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COMMITMENT DECISIONS IN THE JAPANESE CONTEXT

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COMMITMENT DECISIONS IN THE JAPANESE CONTEXT

Tadashi Shiraishi¹

1. Introduction

1. The Government of Japan submitted a Bill that would amend the Antimonopoly Act (AMA) to introduce a commitment decision framework. Based on the comprehensive background paper by the Secretariat,² and paying respect to an article by the Chairman,³ I will examine three points: a brief history preceding the Bill, judicial review, and competition law development. They will be introduced by a description of the proposed framework of the commitment procedure.

2. For the purpose of providing topics from Japan to those experts in other jurisdictions, I will try to avoid local jargon and detailed complexity.⁴

3. Because the Government, substantially the Japan Fair Trade Commission (JFTC), has publicly clarified that hardcore horizontal cartels will not be practically eligible for commitment procedures (paragraph 37 below), I will focus on vertical restraint, exclusionary conduct, and exploitative abuse.^{5 6}

2. A brief history preceding the Bill

4. From 1947 to 2005, the AMA was equipped with crude devices for commitment decisions, but these were repealed by an amendment in 2005 led by the JFTC. Recently, the JFTC seems to be an advocate of introducing a commitment decision framework. I will collect the relevant facts below.

2.1 *The 1947-2005 procedural framework*

2.1.1 *Overview*

5. The AMA was enacted in 1947. At that time, the only order that the JFTC was empowered to issue was a cease-and-desist order. If the targeted firm contested, the JFTC was able to issue orders only after an adversarial hearing procedure. Such orders were called after-hearing decisions.

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² “Commitment decisions in antitrust cases: Background paper by the Secretariat” (DAF/COMP(2016)7, 30 March 2016).

³ Frederic Jenny, “Worst Decision of the EU Court of Justice: The *Alrosa* Judgment in Context and the Future of Commitment Decisions,” *Fordham International Law Journal*, Volume 38, Issue 3 (2015), available at <http://fordhamilj.org/files/2015/05/FILJ_Jenny_WorstDecisionoftheEUCourtofJustice.pdf>.

⁴ For a more detailed, but hopefully still concise, overview of Japanese competition law, see Simon Vande Walle & Tadashi Shiraishi, “Competition Law in Japan,” in John Duns, Arlen Duke & Brendan Sweeney (eds.), *Comparative Competition Law* (Edward Elgar 2015), authors’ manuscript available at <<http://ssrn.com/abstract=2219881>>.

⁵ The AMA is furnished with a regulation of abuse of a superior bargaining position, also known as ASBP. In my descriptive analysis, it is a sort of exploitative abuse. Tadashi Shiraishi, “A Baseline for Analyzing Exploitative Abuse of a Dominant/Superior Position,” *UT Soft Law Review*, No.5 (2013), available at <<http://ssrn.com/abstract=2246558>>.

⁶ Investigations of non-hardcore horizontal cartels have been rare, but a commitment decision framework might increase their frequency. Regardless, they are not usually subject to administrative fines.

6. In order to skip the full-specked procedure when appropriate, the original 1947 AMA was equipped with a recommendation decision procedure (pre-2005 Article 48). Pursuant to the provision, the JFTC usually recommended remedies to a targeted firm, and, if the firm accepted them, the recommended remedies became a recommendation decision, another form of a cease-and-desist order.

7. Statutorily, the JFTC designed the recommended remedies, but there could also be behind-the-scenes negotiations between the JFTC and the firm during the investigation phase.

8. A 1949 amendment added the consent decision procedure (pre-2005 Article 53-3). An adversarial hearing procedure was usually initiated after an unsuccessful recommendation procedure. During the hearing procedure, however, the firm was able to submit proposed commitments to the JFTC, conceding the fact findings and legal evaluations by the JFTC. If the JFTC approved the commitments, they became a consent decision, a third form of a cease-and-desist order.

