

# Prospects for JFTC Competition Policies in 2020

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The 2019 Amendments to the Anti-Monopoly Act (“Amendments”) including revisions to surcharge system (*i.e.*, administrative fine system) will be fully in force within 2020.<sup>1</sup> Accordingly, so-called attorney-client privilege<sup>2</sup> will be introduced by then. Active developments will be expected to continue with respect to rules for the digital market that the Government of Japan is promoting.

## 1. New JFTC Secretary General

The “Commission” of the Japan Fair Trade Commission (“JFTC”) is comprised of Chairman Sugimoto and four Commissioners, and the “General Secretariat” is located under the Commission. Secretary General is the head of the General Secretariat, who manages and supervises the Anti-Monopoly Act (AMA) enforcement and competition policies in Japan.<sup>3</sup> As of January 15, 2020, former Secretary General Akinori Yamada has resigned and new Secretary General Shuichi Sugahisa took up the post. New Secretary General indicated that it is important for the JFTC to disseminate its view and efforts clearly to the public considering the situation where the economic environment has been changing substantially, including dramatic growth of the digital economy, in addition to enforcing competition laws and regulations strictly and appropriately.<sup>4</sup>

## 2. New guidelines with regard to the Amendments

The entire Amendments will be in effect no later than by December 25, 2020. After that date, the calculation method for surcharge (*i.e.*, administrative fine) will be changed (*e.g.*, base for surcharge will be expanded) and a reduction rate will be applicable in accordance with the company’s cooperation degree for a leniency application. The so-called attorney-client privilege will be introduced in the JFTC’s administrative investigation for unreasonable restraint of trade cases (*e.g.*, cartel and bid-rigging).

The JFTC will be issuing relevant rules and guidelines later this year. It apparently will issue drafts of those rules and guidelines in the spring to seek comments from the public. More specifically, it will prepare rules and guidelines with respect to (1) amendments to surcharge (*i.e.*, administrative fine) system, (2) reduction of surcharge (*i.e.*, administrative fine) in accordance with a cooperation degree by a

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<sup>1</sup> Parts of the Amendments have already been in effect (*e.g.*, provisions to exclude a situation where coincidental violating conduct has been ceased before a surcharge payment order for the first time, with respect to surcharge calculation).

<sup>2</sup> Tentative English translation of JFTC’s “Treatment of Attorney-Client Privilege” is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/190619072.pdf>

<sup>3</sup> Tentative English translation of JFTC’s organization chart is available at [https://www.jftc.go.jp/en/about\\_jftc/index\\_files/170919.pdf](https://www.jftc.go.jp/en/about_jftc/index_files/170919.pdf)

<sup>4</sup> The Minutes from the Briefing on January 15, 2020 is available only in Japanese at [https://www.jftc.go.jp/houdou/teirei/2020/jan\\_mar/kaikenkiroku200115.html](https://www.jftc.go.jp/houdou/teirei/2020/jan_mar/kaikenkiroku200115.html)

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leniency applicant, and (3) so-called attorney-client privilege. The drafts of those rules and guidelines will apparently be finalized by this summer after the JFTC reviews and considers public comments on the drafts.

### 3. Rules for the Digital Market

Upon Japan's Cabinet decision "Growth Strategies Action Plan" and "Growth Strategies Follow-Up" made on June 21, 2019, the JFTC issued new "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc." ("New ASBP Guidelines"),<sup>5</sup> amended "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" and "Policies Concerning Procedures of Review of Business Combination,"<sup>6</sup> and conducted market researches (e.g., Report regarding Trade Practice on Digital Platforms (Business-to-Business Transactions on Online Retail Platform and App))<sup>7</sup> last year.

Out of concern for anticompetitive influence by collection and/or usage of personal data as well as oligopoly triggered by data concentration, the JFTC initiated a market research in the digital advertising area at the end of last year, and, as such, the research apparently is ongoing. The interim report should be prepared by this spring. It will apparently discuss (1) structure, transparency and fairness of the digital advertising market, (2) anticompetitive conduct in the digital advertising market, and (3) transparency of collection and usage of personal data.

### 4. AMA Enforcement in the Online Platform Market

This year, in addition to continuing to enforce price cartels and bid-rigging that have substantial impact on people's lives, the JFTC will likely be active in enforcing unilateral conduct in the digital market, especially by an on-line platform operator in accordance with the new ASBP Guidelines (see paragraph 2 above) and market research reports (see paragraph 3 above) issued last year. The JFTC may actually apply abuse of superior bargaining position ("ASBP") to transactions with consumers for the first time in history.

Abuse of Superior Bargaining Position ("ASBP") is a type of prohibited single-firm conduct (e.g., private monopolization or unfair trade practices). ASBP is somewhat analogous to "abuse of a dominant position," but, unlike prohibitions on behavior by dominant firms, ASBP does not require market power. ASBP exists when a party in a relative superior bargaining position – as opposed to a dominant position – engages in abusive conduct that runs the risk of being an "impediment to competition." The JFTC has applied ASBP only to business-to-business transactions, but not to business-to-consumers transactions, although there is no such limit under the law.

Further, the JFTC may utilize commitment procedure (e.g., settlement without fines) more frequently in unfair trade practice cases including ASBP cases, which were introduced on December 30, 2018.

### 5. Digital Platform Transaction Transparency Act

On December 10, 2019, the Headquarters for the Competitive Digital Market of the Cabinet issued "Approaches to a bill on improving transparency of transactions of digital platform operators (provisional name)" ("Proposal") and sought comments from the public. The Bill is expected to be submitted to the ongoing ordinary Diet session in 2020. According to the Proposal, the Ministry of Economy, Trade and Industry ("METI") will mainly be in charge of maintaining the rules for the transactions, and will be coordinating with the JFTC and the Ministry of Internal Affairs and Communication ("MIAC").

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<sup>5</sup> Tentative English Translation of JFTC Press Release on December 17, 2019 is available at [https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217\\_DP.html](https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html)

<sup>6</sup> Tentative English Translation of JFTC Press Release on December 17, 2019 is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>

<sup>7</sup> Tentative English Translation of JFTC Press Release on October 31, 2019 is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html>

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