

# The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation

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In this paper we discuss the main features of the 2013 amendments to Japan's Anti-Monopoly Act (the 'AMA'). The paper is divided into three parts. To provide an evolutionary perspective, Part I contains a condensed historical background of Japanese antimonopoly policy. Part II presents aspects of the 2013 amendments that we would highlight for an international audience. Part III provides a preliminary evaluation of this latest round of reforms.

## **I. Short tour of seven decades**

With around 20 different series of amendments made to the Anti-Monopoly Act thus far, together with various vicissitudes of policy, the evolutions of Japanese competition law and policy are long and complex. They have been recounted on numerous occasions, and occasionally the story has been told in English.<sup>1</sup> We therefore do not belabor the history too much here. Nevertheless, it is worth recalling some of the notable milestones and setbacks so that the latest changes to the AMA may be seen in their historical context.

In parallel with analogous events that unfolded in Germany in the aftermath of World War II, the foreign powers occupying Japan, and specifically the US military wing operating as 'GHQ' (General Headquarters, also known as 'SCAP' – Supreme Commander of the Allied Powers), sought to install a competition law regime in an Asian society that could hardly have been less prepared for it. Since the Meiji years of the late 19<sup>th</sup> Century, Japan had been building an economic system based not on free enterprise (even if it was largely driven by a desire to 'catch up' with the Western world, and thereby to avoid colonialism), but on the principle of State-led development. As the scale of industry in key sectors grew to grotesque proportions, the *zaibatsu* (family-owned mega-conglomerates) emerged, and the economy itself came to be instrumentalized for the interrelated objectives of self-sufficiency, regional power and militarization. Infamously, pursuant to measures adopted in 1925, 1931 and 1938, many industries were required by law to be cartelized. In some respects the line between State and market melted away.

Against the background of this Lewis Carroll kind of world, the 1947 Anti-Monopoly Act was a form of shock therapy: it was not a mere set of prohibitions but a revolutionary exercise in economic engineering (and part of a broader 'economic democratization' plan) that went well beyond the US model.<sup>2</sup> The rigid constraints of the original Act proved to be

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<sup>1</sup> For recent retrospectives, see, e.g., Michiyo Hamada, 'Institutional Structure and Change Regarding Competition Law and Policy in Japan', in Philip Lowe, Mel Marquis and Giorgio Monti, eds., *European Competition Law Annual 2014: Institutional Change and Competition Authorities* (forthcoming, Oxford: Hart Publishing); Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Cheltenham: Edward Elgar, 2014), chapter 2. See also the various citations included in Mel Marquis and Tadashi Shiraishi, 'Japanese Cartel Control in Transition', *CEU San Pablo University Madrid Working Paper No. 47/2014* (Competition Policy Series) 1-21, available at <http://ssrn.com/abstract=2407825>.

<sup>2</sup> For further background regarding the economic democratization campaign and the dismantling of the giant conglomerates, see Thomas A. Bisson, *Zaibatsu Dissolution in Japan* (Westport: Greenwood Press, 1976). On

controversial even in Washington, D.C., and while some key Japanese officials that had interacted with GHQ as the Act was being drawn up welcomed the concept of an open market economy and embraced the new legislation, it was not long before the enemies of the AMA launched legislative counter-attacks.

Thus, in 1953 – the year after Japan regained her sovereignty – the AMA was modified substantially, though it was not hollowed out completely. Japan's antitrust warriors of that age, sensing that a watering down of the legislation was inevitable, opted for a 'strategic retreat', as Hamada has called it, whereby they were able to preserve parts of the Act and even to expand its scope to a certain extent by transforming the 'unfair methods of competition' concept into 'unfair trade practices' – to be defined from time to time by the Japan Fair Trade Commission ('JFTC'). Over the years, this category of unfair trade practices has been the basis for a great deal of enforcement in relation to unilateral practices, including but not limited to monopolization-type practices.<sup>3</sup> In a sense, one may take the view that the 1953 amendment 'saved' the AMA, which might otherwise have been scrapped altogether, taking the JFTC with it.<sup>4</sup> On the other hand there is no denying that, with the introduction of an exemption system for 'recession cartels' and 'rationalization cartels', Japanese antitrust in the 1950s and 1960s withered while the instincts of the Developmental State were revitalized and vindicated, as it were, by periods of vertiginous economic growth.<sup>5</sup>

