Japan's Consolidated Anti-Monopoly Act: Recent Developments and Non-Developments

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Abstract

In this article we discuss developments, or in some cases the lack thereof, in connection with the 2013 amendments to Japan's Anti-Monopoly Act (AMA).[2] The legislative process is now complete, following the rather profound restructuring of the enforcement process on which we reported in an earlier article.[3] Here we discuss newer provisions, including regulations and soft law, which supplement and flesh out some of the AMA's amendments. We will not repeat here the basic provisions that drove the reform in 2013.

The following text is divided into four parts. Part I contains a brief introduction. Part II presents new (mainly but not only procedural) aspects of the Japanese enforcement system since April 2015. Part III ('Residual roncerns') discusses the recent draft Guidelines of the Japan Fair Trade Commission (JFTC) on its Administrative Investigation Procedures. It also discusses issues that have not been resolved by either the draft Guidelines or the reformed Act, including the attorney-client privilege and the presence of counsel during depositions and interrogations. Part IV concludes with some final remarks.

Introduction

The Japanese 'Diet' (in Japanese, the '*Kokkai*') passed the bill to amend the 'Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade' (i.e., the AMA) on 7 December 2013.[4] The new AMA incorporating the relevant amendments was published in April 2015.[5] In brief, the primary changes were as follows.

First, the JFTC's hearing procedure system – essentially, an internal appeal procedure – was abolished. In a related move, the previous counter-intuitive order of procedures – in which orders came first and were followed by a hearing – has now been reversed. Second, the external appeal procedure has been amended so that rather than appealing directly to the Tokyo High Court (normally a second-instance court in non-competition matters), parties wishing to challenge a JFTC administrative order must lodge their appeal before the Tokyo District Court,[6] with further appeals possible to the Tokyo High Court and ultimately to the Supreme Court. In this sense the appellate process has been normalized. However, appeals from JFTC orders will remain distinctive in that the District Court will automatically assign either three or five judges to decide the case, whereas a single judge is the norm. Third, the amended AMA goes some way in reinforcing certain pre-hearing rights of defense, in particular by requiring the JFTC to explain to defendants the content of anticipated orders and providing copies of evidence (subject to limited grounds for refusal by the JFTC). These guarantees do not mean that JFTC procedures as a whole achieve a desirable balance between effective fact-finding and enforcement on the one hand and due process on the other, but they are necessary and welcome components of the pre-order procedure. Finally, the pre-order hearing will be presided over by a hearing officer selected from the JFTC's staff, a concept that emulates, though not completely, the Hearing Officer assigned to conduct hearings and report on fairness issues in investigations of the European Commission.[7]

Additional new features of the Japanese system since April 2015

On procedure: a new Regulation on Opinion Hearings

The 2013 AMA amendments have focused on procedural aspects while steering clear of substantive issues. In this regard, an important development is that in April 2015 the JFTC Regulation on Opinion Hearings pertaining to Cease-and-Desist Orders and Other Measures ('the Regulation') took effect on the same day that the new AMA entered into force, i.e., 1 April 2015.[8] Before the 2013 amendment, the procedure governing the presentation of opinions by investigated parties and the submission of their evidence was included in the investigation regulation. However, given the importance of the procedure on hearings the JFTC has now adopted a new independent regulation on opinion hearings which is separate from the investigation regulation. The Regulation establishes detailed provisions not contained within the AMA itself.

Before the day of an opinion hearing, the JFTC has to provide notice to investigated parties. The Regulation shows the list of evidence which JFTC may use in order to find facts in its cases, and it indicates the names of designated officers. The parties may request a change of the hearing day on the basis of unavoidable reasons, and the procedural details for such requests are provided.

With regard to the inspection and copying of evidence in the possession of the JFTC (which we discuss further in Part III), the Regulation indicates the items of evidence which may be inspected and copied by the parties. The Regulation explains the application form to be used for inspection and copying and makes clearer the power and obligation of JFTC in relation to inspection and copying procedures.

