

Towards the Active Promotion of Competition Policy in response to Socioeconomic
Changes as represented by Digitalization

- Coordination and Strengthening of Competition Policy Advocacy and Law
Enforcement -
(Tentative Translation)

June 16, 2022

Japan Fair Trade Commission

1. Introduction

Japan's society and economy are experiencing swift and global changes as represented by digitalization. In this context, the "Basic Policy on Economic and Fiscal Management and Reform 2022," which was approved by the Cabinet on June 7 2022, noted, "To improve a competitive environment that promotes innovation and corporate growth responding to rapid socioeconomic changes, we will strengthen the advocacy functions of the Japan Fair Trade Commission to study areas where competition is not working due to trading practices and regulations and recommend improvements for trading practices and regulatory revisions." Furthermore, the "Grand Design and Action Plan for a New Form of Capitalism," approved by the Cabinet on the same day, noted, "There are strong expectations for the advocacy functions of the Japan Fair Trade Commission (JFTC) as DX and other social changes progress. In the past few years, the JFTC has conducted competition-related fact-finding surveys and advocacy regarding cell phone rates, interbank transfer fees, initial public offerings by startups, etc. However, systems will be developed to fundamentally strengthen its advocacy functions."

In dealing with trade practices, regulations and systems considered to be problematic under the Antimonopoly Act (hereinafter referred to as AMA) and competition policy and to impede innovation by enterprises, the following measures will play an important role: measures, for instance, to facilitate enhancement of a competitive environment through advocacy recommending improvements in trade practices and review of regulations and systems, as well as eliminating violations to restore competition through strict and appropriate enforcement of the AMA.

Based on the basic understanding stated above, and in light of the content of the above Cabinet Decisions, the JFTC will now intensify its efforts with a focus on enforcement and advocacy as the two wheels of a cart, to strengthen its organization-wide response to changes in society and economy as represented by digitalization, as

follows:

- The JFTC will clarify the basic view on the role, the target fields, the implementation methods, etc. of the fact-finding survey, to promote public understanding and cooperation for fact-finding surveys. Also, the JFTC will strengthen the effectiveness of advocacy through providing an easy-to-understand explanation in releasing and disseminating survey results, and preventing future malpractice of relevant enterprises by encouraging voluntary improvements, which will be inspired by requesting them to execute inspections and improvements as necessary.
- The JFTC will promote coordination of advocacy and enforcement.
- The JFTC will strengthen its enforcement against digital platform operators' alleged violations of the AMA, for instance, with diversified information-gathering tools, such as seeking information and comments from the public by releasing a case summary of the investigation.
- The JFTC will systematically strengthen its organization and increase staffing levels to appropriately implement these measures stated above.

2. Strengthening the effectiveness of advocacy

In order to promptly and appropriately respond to rapid social and economic changes and to strengthen competition policy, the focus should be placed on advocacy that facilitates improvements by relevant authorities and enterprises, etc., through plainly pointing out problems and issues under the AMA and competition policy in relation to new challenges in various fields, then presenting ideas and ideals on such issues in a straightforward manner. This will contribute to creating an appropriate competitive environment that encourages innovation and growth of enterprises, thereby for instance, fundamental reforms of the socioeconomic structure, which may lead to enhancing the interests of general consumers.

To achieve this goal, it is required to make the necessity of competition policy penetrate ever wider society through closer collaboration with the relevant authorities, and better understanding among local governments, relevant enterprises and the entire nation.

Concerning this regard, the JFTC will strengthen the effectiveness of its advocacy through active dialogue and strategic collaboration with relevant authorities, persuasive proposals, effective dissemination, timely and appropriate follow-up, and so on. To this end, regarding advocacy through fact-finding surveys, the JFTC will seek broad understanding and cooperation for fact-finding surveys by clarifying its basic

views on the role, target fields, and implementation methods of fact-finding surveys as follows:

