

System Level Transparency

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June 1, 2016

Mexico City

Presentation at the APEC Workshop on Investigative Process &
Procedural Fairness By Competition Law Enforcement Authorities

II . Transparency About Agency Policies And Standards

4. Transparency about legal standards and agency policies is a basic attribute of sound and effective competition enforcement. Competition laws and policies that govern agency enforcement should be transparent. Transparency to the public about an agency's process and procedures can help to reinforce the values of accountability, predictability and fairness in the application of competition enforcement.

II . Transparency About Agency Policies And Standards (cont'd)

4.1 Enforcement system transparency should include the substantive legal standards used for enforcement, any agency guidelines for analysis, the processes and investigative tools that agencies use to conduct their investigations, the framework for judicial review, and the sanctions and remedies available for competition law violations and how they are determined.

4.2 Competition agency decisions to challenge or prohibit conduct should be transparent and the agency should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency's findings of fact and legal and economic analysis.

4.3 Agencies should be transparent with respect to the framework for their investigative process, to the extent it does not undermine the effectiveness of its investigations. This includes making public relevant agency investigative rules, guidelines, practices, procedures, applicable timeframes, and confidentiality rules. Competition agencies use many formats for the public presentation of such information. They can be presented formally, including through incorporation in relevant competition law or agency rules of practice or procedural guidelines, or in less formal ways, such as agency speeches, closing statements, manuals, staff working papers, fact sheets, Frequently Asked Questions (FAQs), explanatory notes, best practices, or other general advice or information materials related to investigative procedures.

□ Transparency of rules and regulations, decisions

- In addition to the provisions of the AMA, the JFTC publishes various rules and guidelines on the investigation procedures. When the JFTC intends to establish or revise rules or guidelines, it conducts a public comment procedure on the draft.
 - ✓ procedural provisions of the Antimonopoly Act (Paragraph 2 of Chapter 8)
 - ✓ “Rules on Administrative Investigations by the Fair Trade Commission” (Investigation Rules)
 - ✓ “Rules on Hearing of Opinions by the Fair Trade Commission”
 - ✓ “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” (December 25, 2015)
- The JFTC makes a press release when it takes a legal measure or issues a warning, etc. Also, when it considers the case should be made public from the viewpoint of competition policy, it will make a press release, provided that the concerned parties consent to the publication, or the suspected violators want to make it public.
- The JFTC has published, in line with the formulation and publication of the Guidelines on Administrative Investigation Procedures, reference material which shows the standard steps etc. in implementing the JFTC’s administrative investigation procedures for alleged antitrust cases that has been prepared for companies and other parties (December 25, 2015)



Discussion on Investigation Procedures of the JFTC

- The Advisory Panel on Administrative Investigation Procedure under the Antimonopoly Act compiled a report in December 2014.

Topics for Discussion

- Issues Related to On-the-Spot Inspection

- Attorney presence
- Copying materials
- Information for the companies

- Attorney-Client Privilege

- Issues Related to Deposition

- Attorney presence
- Copy of deposition records
- Information for the parties

The JFTC to draw up and make public guidelines, etc. regarding standard administrative investigation procedures for the JFTC's investigation on alleged antitrust cases.

- Recommendations in the report compiled by the “Advisory Panel on Administrative Investigation Procedures under the Antimonopoly Act” (published December 24, 2014)
- From the perspective of further ensuring the appropriateness of administrative investigation procedures, in order to enhance transparency of the JFTC’s investigation procedures and contribute to the smooth implementation of the JFTC’s case investigations, the JFTC make the Guidelines known to the public
- In the Guidelines the JFTC clarifies the standard steps and key points to note in the JFTC’s administrative investigation procedures, taking the past practices into account, and inform officers engaged in administrative investigations of alleged antitrust cases of the Guidelines.

Guidelines on Administrative Investigative Procedures under the Antimonopoly Act (Published on December 25, 2015)

Content of the Guidelines

I General Overview

1. Purpose of the Antimonopoly Act and the mission of the JFTC
2. The JFTC's case investigation system and responsibilities of supervisors
3. Attitude of JFTC officials engaged in case Investigation

(1) Attitude toward case investigation, (2) Keeping disciplines, dignity and confidentiality, (3) compliance with due process, (4) Efficient and effective case investigations and multi-faceted consideration

II Investigative Process

1. On-the-spot inspection

(1) **Grounds and legal nature of on-the-spot inspection:** investigation with the authority to conduct on-the-spot inspection, order submission of materials, etc., enforced by provisions on punishments for disobedience; investigation based on voluntary cooperation of companies

(2) **Procedures and explanations given for on-the-spot inspection:** presentation of ID card by the investigator; notification of the alleged facts on violations; punishment for obstruction of justice; handing out of Reference Material for Business, etc.; procedures for on-the-spot inspection based on voluntary cooperation

(3) **Scope of on-the-spot inspection:** searches can be conducted on the place where an investigator reasonably considers to be necessary

(4) **Procedures related to submission and seizure of materials:** order to submit materials that the investigator reasonably considers necessary for investigations (including electronic data); list of materials submitted, etc.; Making copies of materials that are deemed to be necessary for the daily business activities shall be allowed

(5) **Presence of an attorney during on-the-spot inspection:** shall be allowed, although not as the right of the company

2 Deposition

(1) Grounds and legal nature of deposition: (i) voluntary deposition and (ii) interrogations based on punishment for disobedience