The Regulation also provides for the powers and obligations of the JFTC hearing officer. These details are provided to supplement the provisions of the AMA itself. As specified by the Regulation, the hearing officer has the power to limit the presentation of opinions and other evidence by the investigated parties at the opinion hearing. He may request that the parties submit documents and evidence to answer questions and explain opinions. The deadline for the appointment of the hearing officer is the time at which notice of the opinion hearing is given to the parties.

The Regulation describes the preparation and handing of hearing records and the documents and opinion hearing report to be written by the JFTC hearing officer. The hearing officers must notify the parties when he draws up records and reports, and the parties must be afforded the opportunity to inspect them.

Before the hearing procedure was abolished, both the cease-and-desist etc., procedure and the hearing procedure protected the interest or rights of suspected parties. With the elimination of that procedure, only the former now does so. In this system, there may be some concern that there are insufficient safeguards to secure the protection of defendants in connection with the newly established hearing procedure.

On substance: revised Guidelines on Vertical Restraints

Apart from the legislative reforms, the JFTC has amended its Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act.[9] On some matters the revised Guidelines represent substantive changes with regard to the JFTC's analysis of vertical restraints, including resale price maintenance. In this regard, the JFTC states that it will balance pro-competitive and anticompetitive effects when investigating competition concerns in the vertical restraints context. The revised Guidelines clearly permit claims of justification for RPM by businesses, and they provide a number of examples. The JFTC explains how it will examine such claims, and it can be seen that parties will generally face a significant burden of justification. The revised Guidelines also discuss selective distribution systems, and they describe how the JFTC intends to apply the AMA in the context of this type of distribution.

Some residual concerns

Deficiencies in the procedural fairness of AMA enforcement have been recognized for some time, not only by the defense bar and academics but by Japanese policy makers as well. For example, the problem was reflected in a document issued in late 2009 by the Policy Council. The document, entitled "Basic Policy on the [2009] Amendment to the Antimonopoly Act", stated that "[t]he Government of Japan should undertake a review of measures to ensure the adequacy of the rights of defense, including the right to legal counsel and the attorney-client privilege [...]."[10] These matters today remain unfinished business. It is true that the issues have not been entirely neglected: indeed, in 2014 they were among the significant focal points of debate for the Advisory Panel on Administrative Investigation Procedures under the Antimonopoly Act ('Advisory Panel').[11] However, those discussions have led not to concrete proposals but rather to another policy rendezvous that is supposed to follow further study, an amorphous commitment at the present stage. The further postponement is largely due to the fact that the Advisory Panel to the Government, whose findings are discussed below, was on many points unable to reach consensus: effective fundamental rights and effective fact-finding and enforcement powers seem to be perceived as parts of a zero-sum game. We agree that a balance must be maintained, but if too much weight is attached to the zero-sum paradigm it may unnecessarily slow down the pace of reform. Compounding the problem is that the defenders of the status quo insist that strengthening fundamental rights in the competition sphere will lead to spillovers in other spheres of law such as tax law and criminal law, or at least to inconsistencies and fragmentation.

The reform process is yielding positive action with regard to some aspects of the JFTC's enforcement procedures; but so far it is yielding no action with regard to others. With regard to positive action, one newsworthy by-product of the discussions of the Advisory Panel is a public consultation on draft Guidelines on the JFTC's Administrative Investigation Procedures.[12] More specifically, the draft concerns the JFTC's standard administrative investigation procedure; it does not address the criminal-type investigations known as compulsory investigation procedures.[13] In the context of the standard procedure, the main thrust of the draft Guidelines concerns the conduct of investigating officers and the rights of parties during (i) on-the-spot inspections (dawn raids), and (ii) depositions.

The draft Guidelines: on-the-spot investigations and depositions

(i) On-the-spot inspections

Point I-3(3) of the draft Guidelines, a preliminary, tone-setting paragraph, seems to acknowledge that procedural fairness and transparency remain issues in JFTC investigations. The text provides that:

> "JFTC officials engaged in investigations must be aware that they are in a position of exercising legal authority over companies or their employees, etc. In investigating alleged violation cases, the officials give necessary explanation about procedures for relevant investigation in order to secure the understanding and cooperation of companies and their employees, etc. subject to the investigation. Further, the officials must always exercise the authority by due process of law, without promoting an attitude that may be recognized as intimidation, coercion or the like."

