

DUE PROCESS AND ANTITRUST IN JAPAN: ENFORCERS' PERSPECTIVE¹



BY HIDEO NAKAJIMA²



¹ Since I worked at the Japan Fair Trade Commission (“JFTC”) as Secretary General prior to joining the law firm last year, I would like to discuss an issue of due process in antitrust law from the enforcers’ perspective, though any views mentioned below should be regarded my own. Also, while the definition of “due process” may vary, in this article let me use that term in its broader sense, including procedural safeguards and fairness, as well as the rights of defense.

² Special Advisor, White & Case L.L.P./White & Case Law Offices (Registered Association)

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I. THE BASIC ARGUMENT FOR DUE PROCESS

Needless to say, due process is critical for those parties subject to antitrust enforcement in defending their rights, but it is equally so for antitrust enforcers, since it helps them make fully informed and legitimate decisions, thereby enhancing their effectiveness and the credibility of their antitrust decisions.

From this perspective, the major thrust of due process is, among others, to ensure for those parties concerned a sufficient opportunity to be heard under transparent enforcement procedures.

To be specific, this includes;

- 1) delivering an adequate notice to appraise the parties involved of the agencies' competition concerns,
- 2) affording them sufficient opportunities to present their views and relevant evidence at an appropriate time and in a meaningful manner, and
- 3) ensuring that all of the agency's enforcement procedures are transparent and clearly made public.

In short, open, timely, and sufficient communication exchanged between the antitrust enforcers and the parties concerned at various stages of enforcement procedures not only helps ensure sufficient defense to those parties but also facilitates more legitimate and effective antitrust enforcement actions.

That said, of course, different legal systems, practices, and traditions among jurisdictions may well entail different types of enforcement procedures, which can all still ensure a high standard of due process for those parties subject to antitrust enforcements.

In this context, at the outset of this article, let me refer to a quite unique feature of Japan's antitrust legal framework.

Under Japan's Antimonopoly Act ("AMA"), the amounts of administrative surcharges imposed on parties implicated in antitrust infringements are meant to be determined in a uniform and compulsory manner in accordance with legally prescribed methods, regardless of specific factors concerning individual cases, including whether and to what extent those parties under investigation cooperate with the JFTC.

The amounts of administrative surcharges are calculated as a fixed percentage of a firm's turnover from the sale of the relevant cartelized products or services. These fixed rates of surcharge as stipulated under the AMA vary depending only on the size and types of business (manufacturing, wholesale, or retail) of the parties concerned.

In other words, unlike the administrative fines imposed by the EU and many other overseas agencies, the JFTC is not authorized at all to determine whether a surcharge should be imposed or not, and how much of a surcharge should be imposed in individual cases in accordance with their case-specific factors.

In the same vein, even under the Japanese leniency program, the rates of the surcharge reductions granted to leniency applicants are fixed by law at certain percentages (100, 50, or 30 percent) according only to the timing and order of their respective applications. So long as the information contained in the leniency submission is regarded as sufficient to help the Commission launch or advance its formal investigation, the degree of cooperation by leniency applicants during the Commission's investigation as well as the value of the information contained in leniency submissions are basically irrelevant to whether surcharge reductions will be granted to leniency applicants or how significant they may be.

Actually, such a uniform and compulsory surcharge system is fully consistent with the overall legal framework in Japan. Not only the JFTC, but any other administrative agency of the Japanese government, has never been given such authority or discretionary power to determine the appropriate amount of administrative surcharges imposed upon the relevant parties in accordance with various case-specific factors, including the degree of cooperation of the infringing parties. The basic thought behind this is that administrative surcharges should be highly predictable and transparent in their amounts, and the way of calculating them as they are to be imposed is mainly for the purpose of deterring infringements of administrative laws. Those case-specific factors are, as necessary, to be considered in criminal proceedings by the court judges under the existing judicial system in Japan.

The next section shows very briefly what the JFTC has been doing to enhance due process, and the final section presents what the JFTC will do to enhance it further in the near future.

II. RECENT DEVELOPMENTS IN DUE PROCESS IN ANTITRUST ENFORCEMENT IN JAPAN

The JFTC has recently been taking several measures to enhance due process in its enforcement actions. The AMA was amended five years ago, particularly in response to the requests of business communities. The amendments included the following three major components:

- 1) the abolishment of the *ex-post* administrative hearing procedure held by the Commission for reviewing its original decisions upon appeal by their respondents;
- 2) the improvement of the Commission's pre-decision notification procedure, including allowing the parties concerned almost full access to the evidence held by the Commission for establishing their infringements; and
- 3) a review of the Commission's investigation procedures and the issuance of Guidelines on them.

