

# Japan's New Antimonopoly Act: Two Developments Practitioners Should Know

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## Introduction

The country with the world's third-largest economy and third-oldest antitrust law has recently introduced changes to its long-held antitrust procedures. On April 1, 2015, Japan implemented important revisions to its Antimonopoly Act ("AMA").<sup>1</sup> This will likely have significant impact on the fact-finding process in Japanese antitrust investigations and on parties investigated by the Japan Fair Trade Commission ("JFTC").

In Japan, suspected antitrust violations are usually investigated administratively by the JFTC. If a violation is found, the JFTC imposes administrative sanctions on the investigated party, such as a cease-and-desist order and an administrative surcharge (fine) order.<sup>2</sup> This procedural structure has been heavily criticized because the JFTC simultaneously plays the roles of prosecutor and judge. To improve procedural fairness in antitrust investigations, in December 2013 Japan's Diet passed amendments to the AMA ("2013 Amendment" or "Amendment").<sup>3</sup> While the Amendment includes numerous substantive changes, there are two reforms international antitrust practitioners should be particularly aware of: the new appeal structure and new opinion hearing process.

## The New Appeal Structure

Previously, a party wishing to contest administrative sanctions had to first undergo an administrative appeal hearing ("Administrative Hearing") with the JFTC before seeking review from the judicial branch.<sup>4</sup> This procedure had been in place since the AMA's introduction in 1947.<sup>5</sup> Only after a decision was issued in the Administrative Hearing, could parties appeal to the Tokyo High Court<sup>6</sup> and then ultimately to the Supreme Court.

The 2013 Amendment abolishes the Administrative Hearing. Instead, the first level of appeal against JFTC administrative orders now rests with the Tokyo District Court.<sup>7</sup> A panel of three or five judges hears and decides those appeals to ensure careful review.<sup>8</sup>

The Amendment also changed the standard of review of the JFTC's findings. Under the former AMA, courts were bound by factual findings of the JFTC, so long as those facts were supported by substantial evidence, out of deference to the JFTC's expertise in its fact-finding function.<sup>9</sup> The Amendment, however, abolished this rule and gave the judicial branch authority for *de novo* review.

The Amendment also allows investigated parties to submit evidence that had not been previously presented to the JFTC.

Formerly, investigated parties were restricted from offering new evidence to the courts.<sup>10</sup> The Amendment removes this restriction and allows the investigated parties to submit new evidence as in ordinary administrative litigations.

These can be considered positive changes for investigated parties, but additional issues remain. Under the former AMA, a party against which the JFTC imposed a cease-and-desist order could obtain a stay of enforcement relatively easily by paying a bond.<sup>11</sup> The Amendment, however, defers to the general Administrative Case Litigation Act,<sup>12</sup> which requires an "urgent necessity in order to avoid any serious damage" to obtain a stay. This is generally considered a requirement more difficult to meet.<sup>13</sup>

With respect to burden of proof, the Amendment does not clearly state who bears the burden of proving illegality. It appears, however, that the JFTC still bears the burden as it did under the former system.<sup>14</sup>

## The New Opinion Hearing

Under the previous practice, prior to the JFTC issuing its order, investigated parties had merely an opportunity to hear an "explanation" of the expected content of the order, findings of fact, and evidence that was "necessary" to establish those facts.<sup>15</sup> While investigated parties were able to obtain copies of materials that they had submitted to the JFTC<sup>16</sup> and inspect evidence, they did not formally have a right to do the latter under the AMA. The extent of inspection was within the investigators' discretion and varied widely depending on the case and investigator.<sup>17</sup> In addition, an investigated party was not allowed to obtain copies of written records of statements that its employees made to the JFTC.

The Amendment introduced a new opinion hearing to enhance investigated parties' procedural rights. This new hearing will be presided over by a neutral "designated officer," who is a JFTC officer not involved in the underlying investigation.<sup>18</sup> At the opinion hearing the case investigator must explain the expected content of the order, findings of fact, application of laws and regulations, and "major" evidence proving the findings of fact.<sup>19</sup> The investigated party can pose questions to the investigators, present its own evidence, and submit its own opinion of the matter to the designated officer.<sup>20</sup> In addition, the Amendment explicitly gives investigated parties the right to inspect evidence "proving" the JFTC's findings,<sup>21</sup> which is considered a broader set of evidence than the "necessary" evidence that was "explained" by the investigator under the previous practice. The

Amendment also allows the investigated party to obtain copies of written records of its employees' statements to the JFTC.<sup>22</sup>

The designated officer has general authority to conduct opinion hearings to ensure efficient proceedings. The officer may set new hearing dates when necessary.<sup>23</sup> The time between hearings is expected to be between two weeks and a month, but will vary from case to case.<sup>24</sup> The designated officer will prepare a written record of each hearing and a final report to the Commission listing the points of the case.<sup>25</sup> The Commission must give "careful consideration" to these when making its final decision.<sup>26</sup> Though not allowed to obtain a copy, the investigated party may inspect the records and report.<sup>27</sup>

## Conclusion

The 2013 Amendment appears to improve procedural fairness for the parties investigated by the JFTC. Yet, there is room for further improvement. For example, additional protection of attorney-client communications and acknowledgement of the right to counsel during JFTC interviews have been hotly debated among antitrust practitioners, scholars, and authorities. Japan's government, however, has decided not to implement those protections as part of this procedural reform. Ultimately, whether these amendments truly improve procedural fairness in the Japanese antitrust regime will depend on how the Amendment is applied in practice.

