

"Knock, Knock...it's the JFTC": Report Issued by the Advisory Panel Regarding the Investigation Procedures of the JFTC Under Japan's Anti-Monopoly Act

In December 2013 Japan enacted a partially revised Anti-Monopoly Act. Similar to the U.S. Sherman and Clayton Acts, the Japanese Anti-Monopoly Act generally prohibits activities that impede competition. The Anti-Monopoly Act also gives investigative authority to the Japan Fair Trade Commission ("JFTC"), including the ability to conduct compulsory on-the-spot inspections akin to dawn-raids conducted by the European Commission or search warrant raids carried out by the U.S. Federal Bureau of Investigation. In relation to the investigative procedures of the JFTC, the revised Anti-Monopoly Act stipulated that the Japanese government would consider implementing procedures to ensure that the targets of investigations can sufficiently defend themselves.

To that end, in the beginning of 2014, the Japanese Minister of State appointed an Advisory Panel on Administrative Investigation Procedures Under the Anti-Monopoly Act (the "Advisory Panel") to provide expert advice on the procedures that the JFTC should follow. After a series of fourteen meetings, on December 24, 2014, the Advisory Panel issued its report on the recommended investigative procedures of the JFTC (the "Report"). While the Advisory Panel's report is not binding, companies with operations in Japan should be cognizant of its findings, as these may soon become binding on the JFTC.

On-The-Spot Inspections

In relation to on-the-spot inspections carried out by the JFTC, the Advisory Panel's Report had several important findings. Most importantly, the Report noted that, while the subject of an on-the-spot inspection "may" have an attorney present, the presence of an attorney is not a right such that a company may refuse an inspection until an attorney arrives.

Additionally, the Report found that it is appropriate for the JFTC to allow companies to copy materials being seized by the JFTC that are deemed necessary for the daily business operations of the company, so long as the copying does not interfere with the implementation

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of the on-the-spot inspection. For all other material seized by the JFTC, the Report noted that the JFTC should allow companies to use electronic devices to copy the materials at the JFTC, and even recommended that the JFTC install paid copy machines for such copying.

Based on this Report, companies facing an on-the-spot inspection should take the following action:

- ensure that an attorney is present as soon as possible, and insert such a right if necessary;
- monitor and record any materials being seized by the JFTC and immediately copy those that are necessary for the daily operation of the business; and
- for all other material that is seized, obtain copies at the JFTC as soon as practicable so that the company and its attorneys can begin understanding what the JFTC is reviewing.

Attorney-Client Privilege

While there appears to have been some uncertainty on the subject, the Advisory Panel's Report ultimately concluded that the JFTC should continue to refuse acknowledging the attorney-client privilege at this time. However, the Report did note that this issue was worth further consideration and discussions.

Unfortunately, this means that at the present time the status-quo remains regarding the lack of an attorney-client privilege.

Depositions

The Advisory Panel also addressed the rights of deponents. The Report found that under the current JFTC system, the presence of an attorney during a deposition should not be permitted, nor should video or audio recordings be taken. Similarly, the Report concluded that deponents should not be permitted to take notes while testifying. These findings do not mean, however, that deponents are prohibited from talking with their attorneys or taking notes during breaks.

As the report makes clear, individuals subject to a JFTC deposition should confer with counsel during each permitted break. During these breaks, the deponent and the attorneys should note all of the highlights of the deposition, such as the questions posed by the JFTC, important answers provided by the deponent, and any general themes the deponent believes the JFTC is focusing on.

Guidelines or Manuals

For each of the subjects above, and more generally, the Report concluded that the JFTC should clarify the investigative procedures under the Anti-Monopoly Act and make such procedures public by issuing guidelines or manuals. Additionally, these matters should be made clear to relevant companies, such as those subject to an on-the-spot inspection or deposition through the use of written explanations provided at the initiation of an inspection or deposition.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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