

# Viewpoint: Assuring Due Process: Central to AMA Reform\*

Presented by: The ACCJ's Competition Policy Task Force and Legal Services Committee  
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## RECOMMENDATIONS:

The American Chamber of Commerce in Japan (ACCJ) has consistently been a strong and vocal advocate for strengthening the operations of the Japan Fair Trade Commission (JFTC). The Chamber has recommended on many occasions increasing both the JFTC's staffing and its budget, believing that vigorous enforcement of competition policy will produce greater economic efficiencies for the Japanese economy and improve products and services for Japanese consumers and stimulate economic growth. In this context, the ACCJ welcomes the progress to date and believes, as highlighted in the following Viewpoint, that even more can be done to bolster the role of the JFTC and enhance due process in Japan.

Following the Government of Japan (GOJ)'s promulgation of *The Bill to Amend the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade* (Revision Act) on December 13, 2013, the ACCJ urges the GOJ as it begins to discuss due process to take this opportunity to continue to take steps to establish clear, world-class standards of due process in the practices and procedures of the JFTC, which can have an impact in other jurisdictions. Enforcement of the *Anti-Monopoly Act* (AMA) should be consistent with international standards, especially in light of the changes to enforcement against unlawful cartels and monopolization in Japan.

Respect for "due process" in administrative as well as judicial proceedings, consistent with the utmost commitment to the rule of law, increases respect for the law itself and encourages full cooperation in its enforcement. Accordingly, the current system must do more to (i) adhere to fundamental due process principles and transparency in investigations and (ii) provide sufficient opportunity for investigation targets to prepare and present their defenses. It is essential that the JFTC brings its procedures into line with the international standards applied by other leading antitrust enforcement agencies with which the JFTC often cooperates.

Competition is the lifeblood of an economy, and government has a role in protecting and promoting it. But economic regulation should not be administered at the expense of due process and opportunity for a full and fair defense. Nor should excessive economic regulation stifle robust competition and innovative business practices, which ultimately benefit consumers.

In its Supplementary Resolution to the Draft of the Bill to Amend the AMA (Supplementary Resolution), the GOJ expressed a commitment to take action

with respect to certain due process issues such as the right to legal counsel at interviews. The Supplementary Resolution also indicated that the GOJ should refer to the practices in other countries in examining such issues. The ACCJ supports these principles as useful first steps, as well as some of the specific due process improvements raised in the Supplementary Resolution and discussed further below.

## ISSUES:

The ACCJ appreciates the abolition of the JFTC hearing system (*shinpan seido*). Regardless of what hearing system is eventually implemented, however, such reforms will be meaningless unless they are accompanied by procedural safeguards in the administrative process. Certain issues addressed below, such as protection against waiver of privileges and confidentiality, should also be considered and protected in any judicial review of JFTC orders.

Ensuring that JFTC procedures adhere to international standards of due process has become increasingly important as many competition law investigations today are multijurisdictional, with multiple agencies conducting investigations at the same time and in cooperation with each other. Any action taken in one jurisdiction therefore has an impact on another. This circumstance is unique to competition law investigations and emphasizes the need for consistent standards and procedures at least among the agencies that regularly conduct concurrent, coordinated investigations, which typically include the antitrust enforcement agencies in Japan, the United States, the European Union (EU), Canada, and South Korea. In several jurisdictions, including the United States and the EU, the investigations can result in severe criminal or financial penalties, including possible follow-on civil actions.

As the JFTC has taken a leading role in global antitrust enforcement, and has recently imposed increasingly severe administrative penalties, the JFTC bears a higher responsibility in ensuring that due process and procedural protections are consistent with prevailing international standards.

We discuss below what we perceive to be the key issues in ensuring harmonization of JFTC procedures with those of other leading antitrust enforcement agencies.