(1) Role, etc. of fact-finding surveys

Although fact-finding surveys are not necessarily an essential precondition for advocacy, it is necessary to accurately grasp business activities, economic realities and other elements of each industry and sector for the sake of adequate implementation of advocacy. The JFTC has actively conducted various fact-finding surveys in the past as well; based on the facts, etc. found through the surveys, the JFTC releases reports and guidelines and identifies problems and issues under the AMA and competition policy, and hence, encourages relevant enterprises and trade associations to voluntarily improve their trade practices and recommends a review of regulations and systems to the relevant authorities; it is one of the important pillars of advocacy activities to improve a competitive environment through these activities. In addition, if the problems under the AMA pointed out in the reports and the guidelines are not improved voluntarily and any conduct is found to fall under the violation of the AMA, the conduct concerned is to be eliminated through enforcement; in this respect, another important role of the fact-finding survey is to improve the overall capacity of the JFTC; for instance, the JFTC is able to apply to enforcement the knowledge from latest findings and analysis results obtained through fact-finding surveys.

(2) Target fields for fact-finding surveys

In selecting the target fields for fact-finding surveys, the JFTC will proactively gather information on fields in which fair and free competition needs to be promoted further in view of socioeconomic conditions and other factors by interviewing relevant parties including the relevant authorities. Examples of the fields concerned are as follows:

- (i) Fields in which competition is considered insufficient due to certain regulations, trade practices, etc.;
- (ii) Fields in which regulatory reform is expected to expand the number of new entrants and intensify competition in the future;
- (iii) Fields in which consumers and small and medium-sized enterprises may be unfairly disadvantaged;
- (iv) Fields that require prompt comprehension of the current competitive situation and establishment of competition rules due to rapid changes in the market, such

as the digital market.

The focus is placed on conducting fact-finding surveys in fields in which problems and issues under the AMA and competition policy exist, and the JFTC's advocacy seems effective in promoting fair and free competition. In addition, in order to enhance the effectiveness of advocacy functions in fields where fact-finding surveys have been conducted in the past, the JFTC will monitor their conditions thereafter and periodically conduct fact-finding surveys on the same target fields as necessary.

(3) Method, etc. for conducting fact-finding surveys

In conducting fact-finding surveys, the JFTC uses various methods including sending questionnaires to the relevant enterprises, etc., holding interviews, and conducting an economic analysis based on the information collected. With respect to questionnaires, etc., the relevant enterprises, etc. are normally asked to respond on a voluntary basis. However, in case information-gathering through voluntary surveys is difficult, the JFTC exercises its investigation power under Article 40 of the AMA¹ to the extent necessary and reasonable to achieve the purpose of the survey concerned².

(4) Release and dissemination of survey results

When releasing and disseminating the survey results, the content will be communicated in an easy-to-understand manner by clarifying the background of the fact-finding survey and awareness of the issues.

Coupled with the release of the fact-finding survey report, a commentary on the report will be provided to the relevant authorities and enterprises, etc. Also, the JFTC will directly or through relevant authorities request the relevant trade associations to disseminate the content to member enterprises, and ask relevant authorities, enterprises and trade associations to take the necessary steps (review of systems and

¹ Article 40 of the AMA states, "The JFTC may, if necessary for the performance of its duties, order public offices, juridical persons formed by special laws and regulations, enterprises or organizations of enterprises, or their personnel to appear before the JFTC, or require them to submit necessary reports, information or materials.":

The Act states that a person who violates the measures pursuant to the provisions of Article 40 shall be punished by a fine of not more than three million yen (Article 94-2 of the AMA).

² For example, there are some cases where though the party is not able to respond to a voluntary reporting request due to the existence of a confidentiality agreement, or their internal regulations, etc., do not allow the provision of information held in response to a voluntary reporting request, the same party can provide an answer in the face of report orders with mandatory power.

operations, correction of trade practices). Furthermore, based on expectations for effects such as an early response to concerns associated with the AMA and competition policy and the enhancement of compliance by the relevant enterprises, the JFTC issues a request in writing, etc. to individual relevant enterprises to institute inspections and improvements and report back on the details of improvements, as necessary³. These measures are designed to promote voluntary improvements, etc. in trade practices by the relevant enterprises, etc., and to prevent violations of the AMA or the Subcontract Act.

In addition, the JFTC makes timely publicity campaigns on socioeconomic changes affected by advocacy, including the revision of systems and regulations that reflect the survey results and the status of improvements in trade practices⁴.