On-the-spot inspections may be conducted at business premises or at any place the JFTC investigating officer reasonably considers necessary in order to investigate the case. This would include an employee's residence or, presumably, his means of transport or other relevant locations – again, subject to the reasonableness criterion.[14] When the investigating officer comes knocking, she is required to provide the inspected party with an outline of the alleged facts, and then she asks for cooperation, a polite request backed up with the threat of sanctions.[15]

The inspector may issue an order to submit materials (accounting records, documents, files, etc.) reasonably considered necessary to the investigation. The draft Guidelines stress that not even sensitive items such as day planners or mobile phones are too private to be seized,[16] which may come as a surprise to employees of enterprises with inadequate compliance systems. In a key statement the JFTC indicates that, "[a]lthough it is not recognized as a right [...], materials that are deemed to be necessary for [a company's] daily business activities shall be allowed to be copied as long as it does not affect the smooth implementation of [the]

on-the-spot inspection".[17] It is not entirely clear but it seems that those copies can be made during the inspection. Other materials seized – those not essential for daily business – may later be perused and copied, upon request, at a place designated by the JFTC. For that purpose, parties should bring their own copying devices such as a digital camera or scanner. The ability to copy documents may be critical not only to the preparation of a company's defense in Japan but also for purposes of considering legal strategies in other jurisdictions, including decisions about whether and where to apply for leniency.[18]

With regard to the presence of legal counsel during an on-the-spot inspection, the JFTC adopts the line one might expect from an enforcer: the inspector, upon request, "shall allow an attorney to be present as long as it does not affect the smooth implementation of the on-the-spot inspection. However, such presence of an attorney is not recognized as the right of companies concerned […]."

(ii) Depositions and the (non-existent) rights to have counsel present and to avoid self-incrimination in the JFTC's administrative procedures

Two types of depositions may be given in JFTC procedures. The first, voluntary depositions, are not as such subject to any possibility of sanction. Second and by contrast, in the case of interrogations pursuant to Article 47 of the AMA, a party who disobeys an order to appear or makes false statements may be punished. Although sanctions may apply, the deposing officer of the JFTC, sensibly enough, "shall not use intimidation, coercion or other means that may cause any suspicion about [the] voluntariness of [the] deposition".[19]

Although the point was debated during the meetings of the Advisory Panel in 2014, the right to have an attorney present "during interrogations" by the JFTC is still not recognized.[20] The term "during investigations" is to be construed as meaning that an attorney (or other "outside" parties) may be consulted during breaks in the course of the deposition, provided such consultations do not inappropriately interfere with the questioning of the deponent.[21] Audio and video recording of the deposition are not allowed either; nor is the taking of notes during the deposition. However, during a break the deponent may write down notes from memory to keep a contemporaneous record of the deposition – again, provided this is not disruptive. As a general rule, the time taken by the investigator in deposing a party should not exceed eight hours per day, excluding breaks, unless the deponent so consents. Deposition late into the night is inappropriate absent an unavoidable reason.[22]

The draft Guidelines explain that the investigator conducting the deposition (including interrogations) is responsible for accurately recording information given by the deponent if relevant to the case and she must prepare deposition records taking "comprehensive consideration" of the material evidence and other depositions that she has taken already.[23] When preparing deposition records, the investigator must either read out the draft record to

the deponent or have the latter read the draft, and she must ask whether the draft contains any errors.[24] The draft should then be modified as necessary.

The draft Guidelines are not entirely clear with regard to situations where a party subject to an on-the-spot inspection or a deposition/interrogation submits objections or a complaint to the measure taken (a single week is provided for this). The draft merely states that the investigator is required to "faithfully respond to examination of such objection or complaint".[25] However, Section 22 of the JFTC's Rules on Administrative Investigations provides that the JFTC, if it recognizes that a motion for objection is well founded, will order the investigator to cancel or change the contested measure and to notify the petitioner accordingly. A guarantee of independence and objectivity in this regard seems to be lacking.

