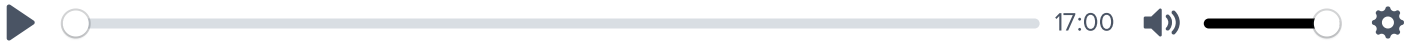


## Episode 12: Antitrust in Japan

AUGUST 5, 2021



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### Audio Transcript

**Kevin Goldstein:** Welcome to Winston & Strawn's Competition Corner podcast, where we discuss hot topics in antitrust law in the United States and around the world.

I'm Kevin Goldstein. And I'm honored to be hosting today with a very special guest, Tomonori Maezawa, who's going to be talking with us about Winston's visiting foreign legal advisor program and the latest developments in Japanese antitrust law. These are developments that will be of interest to anyone who does business in Japan or advises companies that do. Tomo is an attorney admitted in both Japan and in New York, who we've had the pleasure of working with this past year at Winston while Tomo has been on secondment from one of Japan's great law firms, Nishimura & Asahi.

For those unfamiliar, through Winston's foreign legal advisor program, every year we have Japanese lawyers join us on secondment from Japan's top law firms and corporate legal departments. These visiting lawyers have typically been practicing for several years in their native Japan, come to the U.S. to pursue an LLM degree in U.S. law and then join us for a year following their graduation. We also have a similar program for lawyers from Latin America here at Winston. I was very fortunate to get to know Tomo while he was completing his LLM at the University of Chicago and have been thrilled to have him in Winston's New York office for this past year. I'm likewise thrilled that he's joining us today to talk about hot topics in Japanese antitrust law. Maezawa-san, welcome to the podcast and thank you for joining us.

**Tomonori Maezawa:** Thank you for having me.

**Kevin Goldstein:** So Maezawa-san, can you tell us more about your practice?

**Tomonori Maezawa:** Yes. Like you said, I joined Winston & Strawn on secondment from Nishimura & Asahi last September amidst the pandemic. I really appreciate the warm reception from colleagues at Winston during these difficult times and the opportunity to immerse myself in the U.S. legal practice. Before moving to the US, I focused on general corporate, M&A, and antitrust matters for four years. Among various antitrust cases I engaged in, I spent much time working hard on a merger filing in an industry where two different merger deals were ongoing at that time. Obtaining the clearance after more than a year of working with clients, economists and co-counsel was the most memorable experience.

**Kevin Goldstein:** That's wonderful to hear about your experience practicing in Japan. Now, while you've been with us here at Winston, we of course do a tremendous amount of cross-border work and, in particular, work with Japanese clients and helping them get their deals through and resolve their antitrust issues around the world. How have you been able to work together with Winston's U.S. lawyers to help serve Japanese clients while you've been here with us? Are there any particular notable experiences you can share?

**Tomonori Maezawa:** Yeah. I have been given many opportunities to observe or work on various litigations involving cutting-edge issues, among others, an antitrust class action involving Japanese companies across the globe. In particular, I handled the legality of the service to corporate defendants in Japan. I did research on both Japanese laws and the international convention and closely reviewed the actual documents sent to our client. Based on the research results, with help from Winston colleagues, I drafted a short paper summarizing methods of service to Japan in the U.S. litigation on an outside platform. For those interested, please check out [our article](#).

**Kevin Goldstein:** And we've been so grateful for your help advising all of our clients with that research and the other projects you've done. One area that has had a lot of interest in the last few years where we've seen a huge and growing focus is antitrust enforcement in the tech sector. Certainly, in the U.S. and Europe, there are both investigations and enforcement actions ongoing, as well as new legislation and rules being proposed with the intent of increasing competition in the technology space, especially focused on the big digital platforms. To what extent have these sectors also been a focus in Japan?

**Tomonori Maezawa:** As you pointed out, there is growing momentum for platform regulation, and Japan has been actively addressing this issue across the government. The most remarkable initiative is a new act to regulate digital platforms, named The Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms, which was implemented this February. As this official name is a bit of a mouthful, I'd like to just call it the Transparency Act in this podcast. I posted a blog post with Jeff Amato regarding this act last December, but I'd like to follow up on recent developments by taking advantage of this opportunity. So listeners, please check out [this post on the Competition Corner website](#).