9. In cases of non-compliance with a cease-and-desist order, the JFTC could request that the courts impose a punitive fine (Articles 90 (iii) and 95, or Article 97).

2.1.2 *Observations and analyses*

10. It should be noted that vertical restraint, exclusionary conduct, and exploitative abuse were free from administrative fines throughout the period from 1947 to 2005. The 1977 amendment, which introduced administrative fines, was exclusively for hardcore horizontal cartels.

11. In addition, the JFTC decisions lack(ed) binding effects on private litigation, even though a consent decision required concession by the addressee. The Supreme Court admitted in *Tsuruoka Kerosene* that the existence of a recommendation decision or a consent decision could be a positive factor for judges' findings in a private lawsuit court, because the defendant "voluntarily" accepted the decision. However, it was not to the extent that the JFTC's findings bound the courts.^{7 8}

12. A most prominent case for this note must be the *Intel* recommendation decision in 2005, the last year for the 1940's procedural framework, regarding the CPU firm's alleged exclusionary fidelity rebates. Intel, probably after studying the *Tsuruoka Kerosene* Supreme Court Judgment, accepted the JFTC's recommendation and, at the same time, publicly announced that it would not concede any of the JFTC's findings.⁹ Later, AMD sought damages recovery from the courts in Tokyo, and, years later, they settled.

13. If Intel had contested, the JFTC investigators would have submitted many of dawn-raided documents to an adversarial hearing procedure, which an interested person, AMD, could request the JFTC to allow it to read and copy (pre-2005 Article 69). Moreover, the JFTC could not impose any administrative fines. Intel seemed to have no reason to refuse the recommendation.

⁷ *Tsuruoka Kerosene*, Supreme Court Judgment, 8 December 1989, Showa 60 (o) 933. Kerosene consumers sought damages recoveries and lost on other grounds.

⁸ If a recommendation decision or a consent decision, as well as an after-hearing decision, became final and binding, such a decision enabled potential plaintiffs to seek damages recovery pursuant to AMA Articles 25 and 26. However, this was only to satisfy a procedural requirement for potential plaintiffs. Still, potential plaintiffs could seek recovery pursuant to Civil Code Article 709 without any JFTC orders.

⁹ *Intel*, JFTC Recommendation Decision, 13 April 2005, Heisei 17 (kan) 1. Intel's News Release, "Intel Agrees To Comply With JFTC Recommendation; Disagrees With Findings Of Fact" (31 March 2005).

14. The *Microsoft* recommendation decision in 1998, which remedied its tying arrangement of Excel and Word,¹⁰ may be another example that possibly followed a similar story to Intel's. No private enforcements were reported.

2.2 *The 2005-2013 procedural framework*

2.2.1 *Overview*

15. After the Strategic Impediments Initiative talks with the United States, from 1989 to 1990, the JFTC gradually accumulated power and finally renovated its procedural framework through a 2005 amendment. The problem was not recommendation or consent decisions, but after-hearing decisions that took years if the alleged firm actively contested. This meant that it took a long time for the JFTC to issue cease-and-desist orders (i.e., after-hearing decisions). Moreover, in hardcore horizontal cartel cases, the JFTC could impose administrative fines only after issuing a cease-and-desist order. Fine orders could be contested for another years.

16. Thanks to the 2005 amendment, the JFTC streamlined its ordering procedure, making it capable of issuing a cease-and-desist order and an administrative fine order at the same time, after a succinct pre-order procedure. If the addressee wanted to contest, it requested an adversarial hearing procedure. Ordered fines carried interest even during hearing procedures and, as a result, addressees usually paid before contesting.

17. Recommendation decisions and consent decisions were replaced by the streamlined 2005 framework outlined above.

2.2.2 *Observations and analyses*

18. The repeal of the crude 1940's framework of commitment decisions did not seem to raise problems, at least until 2009. Vertical restraint, exclusionary conduct, and exploitative abuse were still free from administrative fines between 2006 and 2009. In addition, the JFTC decisions lack(ed) binding effects on private litigation (paragraph 11 above).

