during deposition and the JFTC does not recognize this in practice. The same applies to investigation of transactions pursuant to the Financial Instruments and Exchange Act,

[9] In the case of administrative investigation procedures under the Anti-Monopoly Act, while administrative disposition is imposed on a company, those subject to deposition are typically employees of the company who are not subject to administrative disposition. Therefore, if an employee wants to tell the whole truth, while his/her company takes a stance to deny an allegation, a conflict of interest arises between the employee and the company. Further, there is a concern that employees would be afraid of internal punishment and other actions, which may hamper the JFTC's fact-finding.

The Advisory Panel conducted the study, taking into account the possibility of the above problems occurring during deposition.

tax investigation pursuant to the Act on General Rules for National Taxes.[10] In regard to criminal procedures as well, a prosecutor in practice takes into account the possibility of impairing the questioning ability, breaching the confidential nature of investigation, etc. and properly judges whether to recognize the presence of an attorney on a case-by-case basis, because there is no legal provision regarding the presence of an attorney during the questioning.[11]

Turning to examples of the U.S. and Europe, there are court precedents that allows an attorney to be present during the questioning of suspects or defendants who are in custody in the U.S. If a suspect, etc. is not in custody, he/she is not granted the right to presence of an attorney but in practice, presence of an attorney is recognized. In EU, the right to presence of an attorney is not granted during investigation conducted by the European Commission but presence of an attorney is recognized in practice.

(ii) Deliberation

As reasons and grounds for allowing an attorney[12] to be present during deposition, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) It is necessary to ensure that testifying parties can consult with an attorney about their rights and legal questions and obtain legal advice.

(b) It was pointed out that many testifying parties mistake voluntary deposition to be compulsory. Furthermore, since the JFTC investigation staff tries to take deposition records as the JFTC wishes, the following complaints were expressed by those

[10] However, a tax accountant (including attorneys registered as a tax accountant and other similar persons) who is delegated authority to act as a representative for tax purposes (Article 2, paragraph 1, item 1 of the Certified Public Tax Accountant Act) is allowed to be present during tax investigation pursuant to the Act on General Rules for National Taxes (An attorney who is not registered as a tax accountant but permitted to engage in the business of tax accountants by notifying the director of the regional taxation bureau to that effect is also allowed to be present [Article 51, paragraph 1 of the Certified Public Tax Accountant Act].).

[11] The results of the hearing from the Ministry of Justice at the fourth meeting show that the ministry has not ascertained specific cases where an attorney was present during the questioning.

[12] An attorney who is present during deposition is considered to work either for companies or testifying parties who are their employees. Given that those subject to disposition under the Anti-Monopoly Act are companies, the Advisory Panel held discussions, basically assuming that an attorney who is present works for companies.

who actually provided a deposition: “I was repeatedly requested to come and asked the same question many times,” “a testifying party requested change in deposition records but the investigation staff turned down the request,” “the investigation staff did not take depositions that do not conform to the story the investigation staff initially had,” etc. It is necessary to ensure that testifying parties can defend against these undue investigation practices.

(c) The trustworthiness of deposition records prepared can be guaranteed by ensuring that testifying parties can obtain legal advice from an attorney and defend against undue investigation practices.

(d) In many overseas cases too, the presence of an attorney enables testifying parties to make accurate statements based on their memories so the presence of an attorney is also helpful for fact-finding activities and improving the efficiency of law enforcement.

(e) If an attorney who is present during deposition obstructs it, a lawyer disciplinary system can be used. It is also possible to consider providing for punishment of such conduct.

(f) Presence of an attorney for companies during deposition may cause a chilling effect on employees because the contents of their depositions would be conveyed to their company. However, such cases can be handled by allowing an attorney for employees to be present.

(g) No chilling effect on employees will be caused if an attorney who works solely for an employee is allowed to be present only at the stage of reading deposition records to the testifying party and on the condition that the attorney does not disclose information he/she acquires in the process to the company, from the perspective of preventing a conflict of interest from arising between the company and the employee.

(h) Even if the right to presence of an attorney is not granted, consideration should be given to clearly stating in guidelines, etc. that the JFTC may at its discretion recognize presence of an attorney.

Meanwhile, other panel members, participants in the hearings by the

Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing presence of an attorney during deposition or that such presence should not be recognized.

(a) Testifying parties are required to tell the truth and need not obtain legal advice from an attorney during deposition (the only legal advice from an attorney might be “tell the truth”.).

(b) Administrative investigation is conducted for imposing dispositions on companies and does not aim to punish individual employees. Therefore, it is doubtful that testifying employees need to hire an attorney for their individual needs. If an attorney for companies is hired, because the truth told by employees may damage their company’s interests, presence of the attorney may cause a chilling effect on the employees who are in fear that the status and contents of their depositions would be conveyed to their company. This will impair the fact-finding ability of the JFTC.

(c) Testifying parties are not in custody and can consult an attorney during a break. For this and other reasons, there is little need for recognizing presence of an attorney.

(d) If an attorney ascertains the content of deposition accurately, an arrangement beforehand may be made to tell the same story within the company or among the companies.

(e) The argument of “undue investigation” does not stem from a violence, intimidation or other human-rights violations but from a conflict as to whether the content of deposition records is appropriate or not. Thus, it is doubtful that presence of an attorney working for a party concerned may help prevent such conflict and ensure trustworthiness of the records because the attorney is not in an impartial and neutral position.

(f) In Japan, there is no mechanism for securing incentives for companies to cooperate in the JFTC’s investigation and disincentives not to cooperate in the investigation. Under such circumstances, if presence of an attorney is recognized, companies will not cooperate in the investigation, causing a great impact on fact-finding activities.

