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Toshiaki Takigawa
Kansai University

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I. INTRODUCTION

A competition agency's decision, consisting of a remedy and a fine, causes serious consequences for the targeted firm. Firms (and other respondents) therefore are empowered to appeal to the courts against an agency's decision. This judicial appeal constitutes the basic safeguard for rights of defense and procedural fairness against abuse of administrative powers by competition agencies.

Nevertheless, discussions at the OECD Competition Committee[2] and, most recently, at the American Bar Association's ("ABA") Antitrust Spring Meeting indicate that the provision of judicial appeals does not constitute an adequate safeguard. Procedural fairness needs to be secured within the decision-making process of the competition agencies.

Setting up a hearing system within a competition agency is deemed necessary because courts usually find it difficult to negate an agency's decision. This is caused by the comparative disadvantage between courts and agencies with regard to specialized knowledge of competition law and economics. Another often cited reason for the ineffectiveness of appeals to the courts is that courts take a long time to reach a decision; during court proceedings, an agency's orders remain in effect.

However, a hearing system presents problems—increasing the administrative and personnel costs of the agency, at the same time slowing down issuance of decisions. Competition agencies therefore need to strike the right balance between procedural fairness and efficient enforcement.

Administrative hearings, as now practiced by the U.S. FTC and the EU's DG Competition, represent two different models for other countries' competition agencies to emulate. In this context, the Japanese experience regarding transformation of its administrative-hearing may help reveal the relative pros and cons of the U.S. FTC and the EU models.

II. THE NEED TO FOCUS EXAMINATION ON THE ADMINISTRATION MODEL OF COMPETITION LAW ENFORCEMENT

World-wide spread of competition laws necessitates examining procedural fairness practices with a globalized perspective, going beyond a selected number of highly developed competition law regimes, prominently those of the United States and the European Union.

[1] Professor, Faculty of Law, Kansai University, Osaka, Japan <takigawa@kansai-u.ac.jp>.

[2] *See* OECD Competition Committee, *Procedural Fairness and Transparency: Key Points* (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf (accessed May 24, 2014).

Practically all large-scale price-fixing cases these days are global, incorporating non-western industrialized countries: Japan, South Korea, and China, in particular. Both Japan and Korea have recently greatly increased amounts of fines against competition law violations.

From a globalized perspective, procedural justice needs to be examined focusing on the administration model (in contrast with the prosecution model) of competition law enforcement. Only a small number of countries with common-law traditions (including the U.S. Department of Justice, but not the U.S. Federal Trade Commission) have adopted the prosecution model, in which competition agencies must bring cases to courts. By contrast, in the administration model (practiced in a dominant majority of countries), competition agencies themselves decide cases and then impose fines on the targeted firms. The firms, in turn, have the right to bring the agencies' decisions to courts.

True, the prosecution model has a clear advantage in securing procedural justice because the model guarantees separation of prosecution from adjudication. But countries now adopting the administration model would find it infeasible to transform their enforcement system to a prosecution model. First, it is too radical a departure from the law enforcement system of countries with the civil (Continental) law traditions.

Second, more importantly, the prosecution model would, in those countries, cause considerable delays in law enforcement, leading to less than optimal enforcement. This is because, in the prosecution model, firms may not be imposed fines until the courts reach decisions, which may take years in countries where the courts' system is not so well developed as in the United States. By contrast, in the administration model, only a minority of firms resort to appealing to courts, and, during court proceedings, an agency's orders remain in effect.

III. THE REASONS BEHIND THE JFTC'S SWITCH FROM THE ADMINISTRATIVE-LAW-JUDGES SYSTEM TO THE HEARING-OFFICERS SYSTEM

Within their respective administration models, the U.S. FTC's administrative-law-judges system and the EU's hearing-officers system both provide hearings conducted prior to the agencies' final decisions. Nevertheless, important differences exist between the two. First, EU hearing-officers only deal with procedural justice; they do not judge the substance of the law's application.[3] Second, hearing-officers are lacking in judge-like power to preside over hearings; they do not possess powers either to summon third-party witnesses or to punish false statements. The U.S. FTC's administrative-law-judges and Commissioners can do both.

In spite of the comparative advantage of the administrative-law-judge system in securing equity between accusers and defendants, only a minority of competition agencies have adopted the system. And the Japan Fair Trade Commission ("JFTC"), at the end of 2013, abolished its administrative-law-judges system and is now in the process of adopting a hearing-officers system akin to the EU system.

Examination of the reasons for the JFTC's forsaking the administrative-law-judge system reveals both pros and cons of the system. The JFTC's administrative-law-judges system took the

[3] *Id.* at 53 ("Although they [hearing officers] do not adjudicate on substance, they report to the Commissioner on whether the rights of defence have been fully respected and provide a full report on the Oral Hearing.")

form of "Hearing-Examiners," who were not administrative-law-judges as practiced in the U.S. legal system. Nevertheless, the Hearing-Examiners were modeled after the U.S. FTC, with the same functions as U.S. administrative-law-judges; the Examiners were independent from the JFTC (the Commissioners as well as the Secretariat) and acted as judges.

