

COMPETITION IN DIGITAL MARKETS

Japan



Competition in Digital Markets

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Quick reference guide enabling side-by-side comparison of local insights into applicable legislation, enforcement authorities and regulatory guidelines; horizontal agreements; vertical agreements; unilateral anticompetitive conduct; merger control; and recent trends.

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LEGAL AND REGULATORY FRAMEWORK

Legislation

What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

The Antimonopoly Act (AMA), which is the standard competition law in Japan, applies to digital markets. There are also special rules from a procedural perspective in digital space as well. The Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), which came into force in 2021, stipulates special rules applicable to digital platform providers. For instance, the TFDPA obligates the designated digital platform providers to disclose certain information, such as trade terms and conditions and to secure fairness in the operation of digital platforms, among other things.

The TFDPA also enables the Minister of the Ministry of Economy, Trade and Industry to request that the competition authority, the Japan Fair Trade Commission (JFTC), should take appropriate measures under the AMA if it is found that designated digital platform providers may have engaged in conduct impeding the transparency and fairness of designated digital platforms, which constitutes unfair trade practices in violation of the AMA. It should be noted, however, that the TFDPA does not alter the substantive competition law and provides no exemption.

Law stated - 21 July 2023

Enforcement authorities

Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The JFTC enforces the AMA in digital markets in Japan. The JFTC has a dedicated investigation unit called IT Digital Task Force, established to investigate anticompetitive conduct related to information technology and digital markets. It has been active recently in the enforcement of the AMA in those areas.

Law stated - 21 July 2023

Regulatory guidelines

Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

Yes. The JFTC has issued 'Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc' (the Guidelines) on the application of the provision prohibiting abuse of a superior bargaining position to digital markets. Abuse of a superior bargaining position is one of the conducts categorised as unfair trade practices, which are prohibited under the AMA.

The Guidelines have clarified that the acquisition of personal information from consumers or use of the acquired personal information at the digital platform of a digital platform operator may constitute abuse of a superior bargaining position.

Historically, the regulation of abuse of a superior bargaining position has been applied to transactions between large companies and small and medium-sized companies, and it was not clear whether the regulation can be applied to the transactions between companies and consumers (individuals). In this regard, the Guidelines made clear that the transactions between companies and consumers are also subject to regulation under the AMA.

Law stated - 21 July 2023

Advisory reports

Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

The following advisory reports, in particular, have been prepared on competition law issues in digital markets:

- 'Report on Competition Policy for Data Markets', released on 25 June 2021, discusses various issues and challenges of competition policy in data markets.
- 'Report on Algorithms/AI and Competition Policy', released on 31 March 2021, discusses issues and challenges in competition law and policy in digital markets.
- 'Report on Business Alliances', released on 10 July 2019, discusses various issues concerning competition law and business alliances, including issues in connection with cross-industry data collaboration.
- 'Report on Data and Competition Policy', released on 6 June 2017, clarifies the issues of competition law and policy relating to the accumulation and utilisation of data.

Law stated - 21 July 2023

Advance compliance guidance

Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

Yes. There are two consultation procedures through which advance guidance can be obtained from the competition authority, the JFTC, before entering into an agreement or determining a pricing strategy. The first is 'Prior Consultation' (jizen-sodan), and the second is 'General Consultation' (ippan-sodan). While the parties must consent to their names, the details of the consultation, and the JFTC's guidance being disclosed to the public following the consultation under the Prior Consultation, they are not required to agree to public disclosure of that information under the General Consultation. The JFTC's guidance is provided orally under the General Consultation as opposed to being provided in writing under the Prior Consultation. The parties may choose between the two depending on their needs.

In both procedures, the parties need to provide the JFTC with information about the proposed project, including information on the parties involved, the details/purpose of the proposed project, and the parties' competition assessment of the proposed project, and respond to any inquiries that the JFTC may pose thereafter. The JFTC announces that it will provide its guidance in principle within 30 days following receipt of a complete set of necessary documents and information from the parties under the Prior Consultation.

