

**GAL COMPETITION WORKSHOP, JAPAN PRÉCIS**  
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**Institutional Structure**

Government enforcement of Japan's Antimonopoly Act (AMA) is done by a single agency, the Japan Fair Trade Commission (JFTC).

The AMA was originally enacted in 1947 at the prodding of U.S. Occupation authorities and the JFTC was designed to follow the model of the U.S. Federal Trade Commission. Thus the JFTC's structure, at least with regard to civil enforcement, follows the "integrated agency model." That is, the Commission investigates violations of the Act, proposes remedial orders ("cease and desist" orders), holds hearings in disputed cases with regard to whether there is a violation, and decides whether there is sufficient evidence to support a finding of a violation and the entry of the remedial order. The Commission follows a similar process for those cases in which it has authority to impose an administrative surcharge (a form of administrative fine).

Certain violations of the AMA can be prosecuted criminally. Criminal offenders are subject to jail or a fine; individuals and business firms can be prosecuted. Unlike the U.S. FTC, however, the JFTC has authority to investigate criminal violations. It does not have the power to prosecute, however, but must refer cases to the Public Prosecutors' Office (PPO). Criminal prosecutions for violation of the AMA cannot occur without a JFTC referral; and the PPO must report to the Minister of Justice if it declines to prosecute a case the JFTC has referred. Thus for criminal enforcement, the JFTC follows a limited version of the "bifurcated judicial model."

The JFTC was structured with some degree of independence, at the insistence of the U.S. Occupation authorities. The JFTC is "administratively attached" to the Prime Minister's Office (it is now under the jurisdiction of the Cabinet Office) rather than being part of a separate Ministry. Under the AMA the JFTC is statutorily guaranteed independence; its Chairman and four Commissioners are appointed by the Prime Minister with the approval of both Houses of the Diet; and the Chairman and Commissioners serve for fixed terms.

Private parties can obtain injunctive relief and damages for violations of the AMA. Damages are single and attorneys' fees are not awarded to the plaintiff. Private suits under the AMA cannot be filed until the JFTC enters a "final and binding" cease and desist order. Suits are tried by a special panel of the Tokyo High Court, rather than by a court of general jurisdiction. Injured parties can avoid the procedural restrictions of the AMA, however, by filing suit under the general tort provision of the Civil Code. It is well established that the "unlawful conduct" covered by that provision includes conduct that violates the AMA. There are very few successful private suits brought under the AMA; most successful suits challenging anticompetitive behavior have been brought under the Civil Code or other statutes related to government bid-rigging.

## **Mandate**

Competition policy in general: The JFTC, the single competition authority under the AMA, has the power to police all kinds of anticompetitive conduct: horizontal and vertical agreements, exclusionary conduct, a kind of exploitative abuse (so-called abuse of superior bargaining position (ASBP)), and mergers and acquisitions (hereinafter “mergers”). The objectives of the AMA are similar to those of other jurisdictions.

Non-merger regulation: Statutory provisions for non-merger regulation consist of two layers: Unreasonable Restraint of Trade and Private Monopolization following U.S. Sherman Act on one hand, and Unfair Trade Practices following U.S. FTC Act on the other. Those two layers are covered by a single agency. The significance (if any) of Unfair Trade Practices is its “incipiency doctrine”, which enables the JFTC to easily issue cease and desist orders, although without administrative surcharge. Unfair Trade Practices omits horizontal agreements, probably because hard-core cartels do not need the “incipiency doctrine”. One of the most important characteristics of Unfair Trade Practices is that it includes ASBP, a kind of exploitative abuse. The JFTC tends to apply the provision to exploitation of small and medium sized enterprises under political pressure, although it makes clear that the provision can be applied also to exploitation of large companies.

Merger regulation: AMA’s merger regulation consists of two areas: regulation of anticompetitive merger and regulation of excessive concentration of economic power. The latter is related to post-war policy and is not so much emphasized today. The former is very similar to those of other jurisdictions.

Exemptions: The JFTC can apply the AMA to regulated industries absent explicit exemptions. Currently there are few exemption provisions, which are not so important. The major remaining exemption is for RPM for newspapers, books, magazines and music CDs.

Consumer Protection: The JFTC formerly had the power to enforce the Act Against Unjustifiable Premiums and Misleading Representations (AUPMR), which was a derivative statute of the AMA, but in 2009 it gave the power to the new Consumer Affairs Agency (CAA).

## **Due Process Norms**

Merger cases: The JFTC has almost never issued an official order in connection with a merger case. The lack of actual cases does not necessarily mean that the JFTC merger regulation does not function at all. Rather, through a system of informal pre-merger consultations, it is thought that the JFTC has deterred some mergers and achieved some restructuring in others to meet its competition concerns. Many stakeholders have been criticizing the consultation system for lack of transparency and exclusion, to some or much extent, of third party viewpoints.

Because merger cases are not actually subject to formal enforcement, the following discussion applies only to non-merger cases.