19. A prominent example, in which a large firm did not contest, may be the *Seven-Eleven Japan* order regarding its exploitative abuse of franchisees.¹¹ It was foreseen that a number of franchisees would seek damages recovery, but Seven-Eleven Japan did not contest the JFTC order itself. The relevant franchisees did seek damages, and the courts rendered a number of judgments. Some franchisees won, while a number of others lost.¹²

2.3 *Significant changes*

20. A tide change occurred, in my view, due to amendments in 2009 and 2013.

¹⁰ *Microsoft*, JFTC Recommendation Decision, 14 December 1998, Heisei 10 (kan) 21. Excel was already popular in Japan, but Word was behind a native incumbent.

¹¹ *Seven-Eleven Japan*, JFTC Cease-and-desist Order, 22 June 2009, Heisei 21 (so) 8.

¹² An exception, in which a large firm contested, may be the *JASRAC* case. *JASRAC*, JFTC Cease-and-desist Order, 27 February 2009, Heisei 21 (so) 2. The music copyright administrator allegedly required broadcasters to agree to contracts which in effect excluded other collecting societies. According to the JASRAC, it was impossible to comply with the JFTC's order. If true, it is understandable why the JASRAC contested it for years, although it was free from administrative fines.

2.3.1 *The 2009 amendment*

21. The 2009 amendment empowered the JFTC to impose administrative fines for vertical restraint,¹³ exclusionary conduct, and exploitative abuse.

22. Monetary sanctions normally raised the possibility of contested orders.

23. Constrained calculation formulae increased the possibility of contested orders, moreover. AMA's administrative fines require the JFTC to apply the relevant provisions non-discretionarily. The JFTC is obliged to impose an administrative fine if it finds qualified illegal conduct. The JFTC is also obliged to impose the size of the fine pursuant to the hard calculation formulae prescribed in the AMA. Such a framework has been seen as indispensable for helping lawmakers to avoid unconstitutional double penalties. It has been interpreted that discretion is a feature of penalties in the meaning of the Constitution.

24. To date, the JFTC has imposed administrative fines in five exploitative abuse cases, all of which were contested. As of 1 June 2016, four of them were still pending in the JFTC's adversarial hearing procedures. For the purpose of a constrained calculation, the JFTC is required to make elaborate findings not only regarding the fine itself but also on the theory of harm.

25. The JFTC has not ever issued any administrative fine orders related to vertical restraint or exclusionary conduct. Due to the non-discretionary nature of the fines, the JFTC is prohibited from exempting fines even for innovative cases.

2.3.2 *The 2013 amendment*

26. The 2013 amendment, which took effect on 1 April 2015, replaced the JFTC's adversarial hearing framework with ordinary judicial reviews by the Tokyo District Court. The JFTC orders first, as it did after the 2005 amendment, and, if the addressee contests the ruling, the dispute proceeds to the courts without spending time in an adversarial hearing at the JFTC. The courts are no longer constrained by the substantial evidence rule. Plaintiffs-addressees can normally submit evidences to the courts.

27. Such a framework theoretically reduces the possibility that the JFTC can withstand judicial reviews.

28. No judicial review cases that include vertical restraint, exclusionary conduct, or exploitative abuse were pending at the Tokyo District Court as of 1 June 2016, because the JFTC had not issued any such orders since the 2013 amendment took effect on 1 April 2015. All of the pending exploitative abuse cases are in adversarial hearing proceedings under the pre-2013 framework, pursuant to interim measures.

2.3.3 *Possible downgrades*

29. Under such circumstances, however, the JFTC could accumulate its works on vertical restraint, exclusionary conduct, and exploitative abuse by downgrading cases. Even under the non-discretionary framework, the JFTC has prosecutorial discretion, including the selection of categories of violation.