A recent non-development: the non-existent privilege against self-incrimination in administrative procedures

Article 38(1) of Japan's Constitution provides for a right against self-incrimination where the party testifying may be held criminally liable. Accordingly, in a hard core cartel or bid rigging case referred by the JFTC to the Public Prosecutor for further proceedings (which is not a common occurrence), there is no doubt that a defendant cannot be compelled to acknowledge its own liability. Furthermore, since the JFTC's interrogation procedure is compulsory, the privilege against self-incrimination applies in that context as well, in the sense that any admission by a party obliged to testify in an interrogation procedure, and any evidence derived from the interrogation, cannot be used in a criminal trial. But the right does not protect any witness in the context of its normal administrative investigations. The idea, well-established in Europe, that the serious consequences of administrative fines (not just in competition cases) justify attributing to such penalties a quasi-penal character has not thus far caught on in Japan, even though it is common nowadays to speak of the creeping criminalization of the AMA's surcharge system. The question of whether a party should be allowed to remain silent in order not to make self-incriminating statements is therefore, for the present, a policy question and not a question of constitutional principle.

As one might surmise, the JFTC is opposed to the recognition of any such privilege in the context of simple depositions. It holds fast to the distinction between criminal and administrative procedures, and within the latter category it holds fast to the distinction mentioned above between voluntary depositions and interrogations. Here again, it expresses concerns with regard to its fact-finding powers, and raises the fragmentation argument as well, given that the privilege is not recognized in other non-competition procedures in the field of administrative law.

We do not think a party should ever be compelled to acknowledge her own liability when serious consequences may follow – whether in a literally criminal procedure or in non-criminal procedures where sanctions may be imposed. We are sensitive to the JFTC's concern about

the need to preserve its ability to discover the truth about facts that have transpired, but this concern does not justify a complete refusal to recognize a privilege against self-incrimination in this context. A number of commentators have argued that the position of the EU Courts does not go far enough from a fundamental rights perspective, as it allows the Commission to compel companies to provide information about facts and to produce documents even when such facts and evidence would be inculpatory.[26] By contrast, the Courts have held that a party cannot be required against her will to provide answers that would amount to acknowledging her own liability.[27] At a minimum we think that the JFTC should recognize a privilege equal to the scope of the privilege guaranteed by the EU Courts. Such a limited privilege would leave the JFTC ample room to carry out its fact-finding activities while preserving the right of a party to maintain her own innocence.

Another recent non-development: the non-existent attorney-client privilege

In certain circles in Japan, there is an abiding distrust of the attorney-client evidentiary privilege. This is unsurprising, as the privilege has historically played no role in the country's legal culture. In Japan, as noted in the Advisory Panel Report, "the perception that [the] attorney-client privilege improves society and a cultural background for accepting the privilege does not yet exist".[28] The lack of recognition of the privilege contrasts vividly with evidence rules in the West, as reflected in the landmark judgments of *Upjohn*[29] in the U.S. and *A M & S*[30] in the EU (where the relevant term is "legal professional privilege"[31]). While these judgments are not unanimous on all issues relating to privilege,[32] each affirms that the core of the privilege is protected as a matter of fundamental rights. Indeed, in *Upjohn* the privilege is conceived as a cornerstone of the administration of justice.[33]

This is not the place to launch into a lengthy discussion of attorney-client privilege. However, it is worth highlighting the JFTC's objections to recognizing such a privilege in the context of its enforcement procedures. The JFTC's central concern is that the privilege would compromise its ability to execute its fact-finding function, and hence that its effectiveness as a public authority would suffer.[34] While it is not difficult to believe that excluding the admissibility of communications with a lawyer for the purpose of seeking legal counsel may sometimes pose difficulties for an enforcer, in general we believe the JTFC's fears to be overstated. In this regard it is worth recalling that, at least in some jurisdictions, and in particular in the United States, the scope of the attorney-client privilege is limited. An investigator remains completely free to obtain evidence and testimony with regard to the underlying facts to which the privileged communications relate. Nor does the privilege cover communications which were not made for the purpose of obtaining legal advice, or which were made in furtherance of illegal conduct.[35] In our view, any marginal facilitation of the JFTC's fact-finding task pales compared to the considerable benefits of the privilege, which stem from the greater confidence a client has to disclose to counsel all relevant information needed for the exercise of his legal rights. In some cases, by encouraging full and frank communications with counsel, the privilege may also indirectly enhance a company's compliance efforts.[36] Although some have suggested that the absence of privilege in some

