

# **A Study on the 2013 Amendment to the Antimonopoly Act of Japan** – Procedural Fairness under the Japanese Antimonopoly Act

by

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### ***Abstract***

The 2013 Amendment to the Japanese Antimonopoly Act, promulgated on 13 December 2013, abolished the current Hearing Procedure System for administrative appeals administered by the Japan Fair Trade Commission. However

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the New Amendment raises a number of problems concerning procedural issues, including independence of the Japan Fair Trade Commission, limitations of judicial review, and exclusive jurisdiction of the Tokyo District Court. This paper reviews related discussions regarding these issues and points out additional possible grounds for the criticism of the 2013 Amendment.

In addition, following the abolition of the Hearing Procedure System, the 2013 Amendment sets out new provisions on hearing procedures under the Antimonopoly Act. This paper thus makes a detailed comparison between the newly enacted provisions on hearing procedures under the Antimonopoly Act and the relevant provisions under the Administrative Procedure Act, which is Japan's main law on administrative procedures. By comparing these provisions, the author examines to what extent procedural fairness is accomplished under the Antimonopoly Act.

### *Résumé*

L'amendement de 2013 à la Loi antimonopole japonaise, promulgué le 13 Décembre 2013, a aboli le système actuel de la procédure d'audience en cours d'appel administratif gérés par la Commission japonais du commerce équitable (Japan Fair Trade Commission (JFTC)). Toutefois, le nouvel amendement soulève un certain nombre de problèmes concernant les questions procédurales, y compris l'indépendance de la JFTC, la limitation du contrôle judiciaire, et la juridiction exclusive de la Cour de la région de Tokyo. Cet article examine les discussions sur ces questions et souligne d'autres motifs possibles pour la critique de l'amendement de 2013. Suite à l'abolition du système de la procédure d'audience, l'amendement de 2013 contient également des nouvelles dispositions relatives à la procédure d'audition en vertu de la Loi antimonopole. Cet article permet ainsi une comparaison détaillée entre ces dispositions nouvellement adoptées et les dispositions pertinentes de la Loi sur la procédure administrative, qui est la loi principale du Japon sur les procédures administratives. En comparant ces dispositions, il est examiné à quel point l'équité procédurale est réalisée sous la Loi antimonopole.

**Classifications and key words:** the 2013 Amendment to the Japanese Antimonopoly Act; procedural fairness; abolition of the Hearing Procedure System; exclusive jurisdiction of the Tokyo District Court; inspection and transcription of evidence

## I. Preface and Summary of the Amendment to the Antimonopoly Act of 2013

This paper presents a study on the 2013 Amendment<sup>1</sup> (hereafter: the New Amendment), to the Japanese Antimonopoly Act<sup>2</sup>, which abolished the current Hearing Procedure System for administrative appeals<sup>3</sup> administered so far by the Japan Fair Trade Commission (hereafter: the JFTC). The New Amendment was promulgated on 13 December 2013, and will be put in force in 2014 or 2015. Nevertheless, as many economic law scholars point out<sup>4</sup>, the New Amendment raises a number of problems concerning procedural issues in particular. These problems constitute the focus of the following analysis.

The New Amendment can be summarized in three following main points. First, 1) the existing Hearing Procedure System for administrative appeals administered by the JFTC will be abolished<sup>5</sup>. Moreover, several provisions of the current AMA will also be abolished. They include: Article 85 item (i)<sup>6</sup> which provides for appellate jurisdiction of the Tokyo High Court over the JFTC's administrative orders; Article 80<sup>7</sup>, which sets out the substantial evidence rule that dictates that fact findings made by the JFTC is binding on

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<sup>1</sup> The full text of the 2013 Amendment in Japanese is available at <http://www.sangiin.go.jp/japanese/joho1/kousei/gian/185/pdf/s031830721850.pdf> (28.08.2014).

<sup>2</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947) (hereafter: AMA).

<sup>3</sup> It can be understood as an administrative tribunal system within the competition authorities.

<sup>4</sup> See, e.g., C. IKEDA, et al, "A formal opposition to the abolition of the Hearing Procedure System", *HÔRITSU JIHÔ* vol. 82 no. 4, p. 73 (2010).

<sup>5</sup> The relevant provisions are to be found from Art. 52 to 68 and in other relevant provisions of the current AMA.

<sup>6</sup> Art. 85 item (i) of the current AMA provides: "The jurisdiction of the first instance over any action or suit falling under any of the following items shall lie with the Tokyo High Court: (i) Action for the judicial review of an administrative disposition defined in Article 3, paragraph (1) of the Administrative Case Litigation Act in connection with decisions of the Fair Trade Commission (excluding action defined in paragraphs (5) to (7) included in the same Article)."

<sup>7</sup> Art. 80 of the current AMA provides: "(1) If a finding of fact made by the Fair Trade Commission in an action provided for in Article 77, paragraph (1) is based on substantial evidence, it is binding on the court. (2) The court shall decide whether or not the substantial evidence provided for in the preceding paragraph exists."

the court if established by substantial evidence and; Article 81<sup>8</sup> imposing limits on submitting new evidence<sup>9</sup>.

Second, 2) according to Article 85, 86 and 87 of the New Amendment, the Tokyo District Court will have exclusive jurisdiction over appeals against cease and desist orders issued by the JFTC for violations of the AMA. Moreover, trials and judgments will be held by a panel of three or five judges. Such provisions are meant to ensure judicial expertise of the reviewing court.

Third, 3) changes are made to the hearing procedures which the JFTC conducts prior to issuing a cease and desist order. In order to enhance administrative procedures prior to the issuance of a final administrative order, the New Amendment contains relevant provisions on presiding hearing officers, explanations of the content of an anticipated cease and desist order, and on the inspection and transcription of evidence of facts found by the JFTC.