<sup>1</sup> AMA, Act No. 54 of 1947, in English available at [www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index.html](http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html).

<sup>2</sup> The JFTC may, however, also choose to conduct a criminal investigation and criminally accuse antitrust violators. *Id.*, ch. XII and art. 96.

<sup>3</sup> See Law No. 100 of 2013.

<sup>4</sup> AMA, arts. 49(6), 50(4), amended by Law No. 100 of 2013.

<sup>5</sup> Prior to amendments to the AMA made in 2005, Administrative Hearings had taken place *before* the JFTC issued cease-and-desist orders if investigated parties were dissatisfied with the JFTC's proposed decision. If the investigated party admitted the proposed decision, the JFTC would issue a cease-

and-desist order without holding an Administrative Hearing. *Id.*, arts. 54 and 48, amended by Law No. 35 of 2005.

<sup>6</sup> AMA, art. 85(i), amended by Law No. 100 of 2013.

<sup>7</sup> *Id.*, art. 85.

<sup>8</sup> *Id.*, art. 86.

<sup>9</sup> *Id.*, art. 80(1), amended by Law No. 100 of 2013.

<sup>10</sup> *Id.*, art. 81, amended by Law No. 100 of 2013.

<sup>11</sup> *Id.*, art. 70-6, amended by Law No. 100 of 2013.

<sup>12</sup> Administrative Case Litigation Act, Act No. 139 of 1962, art. 25(2), in English available at [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&x=16&y=13&kn\[\]=%E3%81%8D&ky=&page=10](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&x=16&y=13&kn[]=%E3%81%8D&ky=&page=10).

<sup>13</sup> See, e.g., Misaki Fujisawa & Kenji Akiha, *Hesē Nijyūgo-nen Kaisē de Kō Kavaru – Dokkeino Jitsumu no Shin Pointo – Dai Ikkai – Kotori Meirē ni Taisuru Fufuku Mōshitae* [The 2013 Amendment Will Bring Changes – New Points in the Antimonopoly Practice – The First Round – Appeals against JFTC's Orders], *Bijinesu Hōmu* [Business Legal], July 2014, at 106, 108 (Japan).

<sup>14</sup> See *id.* at 109.

<sup>15</sup> Kōsē Torihiki Iinkai no Shinsa ni Kansuru Kisoku [Rules on Administrative Investigations by the JFTC], JFTC Rule No. 5 of 2005, art. 25 (repealed 2015).

<sup>16</sup> *Id.*, art. 18.

<sup>17</sup> See e.g., Hideki Usunomiya & Masashi Ichikawa, *Shinpan-Seido Haishi-to ni dō Sonaeru? Kaisē Dokusen Kinshihō to sono Taiō* [How to Prepare for the Abolition of the Hearing System and Other Revisions to the Antimonopoly Act – Revised Antimonopoly Act and Measures in Response to the Revisions] *Bijinesu Hōmu* [Business Legal], May 2014, 66, 68-69 (Japan).

<sup>18</sup> AMA, art. 53(2).

<sup>19</sup> *Id.*, art. 54(1). See also e.g., Yūko Araki & Yūsuke Sakai, *Hesē Nijyūgo-nen Kaisē de Kō Kavaru – Dokkeino Jitsumu no Shin Pointo – Dai Nikai – Meirēmae no Kotori eno Hanron to Shōko Etsuran* [The 2013 Amendment Will Bring Changes – New Points in the Antimonopoly Practice – The Second Round – Counterarguments to the JFTC before Orders and Inspection of Evidence] *Bijinesu Hōmu* [Business Legal], Aug. 2014, 134, 134-5 (Japan).

<sup>20</sup> AMA, art. 54(2).

<sup>21</sup> *Id.*, art. 52(1).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, art. 56.

<sup>24</sup> GENERAL SECRETARIAT OF THE JFTC, *HESÉ NIJYŪGO-NEN KAISÉ DOKUSEN KINSHIHŌ* [2013 AMENDMENT OF THE ANTIMONOPOLY ACT] 11 (2015).

<sup>25</sup> AMA, art. 58.

<sup>26</sup> *Id.*, art. 60.

<sup>27</sup> *Id.*, art. 58(5).



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