

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

December 24, 2014

1. Issues Related to On-the-Spot Inspection

- (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, 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 a scanner, to copy the materials smoothly, and to consider introducing paid copy machines to copy the materials at the Japan Fair Trade Commission (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.

2. Attorney-Client Privilege

- (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.

3. Issues Related to Deposition

- (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 abilities 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.

4. Administrative Investigation Procedures in General

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.

5. Future Studies

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

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.