

...with Kazuyuki Furuya

Chairman, Japan Fair Trade Commission (JFTC)



CPI Talks...

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In this month's edition of CPI Talks... we have the pleasure of speaking with Mr. Kazuyuki Furuya, Chairman of the Japan Fair Trade Commission ("JFTC").

Thank you, Chairman Furuya, for sharing your time for this interview with CPI.

- 1. The JFTC, on November 27, 2020, published its final report on the survey conducted on trade practices involving startup companies. What are the key conclusions of this report? Specifically, what unfair practices have been identified, and what enforcement actions does the JFTC envision taking?**

To promote fair and free competition in the business activities of start-ups, the JFTC conducted a fact-finding survey to grasp the current status of their business practices in a wide range of industries such as the manufacturing industry. The JFTC released the final report on start-ups' business practices on November 27, 2020.

As a result of the survey, the JFTC found several forms of business conduct that could lead to violations of the Antimonopoly Act ("AMA"), including the following:

- Collaborators and investors requesting start-ups to disclose trade secrets without Non-Disclosure Agreements;
- Collaborators requesting start-ups to conclude agreements enabling collaborators to benefit exclusively from intellectual property rights based on the outcome of joint research; and
- Collaborators requesting start-ups to provide licenses for intellectual property rights free of charge.

The JFTC, collaborating with the Ministry of Economy, Trade and Industry, enacted and released guidelines regarding business

collaborations between start-ups and collaborators to show model forms of contracts between them.

The JFTC will make the guidelines well known to enterprises, and the JFTC hopes that this will contribute to preventing possible violations of the AMA. The JFTC will enforce the AMA appropriately, based on the guidelines.

- 2. Specifically, a particular aspect of Japanese competition law relates to so-called "abuse of superior bargaining position." Recently, the JFTC entered into a commitments decision with Amazon Japan under these rules. Please outline the nature of this settlement, and its significance for online commerce platforms. Does the JFTC envisage making further use of this mechanism in this sector?**

The JFTC considered that the conduct of Amazon Japan, a Japanese entity of Amazon, requesting suppliers to lower their prices or demanding money would constitute an abuse of a superior bargaining position such as is prohibited by the AMA. This case was resolved through the commitment procedure. Amazon Japan returned total of approximately 2 billion yen (circa 20 million U.S. dollars) to about 1,400 suppliers.

This case is of importance as not only Amazon Japan took measures that would be normally ordered by cease and desist orders, but also the suppliers were able to restore their monetary damage. Moreover, regarding cases related to the digital field, I am convinced that disposing of cases quickly and effectively by the commitment procedure, such as was done in this case, is also of great significance.

- 3. The 2019 amendments to Japan's Anti-Monopoly Act, including**

revisions to the “surcharge” (or administrative fine system), and changes in rules relating to attorney-client privilege, recently entered into full effect. What are the key practical changes practitioners can expect to navigate under the new system?

The amended AMA was enacted in June 2019 and came into effect on December 25, 2020.

The surcharge system under the AMA before this revision could not always impose appropriate surcharges according to the actual gravity of the violation. This amendment to the AMA aims at further deterring hardcore cartels, revitalizing the Japanese economy and promoting consumer interests by promoting enterprises’ cooperation with the JFTC’s investigations and imposing appropriate surcharges and so forth.

The major revisions include the following:

- The introduction of the “Reduction System for Cooperation in Investigation” that allows surcharges to be reduced if enterprises submit documents etc. that contribute to revealing the case;
- The addition of elements to be taken into account when calculating surcharges, extension of the calculation period, and revisions to the calculation rate, such as abolishing the surcharge calculation rates by business type; and
- Increasing the maximum criminal fine against enterprises etc. obstructing investigations.

It must be noted that there are no Japanese laws or practices that have established or recognized so-called “Attorney-Client Privilege.” Judicial precedents in Japan are consistent with this position.

On the other hand, the revision of the AMA introduced the aforementioned reduction system taking the degree of enterprises’ cooperation in the JFTC’s investigation into account. In response to this revision, I assume that the need for enterprises to consult with independent attorneys in order to effectively

cooperate with the investigation is likely to increase.