### Right to Legal Counsel

The right to have legal counsel present during all aspects of an investigation, including and in particular during witness interviews, should be guaranteed and the fundamental right of attorney-client privilege respected. As noted in the Supplementary Resolution, the right to have legal counsel present at a witness interview is necessary to enable investigation targets to fully exercise

their rights to defend themselves. Under existing procedures, however, the JFTC does not allow legal counsel to be present during witness interviews. This is inconsistent with the practices of other leading antitrust enforcement agencies, such as the U.S. Department of Justice and the Federal Trade Commission. Even legal systems similar to Japan's (like South Korea's) permit legal counsel to be present during witness interviews.

In most advanced economies and legal systems, the right to legal counsel is a fundamental right that is essential to the rule of law – indeed, this right is enshrined in Japan's Constitution. It is particularly important given the increased coordination and information sharing among competition agencies around the world, which in turn require a party to be aware of the risks and differences in each jurisdiction. It is therefore essential for the target of an investigation and its employees who may be subject to interrogation to have ready access to legal counsel to ensure that defenses or privileges in other jurisdictions are not waived unknowingly.

### Protection against Waiver of Privileges and Protections

Several privileges and protections that exist in other jurisdictions are not recognized in Japan. The most fundamental of these is the attorney-client privilege, which is critical to ensuring full and frank disclosure of information to legal counsel (and in turn responsible compliance practices and a fair and effective defense). While the ACCJ would recommend that Japanese law fully recognize this privilege in Japan, not only in JFTC proceedings, we recognize the difficulty in expeditiously implementing such a reform.

The danger of not recognizing privileges and protections is that documents that would be protected in other jurisdictions can be seized and used as evidence in JFTC proceedings. As a consequence, these privileges and protections may be considered waived by courts or governmental agencies in other jurisdictions. Such documents would then have to be produced in competition law investigations and court proceedings in other jurisdictions. The impact of using such documents as evidence can be severe and substantial, particularly in the context of a criminal jury trial and private damage actions in the United States.

Accordingly, the ACCJ at this juncture recommends as a limited reform that the JFTC recognize and respect the privileges and protections that exist in other jurisdictions if they are asserted during the course of JFTC proceedings. This limited measure would at least help to ensure that parties do not waive their rights in other jurisdictions. Specifically, the ACCJ recommends that investigation targets have the ability to assert privileges and protections (i) at the time of seizure, if it is possible to detect which documents are privileged; and (ii) upon review of documents seized or requested by the JFTC.

As noted below, it is critical that parties have access to documents seized by the JFTC, in part for this reason. Investigation targets could be required to assert attorney-client privilege based on written logs by attorneys certified in the jurisdiction in which the privilege applies. Ideally the JFTC would not be allowed to review such documents. At the very least, for purposes of avoiding waiver, investigation targets should be allowed to designate documents or portions of documents as privileged or protected and the JFTC should avoid disclosure of such documents to any third party, including to other enforcement agencies or courts.

### Access to File

Access to the JFTC's allegations and evidence is fundamental to a fair defense opportunity. The European Commission, for example, provides a right of "access to the file," which obligates it to produce its investigation file to investigation targets upon request. Although the Amendment to the AMA made slight progress on this point by allowing an investigation target to access some evidence used by the JFTC during the hearing process before issuance of an enforceable order, there is no such obligation under the JFTC rules. Accordingly, as described further below, the first time that the JFTC must disclose most of its important evidence against an investigation target will be at the court hearing, at which point an enforceable order has already been issued. At that stage, it is too late for an investigation target to adequately take into account such evidence in preparing its defense. The ACCJ thus recommends that the JFTC explicitly provide that an investigation target has the right of full access to the evidence against it prior to the issuance of an administrative order.

Even when an investigation target's own documents are seized during a dawn raid, there is no guarantee that such party can obtain copies of such documents. The JFTC retains discretion to refuse to allow copying, and in practice has done so. This is particularly unfair as an investigation target should at the very least be made aware of which the target's own documents the JFTC may be relying on and should be in a position to promptly analyze whether or not a leniency application should be made. The JFTC's restrictive practices are extremely disruptive to ongoing business activities, and impose a severe burden before liability has been adjudicated. Access to an investigation target's own documents should be an automatic right, and not subject to the discretion of the JFTC.