Before the 2013 amendments above, whenever the parties concerned wanted to appeal JFTC's legal decisions, the appeal had first to be heard in the hearing procedure before the JFTC. This *ex-post* administrative hearing procedure, which was introduced by the 2005 amendments to the AMA by converting from *ex-ante* hearing procedure into an *ex-post* one, had received wide-spread criticism voiced in particular among the business community. They argued that the Commission's *ex-post* procedure lacked the appearance of fairness, since the Commission itself was in a position to review its own original decision under such procedure, where they were to play the roles both of a prosecutor and of a judge.

In response to such criticism, the JFTC had taken various measures, including appointments of court judges or outside lawyers as the examiners on a secondment basis. The criticism regarding a lack of the appearance of fairness, however, could not be dismissed practically without completely overhauling the existing hearing procedure.

After abolishing this *ex-post* hearing procedure, appeals presented by the parties concerned against the JFTC's decisions are now to be filed directly with the Tokyo District Court in the first instance. Regarding the pre-decisional notification procedure, the amendments further enhanced the concerned parties' opportunity to be heard prior to the Commission's decision.

Under the new procedure the investigators of the case, under the direction of a procedure supervising officer appointed by the Commission for each case, are to explain the contents of the draft orders to the parties, who can then raise questions to the investigators and present their arguments and evidence, if they so wish.

The officer is to report to the Commission on those issues raised during the pre-decisional notification procedure with the relevant documents when it is completed, and the Commission is required to give due consideration to the report in making its final decisions.

Furthermore, under the 2013 amendments the parties are allowed almost full access to the evidence establishing their infringements held by the Commission during the advance notification process, regardless of whether it was collected from the relevant parties themselves or from other parties. In addition, they are to be allowed to make a copy of any evidence submitted by themselves and any witness statements by their employees. The Commission cannot refuse such access to the evidence by the parties concerned without justifiable reasons, including jeopardizing third parties' interests.

In addition to those two changes, the 2013 amendments to the AMA requested the government to review the Commission's investigation procedures from the viewpoint of ensuring sufficient defense for the parties under investigation.

In response to this request, in December 2015 the JFTC published "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act," which articulates the guiding principles for administrative investigation procedures under the AMA.

Basically, they have amplified the contents of the existing Rules on Investigation stipulated by the Commission in more detail to clarify the Commission's standard investigation procedures to ensure due process and transparency for the businesses and the general public.

Such guidelines have also established grievance procedures, in which parties or their employees subject to voluntary witness interviews make a complaint in writing to the Commission when they have found violations committed by case-handlers of the requirements articulated in the guidelines. Actually, several complaints have been filed with the Commission through this procedure every year since its introduction.

III. FURTHER STEPS ENVISAGED FOR ENSURING DUE PROCESS

Notwithstanding the Commission's recent efforts to enhance due process in Japan mentioned above, the voices requesting its further enhancement, in particular by introducing attorney-client privilege, remain strong among the business community and defense lawyers alike.

Moreover, the current surcharge system in Japan has been recently confronted with several potential or perceived problems arising from its uniform and compulsory nature, which I referred to earlier.

Lack of discretion for the JFTC in calculating the surcharge amount in individual cases under the current surcharge system has caused the following problems in its antitrust enforcements, particularly in an increasingly globalized economy and with the recent proliferation of competition laws around the world, where alleged violations of competition laws may often be subject to multiple actions by more than one competition agency almost simultaneously. Needless to say, under such circumstances the convergence or harmonization of antitrust enforcement regimes around the world, including the investigation procedures, would be not only desirable but even essential to promote sound worldwide economic development and to ensure more innovative economic environments.

- 1) The JFTC has little room to address so-called double counting or double dipping issues, even though the Commission is aware that overseas competition agencies will include or have included some parts of turnovers of the products subject to infringements in determining the amount of their fines, which the Commission is going to include, too.
- 2) Under the uniform and compulsory surcharge system, the JFTC is legally bound to impose a certain surcharge on the infringed parties even when the Commission believes that they would be of little need or effectiveness in terms of deterring antitrust infringement for cases such as abuses of market dominance or unfair trade practices involving the quite new or innovative business models which have been finally been found to be anti-competitive after thorough investigation.
- 3) One problem that has significant relevance to due process in Japan, unlike other jurisdictions, is that there is actually very little incentive for parties under investigation to cooperate with the JFTC, as whether and to what extent they cooperate is totally irrelevant to the amount of the surcharge imposed upon them. Consequently, cooperation from the parties under investigation has usually been quite limited, even in cases where they have submitted leniency applications.

