

## Impact of the Antitrust Reform Act – Changes in Appeals Process and Introduction of JFTC Pre-Order Hearing

On 1 April 2015, reforms to the Anti-Monopoly Act of Japan (the "Antitrust Reform Act"), which were approved on 7 December 2013, took effect.

The Antitrust Reform Act abolishes the appeal process to the Japan Fair Trade Commission (the "JFTC") in respect of cease and desist orders and fine orders issued by the JFTC (the "JFTC Post-Order Review"), and transfers the first review function from the JFTC to the Tokyo District Court. This is because the JFTC Post-Order Review had been criticised on the grounds that "prosecutors double as judges".

In addition, the Antitrust Reform Act creates a new pre-order hearing conducted by the JFTC (the "Pre-Order Hearing") to enhance the protection of due process for the party.

### Overview of the Antitrust Reform Act

The review process under the Antitrust Reform Act is as follows (please also refer to the chart at the end of this paper):

- (i) After an investigation, the JFTC sends a notice to the party suspected of violating the Antitrust Law;
- (ii) The JFTC must hold a pre-order hearing where both the JFTC's investigator and the party can express their respective opinions to a hearing officer;
- (iii) The JFTC issues an administrative order to the party; and
- (iv) If the party is not satisfied with such administrative order, the party must then file an action to rescind the JFTC's administrative order with the Tokyo District Court.

Under the former Antitrust Law, step (ii) was a simpler process and step (iv) was the JFTC Post-Order Review.

### Key issues

- The Antitrust Reform Act was enacted in response to criticism of post-order reviews held by the JFTC, namely, that it was unfair and insufficient from a due process perspective for the JFTC to alone decide whether the administrative order was proper.
- Key changes are: (i) abolishment of post-order reviews of the administrative order by the JFTC and introduction of judicial review by the Tokyo District Court; and (ii) establishment of the JFTC's pre-order hearing.

## Abolishment of the JFTC Post-Order Review

The JFTC Post-Order Review had been criticised as being unfair and similar to prosecutors doubling as judges because the JFTC issued administrative orders and then judged the adequacy of such administrative orders despite the fact those in charge of administrative orders and the judges in the JFTC Post-Order Review did not overlap.

Even though the parties had the right previously under the former Antitrust Law to appeal the JFTC's Post-Order Review to Tokyo High Court, the Tokyo High Court was subject to a restriction on a finding of facts (i.e., facts found by the JFTC bound the Tokyo High Court, provided such facts were supported by substantive evidence) and the party concerned was subject to a restriction on the submission of new evidence (i.e., when the party wished to submit to the Tokyo High Court new evidence in relation to facts found by the JFTC, the party had to show a specific reason to submit such evidence, e.g., the JFTC's failure to adopt such evidence without justifiable grounds). Consequently, the JFTC's Post-Order Review as the first review process was very important and needed to be fair.

The Antitrust Reform Act abolishes the JFTC Post-Order Review and enables the party concerned to directly file an action with the Tokyo District Court in the same manner as a judicial review in respect of other kinds of administrative orders. Both the restrictions on the finding of facts and the submission of new evidence have now been abolished.

## Creation of the JFTC Pre-Order Hearing

Under the former Antitrust Law, when the JFTC intended to issue an administrative order, it was required to notify the party concerned of the facts found by the JFTC and the expected administrative order. Upon the party's request, JFTC employees who investigated the party's antitrust activities (the "**JFTC Investigators**") were also to briefly explain the expected order, the facts found and the supporting evidence. The party could then express its opinion in writing and submit evidence to the JFTC, but there was no avenue for the JFTC to respond to such communications.

Under the Antitrust Reform Act, the JFTC Pre-Order Hearing will now be conducted by a neutral JFTC hearing officer who was not involved in the investigation of the case in question (the "**JFTC Hearing Officer**").

The party concerned may inspect evidence which forms the basis for the facts found by the JFTC and may make a copy of evidence submitted by the party itself and statements of that party's employees.

At the JFTC Pre-Order Hearing, the JFTC Investigators will explain the expected administrative order, the facts found by the JFTC and supporting evidence laying the foundation for the facts, and on the other hand, the party concerned may express its opinion. The JFTC Hearing Officer is required to fulfil the role of facilitator, ensuring appropriate communication between the JFTC Investigators and the party.