3. Promoting coordination between advocacy and enforcement

The JFTC will use the fact-finding survey to encourage parties to provide information on concrete facts that may constitute a violation of the AMA; specifically, when collecting the responses to questionnaires, etc. from enterprises subject to the fact-finding survey, the JFTC will encourage the enterprises to provide information with questionnaires, etc. stating the contact information for reporting such facts. In addition, the questionnaires, etc. will note clearly that the information collected in the fact-finding survey could be used by a law enforcement department, if there is such a possibility. Even in the absence of such a description, the JFTC obtains the consent of the person who provides the information for its use by a law enforcement department if the information provided during the survey is on concrete facts concerning a

³ As a concrete example, in the “Issues Concerning Competition Policy in the Mobile Phone Market” (published on June 10, 2021), the JFTC requested three MNOs to institute inspections and improvements based on the AMA and competition policy approach as presented in the report. In response, the three MNOs implemented measures such as revision in their method of providing purchasing support programs for devices and elimination of the repurchase obligation for devices. Also, the three MNOs reported to the JFTC the results of their inspections and improvements concerning their purchasing support programs and transactions with sales agents.

In addition, in its “Report on fact-finding survey on transactions between the headquarters of convenience stores and their franchisees,” (published on September 2, 2020), the JFTC informed each of the headquarters of the results of the questionnaire survey and pointed out potential problems under the AMA including the mandatory purchase quota. The JFTC requested each of the headquarters to immediately institute its voluntary inspection and improvement based on the report, and to report back on the inspection result and improvement. This action led each of the headquarters to voluntary improvements, including revision in their systems and progressing clarification on internal rules to prevent order without authorization by its franchisees.

⁴ The JFTC posts on its website information on advocacy activities conducted and released in recent years. Reference: <https://www.jftc.go.jp/dk/advocacy/index.html> (In Japanese)

suspected violation of the AMA.

Regarding enforcement, the JFTC actively utilizes the information provided through the above efforts in the fact-finding surveys; when it is confirmed that the violation of the AMA is suspected based on the information concerned, the JFTC will conduct the case investigation of an alleged violation of the AMA; as such, seamless transition from the fact-finding survey to the enforcement of individual cases will be realized. The possibility of enforcement as described is expected to further enhance the effectiveness of advocacy, as it promotes voluntary improvements by the relevant enterprises, etc. through fact-finding surveys.

4. Strengthening enforcement

The JFTC has proactively tackled violations of the AMA to respond promptly and appropriately to rapid changes in society and economy as represented by digitalization and to promote fair and free competition in the digital markets, etc. While strict law enforcement, as represented by cease and desist orders and surcharge payment orders, remains the bedrock of its policy, it is important to correct competition-associated issues at an early opportunity, especially in consideration of the nature of the complex and rapidly changing digital market. Accordingly, in line with the characteristics of individual cases, the JFTC has worked to restore competition in a prompt and flexible manner through commitment procedures introduced in December 2018 and voluntary submission of remedial measures based on communication with the relevant enterprises subject to investigation. The measures adopted through these cases include effective steps, different from conventional cease and desist orders, such as the restoration of monetary value.

The JFTC also conducts prompt and appropriate merger reviews based on the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” and the “Policies Concerning Procedures of Review of Business Combination”, which were amended in December 2019.

In addition, the JFTC will strengthen its information-gathering capacities from now on to step up the detection of suspected violations of the AMA and to conduct merger reviews, in the digital markets, etc.; in parallel, the JFTC will use accurate analysis in consideration of the unique structure, etc. of the digital market to identify their impact on competition, etc.; to this end, the JFTC will launch the measures outlined below to promote strict and appropriate enforcement.

(1) Request for information and comments pertaining to individual cases

So far, the JFTC has not released the details on the individual investigation cases before it takes legal measures (or completes its investigation), in consideration of its impact on the case investigation and the relevant enterprise(s).