(2) Procedures and explanations given for deposition

- Voluntary deposition: Providing explanation that the deposition is based on voluntary cooperation
- Interrogation: an order to appear to testifying parties; explanation about the legal nature of interrogation, etc.
- Introduction to the Reference Material for Business, etc.
- As necessary, providing the explanation that written deposition records may be subject to perusing and copying in procedures for hearing opinions (under Article 49 of the Antimonopoly Act)

(3) Points to note in a deposition: Presence of third parties including an attorney during deposition, audio / video recording of the deposition, providing copies of deposition records at the time of its preparation, and note taking during a deposition will cause a concern for the JFTC's fact-finding ability, and therefore are not permitted

(4) Length of deposition and break times

(5) Procedure for preparing deposition records and affixing signatures and seals

3 Order to Report

(1) Grounds and legal nature of the Order to Report: (i) voluntary request for report and (ii) order to report based on punishment for disobedience

(2) Procedures for an Order to Report: a written order to report / request for report for voluntary cooperation

4 Objection to measures taken by the investigator and complaint about voluntary deposition

(1) Objection to measures (on-the-spot inspection, interrogation, etc.) taken by the investigator: the objecting party may make a motion for objection to the JFTC within one week

(2) Complaint about voluntary deposition : written complaints can be submitted to the JFTC

Others

-After two years of issuing this guidelines, a follow-up on the status of the administrative investigation procedure and, if necessary, a review of the guidelines (including the attorney-client privileges, format of interrogation, etc.) will be made with reference to the situation of relevant legal systems.

□ Notification of alleged facts at the on-the-spot inspection

- The investigator shall, when carrying out an on-the-spot inspection, make available the document stating “Title of the case”, “Main points of the alleged fact violating the provision of the Act” and “Applicable provisions of the Act” (“Notification on Suspected Violation”) for the concerned persons (Article 20 of the Investigation Rules).
- In practice, at premises subject to the on-the-spot inspection, the investigator hand-delivers the notification to the representative of the said premises at the beginning of the inspection. By this notification, the concerned persons are informed of the alleged fact violating the provision of the AMA.



❑ Objection to measures taken by investigators

- Any person, who was subject to the administrative investigations (Article 47(1)), which was taken by the investigator, may make a motion for objection to the JFTC within one week from the day subject to the measure by a document stating the grounds, when being dissatisfied with the said measure. (Article 22 (1) of the Investigation Rules)
- Where the JFTC acknowledges that the motion has sufficient grounds, it shall order the investigators to revoke, rescind, or modify the measure against which the motion was filed and notify the petitioner to that effect. (Article 22(2) of the Investigation Rules)
- The JFTC shall, when having rejected the motion for objection, notify thereof to the petitioner. In this case, the reasons for the rejection shall be given. (Article 22(3) of the Investigation Rules)

❑ Complaints to measures taken by investigators

- If a party subject to voluntary deposition, etc. argues that the statement and the behavior of the investigator, etc. went against the JFTC's Guidelines during the deposition process, such party may make a complaint in writing to the JFTC within one week of the date of the deposition (New rule established in the JFTC's Guidelines on Administrative Investigation Procedures)

Flowchart of the Hearing of Opinion Procedure (introduced from April 2015)

Notification of the Hearing of Opinions

【Article 50 of the AMA, Art 9 of the Rules of the Hearing of Opinions (hereinafter referred to “Rules”)】

Major items to be notified:

(1)Expected content of the Cease and Desist Order, (2)Facts found by the JFTC and the application of the laws and regulations, (3)Date and place of the hearing of opinions, (4)Titles of the evidence proving the facts found by the JFTC

From 2Weeks
to 1 Month

Notification of the name of the Staff Member Presiding Over Hearing of Opinions (Art. 14 of the Rules)
Inspection and copying of evidence (Art. 52 of the AMA, Art.12 and 13 of the Rules)
Submission of the (Submission of Written Materials, etc. Prior to Date of Hearing (Art. 16 of the Rules)

First date of hearing

【Art. 54 of the AMA】

- Explanation by the investigator on the content of the draft cease and desist order and major evidence
- Questions from the party with the permission of the staff member presiding over hearing of opinions
- Oral Statements and submission of documents by the party

※If considered necessary to continue by the staff member presiding over hearing of opinions

From
2Weeks
To
1 Month

Notification of Preparation of Record of Hearing of Opinions (Art. 58 of the AMA, Art. 21 of the Rules)
Inspection of the Record of Hearing of Opinions (Art. 58 of the AMA, Art.22 of the Rules)
Submission of the (Submission of Written Materials, etc. Prior to Date of Hearing (Art. 16 of the Rules)

Second date of hearing (final)

【Art. 54 of the AMA】

- Hearing of Opinions from the party, submission of evidence, etc.

Notice of Preparation of Record / Report of Hearing of Opinions 【Art. 58 of the AMA, Art. 21 of the Rules】
Inspection of Record / Report of Hearing of Opinions 【Art. 58 of the AMA , Art. 22 of the Rules】

Cease and Desist Order

【Art. 60 of the AMA】

- Resolution of the cease and resist order after careful consideration of the contents of the record / report of the hearing of opinions

Thank you very much !!
Please visit our English website at:
<http://www.jftc.go.jp/en>

Disclaimer: the views expressed in this presentation is solely those of the speaker and do not necessarily reflect those of the agency that the speaker belongs to.
All errors in this presentation are mine.



Dokkin
(JFTC mascot character for kids)