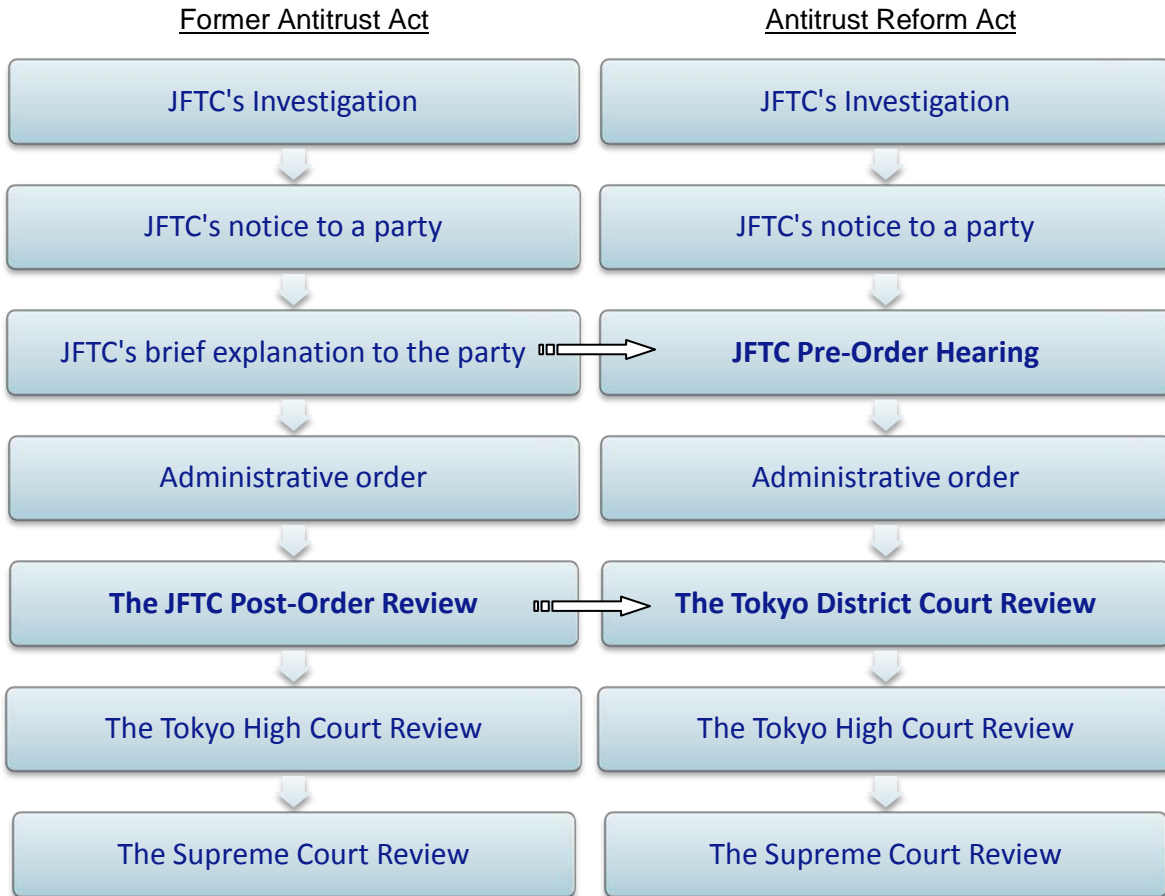
The JFTC Hearing Officer is required to make a record describing the actual process of the JFTC Pre-Order Hearing on the hearing day. The JFTC is required to consider such recordings and report made by the JFTC Hearing Officer.

## Comments

The Antitrust Reform Act aims to utilise the JFTC's professional knowledge and know-how, protect the due process of the party concerned and ensure the appropriateness of the JFTC's decision, which is expected to lead to an effective judicial review of the JFTC's administrative order by the Tokyo District Court.

However, there are still some weaknesses from the point of view of due process: the party concerned is not allowed to make copies of evidence submitted by other parties; attorneys representing the party do not have the right to attend or record the JFTC's investigation against the party; and attorney-client privilege is not yet recognised.

## Change in Review Process of the JFTC's Administrative Order



*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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