

JFTC and METI issued Guidelines for Business Collaboration with Startups

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On March 29, 2021, the Japan Fair Trade Commission (“JFTC”) and Ministry of Economy, Trade and Industry (“METI”) issued Guidelines for Business Collaboration with Startups (“Guidelines”) for the purpose of promoting open innovation and ensuring fair and free competitive environments.¹ The Guidelines are expected to further improve Japan’s competitiveness by fostering and utilizing human resources with challenging spirits, especially at startups.

In recent years, open innovation, where large companies cooperate with startups to create new value, has become important. Ensuring an environment in which startups can compete fairly and freely helps promote value creation through collaboration between startups and large companies.

At the Future Investment Conference held on April 3, 2020, the Cabinet of Japan discussed the policy for promoting open innovation and ensuring fair and free competitive environments. For the purpose of achieving innovation by business collaboration, it decided to prepare guidelines that outline problematic cases and proposed remedial measures and points of view under the Anti-Monopoly Act (“AMA”) to prevent startups from being required to make unilateral contractual arrangements with large companies. Accordingly, on July 17, 2020, the Cabinet of Japan made a decision that the JFTC and METI jointly prepare a draft of Guidelines and seek public comments.

Previously, the JFTC published an interim report about market research on startup business practices on June 30, 2020² and a final report (“JFTC Report”) on November 27, 2020.³ For this purpose, startups were defined as businesses engaged in business activities in growth industry areas that have been in business for around 10 years or less and are unlisted. In addition, on December 23, 2020, the JFTC and METI jointly proposed a draft of Guidelines⁴ and sought comments from the public. The Guidelines issued on March 29, 2021 stayed essentially

¹ The JFTC press release on March 29, 2021 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210329.html>; the Guidelines is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210329_2.pdf.

² Please see our previous Client Alert at <https://www.whitecase.com/publications/alert/interim-report-startup-businesses-practices-japan-fair-trade-commission>; the JFTC press release on June 30, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630.html>; the interim report is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630_2.pdf.

³ The JFTC press release on November 27, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease.html>; the final report is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_2.pdf.

⁴ The JFTC press release on December 23, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/dec/201223pressrelease.html>; the METI press release on December 23, 2020 is available only in Japanese at <https://www.meti.go.jp/press/2020/12/20201223005/20201223005.html>; a draft of

the same with the proposed Guidelines. Most of revisions are made for clarification, including adding a definition of start-ups and business collaborator respectively. Startup is an unlisted business operator engages in business activities in growth industry areas for around 10 years or less. Startups and Business Collaborators include foreign companies as well as public research institutions that conduct business.

As a result of those surveys, the JFTC found potential AMA violations where business collaborations are taking place with startups, as well as relationships of startups with their investors and with startups' competitors. With regard to business collaborations with startups, the JFTC Report categorized into five situations where potential AMA violations were found: (i) non-disclosure agreement ("NDA"), (ii) proof of concept agreement ("PoC"), (iii) joint research and development ("R&D"), (iv) license agreement, and (v) others (e.g., provision of customer information, payment reduction or delay, unilateral burden of liability for damages, restrictions on business partners and most favorable treatment conditions).

In accordance with the JFTC Report, the Guidelines identify four situations in chronological order; (i) NDA, (ii) PoC, (iii) joint R&D and (iv) license agreement, and show how contracts are supposed to be executed for business collaborations with startups.

Usually, an NDA shall be executed between parties of a business collaboration before exchanging confidential information to discuss the business collaboration. The next step would be PoC to verify the realization of functions, performance, and customer value envisioned through the business collaboration, and to determine whether it is possible to proceed to joint R&D. Then, a Joint R&D contract is executed between the parties of the business collaboration which shall provide rights of each party after the commercialization in addition to the roles and cost sharing of each party involved in joint R&D, and the attribution of intellectual property rights developed or acquired. At the time of negotiating a joint R&D contract, it may not be clear whether and/or to what extent patents held prior to the initiation of joint R&D and/or the results of joint R&D will be used, and a license agreement shall stipulate the conditions for licensing the use of intellectual property rights, whether technical information is to be provided, and the handling of improved technology.

For each situation, the Guidelines explain problematic cases that would arise, including potential AMA violations. In addition, they categorize backgrounds of those problems into three reasons; (i) lack of legal literacy by startups, (ii) lack of literacy about open innovation by either or both parties, and/or (iii) undesirable practices in promoting open innovation on the basis of equal footing, and suggest the direction for solutions.

For example, the Guidelines introduce a situation where a startup is required by its business collaborator to disclose its trade secrets without entering into an NDA, and suggest that it would violate the AMA as an abuse of superior bargaining position ("ASBP") when the business collaborator is in a superior position. The business collaborator is considered to be in a superior position in a case where a startup is coerced to accept a request that is significantly disadvantageous to the startup due to its concerns about the impact on future transactions, such as the termination of the business collaboration. Further, competitive influence (i.e., impediment to competition) is considered under the AMA when a violation of ASBP is found. More specifically, whether hindering startups from freely and voluntarily deciding on their own transactions, as well as whether there is a risk that startups will be at a competitive disadvantage in their relationships with their competitors while business collaborators will be at a competitive advantage in their relationships with their competitors are considered.

The Guidelines suspect that such a problem may be caused by any of or all of the three reasons mentioned above; (i) lack of legal literacy by startups, (ii) lack of literacy about open innovation by either or both parties, and/or (iii) undesirable practices in promoting open innovation on the basis of equal footing. Then the Guidelines state that it would be important for the parties to be on the same page regarding the purpose and scope of confidential information to be exchanged by and between each party and to enter into an NDA that is feasible for both parties. More specifically, the Guidelines suggest each party (a) organize what information shall be considered to be confidential information before the contract negotiations start in earnest, and (b) enter into an NDA that explicitly provides the purpose and scope of use of the confidential information.

Guidelines is available only in Japanese at
https://www.jftc.go.jp/houdou/pressrelease/2020/dec/201223pressrelease_2.pdf.

The Guidelines also refer relevant information including contract templates and manuals, such as “Model Contracts Ver.1.0 for Promoting Open Innovation between R&D-based Startups and Business Entities” that are available in English at https://www.meti.go.jp/english/press/2020/0630_002.html.

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