Hearing-Examiners conducted JFTC's complaints through court-like adversarial proceedings. The JFTC Hearing-Examiners system was qualitatively different from the European Commission's hearing-officers. EC hearing-officers review procedural fairness only, while JFTC Hearing-Examiners not only reviewed procedural fairness but also checked facts and applications of the law in JFTC complaints. In other words, Hearing-Examiners, in contrast to hearing-officers, functioned as judges.

The JFTC Hearing-Examiners system lasted to the end of 2013. But the system had already ceased its essential function in 2005, when hearings ceased to be conducted prior to JFTC decisions. After 2005, Hearing-Examiners functioned as the first tribunal when the respondent firms appealed the JFTC's decisions. Then, the business circle's (represented by the powerful Japan Economic Federation's) criticism that these hearings only delayed respondent firms' appeals to courts became convincing.

The reason for the transformation (in 2005) of the JFTC Hearing-Examiners system lay in its inefficiency. The system took a considerably long time (years in some cases), thus hampering the efficient resolution of a case. In order to rectify this deficiency, the JFTC had routinely resorted to a "Recommendation" procedure, whereby the JFTC "recommended" to a respondent firm to accept a JFTC complaint. When the firm accepted the Recommendation, the Recommendation (which represent the JFTC complaint) became the JFTC's decision, without going through a hearing with Hearing-Examiners. The firm accepting the Recommendation was obligated to adhere to the remedy order incorporated in the JFTC complaint, although acceptance of the Recommendation did not constitute admittance of illegal conduct by the firm. Nevertheless, the firm accepting the Recommendation could not escape a fine (for categories of illegal conduct to which fines apply). Recommendation decisions therefore may not have been interpreted as settlements.

A large majority of JFTC decisions originated from Recommendations. Rarely did firms refuse Recommendations. The efficiency of the JFTC's case handling had thus been secured. However, this situation started to change in 1976 when fines against price-related cartels were introduced. Since then, fine amounts have been repeatedly increased through amendments to the Japanese competition law (Antimonopoly Act ("AMA)). Also, the scope of AMA violations covered by fines has broadened. These changes incentivized firms not to accept JFTC Recommendations. As a result, firms that refused to accept Recommendations constantly increased in number, leading to an increased number of hearings being conducted by Hearing-Examiners. Firms adopted such a procedure with the aim of delaying the payment of fines, because fines could not be levied until the JFTC had issued a decision through the hearing process.

IV. THE NEED TO INSTITUTE INDEPENDENT HEARING-OFFICERS WITHIN THE COMPETITION AGENCY

The transformation in 2005 (followed by the termination in 2013) of the Hearing-Examiners system changed the JFTC decision procedure from a hearing system modeled after the U.S. FTC to a system akin to the Continental administration system—the EU competition law decision procedure. The JFTC is now pressed to establish within the JFTC a system akin to hearing-officers at the European Commission, because the repeal of the JFTC Hearing-Examiners necessitates an alternative mechanism for securing procedural justice within JFTC decision-making.

The amended AMA provisions on JFTC procedures regarding hearing-officers (provisionally named "Presiding officer of procedure for hearing")[4] show that the hearing-officer will be equipped with considerably weaker power than the EC's hearing-officers. Most importantly, no measures to secure independence of the hearing-officers are instituted. Concomitantly, the hearing-officer is attached to the Secretariat (not to the Commissioners).

EU experiences[5] reveal that the hearing-officer needs to be equipped with independent power in order to amply check procedural fairness regarding the competition agency's issuance of complaints. The JFTC is advised to emulate the European Commission in guaranteeing independence of its hearing-officers.

V. THE NEED TO PROTECT DEFENSE RIGHTS OF THE RESPONDENT FIRMS

The hearing-officers system is superior to the administrative-law-judges system in its efficiency, but is inferior regarding protection of the defense rights of the accused firms. This inferiority needs to be compensated by giving the accused firms ample power to defend in court. The accused firms, then, need to be guaranteed equal-footing vis-à-vis the accuser (the competition agency) regarding access to the facts used for the accusation.

The amended AMA provisions regarding JFTC procedures do not entitle the respondent firms sufficient access to the JFTC files.[6] First, JFTC documents to which a respondent firm is entitled to get access are limited to those documents that the JFTC used to establish illegality of the respondent firm; documents that may negate the illegality are excluded. Second, a respondent firm is entitled to copy only the documents submitted by itself or its employees.

These rights are conspicuously inferior to the rights given to respondent firms by the European Commission; the Commission hands to the respondent firm a DVD containing all documents (except those deemed confidential) that the DG Competition compiled in establishing a statement of objections. The JFTC needs to provide to a respondent, in a

[4] *See* JFTC, *Outline of the Bill to Amend the Antimonopoly Act*, at §2-(1) (December 9, 2013), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment01.pdf (accessed May 21, 2014).