sense compensates for the relatively light sanctions regime it enforces,[37] which may result in less pressure for firms to cooperate in its investigations, we would prefer to see the shortcomings of the current sanctioning powers of the agency addressed directly.[38] And while the privilege raises practical issues (how can the inspector be sure the privilege applies to a given document), and though the risk of abuse can never be fully erased, there are mechanisms available to address these problems.[39]

The inconclusive outcome reached as of December 2014 was that the Advisory Panel called for further study and discussion of the attorney-client privilege. As the Panel concluded,

"not a few panel members expressed their understanding of a certain significance of [the] attorney-client privilege [...]. However, the ground for granting attorney-client privilege and the scope to which the privilege needs to be applied are not clear [...]. Therefore, the Advisory Panel concluded that it is not appropriate to introduce [the] attorney-client privilege at the present stage. [...] 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 investigation powers. So it is desirable to deepen discussions on the privilege further as an issue to be considered in the future [...]."[40]

From the ambivalence of the above passage one can see that the panelists were divided on both principles and means. However, those opposing recognition of the privilege seem to have succeeded in preventing the Panel from suggesting any time frame for the envisaged deepened discussions.

Final remarks

Besides the yet-to-be-recognized attorney-client privilege, three more issues are mentioned by the Advisory Panel for future study and discussion. These issues, each of which may be viewed as part of the global convergence-differentiation conversation, are: the possible introduction of a settlement procedure to expedite the resolution of cases in a manner similar to the EU's cartel settlement system; the possible introduction of a commitment (consent order) procedure; and finally, cartel-relevant penalty levels and discretionary fining powers.

Moving toward an expansion of the toolbox of remedies and sanctions is surely desirable to put the JFTC in a better position to enforce the AMA flexibly and efficiently.[41] All of the enhanced enforcement instruments just mentioned should be explored, but above all we would underline the need for a modern system of sanctions. As we have suggested before, the JFTC needs discretion to tailor sanctions and penalties according to the concrete circumstances of a given case; and it needs to have the possibility of imposing fines that are at least as serious (as regards a basic amount and duration) as the overcharges that make illicit conduct tempting.[42] Beyond their intrinsic benefits, and in reference to the balance we

mentioned above in part I, such expanded powers may have the additional effect of guaranteeing effective enforcement while due process protections such the attorney-client privilege, and more generally the right to effective counsel are – hopefully – strengthened. In recognition of that interconnection, the Advisory Panel states that, "if strengthening the right to defense is to be considered in ways other than the one to be implemented under the current system [...] it is appropriate to conduct studies concurrently on the possibility of introducing [both enhanced rights of defense and enhanced carrot-and-stick measures to optimize cooperation with the JFTC's investigations]".[43] The Advisory Panel likewise calls for further study of settlement and commitment procedures, as they can "efficiently and effectively solve concerns associated with competition".[44] As in other jurisdictions, the road of reform in Japan is a long one with no particular end point.

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[2] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, as amended.

[3] See Mel Marquis and Shingo Seryo, 'The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation', *Competition Policy International – Asia Antitrust,* pp. 1-10 (2014), https://www.competitionpolicyinternational.com/the-2013-amendments-to-japans-anti-monopoly-act-some-history-and-a-preliminary-evaluation.

[4] See ibid. See also JFTC Press Release of 9 December 2013, 'Enactment of the Bill to Amend the Antimonopoly Act', http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.html; JFTC, Outline of the Bill to Amend the Antimonopoly Act, http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment01.pdf. For further background to the reform, see also Mel Marquis, 'Firebird Suite: Cartel Suppression Reborn in Japan', forthcoming, 4 *Journal of Antitrust Enforcement* ___ (2016).