(g) There is a concern that an attorney may obstruct investigation,

and given that disciplinary action imposed on attorneys mainly focuses on their illegal activities and that in the current Japanese system there is no counterpart of the contempt of court charge in the U.S., it is doubtful that a lawyer disciplinary system will work if an attorney obstructs investigation. Further, it is also difficult to actually apply criminal punishment.

(h) Even if it is stated in guidelines, etc. that the JFTC may at its discretion recognize the presence, there will actually be no cases of recognizing the presence of an attorney, if even the first company applying for the leniency program before the initiation of investigation only provides the minimum cooperation. Such statement is therefore misleading.

(i) An attorney for individual employees cannot be fully deemed as such if companies introduce the attorney to the employees and pay the attorney's fees. Presence of such an attorney during deposition of employees might lead to a conflict of interest as in the case of presence of an attorney for companies.

(j) Even if an attorney for individual employees is present at the stage of reading deposition records to the employees, there is a possibility of deposition records being disclosed to their company as those which the employees were convinced to sign and seal. This will cause other chilling effects on the employees, such as failure by testifying parties to place their signature and seal on deposition records or making only innocuous statements that can be included in deposition records without anxiety.

In response to the opinion that testifying parties are required to tell the truth and need not obtain legal advice from an attorney during deposition ((a) above), some panel members expressed the opinion that although all testifying parties have to do is tell the truth, if testifying parties fail to grasp the meaning of a question from an investigator, their answers will vary significantly and that the need to obtain legal advice cannot be denied.

In addition, from the perspective of classification between voluntary deposition and interrogation, some panel members expressed the following opinion.

(a) In the case of voluntary deposition, the issue is whether, if the JFTC proposes that depositions be taken without presence of

an attorney, testifying parties accept the proposal or not. The issue does not involve making such presence a rule.

(b) If testifying parties refuses to provide a deposition as long as presence of an attorney is not recognized, the investigation staff has no choice but to recognize presence of an attorney according to an interpretation of Articles 47 and 94 of the Anti-Monopoly Act if the investigation staff is to take depositions from them, because the investigation staff is not permitted to take direct enforcement actions such as forcing testifying parties to enter a deposition room and holding them in custody. In the case of interrogation too, the above action taken by testifying parties do not fall into refusal to make statements under Article 94 of the Anti-Monopoly Act.

(c) The interpretation that testifying parties' refusal to respond to interrogation conducted without presence of an attorney does not fall into refusal to make statements is based on the premise that the presence of an attorney is recognized as a right. Such interpretation has not been adopted in the past and there would be no cases where the JFTC accepted it.

(d) In the case of interrogation, legal advice is more important because unlike voluntary deposition, an order to appear is issued and failure to make statements and provision of false statements are subject to punishment.

(e) In the case of interrogation, testifying parties are required to respond to it, and they need to grasp its meaning. Therefore, it is necessary to notify them in advance as to whether the procedure is voluntary deposition or interrogation.

(f) Because interrogation is an administrative investigation procedure and testifying parties are not in custody and can consult an attorney during a break, there is no need to recognize presence of an attorney as is the case in voluntary deposition.

(g) Both voluntary deposition and interrogation procedures are based on the premise that the Japanese citizens are generally required to cooperate with fact-finding activities. Punishment as indirect enforcement actions related to interrogation is interpreted as administrative punishment for failure to perform general cooperation obligations. Thus, as for both procedures, presence of an attorney should basically be considered in the

same manner.

(h) (If testifying parties refuse to testify, interrogation will be conducted and they will be required to respond to it. In that sense, psychologically they might feel that they have the obligation, but) there is no legal foundation for voluntary deposition and formally it cannot be argued that the Japanese citizens are required to accept the obligation of cooperating with fact-finding activities.

(2) Audio/video recording of the process of taking depositions

(i) Current practices in Japan

There are no legal provisions recognizing or not recognizing audio/ video recording of the process of taking depositions by the JFTC. The JFTC does not recognize this in practice. The same applies to investigation of transactions pursuant to the Financial Instruments and Exchange Act, tax investigation pursuant to the Act on General Rules for National Taxes. Meanwhile, in criminal procedures, the Public Prosecutor's Office performs audio and video recording in some of the cases where suspects or defendants are in custody, although there are no legal provisions for the recording.

(ii) Deliberation

As reasons and grounds for recognizing audio or video recording of the process of deposition, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) It is possible to examine ex-post whether or not undue investigation, such as loaded questions and deposition coerced based on a preconception, is conducted by The JFTC investigation staff.

(b) There were cases where the voluntariness and trustworthiness of deposition records were contested during the administrative hearing procedures for a long time. If the process of taking depositions had been recorded and videotaped, the issue would have been resolved immediately. Audio/video recording helps prevent an issue from arising in a subsequent procedure and enables the early completion of fact-finding activities.

(c) Audio/video recording will provide an effective tool to improve

the transparency and appropriateness of an investigation by the JFTC.

(d) Compared with presence of an attorney, it is considered that audio/video recording poses a less risk of smooth deposition being obstructed and causes less negative effects.

(e) In the case of voluntary deposition, if both presence of an attorney and a measure (audio/video recording) for the authorities to ensure the transparency are judged to be unnecessary, testifying parties should be allowed to, for example, bring in a recording device (digital voice recorder) and record the process as an effective mechanism to prevent the investigation staff from taking depositions along the story he/she initially had.

Meanwhile, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing audio/video recording of the process of taking depositions or that such recording should not be allowed.

(a) One characteristic of the Anti-Monopoly Act is that those subject to disposition for violations of the Anti-Monopoly Act are companies, while those subject to deposition (testifying parties) are not companies. Thus, there is a concern that information on the attitude of testifying parties during deposition and the contents of depositions can be conveyed to those other than testifying parties (in particular, a company involved in an alleged violation) through audio or video tapes, which will cause a chilling effect on testifying parties.