30. The AMA is equipped with double standards for vertical restraint and exclusionary conduct: the second degree category for such conduct is normally free from administrative fines. The *DeNA* case is an example in which the JFTC issued a cease-and-desist order without an administrative fine to a sort of

¹³ Some forms of vertical restraint became eligible for administrative fines under the 2005 amendment.

exclusive dealing. DeNA did not contest the order, even though it later contended in a private lawsuit court that the JFTC did not adequately find exclusionary effects.¹⁴

31. Some sorts of exploitative abuses could be remedied without administrative fine by the Subcontract Act, which is also enforced by the JFTC.

32. Warnings (*keikoku*)¹⁵ and cautions (*chui*)¹⁶ are free from administrative fines for all categories in the AMA.

3. Proposed framework of commitment procedure

33. In this section, I outline the basic framework of the proposed commitment decision procedure in Japan. For the sake of simplicity, I am omitting language that shows that the Diet has not passed the bill.

3.1 Background

34. The Trans-Pacific Partnership (TPP), of which Japan is a signatory, requires each party to introduce a commitment decision framework.¹⁷

35. In order to implement the requirement, the JFTC proposes an amendment of the AMA to introduce the framework described below.

3.2 The main provisions

36. The main provisions consist of eight articles in the AMA, Articles 48-2 to 48-9. The former four articles are concerned with ongoing conduct, and the latter four are concerned with conduct no longer taking place. They are mirror images.

37. Statutorily, all categories could be eligible for commitment procedures,¹⁸ but the JFTC is practically going to exclude hardcore horizontal cartels.^{19 20}

¹⁴ *DeNA*, JFTC Cease-and-desist Order, 9 June 2011, Heisei 23 (so) 4. DeNA and GREE were two leading social game platforms for mobile phones and other devices. After the order, GREE sought damages recovery from the Tokyo District Court. They later settled.

¹⁵ The *Mitani* case (paragraph 74 below) is an example.

¹⁶ A prominent example of caution is the *TEPCO* case. *Tokyo Electric Power Company (TEPCO)*, JFTC Caution, 22 June 2012. TEPCO allegedly tried to unilaterally revise long-term contracts by increasing prices, resulting in concerns of exploitative abuse.

¹⁷ TPP Article 16.2, paragraph 5 prescribes as follows:

Each Party shall authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. A Party may provide for such voluntary resolution to be subject to judicial or independent tribunal approval or a public comment period before becoming final.

¹⁸ Articles 48-2 and 48-6.

¹⁹ The announcement is not in the proposed amendment but in the “Overview of the Bill” (in Japanese) publicized under the name of the Cabinet Secretariat, dated March 2016, p. 8.

²⁰ Mergers are eligible, too (Article 48-2). Due to the AMA provisions made in 1998, no one could stop the clock. Pursuant to the amended Article 10 (11)-(14), the JFTC may send a commitment notice (paragraph

38. If the JFTC provisionally considers that it has found illegal conduct by a firm (or firms), and if the JFTC finds it necessary for the promotion of fair and free competition, the JFTC may send a commitment notice that informs the firm that it will be allowed to submit proposed commitments, along with informing the firm of an outline of concerned conduct and relevant statutory provisions.²¹

39. The notified firm may submit proposed commitments within 60 days.²²

40. The JFTC shall issue a commitment decision authorizing the proposed commitments, if the JFTC finds that:

(i) they are sufficient for eliminating the concerned conduct, and

(ii) they are expected to be certainly implemented.²³

41. The JFTC shall dismiss the proposed commitments, if they do not satisfy either (i) or (ii) above.²⁴

42. After a commitment decision, the addressee may modify the authorized commitments by acquiring another commitment decision under the same conditions above.²⁵

43. As a result of a commitment decision, the concerned conduct and the implementation of the commitments are exempt from cease-and-desist and administrative fine orders.²⁶

44. The JFTC shall revoke a commitment decision, if the JFTC finds that:

(i) the addressee has failed to comply with the authorized commitments, or

(ii) the addressee has acquired the commitment decision via false information.²⁷

45. After a revocation of a commitment decision, the JFTC may issue a cease-and-desist and/or administrative fine order within two years, even if the normal five-year period after the cessation of the conduct has passed.²⁸

3.3 *Supplementary comments*

46. The main provisions launch a solid framework that consists of JFTC's notice, firms' submissions, and the JFTC's authorization. However, behind-the-scenes negotiations may proceed. Notices, submissions, and authorizations may be ceremonial in some cases in light of successful behind-the-scenes negotiations.