With respect to the reform of hearing procedures presided over by designated officers<sup>10</sup>, the following five points should be noted. First, regarding a presiding officer in charge of a hearing procedure<sup>11</sup>, the New Amendment provides that a hearing procedure should be presided over by an officer (a designated officer; the so-called “procedural officer”) designated by the JFTC for each case. Second, regarding explanations by investigators<sup>12</sup>, the New Amendment provides that the designated officer should have investigators, and other officials engaged in the case, provide explanations of the content

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<sup>8</sup> Art. 81 of the current AMA provides: “(1) A party may offer the court new evidence relevant to the case only provided that the reason for which a party offers new evidence in connection with a facts found by the Fair Trade Commission must fall under either of the following items:

(i) that the Fair Trade Commission failed to adopt the evidence without justifiable grounds;  
(ii) that it was impossible to present the evidence at the hearings of the Fair Trade Commission, and there was no gross negligence on the part of the party in failing to present such evidence.  
(2) Concerning the offer of new evidence provided in the conditions of the preceding paragraph, the party seeking to introduce the evidence must prove that the evidence falls under any of the items of the preceding paragraph.

(3) If the court finds there to be grounds for a party to offer new evidence as provided in the condition of paragraph (1) and it is necessary to examine such evidence, the court shall remand the case to the Fair Trade Commission and order it to take appropriate measures after examining such evidence.”

<sup>9</sup> It stipulates that a party may present the court new evidence relevant to the case where the JFTC failed to adopt the evidence without justifiable grounds.

<sup>10</sup> Art. 49 et seq. of the New Amendment.

<sup>11</sup> Art. 53 of the New Amendment.

<sup>12</sup> Art. 54(1) of the New Amendment.

of an anticipated cease and desist order<sup>13</sup> for a party attending the hearing<sup>14</sup>. Third, regarding the appointment of a representative<sup>15</sup>, pursuant to the New Amendment the party concerned may appoint a representative during hearing procedures. Fourth, regarding the statements of opinion and inquiry of investigators at the hearing<sup>16</sup>, the party concerned may attend the hearing, state his/her opinions, submit evidence, and, with the permission of the designated officer, question investigators<sup>17</sup>. Fifth, regarding the preparation of records and reports by the designated officer<sup>18</sup>, the New Amendment provides that the designated officer should prepare a written record of the minutes of the hearing, including statements of opinion by the party attending the hearing. The officer should also prepare a report listing the contentious issues pertaining to the hearing. The written record and report should be submitted to the JFTC. The JFTC should, pursuant to the New Amendment, take both of these documents into proper consideration before making a decision on the cease and desist order.

Next, with respect to the inspection and transcription of evidence of facts found by the JFTC<sup>19</sup>, the following two points should be noted. First, regarding the inspection of evidence, the party concerned may inspect the evidence establishing the facts of the case found by the JFTC during the period from the time the party received the hearing notice until the end of the hearing. Second, regarding the transcription of evidence, among the evidence subject to the inspection, the party may request a transcript of the material submitted by the party itself, and that of recorded statements provided by the party's employees.

To better understand the preceding explanations, refer to the diagram below.

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<sup>13</sup> It should include the content of anticipated cease and desist orders, facts found by the JFTC, application of applicable laws and regulations to such facts, and main evidence.

<sup>14</sup> It means the anticipated recipient of the cease and desist order.

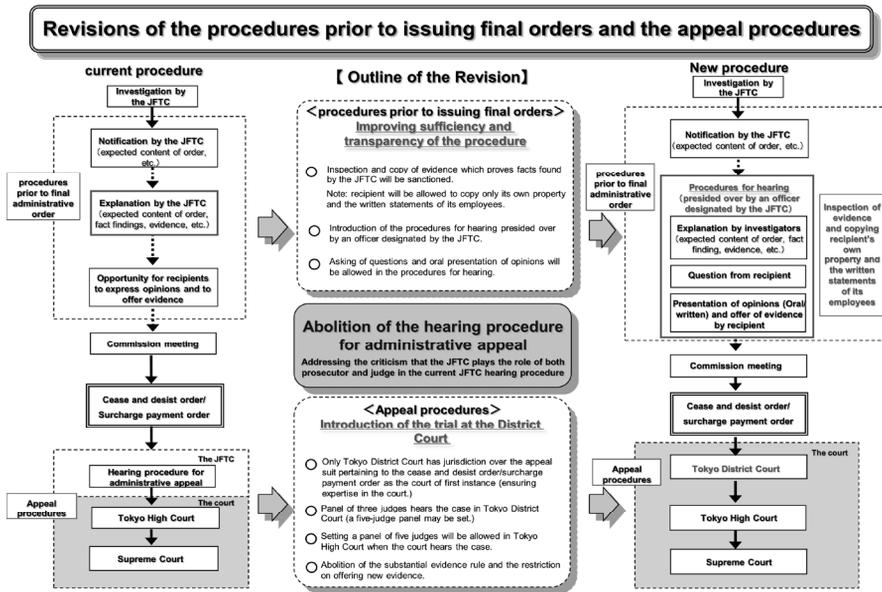
<sup>15</sup> Art. 51 of the New Amendment.

<sup>16</sup> Art. 54(2) of the New Amendment.

<sup>17</sup> The party may choose to present written statements and evidence instead of attending the hearing.

<sup>18</sup> Art. 58 and 60 of the New Amendment.

<sup>19</sup> Art. 52 of the New Amendment.



Source: JFTC’s website, <http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment2.pdf>

## II. Abolition of the Hearing Procedure System for administrative appeals

### 1. Discussions on procedural fairness under the AMA in Japan

Current discussions on the possible revisions of the JFTC’s Hearing Procedure System can be roughly divided into three categories. First, 1) the so-called “argument for the abolition of the JFTC’s Hearing Procedure System,” which is meant to abolish the JFTC’s Hearing Procedure System and to have complaints against the JFTC’s administrative orders be filed to, and considered by, a court in litigation. Second, 2) the so-called “argument for the return to the *ex ante* Hearing Procedure System”, which supports the re-adoption of the *ex ante* Hearing Procedure System<sup>20</sup>. Three, 3) the so-called “argument for the maintenance of the current system,” which asserts that the current *ex post* Hearing Procedure System<sup>21</sup> works fine and needs no changes.

<sup>20</sup> It means a hearing procedure held prior to the issuance of the JFTC’s recommendation.