(b) Procedures for Anti-Monopoly Act cases differ from criminal procedures (where audio/video recording is conducted within a certain condition) in that Anti-Monopoly Act cases are not subject to the lay judge system, testifying parties are not held in custody, and there have been no JFTC decisions or court rulings that depositions were taken unduly. Given these points or other factors, the premise for Anti-Monopoly Act cases might be different from that for criminal procedures in the first place.

(c) In regard to investigation methods for voluntary investigation,

for example, whether or not testifying parties are allowed to record the process of taking depositions with their recording device is considered to be up to the discretion of the JFTC within a reasonable limit. Those subject to investigation do not have a right to request such recording, which means nothing beyond the fact that the JFTC merely cannot further conduct voluntary deposition procedures if it turns down the request.

Other than the above, from the perspective of securing the right to defense, a panel member expressed the opinion that if presence of an attorney during deposition is recognized, there is no need to further recognize audio/video recording.

In addition, from the perspective of distinguishing between voluntary deposition and interrogation, a panel member expressed the opinion that in the case of voluntary deposition, the issue is whether or not testifying parties accept the proposal made by the JFTC that depositions should be taken without audio/video recording, and that the issue does not involve recognizing such recording under a system.

The above points were discussed without limiting scenes and cases where audio/video recording should be conducted. In view of these points discussed, it is possible to consider taking measures, such as limiting the recording to scenes of reading deposition records to testifying parties and limiting cases where the JFTC at its discretion conducts the recording. Then some panel members raised a question as to whether such double limitations affect the JFTC's fact-finding ability.

The Advisory Panel asked the JFTC for opinions on the above points and the JFTC expressed the following opinions.

(a) There still remains a concern that even if the scenes of recording are limited, a chilling effect on testifying parties may be caused as in the cases where no limit is set to the scenes.

(b) Limiting the scenes of recording would cause less negative effects than recording the entire deposition process but the scenes not audio/video recorded cannot be examined, which make the verification less effective.

(c) The issue of chilling effects arises in any case, and there are in principle no cases where there are no problems that the JFTC

at its discretion conducts audio/video recording.

(d) If recording is conducted at the discretion of the JFTC, there is a risk that the court may judge that deposition records prepared without audio/video recording are less strong as evidence.

Other than the above, a member of the Advisory Panel suggested that after what a testifying party wants is confirmed, and only after obtaining his/her consent, audio/video recordings be disclosed to the extent to which the consent is given. The Advisory Panel asked the JFTC for opinions on this regard and the JFTC expressed the opinion that if such method becomes a rule, it is highly likely that companies will, in advance, instruct testifying parties to give the consent, causing distress to testifying parties.

(3) Issuing copies of deposition records to testifying parties when deposition records are taken

(i) Current practices in Japan

There are no legal provisions recognizing or not recognizing issuing copies of deposition records to testifying parties when deposition records are taken in the JFTC's deposition procedure. The JFTC does not recognize this in practice.

However, the revised Anti-Monopoly Act in 2013 (unenforced) provides for disclosure of evidence in pre-order procedures and stipulates that certain deposition records are subject to copying.[13]

In the case of investigation of transactions pursuant to the Financial Instruments and Exchange Act, tax investigation pursuant to the Act on General Rules for National Taxes, there are no legal provisions recognizing or not recognizing issuing copies of deposition records. This is not recognized in practice, either.

For criminal investigation procedures as well, there are no relevant legal provisions. In practice, copies of records of statements are not issued to suspects and other parties when such records are taken.

(ii) Deliberation

As reasons and grounds for recognizing issuing copies of deposition

[13] According to Article 52, paragraph 1 of the Anti-Monopoly Act, the expected recipient the cease and desist order, etc. is permitted to make a request for copying of evidence related to the case that proves facts found by the JFTC and that the Rules of the JFTC defines as deposition records of the company or its employee.

records to testifying parties when deposition records are taken, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) It is virtually impossible for testifying parties to memorize the content of deposition records in detail, and they can examine the content of their own depositions with copies of deposition records after the deposition procedure and ask an attorney for effective advice.

(b) Testifying parties can confirm the content of their own depositions and correct any errors and inappropriate information in a timely manner, which will contribute to fact-finding activities.

(c) Testifying parties can verify whether the content of deposition records is an accurate reflection of what they testified.

Meanwhile, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing issuing copies of deposition records to testifying parties when deposition records are taken or that such issuing should not be recognized.

(a) For example, in the case of bid riggings, a focus is placed on efforts to prove “communication,” which consists of perceptions and affirmations among the concerned parties and the deposition procedure plays a crucial role in proving violations. If copies of deposition records are issued at the stage of fact-finding process, the possibility cannot be denied that the content of depositions of testifying parties, matters of concern of investigators and information they hold in hand will be shared with other companies or among testifying parties in a company and that an arrangement beforehand to tell the same story will be made. Therefore, it is not appropriate to include such right to request for issuing in the right to defense.

(b) To ensure claims can be made appropriately, it is only necessary to, in the pre-order procedure, clarify what evidence supports administrative dispositions implemented by the JFTC and confirm that such evidence is disclosed properly.

(c) As for the issuance of copies of deposition records, as described in (i) above, the revised Anti-Monopoly Act in 2013 provides for disclosure of evidence in pre-order procedures and stipulates that certain deposition records are subject to copying. Therefore, the actual implementation of the pre-order procedures after the enforcement of the revised act should be first ascertained and then the issue of the issuance should be studied.