Nonetheless, as the transactions and business models of digital platform operators are often disclosed and made public, the JFTC believes that the impact on the investigation activities, etc. by releasing information on the investigation of individual cases which suggests possible competition concerns about their activities, would not be as significant as in the case of cartels and bid rigging, etc. which are conducted in secret. Rather, the actions of such digital platform operators often have a multifaceted and extensive impact, which points to the necessity of collecting diverse information from enterprises, etc. in a wide range of areas to conduct an accurate analysis of their impact on the market.

Therefore, when efficient and effective information-gathering is required in a case that involves a digital platform operator, etc. the JFTC will release a summary of the case and seek information and comments from a wider range of third parties, even in the early stages of the case investigation, after carefully comparing and weighting the impact of the release on investigation, etc. In such cases, after notifying the relevant enterprise subject to the investigation in advance about the public announcement and request for information/comments, the JFTC will reveal (1) the name of the enterprise subject to the investigation and (2) the summary of the alleged violations.

As for the merger review in which the secondary investigation opens, the JFTC has announced its intention to seek comments from third parties and requested comments from the public to coincide with the opening of the secondary investigation. However, when the JFTC deems it necessary to seek comments from a wider range of third parties in merger review cases, in view of the complex and rapidly changing market conditions primarily in the digital market, it will announce its intention to seek comments from third parties and solicit information and comments as necessary, regardless of whether or not the secondary investigation opens.

(2) Exercise of investigation power under Article 40 of the AMA

The JFTC usually collects information with voluntary methods when determining whether to open an investigation into an alleged violation of the AMA. When it is difficult to collect information using voluntary methods, however, the JFTC will exercise investigation power under Article 40 of the AMA to the extent necessary and reasonable to achieve the purpose of the relevant information collection. From now

on, also in the process of merger reviews, the JFTC will exercise, as necessary, investigation power under Article 40 of the AMA to the extent necessary and reasonable to achieve the purpose of the relevant review.

(3) Utilization of internal documents in merger review

Learning the accurate facts related to the relevant merger is crucial in conducting a prompt and appropriate merger review. Accordingly, the JFTC may request reviewed parties and stakeholders to submit internal documents. In particular, mergers in the rapidly changing digital market require the identification of several factors, such as the intent and objective of the parties concerned behind the planned merger, their projection on the impact of the merger on various stakeholders including users and competitors, and those on the future of the market; in conducting merger reviews, the JFTC, therefore, will require the submission of internal documents, including materials from the board of directors' meetings and materials related to internal competition analysis, from the initial stage of the review⁵.

(4) Utilization of economic analysis

In the past, the JFTC has utilized economic analysis in enforcement including merger reviews. Working together with the Economic Analysis Office⁶, from now on, the law enforcement department will use more sophisticated economic analysis to identify the impact of the alleged violation of the AMA on competition and the effectiveness of measures, among others.

5. Systematic reinforcement of the organization and increasing staffing levels

As described above, the promotion of competition in the digital market and other areas requires active execution of enforcement and advocacy, as well as further promotion of their coordination. And, in executing enforcement and advocacy, it is also important to steadily promote collaboration with competition authorities in other countries and relevant authorities. The proper implementation of these measures

⁵ As it seeks the submission of internal documents, the JFTC plans to compile and separately announce its policies concerning procedures of requesting the submission of internal documents to contribute to smooth exchanges between the JFTC and the enterprise concerned and stakeholders.

* The JFTC released “Practices of the Japan Fair Trade Commission concerning the submission of internal documents in review of business combination” on June 22, 2022.

Reference: https://www.jftc.go.jp/en/policy_enforcement/mergers/index_files/internal_documents.pdf

⁶ On April 1, 2022, the JFTC established the “Economic Analysis Office” to strengthen its structure for conducting high-quality economic analysis that can serve as a foundation for the enforcement of competent laws and policy planning.

requires systematic and focused reinforcement of the organization and an increase of staff of the JFTC in the areas of digital, economic analysis, investigation technology such as forensics, merger reviews and so on. This calls for qualitative enhancement, such as the expansion of the personnel base for specialized knowledge, including the use of specialized personnel, coupled with quantitative enhancement, such as a drastic upgrade of the organization and personnel. The JFTC will endeavor to secure and enhance the necessary personnel and the organization, whilst obtaining the understanding of relevant parties.