<sup>21</sup> It means a hearing procedure may be held afterward in order to review the JFTC’s order issued to a party dissatisfied with the order and appeals to the JFTC.

First, 1) the “argument for the abolition of the JFTC’s Hearing Procedure System,”<sup>22</sup> is based on the objection that the JFTC plays a dual role therein, as both prosecutor *and* judge. The System is also criticized because there may be a problem of lacking “procedural fairness”. This argument suggests that the JFTC’s Hearing Procedure System should be abolished, and the JFTC’s administrative orders should be appealed directly to the court of 1<sup>st</sup> instance. The New Amendment follows this line of argumentation.

Second, 2) the “argument for the return to the *ex ante* Hearing Procedure System” asserts that, in the *ex ante* Hearing Procedure System, the JFTC would hear statements from entrepreneurs prior to issuing an order. This system allows the JFTC to apply its specialized knowledge so as to make prudent and sophisticated decisions. Besides, compared to the *ex post* system, the *ex ante* system provides more extensive protection of procedural rights. The *ex ante* Hearing Procedure System is supported in an official report (26 June 2007, the Cabinet Office), published by the round-table conference on the basic issues of the Antimonopoly Act held by the Chief Cabinet Secretary<sup>23</sup>. In addition, many competition law scholars and practitioners support this argument.<sup>24</sup>

Third, 3) the “argument for the maintenance of the current system”<sup>25</sup> mainly follows two aspects. One is that the current *ex post* system allows the JFTC to issue orders more rapidly than the *ex ante* system, and that it also contributes to the decline in the number of hearing cases. The second important issue here is that maintaining the Hearing Procedure System has the advantage of allowing the JFTC to apply its specialized knowledge under the hearing procedure.

In addition to the above arguments, the Japan Federation of Bar Associations brings forward a proposal<sup>26</sup> relating to a new system whereby a party may selectively choose to initiate a hearing procedure *or* directly file a lawsuit with the court when it wants to file a complaint against the JFTC’s order. This proposal, though as a possible solution, has potential problems.

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<sup>22</sup> See, e.g., KEIDANREN (the Japan Business Federation), *Towards the Abolition of Hearing Procedure System administered by the Japan Fair Trade Commission and Procedural Fairness in its investigation procedures* (2009); available at <https://www.keidanren.or.jp/japanese/policy/2009/086.html> (28.08.2014).

<sup>23</sup> The Advisory panel on basic issues regarding the Antimonopoly Act, *Report Issued by the Advisory Panel on Basic Issues Regarding the Antimonopoly Act*, the Cabinet Office of Japan (2007); available at <http://www8.cao.go.jp/chosei/dokkin/archive/kaisaijokyo/finalreport/body.pdf> (28.08.2014).

<sup>24</sup> See *supra* note 4.

<sup>25</sup> See *supra* note 23, pp. 23–30.

<sup>26</sup> The Japan Federation of Bar Associations, *Opinion on the Report Issued by the Advisory Panel on Basic Issues Regarding the Antimonopoly Act* (2007), pp. 8–9; available at [http://www.nichibenren.or.jp/library/ja/opinion/report/data/070823\\_2.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/070823_2.pdf) (28.08.2014).

One of the anticipated problems is that, if such administrative review system was adopted, it would be likely that some entrepreneurs might file a lawsuit to the district court, while other entities engaged in the very same case might choose to initiate the JFTC's hearing procedure. As a result, the decision rendered by the district court might differ from that issued by the JFTC, though both decisions would relate to the same case. Such inconsistency is likely to result in considerable confusion regarding the discovery of the facts in the case. It would also present a potential danger that, though both parties filed an objection against the order, one might be granted relief from the order while the other might not. Another problem is that administrative affairs would become more complicated and entangled if the lawsuit and the hearing procedure proceed simultaneously. This might have adverse effects on the JFTC's investigation and might delay its hearing procedure.

After discussions, it was decided that the New Amendment will abolish the JFTC's Hearing Procedure System. The decision drew severe criticism from the business community<sup>27</sup> arguing that the JFTC's hearing procedure lacks procedural fairness because, under the current *ex post* Hearing Procedure System, the JFTC has to determine the appropriateness of its own orders by itself, due to the inherent limitation of the *ex post* Hearing Procedure System. Relevant here is also the political background of the New Amendment. Article 20(1) of the supplementary provisions of the Amendment to the Antimonopoly Act of 2009<sup>28</sup> provides that: "Concerning the provisions relating to the current Hearing Procedure System, the Government of Japan shall undertake an overall review of the System, and conduct a study within the fiscal year 2009. Necessary measures shall be taken based on the result of the study." Furthermore, the supplementary resolution attached to the preceding Amendment to the Antimonopoly Act of 2009 states<sup>29</sup>: "Concerning the provisions relating to the Hearing Procedure System, the supplementary provisions of the Amendment to the Antimonopoly Act of 2009 provide that the Government of Japan shall undertake an overall review of the System, and take necessary measures based on the result of the study conducted within the fiscal year 2009. As to the result of the study, it indicates two possible options: one is to continue adopting the current Hearing Procedure System without amendment, and the other is to amend the Hearing Procedure

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<sup>27</sup> See, e.g., the Japan Chamber of Commerce and Industry and the Tokyo Chamber of Commerce and Industry, *Opinion on the Summary of Issues Concerning the System for Deterring Undertakings from Engaging in Violations Against the Antimonopoly Act* (2006), p. 3; available at <http://www.jcci.or.jp/nissyoi/iken/060908dokinho.pdf> (28.08.2014).

<sup>28</sup> Act No. 51, 2009.

<sup>29</sup> The House of Representatives' Committee on Economy, Trade and Industry, 24 April 2009; the House of Councilors' Committee on Economy and Industry, 2 June 2009.