(4) Note taking by testifying parties during deposition

(i) Current practices in Japan

There are no legal provisions recognizing or not recognizing note-taking by testifying parties during deposition in the JFTC's deposition procedure. The JFTC does not recognize this in practice.

(ii) Deliberation

As reasons and grounds for recognizing note-taking by testifying parties during deposition, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) It is virtually impossible for testifying parties to memorize the content of deposition records in detail, and they can use notes to examine the content of their own depositions after the deposition procedure and ask an attorney for effective advice.

(b) If deposition records are not prepared, notes can be used as records of the content of depositions.

(c) Testifying parties can confirm the content of their own depositions and correct any errors and inappropriate information in a timely manner, which will contribute to fact-finding activities.

Meanwhile, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing note-taking by testifying parties during deposition or that such note-taking should not be recognized.

(a) All testifying parties need to do is to tell what they experience

based on their memories. If note-taking is for facilitating the defense activities of companies, there is no need to recognize it.

(b) The possibility cannot be denied that the content of what testifying parties are asked by investigators during deposition and matters of concern of the investigators and information they hold in hand will be shared with other companies or among testifying parties in a company and that an arrangement beforehand to tell the same story will be made as in the case of issuing copies of deposition records. Therefore, it is not appropriate to include such right to take notes in the right to defense.

(c) If notes taken by an employee are passed to his/her company, it might be like a company monitors the content of his/her depositions as a matter of course, which might hinder employees from testifying freely.

Other than the above, at the hearing by the Advisory Panel, the JFTC presented the view that testifying parties are supposed to try to take notes with as much detail as possible, that they may focus on taking notes and fail to respond sincerely to investigation staff's questions and that taking notes may often stop him/her from questioning.

In response to this, a member of the Advisory Panel expressed the opinion that, assuming that notes taken are not so detailed and contain the minimum necessary words and items to recall memories during consultation with an attorney, the above problems will not arise, and there might be no problems in recognizing note-taking to the extent that the JFTC deems its fact-finding ability is not hampered. In this regard, other panel members expressed the following opinions.

(a) If only the minimum necessary content to recall memories is necessary, they should take notes during a break.

(b) If long consecutive hours of depositions are taken, there may be difficulty in maintaining the memories of the content of depositions until a break and it might be appropriate to recognize note-taking.

(c) Even notes with the minimum necessary content to recall memories can have a great impact on the investigation if the content of depositions including the "existence/non-existence

and frequency of coordination meetings" and "duration of violation" is shared with other companies or among testifying parties in a company. There might be difficulty in determining specific criteria for acceptable notes.

(d) If a break is taken properly during deposition, it may be possible to generally achieve the purpose of note-taking by taking notes during the break.

(5) Privilege against self-incrimination

(i) Current practices in Japan

There are no legal provisions recognizing or not recognizing the privilege against self-incrimination[14] of testifying parties in the JFTC's deposition procedure. The JFTC does not recognize this in practice. Meanwhile, the privilege against self-incrimination is guaranteed in compulsory investigations as well as criminal procedures.

Note that in practice the JFTC does not use deposition records prepared at the administrative investigation phase as evidence for compulsory investigations and takes new deposition records for use in compulsory investigations.

(ii) Deliberation

As reasons and grounds for recognizing the privilege against self-incrimination of testifying parties in the JFTC's deposition procedure, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) A case that is first handled by administrative investigation procedures might become subject to compulsory investigation procedures.

(b) The surcharge has a similar nature to criminal fines, and an amount of surcharge is large. Thus, the surcharge needs to be treated in the same manner as in criminal procedures where the privilege against self-incrimination is guaranteed.

[14] The privilege against self-incrimination is provided for in Article 38, paragraph 1 of the Constitution of Japan (No person shall be compelled to testify against himself.). The legal meaning of this provision is "guaranteeing that no person is forced to testify on matters for which the person may be held criminally liable." (The Judgment of the Full Bench of the Supreme Court of Japan, November 22, 1972 [p.554, Vol. 26, No. 9, Collection of Supreme Court Cases (Criminal Matters)])

Meanwhile, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views as reasons and grounds for postulating that it is necessary to be cautious about recognizing the privilege against self-incrimination or that such privilege should not be recognized.

(a) The privilege against self-incrimination should be considered in the context of not voluntary deposition but interrogation which imposes the obligation of testifying. As for Article 38 of the Constitution of Japan, in the JFTC's administrative procedures, the privilege against self-incrimination is not guaranteed in accordance with the article on the premise of imposing the surcharge. Assuming that such guarantee is provided from the policy perspective, the provision of the guarantee cannot be explained in a manner to maintain consistency with other administrative sanctions. Thus, it is difficult to recognize this.

(b) If it is guaranteed that depositions of testifying parties who are obliged to testify in interrogation procedures and evidence derived from the depositions cannot be used in a criminal trial, there is no need to recognize the privilege against self-incrimination and such recognition is not appropriate.

Other than the above, at the time of hearing by the Advisory Panel, the JFTC presented the view that if the privilege against self-incrimination is recognized, the indirect enforcement in interrogation procedures will become ineffective, and a request to testify on matters related to violations will be turned down. Therefore, according to the JFTC, it may become impossible to obtain statements based on facts to conduct fact-finding activities.

(6) Improving the process of deposition

(i) Current practices in Japan

Those subject to the measures taken by the JFTC investigator (Article 47 of the Anti-Monopoly Act) can appeal against the JFTC if they are dissatisfied with the measures. (Article 22 of Investigation Rules). There is no provision like this in regard to voluntary deposition, and at the JFTC, management level personnel such as investigation chiefs respond to the

above issue in practice.

(ii) Deliberation

As for problems with depositions taken by the JFTC investigation staff, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views.