Save for this general announcement, however, there is no clear timeline set for either procedure; the time for the JFTC's review and guidance varies from case to case. The companies usually take advantage of the non-disclosure nature of the General Consultation (the Prior Consultation is rarely used). The JFTC does not initiate an investigation on a proposed project that the JFTC has concluded would not raise competition issues through consultation procedures so that companies can rely on the guidance provided by the JFTC.

Law stated - 21 July 2023

Regulatory climate and enforcement practice

How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

The general enforcement approach of the JFTC toward digital companies is active. The approach that the JFTC has taken is to conduct and close its investigation through the recently introduced procedures aiming at a voluntary resolution where consent between the JFTC and companies is reached to address competition issues (the 'Commitment Procedures') in an expeditious manner without finding a violation of the competition law rather than conventional procedures leading to the imposition of administrative measures such as cease-and-desist orders or orders for payment of surcharges.

The JFTC has recently strengthened its enforcement activities and addressed suspected anticompetitive conduct in digital markets by including the Commitment Procedures as demonstrated in the following cases in the past three years:

- 'Approval of the Commitment Plan submitted by SCINEX CORPORATION/ Smartvalue' (published on 30 June 2022);
- 'Approval of the Commitment Plan submitted by Expedia Lodging Partner Services' (published on 2 June 2022);
- 'Approval of the Commitment Plan submitted by Booking.com' (published on 16 March 2022);
- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Rakuten Group' (published on 6 December 2021);
- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by UNIQUEST' (published on 2 December 2021);
- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Apple' (published on 2 September 2021); and
- 'Approval of the Commitment Plan submitted by Amazon Japan' (published on 10 September 2020).

In line with the JFTC's recent vigorous enforcement activities in digital markets, the JFTC announced in June 2022 that it will reinforce its enforcement activities with diversifying information collection tools, among other things, such as disclosing the overview of individual cases to the public when the JFTC opens investigation on digital platform providers and calling for information and comments from the public. The disclosure of the information in relation to the ongoing investigation is a major policy change in investigation tactics.

In addition, the JFTC recently used 'market survey' as one of the approaches to investigation. Market survey is not targeted to specific companies but rather focuses on specific industry/market. In terms of digital companies, the JFTC's recent market surveys include online mall and apps store (2019), digital advertisement (2020-2021), cloud services (2022), and mobile OS and apps distribution market (2023).

Law stated - 21 July 2023

HORIZONTAL AGREEMENTS

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets in your jurisdiction?

There are no special rules or exemptions applicable to horizontal agreements in digital markets in the competition law framework.

Law stated - 21 July 2023

Access to online platforms

How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

There is no published case where the competition authority has addressed horizontal restrictions on access to online platforms.

Law stated - 21 July 2023

Algorithms

Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

The Japan Fair Trade Commission (JFTC) has held the 'Study Group on Competition Policy in Digital Markets' to address issues and challenges on the Antimonopoly Act (AMA) and policy in digital markets in 2020. The JFTC released a report titled 'Algorithms/AI and Competition Policy' drafted by the study group following the discussion in the group in 2021.

According to the report, price fixing may be established through the use of an algorithm, even in a case where there is no explicit agreement between companies involved in relation to prices. For instance, if several companies understand how algorithms work, mutually recognise that they use an algorithm that coordinates prices, and use the algorithm, accepting that their respective prices are coordinated, a tacit agreement to coordinate prices between the companies may be found.

More precisely, if a number of competing companies use a price-setting algorithm offered by a single third party while mutually recognising that the use of such algorithm leads to price coordination, it can be considered that the companies have a common recognition that their prices are coordinated even without exchanging information directly or indirectly among those companies. This type of arrangement between companies may be regarded as price fixing, which constitutes an unreasonable restraint of trade in violation of the AMA. However, there is no published case where the JFTC has investigated this type of arrangement.