The 1970s, and 1977 in particular, were a watershed for the enforcement and content of the Anti-Monopoly Act. Once again, institutional change arose not for purely legal reasons but as a function of context. It was the onset of rampant inflation – linked to the first Oil Shock in 1973 as well as other factors – that created an environment of public sentiment favorable to the aggressive (criminal) prosecution of oil companies in Japan for price-fixing and other allegedly illegal collusive conduct. For the first time, the JFTC's role as antitrust

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the draconian provisions of the AMA as originally enacted in 1947, see Simon Vande Walle, 'Competition and competition law in Japan: between scepticism and embrace', in Michael Dowdle, John Gillespie and Imelda Maher, eds., *Asian Capitalism and The Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: CUP, 2013) 123-143, at 124-125.

<sup>3</sup> See Hamada, 'Institutional Structure and Change', cited above note 1.

<sup>4</sup> Other independent agencies were in fact dissolved: for example, the Securities and Exchange Commission was scrapped in July 1952, a mere three months after the departure of the US forces.

<sup>5</sup> This 'vindication', i.e., the sense that the relaxation of competition law in Japan was stoking its economic engines, was deceptive. First of all, a number of other factors contributed to Japan's rapid growth, including not least the extraordinary availability of easy credit, a policy supported by the Bank of Japan, or tax reductions implemented under Prime Minister Ikeda to provoke spending. By late 1964, Japan's GNP was growing at a rate of nearly 14%, and the country rode the cresting wave through the end of the 1960s, with the economy growing at 10-12% between 1966 and 1970. Looking from a wider angle, the growth rate from 1955 to 1990 was 6.5%. Second, some of Japan's prosperity was due to industries in which competition was fierce (specifically, those in which Japan excelled internationally), even if competition law enforcement was generally lax. Japan has often been described as a 'dual economy' in light of this distinction in the competitiveness of different sectors (although the less competitive, low-productivity domestic sector is far larger than its sleeker counterpart, which partly explains Japan's prolonged slump). See, e.g., Michael Porter and Mariko Sakakibara, 'Competition in Japan', 18 *Journal of Economic Perspectives* 27-50 (2004).

enforcer was well aligned with public opinion at large. Indeed, Japan in the 1970s was one of the very few settings worldwide in which the role of antitrust in society has risen to the level of 'high national politics'.<sup>6</sup> The proposals of the JFTC and its Chairman at that time, Takahashi Toshihide, did not sail unmolested through the Diet: the legislative debates were protracted over four years, not unaccompanied by the vagaries and scandals of Japanese politics. Eventually, the virulent, business-backed opposition to the proposals led to a number of compromises.<sup>7</sup> The details of this saga may be omitted here but the main outcome of the 1977 amendments – the introduction of the administrative 'surcharge' – must be underlined, as it sowed the seed for significant subsequent developments. The reason that no monetary penalty or disgorgement system had been installed in the original AMA was that, like the Sherman Act, the AMA contemplated criminal sanctions for infringements; and in Japan, there was a perception that requiring firms to pay any charge comparable to a fine would be unconstitutional on grounds of double jeopardy. Nevertheless, by the 1970s there was increasing dissatisfaction with the JFTC's limited toolbox of remedies. On the one hand, a cease-and-desist order alone had little deterrent effect because ill-gotten gains were safely retained by violators. On the other hand, criminal prosecution was both (i) difficult *per se* given the elevated standard of proof, and (ii) further complicated by what were (and to some extent still are) tense relations between the JFTC and Japan's Public Prosecutors' Office. The solution was the surcharge system; but given the sensitivity of the issue, its original form was cartoonishly weak in magnitude and scope, and in its institutional dimensions. The modest amounts of surcharges imposed following the 1977 amendments, which the JFTC had no discretion to adjust, fell well short of clawing back the full extent of anticompetitive overcharges.<sup>8</sup> Yet those baby steps have over time evolved into a *de facto* system of fines of 21<sup>st</sup> Century magnitude. This causes some anxiety in Japan today, and once again the specter of double jeopardy is commonly invoked by the business community and other critics.

The final historical (i.e., pre-2013) reform that should be recalled here is the 2005 amendment, which may be regarded as Japan's belated coming of age as far as competition law is concerned.<sup>9</sup> The momentum for the modernization of antitrust enforcement in Japan

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<sup>6</sup> Michael Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995* (London and New York: Routledge, 2002) 69.