(a) The investigation staff asks testifying parties loaded questions, persistent questions, questions not related to an alleged violation, etc.

(b) It was pointed out that many testifying parties misunderstand voluntary deposition to be compulsory. Furthermore, since the JFTC investigation staff tries to take deposition records as the JFTC wishes, the following complaints were expressed by those who actually participated in the deposition procedure: “I was repeatedly summoned and asked the same question many times,” “a testifying party requested change in deposition records but the investigation staff turned down the request,” “the investigation staff did not take depositions that do not conform to the story he/she initially had,” etc. (discussed above)

(c) If presence of an attorney is not recognized, consideration should be given to allow testifying parties to consult with an attorney properly, based on the concept of the right to consult with an attorney in criminal procedures.

In response to the above comments, in the hearing procedure of the Advisory Panel, the JFTC provided the following explanations.

(a) The JFTC neither conducts investigations unrelated to an alleged violation nor asks testifying parties to participate in the deposition procedure until late at night on consecutive days.

(b) With a view to advancing the investigation process effectively, it is a natural course of action to presume existence of certain facts based on material evidence obtained or other information and proceed with investigations. However, such presumption is only a hypothesis and if material evidence or other information that denies the hypothesis is obtained, it is also a matter of course to examine its details and make corrections where necessary.

(c) If testifying parties request the correction of draft deposition records, the JFTC confirms the purpose of the requested correction and corrects factual or other errors, if any.

(d) Breaks and mealtimes are taken during deposition as necessary.

In response to the above comments, other panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments expressed the following views.

(a) Whether the deposition is a voluntary one or an interrogation based on authority with indirect enforcement needs to be made clear to testifying parties.

(b) Matters that need to be made clear to testifying parties should be notified in writing before taking a deposition. Using a written form would facilitate smooth investigation.

(c) The investigation staff develops a likely scenario of what happened in the case and as a result, he/she could be less likely to take a look at other possibilities. Therefore, the policy for listening sincerely to what testifying parties tell should be clarified.

(d) There may be the issue of excessive depositions such as asking the same question repeatedly and persistently, and it might be appropriate to establish certain rules for the length of deposition and break per day.

(e) As for the issue of investigation staff not correcting deposition records as testifying parties request, it could be resolved by including their statements in deposition records without fail if they request change in the records.

(f) Complaints about depositions taken by investigation staff as pointed out above can be generally resolved by providing education and training to investigation staff.

(g) It might be appropriate to consider a means of confirming that investigations are conducted properly, such as establishing the obligation for recording in detail the length of break in minutes and the total hours of deposition and disclosing the records properly in the case of a complaint expressed by a company.

(h) As for ensuring a break is taken properly, the length of break that varies depending on cases cannot be used as the standard.

It might be appropriate to give an estimated length of break, such as every one hour and a half or two hours.

(i) In addition to a measure to ensure a break is taken properly, it might be appropriate to set a limit to the number of sessions of deposition per case or to the time length of deposition per day.

(j) At the hearings, it was pointed out that deposition does not take many hours currently. In addition, in the case of a testifying party from a remote place, limiting the number of sessions of deposition or the time length of deposition may affect investigation operations and in the case where many points need to be confirmed by questioning key persons involved in bid rigging or where there are many parties concerned, limiting the number of sessions of deposition is not feasible.

(k) It is neither possible nor appropriate to set numerical criteria for the number of sessions of deposition and the length. It is sufficient if the JFTC makes clear in guidelines that it will conduct investigations efficiently and responds to complaints properly.

(l) The right to consult with an attorney is for suspects in custody or the like, not for parties who testify in the JFTC's investigation procedure. So the setting is different in the first place.

(m) As for ensuring a break is taken properly, it might be appropriate to give consideration to an opportunity for testifying parties to consult with an attorney as long as the deposition procedure is not disturbed.

(n) As long as depositions are taken behind closed doors, and presence of an attorney and audio/video recording are not recognized, verification cannot be made.

(o) It might be appropriate to strengthen a mechanism for enabling companies to express complaints and displeasure.

(p) As a result of the revision of the Anti-Monopoly Act in 2013, it is necessary, during deposition, to notify testifying employees of the possibility that deposition records may be read and copied by their companies in pre-order procedures.

(q) The JFTC seems to excessively rely on deposition records, but it might be appropriate to take an approach of putting more focus on objective evidence, making use of orders to report, and shifting to a framework to secure incentives for companies

concerned to cooperate in investigation easily.

Therefore, it is considered that a mechanism for enabling companies to express complaints should be strengthened. The panel members expressed the following opinions on the mechanism.

(a) At the responsibility of the JFTC, possibly the most independent and neutral mechanism (for example, complaints are received by a department other than the investigation department) should be adopted to deal with the complaints.

(b) Even if there is a system for expressing complaints, the appropriateness of the system cannot be verified currently. If the JFTC says “there is no such fact,” a he-said-she-said dispute ensues. Therefore, complaints should be received by a third party, not by the JFTC.

(c) From the perspective of balancing the two requirements (quick remedy for undue questioning and prevention of obstruction to smooth deposition), it is appropriate that a higher level body within the JFTC (for example, the Commission consisting of the Chairman and 4 Commissioners) receives complaints.

(d) To ensure the effectiveness of the mechanism for dealing with complaints, reasons for complaints and the results of handling them should be published.

(Conclusion by the Advisory Panel)

(1) Presence of an attorney during deposition

As a result of discussions, the Advisory Panel did not come to the conclusion that the presence of an attorney during deposition should be allowed under the current system, given that testifying parties are not in custody and can consult with an attorney during a break, and that there is a concern about the fact-finding ability being affected by chilling effects on testifying employees.