Law stated - 21 July 2023

Data collection and sharing

Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

There is no published case where the JFTC has investigated 'hub and spoke' information exchanges or data collection in the context of digital markets.

On a related note, however, the JFTC released a report titled 'Algorithms/AI and Competition Policy' drafted by a study group addressing issues and challenges on the AMA and policy in digital markets. As an example of 'hub and spoke' concerted practices, the report pointed out a theoretical possibility that a number of competing companies use an algorithm provided by the same third party (eg, a vendor of a price-setting algorithm) and the use of the algorithm leads to the coordination of their prices. For instance, if a number of competing companies ask a specific algorithm vendor to develop a price-setting algorithm to coordinate their prices and use the algorithm, the conduct may be qualified as 'hub and spoke' concerted practices and may be regarded as an unreasonable restraint of trade in violation of the AMA.

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

There is a notable case in relation to the application of competition law to horizontal agreements among news organisations in 2021. A news organisation asked operators of news portal websites to sign a contract with the news organisation for the provision of news headlines of the news organisation on their websites. The operators of news portal websites had posted news headlines of the news organisation without paying fees on their websites. The operators, however, refused to enter into the contract with the news organisation.

Given the refusal, the news organisation consulted with the JFTC on a contemplated scheme where the news organisation, jointly with other news organisations, requested that operators of news portal websites sign contracts with the news organisations before providing the news headlines on their websites. Under the contemplated scheme, the negotiation and conclusion of the contracts have been expected to be performed individually between a news organisation and an operator of a news portal website.

The JFTC gave the green light to the scheme because it did not constitute a violation of the competition law as the operators of news portal websites were not supposed to be requested to make contracts on the same trade terms, and the negotiation and conclusion of the contracts were anticipated to be conducted individually.

Law stated - 21 July 2023

VERTICAL AGREEMENTS**Special rules and exemptions**

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

There are no special rules or exemptions applicable to vertical agreements in digital markets in the competition law framework.

Law stated - 21 July 2023

Online sales bans

How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

The Japan Fair Trade Commission (JFTC) addressed absolute bans on online sales of contact lenses in the following cases in the past three years:

- 'Approval of the Commitment Plan submitted by Alcon Japan' (published on 26 March 2021);
- 'Approval of the Commitment Plan submitted by SEED' (published on 12 November 2020); and
- 'Approval of the Commitment Plan submitted by Cooper Vision Japan' (published on 4 June 2020).

In those cases, the JFTC opened an investigation on the suspicion that the companies, the sellers of daily disposable contact lenses, had engaged in 'trading on restrictive terms', which is a category of unfair trade practices in violation of the competition law, by requesting the retailers they traded with not to sell contact lenses on the internet to consumers even if consumers had a prescription issued for the contact lenses from doctors. The cases were ultimately closed without finding a violation of the competition law as a result of a voluntary resolution where consent between the JFTC and companies has been reached to address competition issues.

Law stated - 21 July 2023

Resale price maintenance

How has the competition authority in your jurisdiction addressed online resale price maintenance?

There is no published case where the JFTC has addressed online resale price maintenance in particular. Still, the JFTC will most likely address online resale price maintenance in the same way as conventional resale price maintenance in brick-and-mortar stores.

In this regard, 'Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act' make clear that the JFTC applies the competition law to transactions through the Internet and those in brick-and-mortar stores in the same way.

Law stated - 21 July 2023

Geoblocking and territorial restrictions

How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

There is no published case where the JFTC has addressed geoblocking (ie, restrictions on sales to customers in other countries).

As regards territorial restrictions generally, in the case where a company with more than 20 per cent of market shares in a relevant market assigns a specific area (presumably in Japan) to each distributor and restricts the distributor's active sales of the company's products to customers outside the assigned area, the restriction would constitute 'trading on restrictive terms', which is a category of unfair trade practices in violation of the competition law, provided that the restriction has price maintenance effects.