System drastically, without returning to the *ex ante* Hearing Procedure System before the 2005 Amendment.” Besides, the Democratic Party of Japan, the ruling party at that time, urged for the abolishment of the Hearing Procedure System in its political manifesto. In response to these political changes, the New Amendment is intended to abolish the JFTC’s Hearing Procedure System and grant jurisdiction over appeals against the JFTC’s administrative orders to the courts, aiming to address the criticism regarding the fairness of the current procedure. Nevertheless, the New Amendment faces fresh criticism that the JFTC’s loss of quasi-judicial authority is likely to jeopardize the *raison d’être* of the JFTC, the latter being an independent administrative commission whose independence in exercising its authority is guaranteed by law.

## 2. The JFTC’s independence in exercising its authority and the necessity thereof

Originally, the grounds for making the JFTC an independent authority could be found in the following three points.

First, a high level of political neutrality is required for the enforcement of the AMA. This point was clearly stated in the reply given by the Director-General of the Cabinet Legislation Bureau, Yoshikuni Ichiro, in the House of Councillors’ plenary session held on 27 June 1975<sup>30</sup>. According to his reply, “the JFTC’s authority is concerned with professional areas, and requires fairness as well as neutrality. Therefore, it should not be affected by political concerns. Such nature of the JFTC’s authority accounts for the reason why Article 28 of the AMA provides for the JFTC’s independence with respect to the exercise of its authority<sup>3132</sup>.”

The second point lies in the highly-specialized nature of the knowledge required for the enforcement of the AMA. Needless to say, the AMA, also known as “the Constitution of economic law”, is a fundamental law establishing basic rules of economic activities in the free market society. Besides, the AMA comprises many highly abstract provisions. Professional and specialized knowledge of law and economics is thus indispensable when such provisions are applied to specific cases. In addition, as regards the enforcement of the AMA, there is a vital need to avoid the risk of arbitrariness. Occasionally, the

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<sup>30</sup> See, Katsuo AOKI, “The Japan Fair Trade Commission and Constitutional Law of Japan – Focusing on the Debate in the Diet”, (1975) *JURIST* no. 596, p. 150.

<sup>31</sup> Art. 28 of the current AMA provides: “The chairman and commissioners of the Fair Trade Commission exercise their authority independently.”

<sup>32</sup> This argument was once put forward as a refutation against the argument questioning the constitutionality of the JFTC.

AMA and competition policy are inevitably concerned with the government's economic policy. Hence, it is deemed appropriate that a strained but healthy relationship should be maintained between law enforcement by the JFTC and the intentions of the government. Similarly, the JFTC should adopt a collegial system consisting of economic and legal experts in its decision-making process so as to enforce the AMA fairly and prudently. Consequently, independence is necessary for administrative organizations adopting a council system in their decision-making process.

The third point relates to the fact that the JFTC is a quasi-judicial body. According to the official report published by the round-table conference on the basic issues of the Antimonopoly Act<sup>33</sup>, independence and neutrality are important factors in the enforcement of the AMA. It should be particularly noted that the fact that the JFTC is an independent administrative commission has been substantially contributing to the establishment of competition policy. Quasi-judicial functions performed by the JFTC are one of the main grounds for the acknowledgement of the JFTC's independence. Specifically speaking, the AMA is designed to regulate private rights and benefits of undertakings by way of the JFTC's administrative orders, which are strictly required to be issued under proper procedures. As a result, the JFTC's administrative hearing procedures are designed to apply *mutatis mutandis* to court proceedings with respect to administrative affairs regarding the issuance of orders. Considering that the nature of quasi-judicial functions, as performed by the JFTC, inherently collides with the direction and supervision by higher level administrative bodies (in the JFTC's case, the Cabinet Office), it is deemed essential to provide quasi-judicial authorities with independence in exercising their powers and functions.

Accordingly, the JFTC's loss of quasi-judicial authority accompanied by the abolition of the Hearing Procedure System may carry the risk of jeopardizing the *raison d'être* of the JFTC as an independent administrative commission. Despite the above criticism, there are some independent administrative bodies in Japan with no administrative tribunals, such as the Japan Transportation Safety Board and the Japan Consumer Commission. On the other hand, some Japanese administrative bodies are not independent and yet they have administrative tribunals such as the Japan Radio Regulatory Council, the Japan Patent Office, the National Tax Tribunal, and the Japan Financial Services Agency. There is no strict correlation, therefore, between the existence of administrative tribunals and whether administrative bodies should be independent or not.

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<sup>33</sup> *Supra* note 23.

### 3. Limitations of judicial review in terms of administrative discretion in decision-making

In addition to the risk of jeopardizing the *raison d'être* of the JFTC as an independent administrative commission, the New Amendment is problematic for two additional reasons. First is the concern that a shift from the Hearing Procedure System to actions for the revocation of administrative orders may lead to the undesirable consequence that the party concerned will be only allowed to claim in court that the order constitutes an abuse or excess of the JFTC's discretion, but will not be given the opportunity to contest the appropriateness of any other aspect of the order. This is because actions for the revocation of administrative decisions are regulated by the Japanese Administrative Case Litigation Act as follows: "The court may revoke an original administrative decision made by an administrative body at its discretion only in cases where the decision has been made beyond the bounds of the body's discretionary power or through an abuse of such power<sup>34</sup>."

As regards the appropriateness of administrative orders, an order is generally speaking not subject to actions for the revocation of administrative orders as long as it is within the discretion of the administrative body in charge. Many precedents<sup>35</sup> also provide that an order should be ruled illegal only if it contains no findings<sup>35</sup> of fact supporting its decision, or evidently lacks appropriateness according to social norms, and is thus deemed to be an abuse or excess of administrative discretion. By contrast, under the Hearing Procedure System, the JFTC may examine a wide range of factors involved in an order including whether the JFTC has exercised its discretion "correctly" of (*i.e.*, whether or not the order is appropriate for the restoration of competition), even if the order is deemed to be within the discretion of the JFTC. On this account, the JFTC may modify part of the content of the original order in its tribunal decision<sup>36</sup>.

Following the abolition of the Hearing Procedure System, relevant special provisions will be abolished as well such as the substantial evidence rule. Under

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<sup>34</sup> Art. 30 of the Administrative Case Litigation Act.