[5] The original Japanese text is available at http://www.jftc.go.jp/dk/guideline/lawdk.html. For the JFTC's English-language translation, see http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html.

[6] For critical discussion of the new grant of exclusive appelate jurisdiction to the Tokyo District Court, see Shuya Hayashi, 'A Study on the 2013 Amendment to the Antimonopoly Act – Procedural Fairness under Japanese Competition Law', 7(10) *Yearbook of Antitrust and Regulatory Studies* 85-106 (2014), at 97-100. Hayashi would prefer a decentralized solution, with jurisdiction extended to other district courts, and specifically the Osaka District Court (which shares jurisdiction over IP litigation), which would imply greater convenience for entrepreneurs suing the JFTC. Hayashi also fears that the greater emphasis on external control, as compared to the internal hearing system that has been scrapped, will be inferior given the (statute-driven) weak nature of judicial review where discretionary administrative acts are contested. See ibid., pages 95-96.

[7] On the comparison between the JFTC's new hearing officer and the Hearing Officer of the European Commission, see Toshiaki Takigawa, 'Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from the JFTC Experiences', *CPI Antitrust Chronicle*, June 2014 (1). For further discussion of fairness concerns in light of the amended AMA, see also Hayashi, 'Procedural Fairness', cited previous footnote. For recent discussion of the Hearing Officer in the EU, see Giacomo di Federico, 'The role of the Hearing Officer in antitrust cases. A critical assessment of the new mandate and practice after 2011', in Paul Nihoul and Tadeusz Ckoczny (eds), *Procedural Fairness in Competition Proceedings*, Edward Elgar, 2015, chapter 6.

[8] The text of the Regulation is available in Japanese at http://www.jftc.go.jp/houdou/pressrelease/h27/jan/150116_1.files/15011631.pdf.

[9] See JFTC Press Release of 30 March 2015, Partial Amendments of the "Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act", http://www.jftc.go.jp/en/pressreleases/yearly-2015/March/150330.html. For the actual Guidelines, see the attachment at http://www.jftc.go.jp/en/pressreleases/yearly-2015/March/150330.files/Attachment.pdf.

[10] The document is available in Japanese at http://www.jftc.go.jp/houdou/pressrelease/h21/dec/091209seisakukaigi.files/091209seisakukaigi-shiryo1.pdf.

[11] See Report of the Advisory Committee, 24 December 2014, http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf. Similar to special advisory bodies established to study AMA-related issues in the past, the Advisory Panel was constituted in early 2014 by Japan's Minister of State. The task of the Advisory Panel was to provide expert, non-binding advice on the JFTC's procedures. In order to prepare its final report the Advisory Panel convened a variety of stakeholders in the course of 14 official meetings.

[12] The draft (dated 30 June 2015) is available at http://www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/Attachment.pdf.

[13] In spite of the language attached to this dichotomy, it should not be assumed that the 'non-compulsory' procedure cannot be enforced. In accordance with Article 94 of the AMA, a party subject to an on-the-spot investigation is obliged to cooperate with the investigation on pain of sanctions. Article 94 provides that obstruction of an inspection can be punished by imprisonment with labor for up to a year or by a fine of up to three million yen (USD 25,000). To date, no case has been prosecuted under this provision.

[14] See draft Guidelines, page 4.

[15] See above note 12.

[16] See draft Guidelines, page 4.

[17] Ibid., page 5.

[18] See Etsuko Kameoka, *Competition Law and Policy in Japan and the EU*, Edward Elgar, 2014, page 131.

[19] Draft Guidelines, page 7.

[20] Ibid.

[21] See ibid. ("Length of deposition and break times").

[22] See ibid.

[23] See ibid.

[24] See ibid.

[25] Ibid., page 9.

[26] For discussion of the issues and for references, see Bartosz Turno and Agata Zawłocka-Turno, 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?', 5(6) *Yearbook of Antitrust and Regulatory Studies* 193-214 (2012).