38 below) to merging firms and extend the Phase II period by a certain number of days, depending on the situation in the proceeding.

²¹ Article 48-2 or Article 48-6.

²² Article 48-3 (1) or Article 48-7 (1).

²³ Article 48-3 (3) or Article 48-7 (3).

²⁴ Article 48-3 (6) or Article 48-7 (5).

²⁵ Article 48-3 (8) or Article 48-7 (7).

²⁶ Article 48-4 or Article 48-8.

²⁷ Article 48-5 (1) or Article 48-9 (1).

²⁸ Article 48-5 (3)(4) or Article 48-9 (3)(4).

47. The framework, as far as it is prescribed in the AMA, lacks provisions for collecting third-party comments or market-testing. However, it is often the case that such practices do not appear in the AMA but rather in a JFTC Rule or JFTC guidelines that are unveiled later. The JFTC could collect public comments and/or consult with interested parties.

48. Whether and when the JFTC will announce a case is unknown. Under the current practice, the JFTC does not officially confirm its in-depth investigations, including dawn raids: the JFTC speaks to the public only on the day of orders.

4. Judicial review

49. Here, I examine two of the issues shown in the background paper by the Secretariat. They are judicial review and competition law development.²⁹

50. Judicial review is a tool for framing an extensive use of commitment decisions.

51. Judicial review is generally governed by the Administrative Case Litigation Act (ACLA). The only special rule provided in the AMA is that the Tokyo District Court has the exclusive jurisdiction of first instance, like judicial review of JFTC orders (AMA Articles 76 and 85). A lawsuit has to be launched usually within six months after a potential plaintiff learns of the administrative disposition (ACLA Article 14).

4.1 Judicial review at request of the proposing firm

52. A typical review requested by the proposing firm will be against a dismissal by the JFTC, which has required the firm to submit allegedly disproportionate or inadequate commitments.

53. A JFTC commitment decision and a dismissal will be construed as “an administrative disposition made by an administrative agency at its discretion” in the meaning of ACLA Article 30, which provides as follows:

The court may revoke an administrative disposition made by an administrative agency at its discretion only in cases where the disposition has been made beyond the bounds of the agency’s discretionary power or through an abuse of such power.

54. However, what is important is the substance of the reviewing criteria. The “bounds of the agency’s discretionary power,” a notion exempt from judicial review, has gradually been curtailed by the courts’ interpretation. If the court has some expertise in the field, the self-restraint by the court respecting the agency’s expertise will be reduced or diminished. The same treatment may be undertaken if the plaintiff has some expertise. ACLA Article 30, which was a product of a 1962 amendment to the Act, has received such a curtailing interpretation.³⁰

²⁹ Even when a JFTC infringement order becomes final and binding, it will not have binding effects in follow-on, private enforcements but just positive influences: That is, the situation described in paragraph 11 above is unchanged. Access to the JFTC’s files may be another issue. The JFTC currently has access guidelines regarding cease-and-desist and administrative fine orders.

³⁰ For a reliable overview on the judicial review of discretionary dispositions, see Tokiyasu Fujita, “Jiyu Sairyō Ron no Shōso [Various Aspects of the Theory of Free Discretion or Die verschiedenen Aspekte zur Theorie des freien Ermessens],” *Nihon Gakushi-in Kiyo [Transactions of the Japan Academy]*, Vol. 70, No. 1 (2015), available at <<http://ci.nii.ac.jp/naid/110009964918/en/>>. The author, a most respected administrative law scholar and former Supreme Court Justice (serving from 2002 to 2010), attached to the article a four-page summary in German.