<sup>35</sup> See, e.g., Saikō Saibansho [Sup. Ct.] Jul. 30, 1954, 8 no.7, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1463, 1510; Saikō Saibansho [Sup. Ct.] Jul. 19, 1974, 28 no. 5, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 790; Saikō Saibansho [Sup. Ct.] Dec. 20, 1977, 31 no. 7, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1101; Saikō Saibansho [Sup. Ct.] Oct. 4, 1978, 32 no. 7, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1223; Saikō Saibansho [Sup. Ct.] Mar. 8, 1996, 50 no. 3, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469.

<sup>36</sup> Art. 66(3) of the current AMA provides: "(3) If there are grounds for the hearing request, the Fair Trade Commission shall issue a decision to rescind or modify all or part of the original order after the hearing proceedings have been completed."

the New Amendment, proceedings applying to actions for the revocation of decisions made by other administrative bodies (in usual administrative cases) should also apply to actions for the revocation of orders issued by the JFTC, including its cease and desist orders. Without being subject to legal constraints such as the substantial evidence rule, the court may thus review the facts on which the order is based, the application of applicable laws and regulations to such facts, and examine whether the JFTC has violated any procedural law or regulation when issuing the order. In such case, even if the order is deemed to be within the discretion of the administrative body, such an order may still sometimes be revoked by the court in the action for its revocation. More specifically, as is the case in reviewing a decision made by an administrative body at its discretion in ordinary circumstances, the court may find that the JFTC's order constitutes an abuse or excessive use of its discretion. The court may thus revoke it as it violates the law, in the event that 1) the order lacks significant findings of fact supporting its decision because, for example, the order is based on an erroneous finding of a fact pivotal to the case, or that 2) the order evidently lacks appropriateness according to social norms because, for example, the application of the law to the fact findings is apparently unreasonable. In the case of discretionary decisions, the first decision made by an administrative body is usually held in high regard and judicial review of such a decision by the court is generally limited and restrained. Cease and desist orders under the AMA, similarly to other administrative decisions, are thus merely subject to the principles of judicial review of discretionary decisions, such as whether they are based on erroneous findings of fact, and whether they violate general legal principles, including the principle of equality, the principle of proportionality, and the principle of good faith.

Additionally, it can hardly be expected that abundant evidence would be submitted to the court, unlike that submitted under the Hearing Procedure System. Even granted that the court issues an order of explanations, the JFTC, as the administrative body issuing the original order, is requested to submit only "the materials that clarify ... the facts constituting the cause of the original administrative decision ... and other grounds for the original administrative decision<sup>37</sup>." This potential deficiency in evidence is also problematic.

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<sup>37</sup> Art. 23-2(1) item (i) of the Administrative Case Litigation Act.

#### **4. Problems in relation to the exclusive jurisdiction of the Tokyo District Court**

The second reason why the New Amendment is problematic is because after the abolition of the Hearing Procedure System, only the Tokyo District Court will have exclusive jurisdiction to review cease and desist orders of the JFTC in 1<sup>st</sup> instance. Is it possible, however, for the Tokyo District Court to deal perfectly with the violations of the AMA, the assessment of which requires professional and specialized knowledge as well as flexibility?

Under the New Amendment, 1<sup>st</sup> instance jurisdiction over actions for the revocation of the JFTC's cease and desist orders should be vested exclusively with the Tokyo District Court in order to ensure its expertise in proceedings regarding violations of the AMA. Consequently, it is expected that the Tokyo District Court will progressively develop such specialized expertise. Moreover, focusing on the need to ensure extra prudence when examining the AMA cases, the New Amendment also regulates the applicable composition of the Tokyo District Court. Trials and judgments in such cases should hence be delivered by a panel of three judges, and, if necessary, may be delivered by a panel of five judges. In normal circumstances, and as a general rule, a single judge hears and adjudicates on cases at the level of a district court<sup>38</sup>. There are indeed no other examples of legal provisions, except the New Amendment, where civil or administrative district courts of 1<sup>st</sup> instance should hear and adjudicate on cases with a panel of judges. Moreover, with respect to the Tokyo High Court as the relevant court of appeals in the AMA cases, the New Amendment provides that trials and judgments should be delivered by a panel of three judges in general, and by a panel of five judges if necessary. It can be thus understood that the New Amendment does take into account the need to ensure that courts must be able to make professional judgments under the AMA.

As to jurisdiction under the Administrative Case Litigation Act, an action for the revocation of an administrative decision is heard by the court that has jurisdiction over the location of the defendant (*i.e.*, the location of the administrative body) so far. Importantly however, pursuant to the Amendment to the Administrative Case Litigation Act of 2004, the court having jurisdiction over the location of the administrative body retains, in principle, its jurisdiction over an action for the revocation of its administrative decisions. Nevertheless, the plaintiff may alternatively choose to sue the defendant in the district court which has jurisdiction over the location of the high court that has jurisdiction

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<sup>38</sup> Art. 26(1) of the Court Act.

over the location of the plaintiff<sup>39</sup>. Such a legal provision is meant to reduce burdens placed on plaintiffs and provide individuals with the convenience of bringing actions to a nearby court.

However, from this perspective, the New Amendment is contrary to the above-mentioned aims. Concerning this issue, the Japan Federation of Bar Associations has issued a written opinion saying that, “although it is unavoidable to concentrate the jurisdiction in the Tokyo District Court as a temporary measure, it should be further examined in the future that other courts should have the jurisdiction to deal with these cases as well”<sup>40</sup>. Also the Osaka Bar Association has stated in its announcement that, “from the viewpoint of protecting the rights of local citizens and entrepreneurs, we strongly demand for the New Amendment to be re-amended to include the district courts which have jurisdiction over the location of the high courts (at least the Osaka District Court)”<sup>41</sup>. In other words, there is still doubt about the Tokyo District Court having exclusive jurisdiction under the New Amendment.