Therefore, at the same time the amended AMA came into force, based on the JFTC’s rules, the JFTC introduced “Determination Procedures” to allow the new leniency program to function more within the JFTC’s administrative investigation process.

The Determination Procedures mean that the JFTC will return to the enterprise objects recording the contents of the confidential communications between an attorney and the enterprise about a possible violation of the AMA which is subject to the leniency program, without the investigators viewing the contents of the objects, if certain conditions (e.g. that they are appropriately stored), are met.

I am firmly convinced that the procedures will allow the new leniency program to function more effectively and substantially protect confidentiality on legal opinions regarding enterprises’ consultations with external attorneys, and thus is of significance to secure due process in the context of the AMA.

4. How has the JFTC adapted its practices in light of the COVID-19 pandemic? Has the JFTC modulated its practices as regards rules relating to, e.g. distribution of essential goods, merger notifications, or other aspects of its enforcement regime? What lessons can the JFTC derive from this experience, and what lessons can it share with other enforcers worldwide?

Japanese enterprises and their businesses have been affected by the global spread of the COVID-19. Given this background, the JFTC has implemented various initiatives including but not limited to the following:

Firstly, the JFTC released “Questions and Answers regarding the relationship between the enterprises’ correspondences against the COVID- 19 and the AMA” to deal with business practices where retailers set unduly high price

for masks and other products. This Q&A clarified that makers' instructions against retailers to set maximum retail prices for products such as masks, for the purpose of preventing retailers from setting undue high prices, would not violate the AMA because consumers basically benefit from those prices, and thus there is a legitimate reason for the instructions, provided that the period of those instructions is limited.

Secondly, on March 10, 2020, the Chairman of the JFTC, the Minister of Economy, Trade and Industry, and the Minister of Health, Labor and Welfare requested enterprises which do business with sole proprietors and freelancers to take their status or circumstances into account, given that contractors may prefer to alter their contracts with sole proprietors and freelancers in light of COVID-19.

Thirdly, the JFTC abolished the rule requiring enterprises to stamp filing documents, and allowed enterprises to file documents related to mergers and acquisitions via email.

5. What has the JFTC learned from its international outreach to other enforcement bodies? The JFTC regularly conducts training sessions for other Asian competition enforcers, and recent publications underline the cordial relations between the JFTC and other international enforcers such as the EU Commission, and the Australian ACCC. How will the JFTC's practice in this regard develop going forward?

As more and more enterprises operate internationally due to the rapid globalization of the economy in recent years, competition authorities are facing an increasing need for cooperation with each other in the area of law enforcement, such as in investigating

international cartels and reviewing international mergers.

As you have pointed out, the JFTC, in collaboration with Japan International Cooperation Agency (hereinafter referred to as the "JICA") and other bodies, has implemented various forms of technical assistance to respond to requests by some competition authorities in East Asia. For example, from February to March of 2021, the JFTC, cooperating with the JICA, held online training courses for those competition authorities, explaining investigation procedures under the AMA, methods of review for mergers and acquisitions, the JFTC's initiatives on international cooperation and so forth. I think that those initiatives contribute to building good relationships and mutual understanding, as well as optimizing law enforcement in East Asian countries.

In addition, regarding cooperation between the JFTC and other competition authorities, I have had online bilateral meetings with Margrethe Vestager, the EC's Executive Vice-President, Rod Sims, Chair of the Australian ACCC, and Andreas Mundt, President of the German Bundeskartellamt, exchanging information on recent developments. Further, JFTC officials also have had online meetings with officials of other competition authorities regarding individual investigations or merger cases including digital related matters.

Furthermore, regarding international cooperation among competition authorities through multilateral frameworks, the JFTC has actively been involved in several multilateral organizations such as the OECD and the ICN. The JFTC is currently leading the work of the ICN's Unilateral Conduct Working Group as a Co-Chair.

The JFTC will continue to contribute to facilitating international cooperation among competition authorities through bilateral and multilateral channels.