However, some panel members were of the opinion that presence of an attorney during deposition should be allowed. The Advisory Panel thus concluded that it is appropriate for the necessity and advisability of introducing the right to presence to be discussed when considering measures which will not impede the effectiveness of the fact-finding ability of the JFTC.

(2) Audio/video recording of the process of taking depositions

As a result of discussions, the Advisory Panel did not come to the conclusion

that audio/video recording should be allowed under the current system, given that although it cannot be denied that such recording is an effective means for examining ex-post whether depositions are taken properly, a chilling effect is caused on testifying parties and it cannot dispel a concern impairing the fact-finding ability, not only in the case where the entire process of deposition is subject to such recording but also in the case where recording is limited to certain scenes such as reading deposition records to testifying parties or is conducted at the discretion of the JFTC.

However, some panel members were of the opinion that audio/video recording should be allowed. The Advisory Panel thus concluded that it is appropriate to continue discussions on the necessity and advisability of introducing such recording when considering measures which will not impede the effectiveness of the fact-finding ability of the JFTC.

(3) Issuing copies of deposition records to testifying parties when deposition records are taken

As a result of discussions, the Advisory Panel did not come to the conclusion that issuing copies of deposition records to testifying parties when deposition records are taken should be allowed, given that if the copies are issued at the stage of fact-finding process, they may be shared with other companies or among testifying parties in a company and be used to make an arrangement beforehand to tell the same story.

(4) Note taking by testifying parties during deposition

The Advisory Panel did not come to the conclusion that note-taking by testifying parties during deposition should be allowed, given that the notes may be used to make an arrangement beforehand to tell the same story, as in the case of issuing copies deposition records described in (3) above, and that even if the content of notes is limited to minimum necessary words and items, there is difficulty in practice in determining specific criteria for acceptable notes.

Note-taking during a break is as shown in (6) below.

(5) Privilege against self-incrimination

The Advisory Panel did not come to the conclusion that the privilege against self-incrimination should be allowed, given that such privilege should be considered in the context of interrogation where the obligation of testifying is imposed, and cannot be explained in a manner to maintain consistency with other administrative sanctions, and that in practice the JFTC does not use

deposition records prepared at the administrative investigation phase as evidence for compulsory investigations and takes new deposition records for use in compulsory investigations.

(6) Improving the process of deposition

As for depositions taken by the JFTC, although there have been no JFTC decisions or court rulings that denies the voluntariness or trustworthiness of deposition records, it is also true that it is often pointed out that the above problem occurs during deposition (or during preparation of deposition records). Therefore, the Advisory Panel concluded that the JFTC should clarify the following matters in guidelines, etc. and make such matters public so that information is widely shared. With regards to matters which should be made clear to testifying parties, the Advisory Panel concluded that it is appropriate to inform testifying parties of such matters in appropriate circumstances such as before taking a deposition, by use of written documents or other means.

- Make clear when taking depositions, by the JFTC's investigation staff, to testifying parties whether the deposition is voluntary or an interrogation based on authority with indirect enforcement.
- Indicate the approximate time length of the deposition.
- Properly ensure breaks, such as mealtimes, making sure that testifying parties may consult with their attorney during such breaks as long as it does not affect the deposition. Make clear to testifying parties that they are not prevented from communicating with their attorney or third parties or taking notes based on their memory during breaks.
- Make clear to the testifying party that the investigation staff shall ask, at the stage of reading of deposition records, the party whether it contains any errors, and if the party makes a request to add, delete or change the records, include such statement in the records.
- Establish a system, within the JFTC, to receive complaints if testifying parties are not satisfied with the handling of the deposition by the investigation staff. In doing so, take account of the independence and neutrality of the system and consider, for example, a system where a section other than the investigation section receives complaints. Likewise, make public the grounds for complaints and how such complaints were processed in a classified manner.

4. Administrative investigation procedures in general

(Summary of conclusion)

Draw up and make public guidelines, etc. regarding standard administrative investigation procedures for the JFTC's investigation on alleged antitrust cases. Likewise, follow up on the implementation of the guidelines after a lapse of a certain period, and make public the results.

(Overview of discussions)

(1) Current practices in Japan, etc.

The JFTC's website provides general information on regulations under the Anti-Monopoly Act. Investigation Rules stipulate the main points about administrative investigation procedures, but the website does not provide detailed information on administrative investigation procedures.

Taking a look at other administrative investigation procedures in Japan, for example, the Securities and Exchange Surveillance Commission has formulated and makes available the "Basic Guidelines on Investigation of Market Misconduct" on its website. The National Tax Agency has also formulated and makes available the "Basic Concepts regarding Implementation of Investigation Procedures (Operating Guidelines)" on its website.

Turning to examples of the U.S. and Europe, for example, the European Commission and the United States Department of Justice have published the "Antitrust Manual of Procedures" and the "Antitrust Division Manual," respectively, on their websites.

(2) Deliberation

As for the JFTC's administrative investigation procedures, some panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments expressed the following views.

(a) By making public manuals used by the JFTC in Japan, like in EU, the transparency of the procedures will be enhanced.

(b) In order to increase the transparency and fairness of the procedures, the JFTC is expected to disseminate its standard procedures.

(c) The JFTC should promptly draw up guidelines, etc. based on the results of the Advisory Panel meetings, and publish them. In addition, a follow-up review should be conducted after a lapse of a certain period of time and the review results should be published.

(d) If the flowchart of standard administrative investigation

procedures using comprehensible images and videos is published on the JFTC's website and used in a workshop, or if what is allowed to do and not to do in administrative investigation procedures is presented in an easy-to-understand manner, administrative investigations can be conducted smoothly.