Investigation: The current investigatory system has been criticized for exclusion of attorneys' presence at interrogation and lack of attorney-client-privilege, among others.

Decision and adjudication: The JFTC orders cease and desist and/or administrative surcharge, when applicable. Recently, there have been interesting debates on an adequate scheme for order and adjudication, including appeal to the courts. Three alternatives can be found in recent Japanese history.

- Pre-2005: JFTC hearing before JFTC order. With respect to appeal to the court, same scheme with post-2005 was applied.

- Post-2005: JFTC hearing after JFTC order. Tokyo High Court reviews JFTC hearing judgment constrained by substantial evidence rule.

- 2010-proposal: JFTC hearing would be abolished. Tokyo District Court would review JFTC order de novo, i.e. without substantial evidence rule. (The 2010-proposal is pending at the Diet as of February 2011.)

Background: The 2005 Amendment was very favorable for the JFTC, which wanted to be able to enter an enforceable order as soon as possible. Those who have opposed JFTC's concentrated power, including business community and most competition lawyers, support the 2010-proposal.

Evaluation factors: Supporters for JFTC hearing emphasize expertise and neutrality of the JFTC. Supporters for 2010-proposal doubt whether competition law expertise really distinguishes competition law from other areas of law so much as to justify such a specialized scheme, and also whether JFTC hearing is really so neutral.

Equality and Non-discrimination: It seems there are few points to be discussed.

Proportionality of Remedies: There are few points to be discussed about cease and desist order. With respect to surcharge order, there are some. Japanese surcharge has at least two features in fear of being regarded as unconstitutional in light of double jeopardy (because a hard-core cartel may be also subject to criminal fine). First, surcharge must be non-discretionary. It has made surcharge "foreseeable" but prevented the JFTC from flexible scheme setting and enforcement. Second, surcharge must be linked to actual turnover in the relevant market. In an international market division case, for example, those foreign companies which promised not to sell in Japan may be subject to cease and desist order but would not have to pay surcharge because they did not raise any actual turnover. The second point may be a factor for finding under-deterrence in Japanese surcharge.

## **Institutional Performance Norms**

Operational efficiency in case handling: The JFTC is a large agency, roughly the size of comparable competition agencies in the U.S. and EU. The JFTC exhibits a fairly high level of activity in various areas (for example, it investigated 152 suspected non-merger AMA violations in FY 2009 and completed 130 of them). Although it appears to

investigate most cases rather efficiently, it has encountered more difficulties with international cartels. Adjudications can take from two to five years to complete; whether this is “too long” or not depends on the complexity of the case, which is difficult to evaluate. The JFTC’s merger reviews depend heavily on pre-merger informal consultations. Although the Commission claims to resolve these consultations within the 30-day period required by its operations manual, in actual practice it takes far longer. The JFTC also devotes considerable resources to policing low prices in Japan’s economy, including the expedited resolution of complaints of “unjust low sales prices” (3225 “cautions” issued in FY 2009) and provides formal and informal consultations for a high volume of cases (3000 in FY 2009).

Expertise: FTC Commissioners are not required to have expertise in competition law. Chairmen have generally been alumni of the Ministry of Finance. One Commissioner has usually been a former Secretary General of the JFTC. JFTC staff is made up of career employees; historically and currently there have been few qualified lawyers or economists with advanced training at the JFTC. Of the six Hearing Examiners, four are legal professionals and two are JFTC employees.

Transparency: The JFTC has issued guidelines in many areas. These guidelines are important tools that allow the JFTC to clarify its interpretation of the AMA, something that is important in light of the lack of formal adjudications and case law. The JFTC receives a high number of complaints of violation of the AMA; for those that present specific facts, the JFTC notifies the reporter of their resolution but generally without giving reasons. There is no requirement that declinations be disclosed, but the JFTC does publish some information on formal consultations and merger reviews. The JFTC also has a program of increasing citizen awareness of competition law and the Secretary General holds a weekly press conference to discuss the progress of high-profile cases and explain the JFTC’s general enforcement approach.

Accountability: The JFTC is accountable to the Diet in a number of ways: budget approval, appointments of Commissioners, presentation of an annual report, and answering Diet member inquiries regarding specific enforcement decisions. The JFTC is also accountable to the courts, but the lack of formal decisions and the lack of party appeals to the courts have kept court review low. This may change in light of recent increases in the scope and amount of surcharge penalties or if the 2010 legislative proposals receive Diet approval.

Commitment to the Rule of Law: The JFTC measures up well on commitment to the rule of law as a formal matter, although the high number of informal consultations make it difficult to draw conclusions with regard to all its activities. Political considerations have played a part in shifts in competition policy over the past two decades, but there has been a high level of legislative involvement in these shifts, leading to important legislative changes to the AMA. As is true with other competition agencies, the JFTC sometimes receives political pressure with regard to decisions in particular cases. It is difficult to know how often this happens and what effect it has on specific enforcement policies and decisions.