55. In that respect, it should be noted that the Tokyo District Court's Eighth Civil Chamber has been accumulating its own expertise in competition law. After the 2013 amendment (2.3.2 above), which took effect on 1 April 2015, the Eighth Chamber has aimed to take care of the judicial review of JFTC orders. Even before the 2013 amendment, private lawsuits seeking injunctive reliefs pursuant to AMA Article 24, if brought to the Tokyo District Court, were usually concentrated in the Eighth Chamber.

56. In contrast, the revocation of a commitment decision at the request of the addressee will be rare. In the *Oil Cartel Recommendation Decision* case, the Supreme Court dismissed a similar request, because the addressee accepted a JFTC recommendation voluntarily.³¹ According to the addressee, it accepted the recommendation because another agency supervising the industry advised the addressee that such an acceptance would exempt it from criminal referral by the JFTC. The JFTC did send a referral, which was a prerequisite for a criminal prosecution.

4.2 *Judicial review at request of a third party*

4.2.1 *The Novo Industri case*

57. If a third party accuses the JFTC of requiring disproportionate or inadequate commitments, it will technically be a lawsuit seeking the revocation of a commitment decision, in whole or in part.

58. However, there is a Supreme Court case that is disadvantageous to such a potential plaintiff.

59. In *Novo Industri*,³² the Danish pharmaceutical firm supplied a kind of enzyme to a Japanese pharmaceutical firm, Amano, with a non-competition clause extending even after cessation of the contract. The AMA has a special provision for international contracts, Article 6, pursuant to which even the restrained firm can be a violator and an addressee of an order by the JFTC. After the cessation of the contract, probably at the request of Amano, the JFTC sent a recommendation to Amano, not to Novo. Amano normally accepted the recommendation decision, which ordered it to delete the non-competition clause.³³ Novo appealed. The Supreme Court denied Novo's standing. According to the Court, Novo could test the validity of the clause in a contract lawsuit in which Amano would be a defendant, so the Danish firm did not have a "legal interest" (ACLA Article 9) in requesting the revocation of the recommendation decision.

60. If Novo prevailed in the contract lawsuit, Amano might have been in a dilemma between the court judgment and the JFTC decision. The Supreme Court added that the Court would not care in such a situation, because Amano had accepted the recommendation voluntarily. However, it should be read as an unnecessary dictum. Even if it had been an after-hearing decision, under the logic of the Court, Novo would have been denied the standing because it could test the validity of the clause through a contract lawsuit court.

4.2.2 *The E-License v JFTC (JASRAC) case*

61. If a third party accuses the JFTC of approving scant commitments, it will technically be a lawsuit seeking revocation of the commitment decision and an imposition of obligation on the JFTC of more measures.

62. There is a Tokyo High Court judgment that may support such a party.

³¹ *Oil Cartel Recommendation Decision*, Supreme Court Judgment, 4 April 1978, Showa 50 (gyo-tsu) 112. Technically, the addressee had a standing, but had shown no reason to revoke the decision.

³² *Novo Industri*, Supreme Court Judgment, 28 November 1975, Showa 46 (gyo-tsu) 66.

³³ Article 6 has been harshly criticized for its protectionist tone, and the JFTC has refrained from using it, at least in recent years.

63. In 2009, the JFTC issued a cease-and-desist order to the JASRAC (footnote 12 above). The incumbent music copyright administrator contested. In 2012, the JFTC revoked its own order via an after-hearing decision. A competitor, E-License, tried to challenge the decision in the Tokyo High Court.

64. The Tokyo High Court found a standing for E-License.³⁴ According to the judgment, a revocation of the cease-and-desist order could have remarkably serious effects on E-License, because JASRAC used to be a quasi-statutory monopolist and E-License was the only competitor in the relevant market. The Supreme Court kept silent on the standing issue and went on to affirm the Tokyo High Court judgment, which revoked the JFTC decision, reviving the original JFTC cease-and-desist order as a result.³⁵ The case has been remanded to a JFTC adversarial hearing procedure with the JASRAC and the investigators of the JFTC.