In response to the above comments, in the hearing procedure of the Advisory Panel, the JFTC expressed the opinion that the JFTC's documents for internal use can contain investigation methods, points to note, etc., and publishing the details of such information is not appropriate since it will lead to violations being kept secret and affect the JFTC's investigation.

(Conclusion by the Advisory Panel)

As a result of discussions, the Advisory Panel 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 antitrust cases.

Likewise, the Advisory Panel also concluded that it is appropriate for the JFTC to follow up on the implementation of the guidelines after a lapse of a certain period of time from implementation of procedures based on the new guidelines and make public the results.

5. Preparing for future studies

(Summary of conclusion)

(a) If strengthening the right to defense is to be considered in ways other than the one to be implemented under the current system by the Advisory Panel, it is appropriate to conduct studies concurrently on the possibility of introducing systems to secure incentives to cooperate with the JFTC's investigation as well as disincentives not to cooperate or to obstruct investigations, including a discretionary surcharge system[15].

(b) It is also appropriate to conduct studies on the possibility of introducing systems similar to the settlement procedure and the commitment procedure[16] in the EU.

(Overview of discussions)

(1) Current practices in Japan, etc.

Regarding administrative investigation procedures for alleged antitrust cases in Japan, there is no system to reduce the amount of surcharge on the grounds that a company under investigation cooperates with investigation. Meanwhile, there is a leniency program where the first company applying before start of investigation are exempted from the entire surcharge while the JFTC has no discretion to reduce the amount of surcharge for the second or subsequent companies according to the extent of cooperation they provide. Further, the amount of surcharge cannot be increased because of obstructing investigations, and although a crime of obstruction of inspection is provided for in Article 94 of the Anti-Monopoly Act, there were no cases of a criminal prosecution in the past.

In EU, cooperation with investigations can reduce the amount of fines imposed on violations, and under the leniency program, the first applicants are exempted from fines, and the authorities have discretion to reduce fines for the second and subsequent applicants according to the extent of their cooperation. To apply the leniency program, full and continuous cooperation is required.

[15] A system like fines in the EU that allows the authorities to decide the amount of a fine, taking into account the extent of cooperation and non-cooperation of companies under investigation and other factors.

[16] Settlement is typically a system where the authorities commences a negotiation after determining that the case is qualified for settlement, and the procedures are simplified and fines are reduced, if a company proposes that it does not contest the content of findings and dispositions related to violations, and if the authorities agree to the proposal. Commitment is typically a system where the authorities determine whether a company has an intention to an effective proposal, and if a company proposes a remedy and the authorities agree to the proposal, the company is obligated by an order, etc. to implement the remedy with the investigation concluded without determining whether the company has committed a violation.

Furthermore, obstructing investigations can lead to higher fines related to violations and the act of obstructing itself can be subject to a separate fine.

In the U.S., cooperation with investigations can mitigate punishment for violations, and persons covered by the leniency policy are exempted from a criminal prosecution. For the second and subsequent applicants, punishment can be mitigated according to the extent of cooperation under the plea-bargain system. To apply leniency or plea-bargain systems, full and continuous cooperation is required. Furthermore, obstructing investigations can lead to harsher punishment related to violations and persons who obstruct investigations can be separately charged with an obstruction of justice or offense of perjury.

On the other hand, in Japan, there is no system to remedy competition concerns efficiently and effectively by voluntary agreement between the competition authorities and companies, such as settlement procedure and commitment procedure in the EU as well as consent decree and consent order in the U.S.

(2) Deliberation

While studying issues such as those related to on-the-spot inspection and those related to deposition, and comparing current practices and systems in Japan with those overseas, the panel members, participants in the hearings by the Advisory Panel and persons who responded to the solicitation of public comments primarily expressed the following views on a system for securing incentives to cooperate in investigations and disincentives not to cooperate in investigations.

(a) Currently, unlike the U.S. and Europe, Japan has no system for securing incentives for companies to cooperate in the investigation and disincentives not to cooperate or obstruct it. Under such circumstances, if attorney-client privilege and presence of an attorney during deposition is recognized, companies will not cooperate in the investigation, causing a great impact on the JFTC’s fact-finding ability.

(b) Investigation procedures must be aligned with global standards. A system where a company cooperates in investigation by providing facts and evidence, and authorities conduct fact-finding activities using them is mainstream around the world. To make the Japanese procedures conform to such practice, there is also a need to change the overall system.

(c) It is essential to introduce a discretionary surcharge system and put in place a system where the authorities have discretion to make a variance in the amount of surcharge according to the extent of cooperation and non-cooperation of companies. Further, introduction of a discretionary surcharge system is an urgent issue, and discretionary surcharge should be adopted promptly with the amount of the current surcharge set as the upper limit.

(d) I take a favorable view of the introduction of a discretionary surcharge system but the amount of surcharge in Japan is smaller than that in the U.S. and Europe and the calculation period in Japan is also shorter (3 years at the maximum in Japan, but in the U.S. and Europe there is no limit to the period, which often spans over 10 years). Therefore, a system with the amount of the current surcharge set as the upper limit is inadequate.

(e) Settlement procedure and commitment procedure in the EU do not provide incentives to cooperate in investigation at the stage of fact-finding process, but provide incentives to cooperate in concluding investigation and procedures. However, both of them could provide some incentives for cooperation to that extent and it is worthwhile to also consider introducing systems such as settlement procedure and commitment procedure in the EU.

(f) It is possible to deem that the discretionary surcharge not only strengthens investigation powers but provides a kind of defense to companies because it enhances incentives to cooperate with the competition authorities.

(g) Introducing in Japan a discretionary surcharge system or other mechanism for securing incentives to cooperate in investigation and a system such as settlement procedure and commitment procedure in the EU is desirable in that cases are handled under the cooperation between companies and the competition authorities from the perspective of due process.