<sup>7</sup> See *ibid.*, pp. 73-74 and 88-95; and Hamada, 'Institutional Structure and Change', cited above note 1.

<sup>8</sup> The modest percentages that were used to calculate relevant proportions of sales were justified by allegedly low average profits generated by businesses across Japan. By institutionalizing uniform assumptions about the profitability of an extremely wide range of industries, one has to wonder whether the surcharge system was inherently discriminatory. In any case, the low levels of assumed profitability are in stark contradiction to the findings that have emerged in a number of empirical studies generally focusing on international cartels. Typical estimates gravitate around 15-20%, whereas the original surcharge under the 1977 amendments was limited to just 2% of sales in the case of manufacturers, 1% for retailers and 0.5% for wholesalers.

<sup>9</sup> This coming of age (which should not be misunderstood as a dilution of identity; competition law and policy in Japan remain highly distinctive in many respects) may be seen, in Teubnerian terms, as part of a process of the reciprocal 'irritation' and co-evolution of the Anti-Monopoly Act on the one hand (Teubner's 'legal irritant') and Japanese society and its culturally determined form of ambiguous capitalism on the other. For this conceptualization, see Vande Walle, cited above note 2, for example at 139.

began to build slowly in the early 1990s from a confluence of ‘winds’ blowing from outside and from within the country.<sup>10</sup> The tailwind of the Structural Impediments Initiative (1989-1993), wherein the US Government extracted promises from Japan to tighten up enforcement as part of a larger package of measures designed to address the swollen trade imbalance between the two countries, was the most conspicuous driver from the perspective of outside observers. The headwind of an endogenous change of *ethos*, linked to Japan’s stalling economy, was less visible but arguably even more powerful as an explanatory factor behind Japan’s ‘turn’ (back) toward serious antitrust.<sup>11</sup> This endogenous development culminated in (i) greater political commitment (under Prime Minister Koizumi), and with it the ascendance of the JFTC to the rank of a ministry-level organ, and (ii) an important new legislative proposal, under the leadership of then-Chairman Takeshima, that led to the 2005 change in the law. In the course of that 15-year span of time, the AMA itself as well as separate provisions on (government-assisted) bid-rigging and the powers of the JFTC were all progressively reinforced (and a bewildering variety of exemptions were progressively suppressed) by amendments made in 1991, 1992, 1996, 1997, 1999 and 2002. But the major principal additions and revisions made to the AMA in 2005 can be summarized as follows.

- The rates applying under the surcharge system were (again) raised, as a result of which, for example, manufacturers must now pay a charge equal to 10 percent of (cartelized) sales.<sup>12</sup> Related reforms included an expansion of the types of conduct for which surcharges are assessed,<sup>13</sup> a ‘discount’ where a criminal fine is also imposed,<sup>14</sup> and an intensification of the surcharge rate in the case of recidivism

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<sup>10</sup> The ‘winds’ metaphor, which implicitly evokes other legendary events from Japanese history, is borrowed from Hamada (cited above note 1).

<sup>11</sup> For discussion of the links between Japan’s economic malaise and the anti-monopoly ‘renaissance’, see Marquis and Shiraishi, ‘Transition’, cited above note 1. See also Vande Walle ‘Competition and competition law in Japan’, cited above note 2 (underlining Japan’s counter-cyclical enthusiasm, so to speak, for the antitrust enterprise).

<sup>12</sup> The fiction that the surcharge system is purely about disgorgement of illegal profits has become increasingly tenuous in Japan, and it is widely understood that the system’s real concern today is deterrence. (A judgment of the Supreme Court of Japan issued on 13 September 2005 supports the decoupling of the surcharge concept from that of disgorgement.) As we suggest below in part III of this paper, the applicable surcharge rates have still not reached adequate levels to deter misconduct. However, it must be acknowledged that fine levels in themselves are probably never a sufficient determinant of compliance, particularly where, as is the case *de facto* in Japan (and leaving aside the special sphere of bid-rigging), individual penalties are rarely if ever imposed for price-fixing behavior.

<sup>13</sup> For example, together with a subsequent reform in 2009, the 2005 amendment required that the application of surcharges extend beyond horizontal collusion to reach firms found to have engaged in, *inter alia*, resale price maintenance (repeat infringers only), ‘private monopolization’, the abuse of a superior bargaining position and ‘unjust’ low-price sales even absent a dominant position (again, repeat infringers only).

