

Episode 7: Hot Topics in Japanese Antitrust Law

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Audio Transcript

I'm really excited about today's episode. My guest is Yukio Kaiju. Yukio is an attorney visiting Winston and Strawn from the TMI Associates Law Firm in Japan. Yukio has his LLM from the University of California at Berkeley, and has experience at both the U.S. FTC and the Japan Fair Trade Commission. At TMI Associates, Yukio's practice includes General Corporate, M&A, Cartels, Monopolization, and other unfair trade practices, amongst other things. We are very pleased to have Yukio here at Winston and Strawn, and I'm equally pleased he's joining today's podcast.

Since I have Yukio as my guest, I wanted to shift away from U.S. antitrust law, which I know is typically our prime focus. But, I want to look instead at Yukio's view of hot topics in competition law in Japan.

Yukio, welcome to the podcast and thank you for joining us.

Yukio Kaiju: Thank you for having me.

Well, first, since we're in the middle of the COVID epidemic here in New York, I just want to mention that we are recording remotely. And I'm telling you this because our sound quality may not be as good as it normally would be, but of course we are practicing social distancing. Aside from that—and wishing all of our friends, colleagues, and other listeners well during these exceedingly challenging times—the rest of this podcast is going to be COVID-free for those who need a COVID break. So, with that said, Yukio, let's get started by you telling us a little bit more about your background and legal practice in Japan.

Yukio Kaiju: Sure. I joined TMI Associates in 2009. As you noted, my practice is focused on antitrust. For example, I represented a Japanese supplier in the international auto parts cartel cases, and handled the investigations as well as leniency process. I have also handled many merger reviews in various industries including supermarkets, the food industry, and chemical industry. Between 2012 and 2014, I was seconded to the legal department of Toyota

Motor Corporation in Aichi prefecture in Japan where I advised on antitrust matters, matters involving the Subcontractors Act, and contracts including joint development agreements, and M&A matters. From 2016 to 2018, I joined the Japan Fair Trade Commission as a chief investigator and litigator. There I worked on international cartel cases, unfair trade cases, and monopolization cases.

Well, that sounds interesting. What else can you say about your time there at the JFTC? What exactly was your role?

Yukio Kaiju: In 2015, there was an amendment to Japan's Antimonopoly Act, which required that the JFTC's orders would be subject to direct review by the district court rather than going through administrative trial proceedings at the JFTC, which was how things proceeded before the amendment.

The district court judge is not bound by the JFTC's findings of fact, so under the new system, the JFTC staff must prove the facts and their theory of harm in a way that's easy for the judge, who is not an antitrust expert, to understand. I handled the first unfair trade practices case that was brought to the district court after the amendment went into effect. As a litigator, it was my job to prove the related facts carefully by submitting evidence and documents. I discussed several issues with my JFTC colleagues, and sometimes I collected the related evidence and conducted investigations myself. Eventually, the JFTC won that case in the district court.

Right. Okay. Let's get into today's topic. Since we don't have that much time in any given podcast episode, I want to get going. So, if you can, can you list the top three hot topics that you think are happening in Japanese competition law right now in April 2020?

Yukio Kaiju: Sure. The first would be the amended guidelines and policies regarding merger review, which were issued by the JFTC last December. On the same day, the JFTC also issued new guidelines on abuse of a superior bargaining position in transactions between digital platform operators and consumers. So, that's the second hot topic. And finally, the third hot topic is the recent amendment to the leniency program and the surcharge system, which was passed last year and will come into effect in 2020.

Okay, that's a good list. So, let's start with the first one you mentioned, the new merger review guidelines. If you would just briefly explain what those guidelines cover and what they say.

Yukio Kaiju: Sure. The amended merger guidelines focus primarily on business combinations in the digital market. The precise market definition for evaluating a particular combination focuses on competition by means of quality as opposed to price. And the guidelines clarify considerations in defining the product market (for example, characteristics of content, quality, and user-friendliness), as well as the geographic market (for example, a range within which our user can enjoy service on the same terms, and with the same quality). The guidelines also address the JFTC's views on competition analysis based on characteristics of digital services, looking at things like network effects and switching costs.

Okay. Something that comes to my mind is this idea of so-called "killer acquisitions" in the digital marketplace, and I think that that subject is on the top of many enforcers' minds. Do the JFTC's new guidelines speak to that issue?

Yukio Kaiju: Yeah. As I understand it, the term "killer acquisition" refers to the idea that a large company could be intentionally acquiring startups to stop the target's innovation and preempt future competition. The amended guidelines do address that issue. Let's imagine that Company A acquires Company B, a startup that is not engaged in the same business as Company A, but does have material input goods, such as important data for businesses, and therefore it would be expected to become a possible competitor to Company A. If this acquisition eliminates the possibility for Company B to enter the market, then the business combination would greatly affect competition. Such a transaction would likely be prohibited. But of course, it's difficult to determine with certainty whether the transaction will harm competition, because any procompetitive effects of the combination should be considered carefully as well.

Okay. Are there any high profile or other interesting examples of how that these new merger guidelines for digital platforms have actually been applied?

Yukio Kaiju: Not yet, but in November, 2019, Yahoo! Japan operator, Z Holdings Corp. and Line Corp. announced a planned merger. The integration of these companies, which both offer wide array of internet-based services, will be the first test case that we can watch to see how the JFTC actually applies the amended guidelines. In particular, it will be interesting to see how the relevant product and geographic markets are defined. Another important issue will be how to assess the influence of the merger on that market.