It is worth conducting a comparison here with jurisdiction rules under other laws. For example, pursuant to the general rules under the Code of Civil Procedure, jurisdiction over intellectual property right (hereafter: IPR) litigation used to be with the district court that had jurisdiction over the location of the defendant (entrepreneurs). These rules covered lawsuits over patent rights, utility model rights, layout-design exploitation rights (mask work rights) and copyright of computer programs. However, the Amendment to the Code of Civil Procedure of 1996 allowed IPR cases to be under the concurrent jurisdiction of the Tokyo and the Osaka District Courts. Considering that IPR cases require specialized expertise, and their large number, this amendment was meant to ensure prompt, full, and substantial trial by, as far as practicable, concentrating jurisdiction over IPR cases in the Tokyo and Osaka District

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<sup>39</sup> Art. 12(4) of the Administrative Case Litigation Act provides: “An action for the revocation of an administrative decision against the State or an independent administrative agency prescribed in Article 2, paragraph (1) of the Act on General Rules for Independent Administrative Agency (Act No. 103 of 1999) or any of the juridical persons listed in the appended table may also be filed with the district court that has jurisdiction over the location of the high court that has jurisdiction over the location of the plaintiff’s general venue (hereafter referred to as a “specified court with jurisdiction” in the following paragraph).”

<sup>40</sup> The Japan Federation of Bar Associations, *Opinion on the Procedures Prior to the Issuance of Administrative Order Under the Antimonopoly Act After the Abolition of the Hearing Procedure System (Shifting to Actions for the Revocation of Administrative Orders)* (2010), p. 5; available at <http://www.nichibenren.or.jp/library/ja/opinion/report/data/100205.pdf> (01.09.2014).

<sup>41</sup> The Osaka Bar Association, *the President’s Announcement About Extension of Jurisdiction under the Antimonopoly Act* (2010), p. 1; available at [http://www.osakaben.or.jp/web/03\\_speak/seimei/seimei100430.pdf](http://www.osakaben.or.jp/web/03_speak/seimei/seimei100430.pdf) (1.09.2014).

Courts, which have the know-how and expertise in hearing and adjudicating such cases. Furthermore, the Code of Civil Procedure was amended again in 2003 with the aim of addressing issues concerning IPR litigation. Accordingly, the Tokyo and the Osaka District Courts now have exclusive jurisdiction over IPR litigations in the 1<sup>st</sup> instance; the Tokyo High Court has exclusive jurisdiction in the 2<sup>nd</sup> instance. In comparison with jurisdiction for IPR litigation, there seem to be no convincing reasons for concentrating 1<sup>st</sup> instance jurisdiction for the AMA in the Tokyo District Court only.

Nevertheless, three plausible grounds can be listed for concentrating jurisdiction in the Tokyo District Court over actions for the revocation of the JFTC's cease and desist orders. First, it is necessary to ensure that professional judgments can be made by the court. Second, it is necessary to ensure that cases involving multiple entrepreneurs engaged in the same anti-competitive activities, such as cartel and bid-rigging, will be determined by the same court so as to achieve uniformity in decisions. Third, the JFTC's Hearing Procedure System for administrative appeals, which functions in practice as the court of 1<sup>st</sup> instance, was basically conducted at the JFTC's tribunal in Tokyo. Therefore, concentrating jurisdiction in the Tokyo District Court may not cause any more inconvenience to entrepreneurs than the present solution.

However, these are not sufficient grounds to support exclusive jurisdiction of the Tokyo District Court. First, if professionalism in ruling on violations of the AMA is necessary, a special division for that purpose can be established in the Osaka District Court as well, as is the case for IPR litigation. Moreover, other options are available from the viewpoint of legislation also. For example, similarly to, again, IPR litigation, the latter is under the joint jurisdiction of the Tokyo and the Osaka District Courts in the 1<sup>st</sup> instance, but under the exclusive jurisdiction of the Tokyo High Court in the 2<sup>nd</sup> instance. Whatever the case may be, the need for professional expertise and uniformity in decisions cannot be a reasonable ground for sticking to the exclusive jurisdiction of the Tokyo District Court. Second, if uniformity in decisions regarding the AMA is so necessary, it can be ultimately achieved by the decision of the Supreme Court, which is also the principle of judicial review in Japan. Third, the JFTC's Hearing Procedure System for administrative appeals used to be conducted in the JFTC Kinki Regional Office in Osaka City (the so-called "visiting tribunal"). This undeniable fact proved that there is an ongoing (although sporadic) need to conduct the hearing procedure in the JFTC's Regional Office at short notice so as to examine witnesses efficiently. It undeniably raises concerns that, by concentrating jurisdiction in the Tokyo District Court, entrepreneurs might be more inconvenienced than under the current system. To sum up, the concentration of jurisdiction in the Tokyo District Court under the New Amendment is unavoidable *for the moment*, in order to accumulate

know-how and improve the professionalism of judges. However, in view of the convenience of the parties concerned, it is necessary to consider the possibility to amend the AMA once again to extend jurisdiction to other district courts (such as the Osaka District Court) in the future.

### **III. Hearing procedures pertaining to the JFTC's administrative orders, including cease and desist orders**

#### **1. Introduction**

Following the abolition of the Hearing Procedure System, the final decision made by the JFTC will be shown in its cease and desist order. It is thus necessary to further enhance current administrative procedures applicable prior to the issuance of the JFTC's cease and desist orders. In response to this need, the New Amendment provides for relevant hearing procedures under the AMA in accordance with the protection level set out in the provisions for hearing procedures under the Administrative Procedure Act<sup>42</sup>, Japan's main law on administrative procedures. Specifically speaking, the JFTC should designate an officer to preside over the hearing procedures for its orders, including cease and desist orders, in order to enhance administrative procedures taking place prior to the issuance of its orders<sup>43 44</sup>.

The duty of the procedural officer includes: 1) presiding over the hearing procedure, having investigators provide explanations of the content of an anticipated cease and desist order and of the main evidence, and adequately directing the entrepreneurs to inquire questions of investigators; 2) hearing the entrepreneurs' statements of opinion; and 3) preparing a written record of the minutes of the hearing procedure and a report listing the contentious issues based on the statements of opinion and evidence presented in the hearing. This way, the procedural officer, as the presiding officer in charge of the hearing procedure, shoulders the responsibility for guaranteeing procedural fairness during the whole hearing procedure, starting from the stage of the investigator's explanation and ending with the entrepreneur's statements of opinion. In light of the general rule that hearings shall be in principle closed to the public<sup>45</sup>, the New Amendment stipulates that the JFTC's hearing

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<sup>42</sup> Art. 15–28 of the Administrative Procedure Act.