Likewise, in the case where a company, irrespective of the degree of its market shares, assigns a specific area (presumably in Japan) to each distributor and restricts the distributor's sale of the company's products to customers outside the assigned area upon such customers' request, the restriction would constitute 'trading on restrictive terms', provided that the restriction has price maintenance effects.

Law stated - 21 July 2023

Platform bans

How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

There is no published case where the JFTC has addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators.

Law stated - 21 July 2023

Targeted online advertising

How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

There is no published case where the JFTC has addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising.

Law stated - 21 July 2023

Most-favoured-nation clauses

How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

The JFTC has addressed most-favoured-nation (MFN) clauses in the following cases:

- 'Approval of the Commitment Plan submitted by Expedia Lodging Partner Services' (published on 2 June 2022);
- 'Approval of the Commitment Plan submitted by Booking.com' (published on 16 March 2022);
- 'Approval of the Commitment Plan submitted by Rakuten' (published on 25 October 2019); and
- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan' (published on 1 June 2017).

In those cases, the JFTC has opened an investigation on suspicion that the companies, such as online platform providers, have engaged in 'trading on restrictive terms', which is a category of unfair trade practices in violation of the competition law, by requesting their trading partners to deal with the companies on the most favourable terms.

The cases were ultimately closed without finding a violation of the competition law because of a voluntary resolution (where consent between the JFTC and companies has been reached to address competition issues) or a voluntary measure that has been taken to address the competition issues.

Law stated - 21 July 2023

Multisided digital markets

How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

The JFTC has addressed vertical restraints imposed in multisided digital markets in the same way as the other vertical restraints. In this regard, 'Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act' make clear that the JFTC applies the competition law to the conduct of providers of platforms (eg, online marketplaces and online travel booking services) toward users of their platforms in the same way as conduct of any other companies.

Law stated - 21 July 2023

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

There is a notable case in relation to the application of competition law to vertical agreements in digital markets in 2021. The JFTC has investigated Apple Inc on suspicion of having engaged in private monopolization and unfair trade practices (trading on restrictive terms) in violation of the Antimonopoly Act (AMA).

Apple has been suspected of restricting business activities such as selling digital content (eg, music, e-books and video) of companies (the developers) that distribute applications based on App Store Review Guidelines (the Guidelines) when Apple operates App Store where the developers distribute applications for iPhone. Based on the Guidelines, Apple has required developers to use the means of payment which Apple specifies (the IAP) for sales of digital content within applications and has charged developers a fee amounting to 15 or 30 per cent of sales through the IAP.

The Guidelines stipulated that developers were required to use the IAP for sales of digital content and prohibited from including external links or buttons within applications to induce consumers into purchase other than using the IAP. Against this backdrop, the JFTC pointed out to Apple that prohibiting developers from including an in-app link could constitute a violation of the AMA. As Apple took measures to allow developers to include an in-app link within reader applications of music streaming services, the JFTC decided to drop the case.

Law stated - 21 July 2023

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

Under the competition law in Japan, there is a concept, 'abuse of a superior bargaining position', similar to 'abuse of economic dependence' as seen in the European jurisprudence. Establishing a superior bargaining position does not require a dominant market position or a dominant bargaining position. It requires only a relatively superior bargaining position compared to the counterparty to the transaction between transacting companies.

Assuming that Party A has a business relationship with Party B, the existence of a superior bargaining position of Party B is determined by considering in a comprehensive manner the following:

- the degree of dependence by Party A on the transactions with Party B;
- the position of Party B in the market;
- the possibility of Party A changing Party B as its business counterpart; and
- other facts indicating the need for Party A to carry out transactions with Party B.

Law stated - 21 July 2023

Abuse of market power

To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

The categories of conduct that constitute 'abuse' include various activities such as coercing a transacting party into purchasing goods or services other than those pertaining to the transaction in question, compelling a transacting party to provide money, services or other economic benefits, refusing to receive goods from a transacting party, returning goods to a transacting party, delaying payment for goods or services to a transacting party and reducing the agreed price of goods or services without just cause.