4.2.3 Conclusion

65. It is hard to distinguish the two cases, *Novo Industri* and *JASRAC* above. To be sure, E-License was not in contract with JASRAC, so it could not rely on a contract lawsuit. However, it could seek injunctive relief pursuant to AMA Article 24, and it actually did. Hence, in order to distinguish the two cases, one should consider the nature of the plaintiff: an alleged beneficiary from the concerned conduct (*Novo*), or an alleged victim by the concerned conduct (E-License).

66. If the plaintiff is allowed to proceed with a standing, the review criteria will be the same with the case raised by the firm that submitted proposed commitments (paragraphs 52-55 above).

5. Competition law development

67. There are concerns that an extensive use of commitment decisions could affect the development of competition law regarding criteria of illegality. It is also called the issue of legal certainty and predictability.³⁶

³⁷

68. A first and half-serious answer from Japan may be “More than zero would be better than zero.” There have been no vertical restraint or exclusionary conduct cases in which addressees were imposed administrative fines since such fines were introduced by the 2009 amendment, while there have been a few second degree cases without administrative fines (paragraphs 29-32 above). There have been no exploitative abuse cases subject to administrative fines since the 2013 amendment took effect in 2015 and replaced the JFTC’s adversarial hearing procedures with direct judicial reviews. Those categories could be revived by commitment decisions.

69. Thinking about the positive aspects of commitment decisions, we may have to spin out a second-best resolution for the issue of competition law development.

5.1 Detailed announcement by competition authorities

70. A first solution is expecting competition authorities to provide their fact-findings and legal reasonings as much as possible.

³⁴ *E-License v JFTC*, Tokyo High Court Judgment, 1 November 2013, Heisei 24 (gyo-ke) 8.

³⁵ *JFTC v E-License*, Supreme Court Judgment, 28 April 2015, Heisei 26 (gyo-hi) 75.

³⁶ Secretariat’s background paper (n 2) paragraphs 44-46 and 62.

³⁷ Legal certainty and predictability regarding commitment decision law is another serious issue (Secretariat’s background paper (n 2) paragraph 64). That issue could be addressed by self-binding guidelines, as the background paper mentions.

71. Because Japan has not yet implemented a commitment procedure, I will show similar examples from the JFTC's practices.

72. The JFTC's merger review reports may be a good equivalent. The JFTC publicizes a report right after a clearance notice in each Phase II case, while the JFTC also collects notable Phase I cases for its annual merger case reports. Those reports are usually succinct, compared to those from other competition authorities. The reports may be too thin to allow for quantitative analyses. Moreover, some merging firms offer remedies (i.e., commitments) even before the JFTC informs them of its concern. Such circumstances would make the reports all the more vague. However, for those who usually undertake qualitative analyses, at least in my view, most reports provide fairly good, if not sufficient, information on fact-finding efforts and legal evaluations.

73. For another example, the JFTC used to unveil its preliminary assessment in some cases when it closed its investigation because the alleged firm implemented or promised to implement some commitments. The *Canon* case is a good example of this. The announcement by the JFTC in the *Canon* case provided the JFTC's view of the facts, even accompanied with the JFTC's ad hoc mini guidelines on printers and ink cartridges.³⁸ It seems that these materials have contributed to some aftermarket lawsuits.³⁹

74. Even when the JFTC itself fails to elaborate, investigators' comments published elsewhere in journals sometimes provide useful information. A good example may be the *Mitani* case. The JFTC sometimes issues cease-and-desist orders regarding gas stations' predatory low pricing. They usually seem to be issued without dawn raids. *Mitani*, a gas station firm in the Fukui Prefecture, reportedly received a rare dawn raid, but, in the end, the JFTC did not issue a cease-and-desist order, only a warning. The JFTC itself provided scant information on this.⁴⁰ However, investigators' comments showed detailed information that it was a parallel low pricing case with other no-brand stations that were capable of procuring cheaper gasoline (i.e., not below-cost) than *Mitani*, which sold branded gasoline. The comments also suggested that *Mitani*'s below-cost pricing lacked a requisite contribution to the exclusion of smaller stations.⁴¹ Thanks to the investigators' comments, I can cite the case to exemplify the theory of causation in competition law.