<sup>43</sup> Art. 53(1) of the New Amendment.

<sup>44</sup> The designated officer presiding over the hearing procedure is hereafter referred to as “the procedural officer”.

<sup>45</sup> Art. 20(6) of the Administrative Procedure Act.

procedures are not open to the public either<sup>46</sup>. This is due to the consideration that the explanations provided by the investigators in the beginning of the hearing procedure, as well as the arguments between the parties concerned and the investigators, may include the parties' trade secrets, trade secrets of their clients, and private information of the parties' employees.

## 2. Differences with the Administrative Procedure Act

The hearing procedure under the New Amendment is basically at the same level of procedural protection as that set out in the provisions of the Administrative Procedure Act. Among these provisions, several specific ones may be worth noting. First, a party concerned may appoint a representative. Second, a party concerned may inspect relevant evidence. Third, officials of the administrative body should explain the content of an anticipated decision, facts found by the administrative body, and the application of relevant laws and regulations to such facts. A party concerned may question investigators of the administrative body and state its opinion orally at the hearing (or present written statements of opinion). Fourth, officers presiding over the procedure should prepare a written record of the minutes of the procedure as well as a report. They must submit these documents to the administrative body in charge.

On the other hand, some differences with the Administrative Procedure Act also exist. Take the following points for example. First, whereas the transcription of evidence is not permitted in hearings held under the Administrative Procedure Act, it is allowed (the party's documents and objects retained or seized by the JFTC, or the recorded statements provided by the party's employees) under the hearing procedure provided in the AMA. Second, when officials provide explanations of the facts found by the administrative body, they do not have to explain the evidence in the hearing held under the Administrative Procedure Act. By contrast, investigators of the JFTC must explain main evidence when clarifying the facts found by the JFTC under the hearing procedure provided in the AMA. Third, as to the provisions not prescribed in the Administrative Procedure Act, the AMA provides that the JFTC's officials engaged in the investigation of the given case, such as the investigators in charge, cannot be designated as the procedural officer presiding over the hearing procedure. Fourth, the Administrative Procedure Act states that the officer presiding over the procedure should prepare a written report addressing his/her opinion as to whether or not the party's assertion is justified. By contrast, the AMA

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<sup>46</sup> Art. 54(5) of the New Amendment.

provides that the procedural officer should prepare a written report listing the contentious issues with respect to the case in question under the hearing procedure.

### 3. Inspection and transcription of evidence under the hearing procedure

It is worth mentioning that it can also be argued that in order to further enhance procedural fairness, the party should be allowed to inspect or request full disclosure of all evidence held by the JFTC. Article 52 of the New Amendment provides that the party is allowed to inspect or transcribe the evidence that establishes the facts found by the JFTC<sup>47</sup>.

The “notifying and hearing” procedure prescribed in the Administrative Procedure Act stipulates that, prior to the issuance of a decision, the administrative body should inform the party (the anticipated recipient of a decision) of the content of the decision and its grounds and then hear the party’s opinion. Assuming that the hearing procedure under the AMA can be understood as such “notifying and hearing” procedure, then the inspection of evidence establishing the facts found by the JFTC under the AMA can be considered as a rule that provides the same level of procedural protection as “the inspection of ... other materials which prove the facts upon which the anticipated unfavorable decision will be based” prescribed in Article 18 of the Administrative Procedure Act<sup>48</sup>. In such a case, the purpose of the inspection

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<sup>47</sup> Article 52 of the New Amendment provides: “With respect to a case under the hearing procedure, a party concerned may submit a request to the Fair Trade Commission to inspect or transcribe the evidence establishing the facts found by the Fair Trade Commission, during the period from the time it received the notice pursuant to Article 51 paragraph (1) until the hearing procedure is concluded. (With respect to transcription, among all the evidence, the evidence subject to transcription is limited to the evidence prescribed by the Rules of the Fair Trade Commission, including the evidence submitted by the party or the party’s employees, and the recorded statements provided by the party or the party’s employees; the same applies hereafter in this article.) In such a case, the Fair Trade Commission may not refuse to allow the person to inspect or copy the records of the case in question unless this is likely to harm the interests of a third party or unless there are any other justifiable grounds.”

<sup>48</sup> Art. 18(1) of the Administrative Procedure Act provides: “(1) Parties and interveners whose interests would be harmed by a particular unfavorable decision (referred to in this Article and in Article 24, paragraph 3 as “parties, etc.”) may, between the time when notice of a hearing is given and the time when the hearing is concluded, request from the administrative body concerned the inspection of records indicating the results of investigations on the matter in question and other materials which prove the facts upon which the anticipated unfavorable decision will be based. In this case, administrative bodies may not reject inspection requests unless there is a risk that the interests of third parties would be harmed or unless there is some other justifiable grounds.”

of evidence establishing the facts found by the JFTC will be to enhance and substantialize the hearing procedure by informing the party which evidence constitutes the grounds for the anticipated order that will be issued by the JFTC.

As mentioned, some justifications exist for Article 52 of the New Amendment. It is desirable, however, to enforce this provision in a more circumspect and flexible manner. More specifically, the purpose of this provision cannot be achieved if by saying that “the scope of the inspection should be determined by the administrative body’s discretion at first” the JFTC’s officer in charge sticks to the rules literally and informs the party of neither the grounds for the anticipated order nor the substantial part of the evidence on which the order is based. Are these concerns groundless? Certainly, the party will not request to inspect all evidence but flexible enforcement is still desirable from the viewpoint of ensuring the party’s procedural defense right. Even though in the action for the revocation of an administrative decision an interested party may file a petition to the court for an order to submit documents pursuant to Article 220 of the Code of Civil Procedure, this would be nothing more than the *status quo*, provided that the hearing procedure under the AMA lost its substance and became an empty shell.