In this regard, there are two notable cases that the Japan Fair Trade Commission (JFTC) has opened an investigation in digital markets. The first case concerns the JFTC's investigation of the suspected abuse of a superior bargaining position by Rakuten Group in 2021. Rakuten was alleged to have coerced merchants using Rakuten's online retail platform into assuming the cost of shipping to purchasers of goods in effect.

The second case concerns the JFTC's investigation of the suspected abuse of a superior bargaining position by Amazon Japan (Amazon) in 2020. Amazon has allegedly reduced the price of goods agreed with transacting parties and compelled transacting parties to provide money to Amazon, among other things.

In the context of transactions between consumers and digital platform operators, the following conduct performed by a digital platform operator may constitute abuse of a superior bargaining position under the 'Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc':

- acquiring personal information without stating the purpose of use to consumers;
- acquiring personal information against consumers' intention beyond the scope necessary to achieve the purpose of use;
- acquiring personal information without taking the precautions necessary and appropriate for the safe management of personal data;
- causing consumers in continuous use of services to provide other economic interests such as personal information in addition to the consideration provided in exchange for the use of services;
- using personal information against the intention of consumers; and
- using personal information without taking the precautions necessary and appropriate for the safe management of personal data.

Law stated - 21 July 2023

Data access

How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

There is no published case where the JFTC has addressed concerns surrounding access to data held by companies with market power in digital markets.

Law stated - 21 July 2023

Data collection

How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

'Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc' clarifies the following types of conduct performed by a digital platform operator that may constitute abuse of a superior bargaining position:

- acquiring personal information without stating the purpose of use to consumers;
- acquiring personal information against consumers' intention beyond the scope necessary to achieve the purpose of use;
- acquiring personal information without taking the precautions necessary and appropriate for the safe management of personal data; and
- causing consumers in continuous use of services to provide other economic interests, such as personal information, in addition to the consideration provided in exchange for the use of services.

Law stated - 21 July 2023

Leveraging market power

Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

No decision adopted by the JFTC involves theories of harm relating to leveraging market power in digital markets, such as tying/bundling or self-preferencing.

Separately, the JFTC has addressed theories of harm relating to leveraging market power in requesting exclusivity to foreclose competitors as follows:

- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by UNIQUEST' (published on 2 December 2021); and
- 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Minna no Pet Online' (published on 23 May 2018).

In those cases, the JFTC has opened an investigation on suspicion that the companies, such as online platform providers, have engaged in 'trading on exclusionary terms', which is a category of unfair trade practices in violation of the competition law, by requesting their trading partners not to use competing online platforms. The cases were ultimately closed without finding a violation of the competition law as a result of a voluntary resolution (where consent between the JFTC and companies has been reached to address competition issues) or a voluntary measure that has been taken to address the competition issues.

Law stated - 21 July 2023

Other theories of harm

What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

Other theories of harm have not been found to amount to abuse of market power in digital markets.

Law stated - 21 July 2023

MERGER CONTROL

Merger control framework

How is the merger control framework applied to digital markets in your jurisdiction?

There are no special rules or specific thresholds applicable to digital markets in the merger control framework. However, the recently introduced value-based thresholds for voluntary consultation, in which the parties are advised to consult with the Japan Fair Trade Commission (JFTC) on non-notifiable mergers when the total consideration for mergers exceeds 40 billion yen and non-notifiable mergers are expected to affect Japanese consumers, are said to target mergers in digital markets.

Law stated - 21 July 2023

Prohibited mergers

Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

The JFTC has not prohibited any mergers in digital markets.

Law stated - 21 July 2023

Market definition

How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

The JFTC amended the 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination' (the Merger Guidelines) in 2019. The Merger Guidelines have clarified what should be taken into consideration when the relevant product market and geographic market are defined in digital markets.

When defining the relevant product market for digital service, for example, the characteristics of its content (eg, the type and function), the qualities (eg, sound and image provided, communication speed, and the level of security), the user-friendliness (eg, usable languages and terminals) in connection with the available service are taken into consideration.