<sup>14</sup> In the relatively rare scenario that a criminal fine is imposed in the same case, the surcharge is reduced by an amount equal to half of the fine. The discount may be seen as a solution, albeit an awkward one, to the above-mentioned concerns about double jeopardy.

(whereby the repeat offender pays 150% of the otherwise applicable charge<sup>15</sup>). The reinforcement of the surcharge system, though justifiable in itself, was particularly vital in light of the second major element of the reform. Specifically:

- For the first time, and over stiff opposition, the reforms incorporated within the AMA a statutory leniency program. This aspect of the reform was undeniably driven by a tailwind that caught the imagination of Chairman Takeshima, and he refused to cave in despite a barrage of legal and cultural objections. Contrary to critics' predictions, the leniency program has proved successful<sup>16</sup> – perhaps even too successful, as it is not entirely clear that the high number of applications can be timely processed and converted into investigations. Although the program is generally transparent, some of the details regarding its operation have not been disclosed.<sup>17</sup>
- A third major reform in 2005 concerned the procedures governing JFTC investigations. As a means of rationalizing what were arguably byzantine sequential procedures, the old 'recommendation decisions' and consent decisions were abolished, and the cease-and-desist device and the surcharge payment order were combined within a unified procedure. As a controversial consequence of this restructuring, pre-order (i.e., pre-surcharge) hearings were replaced by *post-order* hearings guaranteeing a right to be heard which, from the perspective of a firm subject to such an order, comes palpably too late.<sup>18</sup>

In an almost neo-functionalist manner, the third reform described above – i.e., the switch to a post-order hearing – has itself triggered the latest round of reforms in 2013, as the Japanese legislature seems to have accepted the view that procedural fairness was illusory when a firm subject to a payment order had to appeal, at first instance, to the very institution that imposed it.

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<sup>15</sup> Following the amendments made in 2009, a firm that played a leading role in a cartel is likewise to be charged 150% of the normally applicable rate. When the leading cartel member is also a recidivist, the jackpot rate of 200% is attained.

<sup>16</sup> Leniency was further refined by the 2009 amendments. Since the program was activated on 4 January 2006, the JFTC has been receiving an average of nearly 100 leniency applications per year (with a two-year spike in FY 2010-2011); failure to seek leniency may provoke shareholder derivative litigation. For details, see Toshiyuki Nambu, 'A Successful Story: Leniency and (International) Cartel Enforcement in Japan', 5(3) *Journal of European Competition Law and Practice* (2014); Hamada, 'Institutional Structure and Change', cited above note 1, at footnote 65 and accompanying text.

<sup>17</sup> See Harry First and Tadashi Shiraishi, 'Japan: The Competition Law System and the Country's Norms', in Eleanor Fox and Michael Trebilcock, eds., *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: OUP, 2013) 232-265, at 243.

<sup>18</sup> For further background concerning the debates over the merits of the pre-order and post-order hearings, see Mitsuo Matsushita, 'Reforming the Enforcement of the Japanese Antimonopoly Law', 41 *Loyola University of Chicago Law Journal* 521-534 (2010). See also First and Shiraishi, 'Japan', cited previous footnote, at 246-248 and 261-262.



We may turn now to a discussion of these recent amendments. As will be explained, a largely unforeseen repercussion of the 2005 reforms is that they have led to the accidental suicide of the JFTC's hearing procedure.

## **II. Highlights of the 2013 amendments to the Anti-Monopoly Act**

The Japanese 'Diet' (*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.<sup>19</sup> The new law was promulgated six days later. This amended version of the AMA will take effect on a day to be specified by Cabinet Order no later than mid-May 2015. As of early October 2014, the Order had not yet been issued.

The 2013 reform was aimed mainly at procedural and institutional matters, but it is also apt to influence the AMA's substantive enforcement. In general, the reform can be understood as the counterpart to, and in some ways the unintended consequence of, the 2005 amendments described above. Its contents may be outlined as follows:<sup>20</sup>