In my view, such differences or uniqueness in the Japanese surcharge system should be viewed critically in considering an appropriate method for investigation procedures ensuring due process in Japan, since further strengthening the rights of defense may not necessarily mean that the Commission is well-informed in its investigation process so long as the current uniform and compulsory surcharge system is kept intact and the parties concerned are not incentivized to cooperate with the Commission.

In order to cope with those problems mentioned above, the current surcharge system may, for example, be revised in such a way as to authorize the JFTC to determine at its discretion (probably within the permissible range clearly prescribed by the law as necessary) the most appropriate amounts of surcharge imposed upon the infringing parties for each individual case in accordance with relevant case-specific factors.

Such a revised surcharge system may allow companies under investigation to receive a reduced surcharge in return for their cooperation with the JFTC, as in a lot of overseas jurisdictions, thereby incentivizing them to cooperate with the commission's investigations. Accordingly, it would be expected not only to facilitate the Commission's fact-finding activities during its investigation but also to help enhance antitrust compliance by the relevant companies, particularly through effective communication with their defense lawyers.

It is in this context, I believe, that the introduction of such an incentive mechanism into our surcharge system would possibly lead to the further enhancement of due process in our procedures by strengthening the rights of defense through the introduction of attorney-client privilege, which has never been recognized at all in Japan's legal system, as well as the right to legal counsel during witness interviews.

What is important in reviewing investigation procedures in our jurisdiction in terms of further ensuring due process is to strike a proper balance between the Commission's investigative powers and the rights of defense of the parties under investigation. For doing so, incentive mechanisms for businesses provided by the new discretionary surcharge system should play a key role in Japan, as they do in other jurisdictions.

IV. THE CURRENT STATUS OF DISCUSSION ON THE AMA AMENDMENTS

Of the actions mentioned above, the JFTC actually began reviewing the current surcharge system by establishing an expert study group in 2016 in order to align it more closely with prevailing international standards under a global economy. The group issued a report summarizing its deliberations in April 2017.

That report stressed the importance of improving the surcharge system so as to determine the surcharge amounts in a more flexible manner in accordance with case specific factors, without undermining its transparency and predictability.

It also recommended that attorney-client privilege be paid due attention in the JFTC's enforcement actions, to the extent to which discretionary power is authorized for the Commission. In this regard, the study group noted that an introduction of such legal privilege may affect the entire legal framework in Japan, since this is not currently recognized at all in any legal fields there, unlike in other jurisdictions. Accordingly, it recommended the Commission to explore the possibility of introducing attorney-client privilege in its enforcement actions as a matter of implementation policy for the time being, rather than legalizing it by amending the AMA.

After the report was published, the JFTC started preparing an amendment bill to the AMA in accordance with its recommendations.

Originally, the JFTC was planning to submit the amendments bill to the National Diet earlier this year, but the Commission recently announced that it had given up doing so since lawmakers from the ruling parties, as well as several lawyers, had strongly argued over the legalization of attorney-client privilege by the forthcoming amendments bill, in addition to the proposals for revising the current clear and predictable, but rather rigid, surcharge system.

Facing such arguments from lawmakers for the legalization of a privilege which is likely to affect the entire legal framework of our nation, the Commission has decided to closely watch and follow the developments and outcomes of legislators' deliberations instead of submitting any amendment bill for the AMA to the National Diet right away.

Furthermore, the authorization of discretionary power for the JFTC, even to a rather moderate extent, may not be so straightforward at all under the existing legal system in Japan. As mentioned earlier, no administrative agencies of the Japanese government have ever been given the authority to exercise their own discretion in determining the amount of administrative surcharges imposed upon infringing parties in accordance

with various case-specific factors. On top of that, as antitrust infringements such as cartels are subject to criminal proceedings as well as administrative ones, an issue of double jeopardy may also need to be cleared by the Cabinet Legislation Bureau, a legal office of the government.

At this moment, it remains unclear when the amendments bill to the AMA, including an improvement of the surcharge system, will be submitted to the National Diet for its deliberation and approval.

Any changes to the AMA would definitely require the full understanding and cooperation of all stakeholders including businesses communities, lawmakers, defense lawyers, and academics, as well as the relevant government branches, and the general public. In particular, both the introduction of discretionary authority to the JFTC and the matter of attorney-client privilege are closely related to issues concerning the overall legal framework in Japan. Therefore, thorough and constructive discussion would need to continue among the stakeholders before concluding any amendments bill to the AMA, though the problems mentioned earlier arising from the current surcharge system should be addressed as promptly as possible given the current global situation.



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