Similarly, when defining the relevant geographic market for digital service, an area within which a user can enjoy the service provided by a supplier on the same terms and quality and an area where the user can enjoy such service that is provided by suppliers are taken into consideration.

Law stated - 21 July 2023

'Killer' acquisitions

How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

The JFTC amended 'Policies Concerning Procedures of Review of Business Combination (the Merger Policies)' in 2019 to address the increased necessity of properly handling mergers in digital markets in recent years. In particular, the Merger Policies have clarified that even if the contemplated merger does not meet the merger thresholds, which is typical in the context of 'killer' acquisitions, the parties are advised to consult with the JFTC on non-notifiable mergers when the total consideration for mergers exceeds 40 billion yen and non-notifiable mergers are expected to affect Japanese consumers in a way such as the following:

- when the business base or research and development base of the acquired company, among other things, is located in Japan;
- when the acquired company conducts sales activities targeting Japanese consumers, such as opening a Japanese website or using a Japanese pamphlet; and
- when the total Japanese sales of the acquired company exceed 100 million yen.

In this regard, the following two cases have been reviewed by the JFTC even though they do not satisfy the merger thresholds.

In 2019, the JFTC conducted an ex-post-merger review of the acquisition of shares of Nihon Ultmarc (Ultmarc) by M3. M3 is an operator of a drug information platform for doctors, which provides information and advertising on the proper use of prescription drugs. Ultmarc is an operator of a medical information database, which provides organised collections of information on medical institutions, doctors and other healthcare professionals. The JFTC defined two relevant markets for two-sided markets and concluded that the transaction would raise competition issues. The parties proposed behavioural remedies such as not refusing access to the medical information database to M3's competitors and not engaging in discriminatory treatment in the trading terms for the database. The JFTC concluded that the acquisition would not raise competition concerns based on the proposed remedies.

In 2021, the JFTC reviewed a proposed acquisition of Fitbit Inc by Google. The Google group is active in a wide range of areas in services regarding digital advertisement, internet search, cloud computing, software and hardware. Fitbit mainly operates the business of manufacturing and distributing wrist-worn wearable devices. The JFTC defined several markets and focused on some, such as vertical integration of Google's business of providing smartphone OS and Fitbit's manufacturing and distributing wrist-worn wearable devices. The parties proposed behavioural remedies such as not refusing access to the Android Application Programming Interface (API) to Fitbit's competitors, among other things. The JFTC concluded that the acquisition would not raise competition concerns based on the proposed remedies.

Law stated - 21 July 2023

Substantive assessment

What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

In the case of horizontal mergers, where each party to mergers is engaged in research and development of goods or services which are expected to compete significantly after being placed in the market, the JFTC is of the view that the

mergers will greatly affect competition, compared to a situation where the goods or services are expected not to compete significantly because the mergers would decrease competition between the parties and diminish incentives for the parties to do research and development that would have been realised without the mergers.

Also, when direct or indirect network effects are involved, the JFTC considers those effects when assessing how mergers affect competition. In particular, the JFTC expresses its view that a direct network effect affects competition in a single-homing case (ie, where many of the users use only one service) to a greater extent than in a multi-homing case (ie, where many of the users use multiple services).

In the case of vertical and conglomerate mergers, the JFTC clarifies that if Company A in the upstream market holding important data for a competition purpose enters into a vertical merger with Company B in the downstream market, which uses such data to provide its service, Company A's refusal to supply the data against competitors of Company B may give rise to the closure of or exclusion of the competitors from the downstream market.

Also, the JFTC makes clear that if Company A, which is already engaged in a business in a particular market, enters into a conglomerate merger with Company B, which is not engaged in the same business but has important inputs such as data and, therefore, would be expected to become a powerful competitor if Company B enters into the market, the merger will eliminate the possibility for Company B to enter into the market and thereby greatly affect competition, compared to a situation in which Company B would not be expected to become a powerful competitor.

