

ENFORCER HUB

Japan: private practice perspective

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Japan's enforcement agency

The substantive provisions of Japan's competition rules are contained in the Antimonopoly Act of Japan (AMA). The Japan Fair Trade Commission (JFTC), composed of a chairman and four commissioners, is the principal enforcement agency set up as an independent administrative office with broad powers to enforce the AMA. The JFTC welcomed the new chairman, Furuya Kazuyuki, in September 2020. The AMA comprises four major categories of regulations:

- prohibition of unreasonable restraint of trade (for example, cartels and bid rigging);
- prohibition of private monopolisation;
- prohibition of unfair trade practices; and
- regulation of business combinations (for example, via mergers and acquisitions).

The JFTC is the sole enforcement agency except with respect to criminal investigations, in which case the JFTC will make a submission to the prosecutor general setting out its criminal accusation, whereupon the public prosecutor's office takes charge of criminal prosecution matters.

Recent developments

The JFTC's policy on the digital economy

The JFTC continues to update its policy on digital industries in line with government policy in this area. On 18 June 2021, the Cabinet adopted its Action Plan for Growth Strategy 2021, which states that strengthening competition policy is a key to growth. For the purpose of strengthening competition policy, the government decided to take the approaches of (i) strengthening advocacy of competition policy by the JFTC in the digital market and other areas and (ii) enhancing quality and quantity of human resources of the JFTC. In particular, the government plans to set up measures necessary for strengthening competition policy for enhancement of DXs in private sectors.

Pursuant to government policy, the JFTC has carried out various activities to enhance competition policy in the digital economy. For example:

- (i) The JFTC published the Final Report Regarding Digital Advertising on 17 February 2021, based upon its survey on trade practices of businesses with digital platform operators. In this report, the JFTC pointed out certain transactions and business conditions that are considered to be problematic under the AMA. The JFTC presents that it will strictly and accurately enforce the AMA in reference to this Report, will conduct further surveys in the areas related to digital businesses, will actively cooperate with other government organisations, and will enhance continuous cooperation with foreign competition authorities. On 31 March 2021, based on a cross-sectional survey of businesses using algorithm/AI, a study group of the JFTC published the Report on Algorithm/AI and Competition Policy. This report discusses potential risk to competition involved in certain types of business practices using algorithm/AI, such as concerted practices by monitoring algorithms, and the possibility of applying the AMA to such practices.
- (ii) In respect of businesses using data, on 25 June 2021, the JFTC published its Report on Competition Policy in the Data Market. Since 2020, the JFTC has widely studied businesses using data in various sectors, such as agriculture, shipping, medical science, broadcasting, electricity and mobility (Data Market) to finally publish this Report. The JFTC analysed and studied the Data Market and discussed issues to be addressed under the competition policy to show future directions to be considered.

In addition, in May 2020, the bill on the Act on Improving Transparency and Fairness of Digital Platforms (the Act) was passed in the Diet. The Act became effective in February 2021. In April 2021, pursuant to the Act, Amazon Japan GK, Rakuten Group, Inc, Yahoo Japan Corporation, Apple Inc, iTunes KK, and Google LLC were designated as Specified Digital Platform Providers (individually, SDPP) by the Ministry of Economy, Trade and Industry (METI). Every year, each SDPP must submit to METI a report concerning the outline of its business and the measures voluntarily taken to maintain fairness of its business. If METI suspects a violation of the AMA on the facts they grasped, METI will request the JFTC to take measures against the suspected violation under the AMA.

Furthermore, in 2021, the JFTC appointed four digital special advisers from the digital industry. Each adviser has expertise in his or her own specialised area such as AI, 5G, digital advertising and personal information protection. These advisers will independently collaborate with the JFTC by way of participation in relevant surveys

and study groups, and having meetings with JFTC officials from time to time to provide their opinions on the digital industry and the business and products offered by the digital industry.

Private monopolisation, unfair trade practices and abuse of superior bargaining position

In FY 2020, as to private monopolisation, one case (the Mainami Aviation Services case) was subject to a cease-and-desist order and a surcharge payment order. This was the first case where the JFTC issued a surcharge payment order for exclusionary private monopolisation after the amendment of the AMA in 2009, which introduced a surcharge payment order for such conduct.

As to unfair trade practices, no cease-and-desist order or surcharge payment order was issued, but three cases were closed by the JFTC approving commitment plans submitted by suspected violators, using the commitment procedure. Those three cases concern trading on restrictive terms conducted by contact lens manufacturers. In addition, three cases of abuse of a superior bargaining position were closed by the JFTC, as it approved the commitment plans submitted by subject parties using the commitment procedures. One of the cases related to abuse of a superior bargaining position by Amazon Japan GK, which was found to have unjustly forced suppliers to give discounts, unjustly returned unsold goods to suppliers and accepted unjust monetary donations from suppliers. Further, the JFTC launched an investigation against Dentsu Inc, the largest advertising agency in Japan, on suspicion of interference with a competitor's transactions, and finally issued a caution and publicised the case.

Following implementation of the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information Etc. (the Platform ASBP Guidelines) on 17 December 2019, the JFTC has been actively targeting digital platform operators.

Cartels

The JFTC issued cease-and-desist orders and surcharge payment orders in eight cartel or bid-rigging cases in FY 2020. All eight cases pertain only to the Japanese domestic market. The total amount of surcharges imposed in FY 2020 was ¥43.2 billion, significantly lower than ¥692.7 billion in FY 2019. The amount of surcharges levied in cartel cases is calculated as a certain percentage of total sales of the relevant products or services during the period of infringement, extending retrospectively up to 10 years (up to three years for infringement before 25 December 2020 when the 2019 amendment to the AMA came into force and up to 10 years in total when infringement extends before and after the enforcement of the amendment) from the date when the JFTC commenced its investigation. The percentage rate is usually levied at a base rate of 10 per cent, but will depend on the circumstances and may be increased to 15 per cent if repeated within 10 years under certain conditions.