(h) Not a tug of war between the two requirements (strengthening the right to defense and strengthening investigation powers) but an environment that ensures economic activities are conducted fairly is an important issue for the public. If there is suspicion that fair economic activities are impaired, a framework where the competition authorities and companies work together to solve the issue needs to be established.

(i) It is desirable, on the premise that cooperation can be obtained from companies, to make a shift from the investigation method that is excessively dependent on depositions to the European investigation method that mainly relies on reporting orders.

(j) In light of the fact that the Advisory Panel did not reach the conclusion that presence of an attorney should be recognized because negative effects on the fact-finding ability would be caused under the current situation, if the right to defense is discussed in the future, such discussion should be based on a system revision that secures sufficient incentives for companies to cooperate in the JFTC's investigation.

(k) The Advisory Panel conducted a review from the viewpoint of securing sufficient defense for companies under investigation, and although the issue of strengthening investigation powers may be discussed in the future, the issue is not of a nature to be discussed at the Advisory Panel meetings.

(l) In Article 16 of the supplementary provisions of the revised Anti-Monopoly Act, a restriction is provided using the term "(procedures to conduct) necessary investigation" and because it is a matter of course to conduct fact-finding activities, protection of the right to defense by impairing the fact-finding ability is not required under the article.

(Conclusion by the Advisory Panel)

The Advisory Panel did not come to the conclusion that attorney-client privilege, presence of an attorney during deposition, and other rights to defense should be allowed, due mainly to a concern that the JFTC's fact-finding ability is affected.

However, if discretionary surcharge or other systems for securing incentives to cooperate in the JFTC's investigation and disincentives not to cooperate in or obstruct it are introduced, companies will be further encouraged to provide cooperation. As a result, a situation that impairs the fact-finding ability, which is concerned under the current circumstances, will be less likely to arise.

Thus, if strengthening the right to defense is to be considered in ways other than the one to be implemented under the current system by the Advisory Panel, the Advisory Panel concluded that it is appropriate to conduct studies concurrently on the possibility of introducing the above systems

In addition, systems such as the so-called settlement procedure and

commitment procedure in the EU do not necessarily provide incentives to cooperate with investigation in the fact-finding process but they can efficiently and effectively solve concerns associated with competition. For this reason, the Advisory Panel concluded that it is also appropriate to conduct studies on the possibility of introducing these systems.

Attachment 1

List of Members of the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act

(As of December 24, 2014)

Chairman	Katsuya UGA	Professor, the University of Tokyo Graduate Schools for Law and Politics
Acting Chairman	Masayuki FUNADA	Professor emeritus, Rikkyo University
	Kaoru AOYAGI	Professor, Nihon University Law School
	Takeyoshi IMAI	Professor, Hosei University Law School
	Masaru OIKAWA	Head of Policy Promotion Department, National Federation of Small Business Associations
	Yoichiro OSAWA	Editorial Writer, the Yomiuri Shimbun Tokyo Head Office
	Toshihiro KAWAIDE	Professor, the University of Tokyo Graduate Schools for Law and Politics
	Chihiro KAWASHIMA	Chief of Policy Bureau, Japanese Trade Union Confederation
	Yasuko KOUNO	Director-General of the Secretariat, National Liaison Committee of Consumer Organizations
	Miki SAKAKIBARA	Competition Law Panel member, Committee on Economic Law, KEIDANREN (Japan Business Federation) , Attorney-at-law
	Fumio SENSUI	Professor, Kobe University Graduate School of Law
	Takehisa NAKAGAWA	Professor, Kobe University Graduate School of Law
	Yumiko MIMURA	Professor, Aoyama Gakuin University School of Business
	Masahiro MURAKAMI	Professor, Seikei University Law School
	Kimitoshi YABUKI	Attorney-at-law, Yabuki Law Offices

Attachment 2

Participants in the hearings by the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act

(Job titles and positions are those at the time of the meetings)

The 2nd Meeting (March 27, 2014)

Yasuhisa ABE	Director, Business Infrastructure Bureau, KEIDANREN (Japan Business Federation)
Kazuyuki YABATA	Head of the Maebashi Metal-Working Factory Complex Association (National Federation of Small Business Associations)
Jay Ponazecki	President, The American Chamber of Commerce in Japan (ACCJ)
Hiromitsu MIYAKAWA	Chairman of Competition Policy Task Force Committee, The American Chamber of Commerce in Japan (ACCJ)

The 3rd Meeting (April 11, 2014)

Toshiaki TADA	Attorney
Vassili Moussis	Attorney (Registered foreign lawyer)
Shiro SHIDA	Attorney

The 4th Meeting (April 23, 2014)

Tetsuya NAGASAWA	Attorney
Shuichi SONODA	Director, Coordination Division, Secretariat, Securities and Exchange Surveillance Commission
Tetsuro SHIGETO	Director of Taxation Management Division, Taxation Department, National Tax Agency
Hiroshi YAMAMOTO	Director of Criminal Affairs Division, Criminal Affairs Bureau, the Ministry of Justice
Kazuto HOSAKA	Counselor, Director of the Criminal Legislative Division, Criminal Affairs Bureau, the Ministry of Justice

The 5th Meeting (May 14, 2014)

Masaru MATSUO	Director General, Economic Affairs Bureau of General Secretariat, JFTC
Hiroo IWANARI	Counselor, Secretariat of General Secretariat, JFTC
Masayuki YAMAGUCHI	Director, Planning Office, Investigation Bureau of General Secretariat, JFTC
Naohiko KOMURO	Senior Planning Officer, Investigation Bureau of General Secretariat, JFTC