[27] This meridian between compelled self-incrimination and legitimately required production of evidence was articulated in Case 374/87 *Orkem v Commission*, EU:C:1989:387, paragraphs 18-42, and especially paragraphs 34-40. (See also Case 301/04 P *Commission v SGL Carbon AG*, EU:C:2006:432, paragraphs 42-49; Case 112/98 *Mannesmannröhren-Werke v Commission,* EU:T:2001:61, paragraphs 42, 65-67 and 75-78.) At paragraphs 34-35 of its *Orkem* judgment, the Court states: "Accordingly, whilst the Commission is entitled […] to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct" but it "may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove". It is commonly observed that *Orkem*, which was decided in 1989, falls short of the more rigorous standard of protection later embraced by the European Court of Human Rights (which does however allow an authority, pursuant to judicial warrant, to compel a party to produce documents and similar evidence). In the current state of EU law and strictly speaking, applicants cannot rely directly on the ECHR before the EU Courts, and the EU's accession to the ECHR has suffered a serious judicial setback (Opinion 2/13, EU:C:2014:2454) and will not occur any time soon; however, by virtue of Article 52(3) of the EU Charter of Fundamental Rights, the meaning and scope of rights protected by the Charter (including the privilege against self-incrimination, which is implicit in Article 48 of the Charter) must be at least as protective as those of rights under the ECHR (where the privilege is implicit in Article 6).

[28] Report of the Advisory Panel, cited above note 11, page 19. This observation may however be employed counterproductively in defense of the status quo. In this sense it is important to guard against the fallacy of culture-based deterministic thinking. For further discussion of culture, see Jingyuan Ma and Mel Marquis, 'Business Culture in East Asia and Implications for Competition Law', forthcoming, 51 *Texas International Law Journal* ___ (2016).

[29] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[30] Case 155/79 *A M & S Europe Limited v Commission*, EU:C:1982:157.

[31] See, e.g., Turno and Zawlocka Turno, cited above note 26; Jean-François Bellis, 'Legal Professional Privilege: An Overview of EU and National Case Law', *e-Competitions*, Nº 39467 (October 2011).

[32] Many readers will be aware of the frequently criticized position of the European Court of Justice that the attorney-client privilege does not extend to communications between an undertaking and its in-house counsel, given that the latter is an employee and lacks the independence of outside lawyers (even where the in-house counsel is subject to the discipline of one or more professional bars). See in particular Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, EU:C:2010:512.

[33] See also Kameoka, *Competition Law and Policy in Japan and the EU*, cited above note 18, page 127 (noting some of the benefits of the privilege).

[34] See Report of the Advisory Committee, cited above note 11, for example at page 20. On the other hand, the JFTC has also indicated that there have been no cases where a document that could have been withheld (hypothetically) on the basis of the privilege constituted "conclusive evidence" of an infringement. See ibid., page 18.

[35] See *Upjohn,* cited above note 29, at 395-396.

[36] See Report of the Advisory Panel, cited above note 11, page 18.

[37] See ibid., page 19.

[38] We share this conclusion with, e.g., certain Sections of the ABA. See Joint comments of the American Bar Association's Sections of International Law and Antitrust Law on attorney-client Privilege in response to the public consultation issued by the Cabinet Office of the Government of Japan (10 July), http://www.nichibenren.or.jp/library/ja/committee/list/data/attorney-client_privilege/ABA_original.pdf, pp. 5-6.

[39] See further Report of the Advisory Panel, cited above note 11, pages 20-21, and the JFTC's misgivings at page 22.

[40] See ibid., pages 22-23. See also Hayashi, 'Procedural Fairness', cited above note 6, page 105 ("[W]e 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.").

[41] See, e.g., Kameoka, *Competition Law and Policy in Japan and the EU*, cited above note 17, pages 124-125 (discussing and cautiously endorsing the posible transplant of commitment procedures in Japan).

[42] See Marquis and Seryo, 'The 2013 Amendments', cited above note 2. See also Marquis, 'Firebird Suite', cited above note 3.

[43] See Report of the Advisory Panel, cited above note 11, page 51.

[44] Ibid., page 52.