#### IV. Remaining Issues

Article 16 of the supplementary provisions of the New Amendment provides that, “the Act shall be reviewed from the viewpoint of achieving consistency with other administrative procedures in Japan, and of ensuring that a party can adequately enforce its defense right. The Government of Japan aims to reach a conclusion of the review one year after the Act is promulgated, and will take necessary measures when found necessary.” It is scheduled that the following two issues will be discussed thoroughly and in a neutral manner from now on: how to strike a balance between the JFTC’s fact-finding functions and the protection of the defence right of parties concerned, and how to guarantee consistency with other domestic administrative investigation procedures. This is based on the Policy Council’s document “Basic Policy on the Amendment to the Antimonopoly Act” published on 9 December 2009<sup>49</sup>, which provides as follows: “Third Discussions on the procedural fairness under administrative investigation procedure. The Government of Japan should undertake a review

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<sup>49</sup> JFTC, *Basic Policy on the Amendment to the Antimonopoly Act* (2009), p. 2: available at <http://www.jftc.go.jp/houdou/pressrelease/h21/dec/091209seisakukaigi.files/091209seisakukaigi-shiryo1.pdf> (2.09.2014).

of the measures taken to ensure the party's adequate defence right, including the right to legal counsel and the attorney-client privilege, in a neutral manner on the basis of the supplementary resolution attached to the Amendment to the Antimonopoly Act of 2009. The conclusion of the review should, in principle, be reached within one year since the commencement of the review". Besides, the Supplementary Resolution of the Amendment to the Antimonopoly Act of 2009<sup>50</sup> also provides the basis for such a review. "For the purpose of allowing parties to effectively enforce their defence right when the JFTC conducts an interrogation or a voluntary hearing procedure, the Government of Japan should undertake a review in a forward-looking manner by referring to foreign cases and by maintaining consistency with criminal and other administrative procedures in Japan, with respect to the right to appoint a representative, right to have legal counsel present, and right to request a transcript of the recorded statements."

In the future, it is expected that there will be a request to "visualize" the investigation procedures (*i.e.*, make the investigation procedures more transparent) so as to guarantee procedural fairness and transparency. However, this approach is criticized because witnesses may be refrained from telling the truth. Moreover, particularly in cases such as abuse of superior bargaining position, small and medium sized enterprises that were harmed may be unwilling to cooperate because they are afraid of revenge from the infringers. Similarly, there are no regulations regarding the presence of legal counsel during witness interrogation and, in practice, it is not accepted either.

As to the reason for not permitting the presence of legal counsel, it is pointed out that if such right was permitted, it would be easier to destroy evidence by conspiracy, resulting in reluctant witness problems and thus constituting an obstacle to the discovery of truth. The "reluctant witness problem" happens not only when legal counsel is appointed by the entrepreneur, but also when such counsel is appointed by the witness itself. There are no differences in the fundamental problem – a witness may be reluctant to testify due to his/her awareness of a third party existing in the procedure. When a witness refuses to appoint a legal counsel recommended by the entrepreneur, and decides to appoint one by itself, this may be regarded as an indicator that this particular witness will testify against the entrepreneur. A secondary reason for not permitting the presence of legal counsel is that, under current similar criminal and other administrative investigation procedures in Japan, it is still not allowed for legal counsel to be present during interrogation proceedings. By contrast, some argue that if the person under investigation submits a request, a transcript of the recorded statements should be disclosed

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<sup>50</sup> *Supra* note 29.

to the requester<sup>51</sup>. Some corresponding measures should also be taken such as allowing the presence of legal counsel during the interrogation conducted by the investigator and the video recording of the procedure.

Concerning the arguments for introducing the right to legal counsel and the attorney-client privilege, it is worrisome that if such a system was to be introduced into the current administrative investigation procedures for violations of the AMA, it might become more difficult for the JFTC to discover the truth. The enforcement of the AMA would thus be significantly affected. On the other hand, it is indisputable that procedural protection of parties should be properly ensured. In conclusion, we should thoroughly and carefully examine the arguments for introducing the right to legal counsel and the attorney-client privilege, rather than denying these arguments in the very beginning.

## V. Concluding Remarks

In conclusion, the following point should be noted. In order to facilitate sanctions serving as enforcement of competition law, the following four aspects are crucial and should be emphasized. The first issue relates to effectiveness. No matter how severely the sanctions regime is strengthened, it would remain an unrealistic hope to uphold the Japanese Antimonopoly Act without effective enforcement methods. The second aspect is related to legal systematization. Among various sanctions prescribed by the Antimonopoly Act, some are, such as the surcharge and fine, in the same manner pecuniary burdens. The legal nature of these sanctions should be further examined in a systematic manner so as to sufficiently suppress anticompetitive violations. The third issue regards fairness. It is essential even for addressees subject to sanctions that the sanctions regime is fair and acceptable, which also correlates with the enhancement of deterrence. The last aspect relates to efficiency. The JFTC, though performing a central role in enforcing the Antimonopoly Act, has only limited resources. This realization inevitably leads to the fact that the costs of implementing laws and regulations need to be kept relatively low in comparison with the benefits derived from the very same laws and regulations.

What is of particular significance from among these aspects, from the perspective of this paper, is that due process of law must be guaranteed in the

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<sup>51</sup> See, e.g., the Japan Federation of Bar Associations, *Opinion on the Summary of Issues for Administrative Investigation Procedures under the Antimonopoly Act* (2014), pp. 6–8: available at [http://www.nichibenren.or.jp/library/ja/opinion/report/data/2014/opinion\\_140717\\_2.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/2014/opinion_140717_2.pdf) (2.09.2014).

process of rendering administrative decisions. Administrative decisions issued by the JFTC, including cease and desist as well as surcharge payment orders, have formed the core of the enforcement of the Antimonopoly Act. It is thus necessary to establish fair and transparent procedures for the issuance of such decisions. In the meantime, securing effective law enforcement should not be neglected when taking into account the due process of law. For this reason, by focusing on the Amendment to the Antimonopoly Act, this paper aims to depict how the Japanese lawmakers endeavoured to strike a balance between procedural fairness and the effectiveness of competition law.