Okay. Let's switch now to the second hot topic you identified—the other set of guidelines for digital platforms announced in December 2019 relating to abuse of superior bargaining position. For purposes of those guidelines, what counts as a digital platform? And it might be helpful if you could give us some examples.

Yukio Kaiju: Sure. The guidelines define a digital platform operator. This refers to a company that operates platforms online such as internet shopping malls, online auctions, apps markets, search services, content distribution services (like eBooks), booking services (for example, Booking.com), sharing economy platforms (for example, Airbnb), and social networking services. So, generally any company that provides consumers online services and obtains consumers' personal information, needs to be aware of these guidelines.

All right, and what do the new guidelines say?

Yukio Kaiju: The new guidelines are called guidelines concerning abuse of a superior bargaining position in transactions between digital platform operators and consumers. In the guidelines, the JFTC took this opportunity to clarify some examples of potentially risky conduct for digital platform operators, in order to improve predictability and provide transparency with respect to its enforcement priorities.

The guidelines address conduct that JFTC will investigate “on a priority basis.” This includes, for example, acquiring personal information without stating to your consumers the purpose for which the information will be used, and acquiring personal information against consumers' intention beyond the scope necessary to achieve the purpose of use. Well, the aim of the guidelines is to prevent digital platform operators from acquiring personal information in an unfair manner, which disadvantages consumers, and adversely affects competition. These concepts seem to focus on disparity in the quality and the quantity of information, and the negotiating power between consumers and digital platform operators. So, JFTC is concerned about them causing competitive harm by abusing their superior bargaining position to, for example, acquire personal information without stating the purpose of use to consumers.

We have to move now to your third hot topic, the changes to the JFTC's leniency policy. When were those changes made? And broadly speaking, what do they cover?

Yukio Kaiju: In June 2019, the JFTC enacted the amendment which changes both the leniency program and the surcharge system. Unlike the guidelines we just talked about, which were effective immediately, this amendment will probably come into effect this fall. The key changes for the leniency program are in the cooperation credit and the number of applicants. First, there is more cooperation credit available for cooperating companies that are not the first ones to apply for leniency. For example, under the previous system, the third-in-line company could only receive a 30% reduction in its fine for cooperating with the JFTC's investigation. The new system would allow a third-in company to get up to a 50% fine reduction. There is a range of 10% to 50% discount for third-in cooperators. So, under the new system, cooperating with the JFTC's investigation is even more important than before because there are greater benefits available. In addition, the amendment abolished the limitation on the number of leniency applicants. Under the previous system, only up to five companies could apply for leniency.

And as for the surcharge system, the period for calculating fines only goes back three years under the previous system. The amended period for calculating fines is up to 10 years. So, the surcharge will increase. It also increases the available penalties for obstruction of justice.

Do you think that the flexibility in determining cooperation credit and fine reductions will be beneficial overall to companies who do decide to seek leniency? Or, is it your feeling that the JFTC is going to be harsh in exercising its new discretion?

Yukio Kaiju: Well, these changes can certainly be beneficial for later cooperating companies, as it will now be possible to get a larger fine reduction. In April, the JFTC published proposed guidelines about the factors for

cooperation evaluation, such as whether or not the content of the report provided by a company (1) is detailed and concrete; (2) includes all the relevant materials described in the guidelines contributing to revealing the truth of the case; and (3) is corroborated by materials submitted by the company. This will help provide some clarity for companies seeking leniency.

And on a different subject, I understand that there is now an official policy of the JFTC as part of these changes to now respect the confidentiality of legal advice given to companies by outside lawyers regarding cartel situations. And I understand that's an improvement over past policy. But, my question is, I understand that materials like lawyer notes from interviews of employee witnesses still are not going to be protected. Is that true? And even if the notes were made by outside counsel? And what about notes made by U.S. counsel representing a company in Japan for purposes of protecting and defending that company in a global cartel situation?

Yukio Kaiju: That's right, Molly. To make the new leniency program more effective and to protect confidential legal advice, a new system similar to the protections for attorney-client privilege for confidential information in the U.S., was set forth. While this is not in the law, it will be a policy. And it's only applicable in unreasonable restraint of trade cases, such as cartel cases. According to the JFTC's proposed guidelines, this seems to apply only to legal advice, so a note by an attorney will not likely be protected under this policy. This policy is not applicable to in-house attorneys unless they are independently engaged in legal practice.

On the other hand, the proposed guidelines say with respect to international cartels, related to an alleged violation case, documents stating the contents of confidential communications between the company and the foreign attorneys regarding foreign competition laws—excluding primary materials and fact-finding materials—will be protected.

And in your experience, as a practical matter, does the JFTC actually ask for these types of materials, like lawyer notes from interviews? Or, do they generally respect privilege, even without an official policy to do so?

Yukio Kaiju: It depends on the case. I've heard that in an international cartel investigation case, when the JFTC investigated a company which had applied for leniency, then the JFTC respected the so-called "privileged" materials in the investigation process. But, this is really done on a case-by-case basis.

All right. I understand. Before we end, I want to ask you on a more personal note, what brought you to Winston & Strawn? What are you hoping to gain from this experience in this time that you'll be with us?

Yukio Kaiju: Well, while I bring my experience in recent antitrust enforcement in Japan, and also global enforcement trends from my time at both the U.S. and Japanese antitrust authorities, I would like to learn more about the practice of antitrust matters in the U.S., including how to handle investigations and litigation here.

All right, well, I hope that you are able to learn that. And we are certainly learning very much from you, including in today's podcast, which I think has been so informative for our listeners, and a nice episode for me to do as well. So, thanks very much, Yukio.

Yukio Kaiju: Thank you. It's been my pleasure, Molly.

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