As to leniency, 33 filings were made in FY 2020, significantly lower than the 72 filings made in FY 2019.

As to criminal accusations, the JFTC filed a criminal accusation with the Public Prosecutor-General against three pharmaceutical wholesalers and seven individuals in charge of sales and price negotiations in these companies on account of bid rigging in relation to comprehensive pharmaceutical procurement contracts for 57 hospitals, operated by the Japan Community Health Care Organization on 9 December 2020. This is the first criminal accusation filed by the JFTC in the past three years. The JFTC's policy is to proactively file criminal accusations in cases that are serious, malicious and likely to broadly affect people's lives, or cases involving companies that have repeatedly breached the AMA or failed to comply with a cease-and-desist order if administrative orders alone are not sufficient to achieve the purpose of the AMA.

Mergers

A total of 266 merger notifications were made in FY 2020. The JFTC cleared 258 cases without a Phase II review and, of those, the 30-day waiting period, during which the notified transaction cannot be closed, was shortened in 199 cases. Of the 266 cases, only one transitioned to a Phase II review.

Mergers, business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) require prior notification under the AMA where they will exceed certain thresholds, even in some cases of foreign-to-foreign mergers between companies that have no Japanese subsidiary or branch office in Japan, which may have a significant negative impact on competition in the Japanese market.

The JFTC amended its Guidelines on Application of the AMA Concerning Review of Business Combinations (the Merger Guidelines) and Policies Concerning Procedures for Review of Business Combinations (the Merger Review Policies) on 17 December 2019 in response to the increasing necessity in recent years to properly deal with mergers in the digital and data markets. The amended Merger Guidelines and Merger Review Policies clarify the approach to

reviews of mergers in the digital sector where digital platform operators are involved, based on the characteristics of digital services, and also recommend parties to make a voluntary consultation with the JFTC, even if the planned transaction does not meet the notification thresholds under the AMA, in cases where the total consideration for the acquisition exceeds a certain amount and it will likely affect domestic consumers in Japan. In fact, the JFTC has intensively reviewed mergers involving digital platform operators in accordance with the amended Merger Guidelines and Merger Review Policies.

In August 2020, the JFTC approved the proposed business integration of digital platform operators Z Holdings Corporation (which owns Yahoo Japan Corporation) and LINE Corporation, subject to relatively moderate behavioural remedies. Economic analysis was used to review the transaction in this case in line with the recent trend of the JFTC to put importance on economic analysis in merger review.

In January 2021, the JFTC approved Google LLC's acquisition of Fitbit, Inc, subject to certain behavioural remedies. The transaction did not reach the mandatory notification thresholds due to the Fitbit's small sales amount in Japan. However, the JFTC still reviewed the transaction because of the large deal size and expected significant impact on Japanese domestic customers.

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Tatsuo Yamashima is a partner at Atsumi & Sakai, working primarily in the field of antitrust and competition law, government regulations, employment and human resources and other corporate legal affairs. He has assisted and represented many Japanese and foreign companies with antitrust cases and merger cases involving the JFTC, as well as authorities in many foreign jurisdictions. In particular, he has significant experience with leniency applications for the JFTC. He is ranked as a notable practitioner in relation to antitrust and competition law in Who's Who Legal (2020), Who's Who Legal: Japan (2020), Chambers Asia-Pacific (2021), The Best Lawyers in Japan (2022), Legal 500 Asia Pacific (2021), Asialaw Leading Lawyers (2021) and GCR Competition (2019). He is a graduate of the University of Tokyo (BA, 2002; LLM, 2004) and is admitted to the Bar in Japan. He worked in Brussels at the competition law group of a leading global firm in 2011 as a visiting foreign attorney.

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Saori Hanada is a partner at Atsumi & Sakai, working primarily in the fields of antitrust and competition law, employment law and other corporate legal affairs. She has advised major Japanese and multinational companies on various unfair trade practice issues, and represented Japanese and multinational companies in international cartel and merger cases. She is ranked as an up-and-coming practitioner in relation to antitrust and competition law in Chambers Asia-Pacific 2020 and is listed in Who's Who Legal Competition 2020, Who's Who Legal Japan 2020, Asialaw Leading Lawyers 2021, The Best Lawyers in Japan (2021) and GCR Competition 2019. She was admitted to the Japan Federation of Bar Associations in 2000 and the New York State Bar in 2012. She graduated from Waseda University (MA in political science) and obtained an LLM from Columbia Law School.

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The antitrust team at Atsumi & Sakai has acted as local counsel and as lead counsel on numerous multinational antitrust cases (some involving dozens of jurisdictions) and has significant experience in dealing with the Japan Fair Trade Commission (JFTC), the US Department of Justice, The European Commission and other foreign regulators. The team, through full discussions with JFTC and other foreign regulators and relevant local lawyers, coordinates the many conflicting and complex legal issues of each local law and practice to guide the clients to the most effective global solution.

The team handles many international cartel investigations and private enforcements and extradition issues as well as international and domestic merger controls. Also, we see an increase in cases regarding the domestic and international business alliances among competitors, in various industries, including in particular the pharmaceutical industry.

Recently we have seen a sharp increase in consultation and advice for vertical restraints, including restraints on distribution, resale price maintenance and discounting, and also abuse of dominant bargaining positions including request for rebates or disclosure of customer information in platform businesses. Some of this relates to preparation of responses to obligatory or voluntary sector searches made by the JFTC to the investigated parties or third parties.

In addition, Atsumi & Sakai provides advice on domestic or international compliance systems including systems for group subsidiaries and relevant internal training.

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