1. The hearing procedure for administrative appeals, whereby since 2005 the JFTC has functioned as its own court of first instance, as it were, is to be abolished. The 2005 appeal system, pursuant to which the final decision of the JFTC was appealed before the Tokyo High Court (an intermediate court situated between the District Courts and the Supreme Court), is likewise to be abolished.
2. A new system for appeals brought against administrative measures adopted by the JFTC will be introduced. Exclusive jurisdiction over such appeals is attributed to the Tokyo District Court, and specifically to a panel of three or, if necessary, five judges. The hope is that this approach will allow the District Court to develop specialized antitrust expertise and to accumulate institutional experience, thus promoting quality and consistency across different judgments. On subsequent appeal the Tokyo High Court will assign the case to a panel of five judges. As has always been the case, final appeals will be heard by the Supreme Court of Japan.
3. Changes will also be made to administrative procedures that lead to the adoption of cease-and-desist orders and other measures by the JFTC. The relevant reforms involve: (i) the designation by the JFTC of hearing officers (distinct from the Hearing Examiners that have until now been hearing post-order administrative appeals<sup>21</sup>),

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<sup>19</sup> See JFTC Press Release of 9 December 2013, 'Enactment of the Bill to Amend the Antimonopoly Act', available at <http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.html>.

<sup>20</sup> The new features to which we refer here are found in Articles 85 et seq. and Articles 51 et seq. of the AMA, as amended. For a more detailed summary, see JFTC, Outline of the Bill to Amend the Antimonopoly Act, available at <http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment01.pdf>.

<sup>21</sup> The hearing officer cannot be any person that has been involved in the investigation of the case. Unlike the Hearing Examiners under the 2005 system, hearing officers will not prepare a preliminary decision. On the roles of the soon-to-be-defunct Hearing Examiners under the current system and the hearing officers under

who will preside over the administrative hearing; (ii) the possibility for alleged infringers to obtain an explanation regarding the contents of measures the JFTC expects to adopt; and (iii) the possibility for alleged infringers to inspect and photocopy the evidence taken from them and used by the JFTC to build its case, subject to limited grounds for refusal by the JFTC, such as where disclosure would cause harm to third parties.

In procedural and institutional terms, the above provisions amount to a fairly radical overhaul. Several observations can be made in this connection. First, with regard to the new appellate structure, the requirement of a minimum three-judge panel is a notable departure from the general custom for judicial review of administrative decisions, where only a single judge hears the case. The purpose behind this new approach is to ensure the careful examination of competition law decisions in light of the complicated fact-finding on which they are based, the unusual degree of expertise and sophisticated analysis embedded in those decisions, and their significant influence on business activities and the economy – arising, e.g., from the indirect effects of Type I and Type II errors. The shift from a two-tier to a three-tier appellate system (District Court, High Court, Supreme Court) may perhaps also be seen as introducing an additional possibility to correct errors.

Second, the notion that the JFTC's decisions should be subject to closer scrutiny is reinforced by the abolition of the 'substantial evidence' rule, which until now has to a large extent bound the Tokyo High Court to the JFTC's findings of fact. Unhampered by this rule, the Tokyo District Court will be able to assess both the accuracy and the completeness of the JFTC's factual conclusions. At the same time, an embargo against the appellant introducing new evidence on appeal to challenge the JFTC's decision has also been lifted. In the shadow of this enhanced scrutiny, the quality of the case mounted by the JFTC can be expected to improve.

Third, it can be seen that the reforms are partly intended to improve elements of due process. Most fundamentally, the abolition of the 2005 (post-order) hearing procedure reflects this aim. But a number of second-order changes are equally relevant. Thus, as noted above, the JFTC's investigators may be called on to provide explanations of the expected content of cease-and-desist orders and other measures. Such explanations may concern, in particular, the facts established by the JFTC, the application of laws and regulations to those facts, and the nature of the relevant evidence. In addition, a party under investigation may appoint a representative for the purpose of presenting its opinions. It may attend hearings, submit its views, offer evidence and put questions to investigators.<sup>22</sup> Designated hearing officers will prepare a written record of the opinions of parties attending the hearings, which is then submitted to the JFTC. When formulating its decision, the JFTC is required to give due consideration to the record and report submitted by the designated officers.

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the new system, with comparisons to role of 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).

<sup>22</sup> The party may submit written statements and other evidence instead of attending the hearings.



### III. Preliminary evaluation of the 2013 reforms

Some commentators have expressed concerns about the latest amendments on the ground that they degrade the JFTC's ability to manage its competition cases. It has been suggested that, by maintaining an administrative proceeding that encompasses an adversarial hearing, the JFTC could have accumulated substantial knowledge and experience from the exchange of opinions with parties under investigation.