The document inventory index currently provided by the JFTC to an investigation target after a dawn raid is insufficient to determine which specific documents were seized or their contents, as the originals are taken by the JFTC and the document inventory index merely lists documents in general terms. At the very least, the right to copies of documents seized by the JFTC should be ensured.

## Confidentiality

The current rules do not afford adequate protection of information provided to the JFTC during an investigation. Information obtained in JFTC investigations has been disclosed in private actions and in investigations in other jurisdictions. Press leaks frequently occur, as evidenced by the presence of reporters at an investigation target's premises during "surprise" dawn raids by the JFTC. This lack of protection will likely have a chilling effect on disclosure of information to the JFTC, particularly in the context of multijurisdictional investigations, and leads to the impression that the JFTC wishes to have the target tried in the press (by journalists favored by the JFTC through provision of "news scoops"). The ACCJ recommends that every press leak incident should be diligently investigated by the JFTC to identify the source of the leak, and steps should be taken to prevent future leaks.

Preserving confidentiality is particularly important to the leniency program, which requires full disclosure and cooperation by the applicants to be effective. In the United States and the EU, explicit provisions ban disclosure of any information received pursuant to a leniency application without the consent of the applicant.

The JFTC should therefore be obliged to keep all information provided to the JFTC during an investigation confidential (except such facts that are required to be presented in a final order, as with the EU's statement of objections), and implement a similar policy to that in effect in the EU and the United States with respect to information provided pursuant to a leniency application. Such provisions would be even more effective if JFTC officials and their consultants were subject to sanctions for breaching their confidentiality obligations.

Strengthened confidentiality protections would also increase investigation targets' (and the public's) confidence and trust in the JFTC.

## Adequate Notice and Opportunity to Present Defense Prior to Issuance of Administrative Order

Regardless of which hearing system is eventually implemented, investigation targets should be given a meaningful opportunity to present a defense prior to the issuance of an administrative order. While such an opportunity is provided for under the current rules, it is substantially limited due to the fact that arguments and evidence are presented to and weighed by the JFTC investigators, rather than by an objective hearing officer. Although the Amendments to the AMA partially improved the defenses of investigation targets during the pre-decision stage, there are still shortcomings as explained below.

A meaningful opportunity to present a defense requires adequate notice and time to prepare. As the Supplementary Resolution states, the notice of tentative order should be explicit and sufficiently detailed to enable an investigation target to consider and prepare its defenses. Furthermore, while the rules provide that the JFTC shall set a deadline to present views and submit evidence "that ensures an appropriate period" to prepare such materials, in reality the time period given is usually only two weeks: AMA Arts. 49(5) and 50(6). Such a short time period to prepare an opinion and evidence is not adequate, particularly considering that the notice of tentative order is often the first time the investigation target is made aware of the facts and allegations against it. The ACCJ recommends that the time period be fixed at not less than 45-60 working days.

### Adequate Protections for Witness Statements

Under current procedures, JFTC investigators prepare a witness statement following an interview. The witness (without legal counsel present) must then sign or seal the statement, attesting that the statement, which the witness has had little or no opportunity to amend, confirm or correct, is accurate. The JFTC retains the statement and does not provide a copy to the witness. Such statements can be used by the JFTC for the fact findings and administrative orders, and subsequently can be used for a court procedure, at which point they become public. These procedures are problematic, because they can result in coerced, unreliable statements being used as evidence in JFTC and other proceedings.

A witness should not have to sign the statement, at least unless he or she has had adequate opportunity to review and correct it. Without an opportunity to have legal counsel present, there is intense pressure to sign the statement even though it may be an interpretive and/or selective summary by the JFTC. These situations are coercive and can result in statements that contain inaccurate, biased, manipulated or incomplete information. In past investigations, interviewing JFTC officers have suggested to the witness that, until the witness signs or seals the statement, the witness will need to repeatedly return to the JFTC offices for extended "interviews", thereby preventing the witness' return to work.