[5] *See*, e.g., Michael Albers & Jérémie Jourdan, *The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective* 2(3) J.E.C.L. & PRACT. 185 (2011), *available at* *http://jeclap.oxfordjournals.org/content/earle/2011/05/15/jeclap.lpr023.full.pdf+html (accessed May 21, 2014).*

[6] *See* JFTC, *supra* note 4, at §2-(2).

convenient DVD format, all evidence (subject to legitimate confidentiality concerns) used by the JFTC in establishing its complaint.

VI. THE NEED TO SET UP SIMPLIFIED PROCEDURES IN COMPETITION LAW ENFORCEMENT: SETTLEMENTS OR CONSENT DECREES

As hearings tend to take a long time, competition agencies need to make use of simplified procedures in cases in which firms agree to forgo the right to a hearing. Firms have in the past agreed to forgo a hearing in exchange for escaping fines, while accepting remedy orders. Nevertheless, competition agencies should not forgo the imposition of fines for serious violations—mostly, hard-core cartel conduct. For other less serious violations, competition agencies may forgo imposing fines in order to swiftly get rid of anticompetitive practices.[7]

Settlements (or similar procedures) have the merit of swiftly resolving cases with lesser resources expended by competition agencies. Settlements, however, are achieved at the expense of not determining the illegality of the allegedly anticompetitive practices and, consequently, fines are not imposed on firms. Settlements, therefore, are inappropriate for serious violations that deserve the imposition of fines. Nor are settlements appropriate for important cases that, for the sake of establishing precedents, require detailed determinations on whether the practices under consideration constitute infringement of the law.

The establishment of limiting principles is therefore required to constrain competition agencies in their use of settlements. In counterbalancing this consideration, rules that are too constraining would excessively deter use of settlements, at the expense of administrative efficiencies.

The JFTC currently does not allow for any simplified enforcement procedure in its handling of competition law cases. Prior to the 2005 AMA amendment, the JFTC had two simplified procedures, Recommendations and consent decisions, both of which were repealed by the 2005 AMA amendment.

The JFTC therefore needs to set up a new simplified procedure, most plausibly by reviving the consent decisions. A key obstacle, however, prevents the JFTC from instituting a settlements procedure. This is the mandatory nature of fines with AMA violations.[8] This lack of discretion by the JFTC, regarding not only the amount of the fine but also whether or not to impose a fine at all, needs to be rectified before the JFTC puts in place a settlement procedure.

VII. CONCLUSION

Globalization of competition law enforcement necessitates examining procedural fairness with a globalized perspective. Procedural fairness, then, needs to be designed based on the administration model, which is adopted by a dominant majority of competition agencies.

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[7] Daniel Crane names such solutions as "administrative solutions," which have the advantage of being swifter and less cumbersome than "the adjudicatory system, " *see* D.A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT, at 107 (2011).

[8] Antimonopoly Act, Article 7-2 (as well as other similar articles) stipulate that the JFTC is obligated to impose fines on categories of AMA violations stipulated in the Articles. The discretion of the amount of a fine is also removed from the JFTC; the Antimonopoly Act, Article 7-2 (as well as other similar Articles) stipulate the concrete amount (on a percentage basis) of the fine for each violation.

The experiences of the JFTC reveals the impracticality of instituting administrative-law-judges (or their equivalents) for competition agencies that are equipped with powers to impose substantial fines (the U.S. FTC is not empowered to impose fines for antitrust offenses). This is because a firm that is subject to a decision that imposes a fine of a considerable amount naturally demands a hearing rather than simply accepting a simplified procedure. Since a court-like proceeding by law judges (or their equivalents) takes considerable time before its conclusion, routine use of court-like proceedings causes delay in the resolution of a case.

Given that appeals against competition agencies' decisions to courts are secured, the hearing system within a competition agency needs not one-handedly cater to procedural fairness (i.e. protection of a firm's right of defense). As an example, the hearing-officers system implemented at the European Commission may be regarded as sufficient for balancing procedural fairness with administrative efficiency.

The best design of a hearing-officers system needs to be contemplated for each individual country, bearing in mind the debate over European Commission's hearing-officers. The EU experiences show the critical importance of securing two points: first, independence of hearing-officers; second, availability (to the respondent firms) of all documents (subject to legitimate confidentiality concerns) used by the competition agency in establishing its complaint. The JFTC hearing system, as currently envisaged, is deficient in both points.

Following the adoption of an administrative hearing system, competition agencies need to establish simplified enforcement procedures for speeding up the resolution of cases. The most straightforward way to achieve this is with a settlement between a competition agency and a respondent firm, whereby the firm will undertake the remedy order in exchange for escaping a fine. Hard-core cartels should be excluded from settlements. Competition agencies also need to publish guidelines delineating instances where settlements may be utilized.