Furthermore, in assessing the importance of data for competition, the following points are said to be taken into consideration:

- what kind of data is held or collected by one of the parties;
- how much or how wide a range of data is collected by one of the parties on a daily basis as well as how much data are already held;
- how frequently one of the parties collects data; and
- how much of the data held or collected by one of the parties relates to the improvement of the service provided by the other companies in the product market.

In addition, the JFTC evaluates how advantageous, in terms of the points mentioned above, the data held or collected by one of the parties is as compared with the data available to the competitor in the product market of the other company.

Law stated - 21 July 2023

Remedies

How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

Generally, the JFTC tends to favour structural remedies in principle, such as the transfer of business over behavioural remedies. However, behavioural remedies such as securing access to inputs to competitors on non-discriminatory terms and ring-fencing of competitively sensitive information have been accepted mostly in vertical and conglomerate mergers.

There are three cases in digital markets where the JFTC have considered remedies proposed by the parties and gave conditional clearance based on the proposed remedies and periodic reporting obligation on compliance with the proposed remedies over the course of three to 10 years.

The first case concerns an ex-post-merger review of the acquisition of shares of Nihon Ultmarc by M3. in 2019. The

parties proposed behavioural remedies such as not refusing access to the medical information database to M3's competitors and not engaging in discriminatory treatment in the trading terms for the database.

The second case concerns a merger review of the proposed managerial integration of Z Holdings Corporation and LINE Corporation in 2020. The parties proposed behavioural remedies such as the removal of exclusive dealing conditions with member stores in code-based payment service as well as the proposal of further necessary remedial measures through consultation with the JFTC in case competition issues arise in the future.

The third case concerns a merger review of the proposed acquisition of Fitbit Inc by Google in 2021. The parties proposed behavioural remedies such as not refusing access to the Android Application Programming Interface to Fitbit's competitors, among other things.

Law stated - 21 July 2023

UPDATE AND TRENDS

Recent developments and future prospects

What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

The Japan Fair Trade Commission (JFTC) has a dedicated investigation unit called the IT Digital Task Force and has been vigilant against anticompetition conduct in digital markets. Apart from the JFTC's active enforcement activities, the Cabinet has decided to establish the Headquarters for Digital Market Competition (the Competition Headquarters) in 2019, which comprises the Chief Cabinet Secretary and the relevant ministers, with the aim of a swift and effective implementation of competition policy to promote the competition and innovation in digital markets.

Furthermore, the Competition Headquarters decided, in 2019, that the Digital Market Competition Council (the Competition Council), which consists of members of the Competition Headquarters and experts on digital markets, should conduct research on and discuss important matters in relation to digital markets. The Competition Council has taken the lead in framing the competition policy in digital markets.

In June 2023, the Competition Council completed and put up for public comments a report on 'Competition Assessment of the Mobile Ecosystem' which has presented two regulatory approaches to address competition concerns caused by platform operators in the mobile ecosystem. The first approach is an introduction of a regulatory framework (co-regulation) that respects the voluntary efforts of platform operators, limiting the role of the government in establishing a general framework.

The second approach is an introduction of a regulatory framework (ex-ante regulation) that prohibits platform operators from performing certain types of conduct or obligates platform operators to perform certain types of conduct. Against this backdrop, it remains to be seen what future regulation would look like in digital markets. In the meantime, however, the JFTC's vigorous enforcement activities are most likely to continue in this space.

Law stated - 21 July 2023

Jurisdictions

	Australia	Gilbert + Tobin
	Brazil	Advocacia José Del Chiaro
	European Union	Herbert Smith Freehills LLP
	France	Nomos
	Germany	Herbert Smith Freehills LLP
	Japan	Nishimura & Asahi
	Mexico	Galicia Abogados SC
	South Korea	Yoon & Yang LLC
	Switzerland	Prager Dreifuss
	Turkey	ELIG Gürkaynak Attorneys-at-Law
	United Kingdom	Herbert Smith Freehills LLP
	USA	Crowell & Moring LLP