Once a statement is signed, it may be considered to be an admission by the witness and/or the investigation target, and may be discoverable and/or admissible in U.S. or other non-Japanese litigation or governmental proceedings. This also underscores the importance of the right to legal counsel at an interview. Even if, as recommended by the ACCJ, a witness is entitled to have legal counsel present at the interview, the witness should also have adequate time and privacy to review the statement with his or her legal counsel. From a due process standpoint, there should be no requirement for the witness to sign a statement that might self-incriminate the witness. Protection against self-incrimination is recognized in many

jurisdictions around the world. Instead, it should be sufficient for the investigator drafting the statement to aver that it is a JFTC-drafted statement executed by the JFTC investigator in good faith.

An investigation target should have access to any witness statements, as well as any other evidence against it in the possession of the JFTC. Access should be a voluntary and not an automatic procedure, as a witness statement in the possession of the investigated target may be subject to discovery in U.S. or other non-Japanese litigation or government proceedings.

## Economic Analysis

As expressed in the Supplementary Resolution, the JFTC should employ personnel with expertise in economic analysis. Moreover, JFTC decisions should be based on thorough economic analysis, and investigation targets should have an opportunity to submit economic analyses, expert reports, and evidence in support of their practices and positions. At the conclusion of a proceeding, the JFTC's written decision should thoroughly explain the JFTC's economic reasoning for better understanding by other enterprises seeking to comply responsibly.

This is especially important in cases involving unilateral conduct, such as private monopolization and unfair trade practices, as there is a potential for overdeterrence if careful economic analysis of the market and the conduct in question is not undertaken. As the GOJ is able to impose surcharges for unilateral exclusionary conduct and unfair trade practices, it should ensure that decisions to impose any surcharges are firmly rooted in economic analysis in order to avoid a chilling effect on procompetitive conduct and market innovations.

## Enforcement of Proper Procedures

Investigation targets should be provided an opportunity to contest procedures that do not conform to JFTC rules or other due process norms. Currently, the only mechanism to raise and resolve such issues is through Article 22 of the Rules on Administrative Investigation, which provides for a right of objection to the JFTC. However, there is no provision for an independent hearing officer to adjudicate the motion, and no opportunity for review of the internal decision. Such motions should be resolved by an objective third party or hearing officer and should be reviewable by a court. In the EU and the United States, an independent Ombudsman Office is sometimes available to handle alleged due process breaches and other grievances. The GOJ may wish to consider establishing a similar oversight office for the JFTC and other agencies. In addition, the JFTC should consider publically disclosing sanctions against JFTC officials who do not follow the procedures prescribed in the rules, in order to improve transparency of the

agency. (If there are privacy concerns, the name of the official can be redacted.)

### CONCLUSION:

The ACCJ has always been a strong and vocal advocate for strengthening the operations of the JFTC. We have recommended on many occasions increasing both the JFTC's staffing and its budget, believing that vigorous enforcement of competition policy benefits everyone, but most importantly Japanese and foreign companies who are new to the market and need a level playing field if they are to succeed. Such new-to-market competition will produce greater economic efficiencies for the Japanese economy, and improve products and services for Japanese consumers and stimulate economic growth.

A fair and effective competition policy, however, must also work under a set of rules that are clear to all and consistent across jurisdictions. Commitment to due process should precede increased enforcement activity. Insufficient procedural safeguards are particularly problematic as the JFTC increases enforcement activity and administrative penalties. As emerging market competition authorities mature, Japan should set an example by strongly affirming its commitment to due process through procedural reforms. Revisions to the hearing system should be treated as an opportunity to implement reforms that will cause Japan's competition law framework to evolve in a manner consistent with the highest international standards and a commitment to the rule of law, as expressed in the Supplementary Resolution.

\*Note: This Viewpoint is not a standard ACCJ Viewpoint. Standard ACCJ Viewpoints are presented in both English and Japanese in a branded format (for other ACCJ Viewpoints, please visit: <http://www.accj.or.jp/en/advocacy/viewpoints>). This document, however, does represent the ACCJ's official position and will form the English portion of a forthcoming standard ACCJ Viewpoint.