Others have been critical because, in their view, the 2013 amendments fail to establish sufficiently strong rights for defendants. They regard the reforms as being only a partial response to the defects, in terms of procedural guarantees and fairness, that blight the current framework. Additional safeguards are thus called for, including, e.g., the right to have an attorney present during questioning, recognition of attorney-client privilege, and other procedural means of protection.<sup>23</sup>

From a quite different perspective, one could also criticize the reforms for failing to address the (im)potency of sanctions prescribed by the AMA in cases involving serious infringements such as price-fixing, market sharing and similar forms of naked collusion.<sup>24</sup> The JFTC's anomalous lack of discretion in imposing surcharges also remains unaddressed.

A definitive assessment is problematic at the present stage, and we cannot easily draw any final conclusions. This is partly because the precise contours of the reforms have not yet been decided by the relevant Cabinet Order (see above), and more importantly because it may well take a few years of practice to determine the ways in which the reforms will influence the practice of the JFTC and of Japan's courts. We would however make the following observations, which can frame the evaluation of the 2013 reforms going forward.

First, it is implicit from the content of this short article that elements of efficient and effective enforcement are sometimes in tension with the objective of maintaining high standards of due process. Efficiency and effectiveness are obviously important parameters of output and of output legitimacy, but due process is equally important: it is not only desirable for its own sake but also serves as a means of earning the trust of those expected to comply with the law, which is to say that effective and legitimate enforcement are to some degree interconnected.<sup>25</sup> This is a dynamic tension that is still evolving in Japan, and the 2013 amendments are surely only a mile marker. There is much work yet to be done to develop both the effectiveness and the due process dimensions.

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<sup>23</sup> See Daizo Kawai, 'Influences and Practical Issues: The 2013 Amendment of the AMA', *Shojihoumu* No 2028, 36 (2014).

<sup>24</sup> The persistent weakness of the surcharges provided for under the AMA, despite repeated reforms to address this issue, has been noted by many commentators. See, e.g., Shuya Hayashi, 'The goals of Japanese competition law', in Josef Drexel et al., eds., *Economic Theory and Competition Law* (Cheltenham: Edward Elgar, 2009) 45-69, at 67; Marquis and Shiraishi, 'Transition', cited above note 1, at page 6, footnote 2 *in fine*.

<sup>25</sup> See generally Philip Lowe, Mel Marquis and Giorgio Monti, eds., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (forthcoming, Oxford: Hart Publishing).

Second, the reforms discussed above should not be isolated from institutional considerations. It is recalled that Trebilcock and Iacobucci classify competition law enforcement institutions according to three categories.<sup>26</sup> First, there are specialized and separate investigative and enforcement authorities that must bring formal complaints before courts in order to obtain remedial relief (the *bifurcated judicial* model). Second, there are specialized enforcement agencies that must bring formal complaints before separate, specialized adjudicative agencies (the *bifurcated agency* model). And third is the *integrated agency* model, generally associated with the civil law tradition, where a single agency comprehensively undertakes investigative, enforcement, and adjudicative functions. Various combinations of these three models are of course possible as well.

One recent study suggests that, in jurisdictions where courts are weak, the bifurcated and integrated agency models have some significant advantages. On the other hand, where courts are strong, independent, honest and efficient (as is generally true in the US and in other established jurisdictions), the bifurcated judicial model has some significant advantages.<sup>27</sup> It may be that the Japanese competition law system has not quite arrived at the stage where immediate advantages will likely be gained by assigning more responsibility and quality control powers to the courts (without going so far as to switch to a bifurcated judicial model, since the JFTC will retain its investigative and remedial powers). In the medium term, as the Tokyo District Court moves down the ‘experience curve’, the benefits of the 2013 reforms might begin to manifest themselves. In the meantime, however, there is a more immediate advantage that may be derived. Specifically, this relates to the perception that both due process and efficiency will be better served under the new system, since: one on the one hand it casts the shadow of judicial scrutiny over the administrative procedure; while on the other hand it eliminates an apparently superfluous layer of bureaucracy. As suggested above, however, any such improvements should be seen as intermediate in nature, as the need for reform in Japanese antitrust has not been quenched.

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<sup>26</sup> Michael Trebilcock and Edward Iacobucci, ‘Designing Competition Law Institutions’, 25(3) *World Competition* 361-394 (2002), at 361-363.

<sup>27</sup> Eleanor Fox and Michael Trebilcock, ‘Introduction: the GAL Competition Project: The Global Convergence of Process Norms’, in Fox and Trebilcock, eds., *The Design of Competition Law Institutions*, cited above note 17, pp. 1-48.