75. The downsides may be that all the noted examples above depend upon the JFTC's voluntary efforts, either organizational or personal. Facing the possibility of extensive use of commitment decisions, such practices should be made sustainable.⁴²

76. It should also be pointed out that sound analyses of those succinct descriptions require reading comprehension levels endorsed by a sufficient literacy with government documents. Such research often needs side information to allow analysts to read between the lines.

5.2 *Expanding the scope of reference*

77. Because national competition laws have a number of common features, a jurisdiction that lacks enough case law could make reference to cases in other jurisdictions. I believe I need to say nothing more when thinking about the marvelous accumulation of contributions at the OECD roundtables.

³⁸ *Canon*, JFTC announcement of closing investigation and ad hoc mini guidelines, 21 October 2004.

³⁹ Even in my limited knowledge, a plaintiff took advantage of the JFTC materials in an aftermarket lawsuit at a court and acquired a favorable settlement, as far as I hear from a representative of the plaintiff.

⁴⁰ *Mitani*, JFTC Warning, 10 January 2013.

⁴¹ Masaya Sakuma & Yoshimichi Yamanaka, *Kosei Torihiki [Fair Trade]* No. 750 (2013)(in Japanese).

⁴² See Florian Wagner-von Papp, "Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the 'Struggle For Competition Law,'" *Common Market Law Review*, Vol. 49 (2012), pp.969-970, available at <<http://ssrn.com/abstract=2262864>>.

5.3 *Raising competitors for competition authorities*

78. If competition is beneficial for welfare and innovation, the same theory should apply to competition between a competition authority and courts. In this respect, stand-alone private lawsuits, as well as follow-on ones and judicial reviews, should play significant roles.⁴³

79. Recently in Japan, as far as I know, there have been a fair number of stand-alone private lawsuits involving even large firms. They include *AMD v Intel* (paragraph 12 above), *GREE v DeNA* (paragraph 30 above),⁴⁴ *Softbank v NTT*,⁴⁵ *Shimano v Apple*,⁴⁶ and other behind-the-scenes cases. Moreover, amplified by the 2013 amendment, the Tokyo District Court has been accumulating expertise in competition law (paragraph 55 above).

5.4 *Systematic streamlining of knowledge in competition law*

80. A well-structured system for understanding and analyzing competition law could assist all the individual solutions outlined above. Without a sufficient analytical framework, it is hard to comprehend and read between the lines of succinct JFTC announcements. Systematically streamlined information would be relied upon by court judges, and establishing such a plain and reliable system would lead competition law to a much better phase, on which commitment decisions could contribute with fewer drawbacks.

⁴³ See Heike Schweitzer, “Judicial review in EU competition law,” in Ioannis Lianos & Damien Geradin (eds.), *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar 2013), pp. 534-538.

⁴⁴ *AMD v Intel* and *GREE v DeNA* could be classified as follow-on lawsuits, but, substantially, they were stand-alone, because each defendant contended that the JFTC’s findings were wrong and neither court seemed to be bound by the JFTC order.

⁴⁵ *Softbank v NTT*, Tokyo District Court Judgment, 19 June 2014, Heisei 23 (wa) 32660. The plaintiff and the defendant were two of three largest telecom firms. Softbank lost in its allegation that NTT unlawfully excluded it.

⁴⁶ Shimano’s announcement of launching a lawsuit seeking damages recovery from Apple in the Tokyo District Court, 12 September 2014. It is reported that Apple allegedly invoked exploitative abuse in purchasing magnetic connectors between power lines and computers from Shimano. This lawsuit seems to be still pending.