And before getting down to the main point, let me touch on the background. Back in 2019, the JFTC—the Japanese antitrust enforcer—conducted a fact-finding survey on online shopping malls and app stores and heard voices from third-party sellers that use these platforms. They complained about, among other things, first, unilateral changes of terms and conditions, for example, to increase transactional fees; second, self-preferencing treatment, such as rigged search results to promote platform providers' products as platform providers play a dual role, as you know, both as an owner of a shopping mall and a store selling at that shopping mall; third, misappropriation of third-party sellers' data on their transactional records to find a successful and market-tested product and make it their own; and lastly, most favored nation clauses requiring prices set below those in any other platform. To improve this situation, the Transparency Act was enacted, aiming to enhance transparency—as its name suggests—by imposing disclosure obligations as to these terms in the sphere of online shopping and app distribution.

**Kevin Goldstein:** That's really interesting. So the Transparency Act applies to digital platforms. But how is that defined in the act? What kind of companies are covered by it?

**Tomonori Maezawa:** The short answer is several of the largest big tech giants. The Transparency Act sets a high threshold in gross merchandise volume in Japan, so that it only covers those who have a great impact on people's lives. For online malls, no less than 300 billion Japanese yen (approximately US\$2.7 billion under current exchange rates), for app stores, no less than 200 billion Japanese yen (likewise US\$1.8 billion) must be reached.

**Kevin Goldstein:** So when a company is subject to the Transparency Act, what are they required to do?

**Tomonori Maezawa:** As for the disclosure obligation, the Act requires platform providers to disclose, among others, the following:

- criteria for refusal to a deal,
- basic factors used to determine search ranking,
- terms and conditions to acquire data about items provided by third-party sellers, such as changes in sales volume,
- MFN clauses and self-preferential or discriminatory treatment, if applicable.

As for their fair procedure and system, the platform providers are required to ensure fair provision and services to third-party sellers and handle compliance and resolve disputes through, for example, the code of conduct, impact assessment before amending the terms and conditions, screening criteria for penalties.

With respect to the enforcement, the Act's basic principle is to encourage digital platform providers to improve transparency proactively and voluntarily, and to keep the government involvement and the regulation to a minimum, so they can take innovative initiatives suitable for each platform. As such, basically, performance of the obligations is supposed to be monitored and enforced through an annual report to be submitted by each provider, though the Act provides for administrative and criminal sanctions for non-compliance with the Act.

**Kevin Goldstein:** That's really interesting and quite a lot of disclosure. However, it seems notable that the Transparency Act, as it's being implemented right now, applies to really just a pretty small number of companies with the big tech giants and pretty high turnover thresholds. Has there been any discussion about expanding the Transparency Act beyond the major platforms to apply to smaller companies or other parts of the digital economy?

**Tomonori Maezawa:** That's a good question. The Transparency Act sets forth the general framework of this regulation and delegates the details through subordinate orders that can be amended without the Diet's approval, so it can be flexible with changes. The current scope is limited to online shopping malls and app stores, but it can be extended to another industry. The government released the final report regarding competition in the digital advertising market this April, pointing out that what happens in the real-time bidding behind the scenes is obscured in a black box. To improve transparency in transaction details and pricing, and clear away suspicions about conflicts of interest and self-preferencing in bid-matching is an urgent matter. The government is considering applying the Transparency Act to this industry.

Plus, this April, JFTC announced it initiated a fact-finding survey on cloud services. This June, JFTC also released a report on competition policy for data markets. It expressed concerns that big tech's enclosure of users and data will lead to monopolies, and suggested that ex ante rules, beyond the existing frameworks, can be an option if necessarily. We should keep an eye on the developments in regulations.

**Kevin Goldstein:** Definitely, that sounds like something to follow and that we'll be looking out for. So shifting a little bit, in the U.S., we recently had a very significant administration shift with President Biden's election and have seen a sweeping new Executive Order focused on increasing competition and antitrust enforcement. Now in Japan, it's not quite the same as switching from the Trump administration to the Biden administration—not quite as big a shift—but you have had both a new prime minister and a new chairman of the JFTC assume office in September 2020, with the new prime minister, Suga, from the same party as the prior prime minister. Have the new leaders identified any new initiatives or priorities in the competition area since coming into power?

**Tomonori Maezawa:** Yeah. In reaction to growing momentum across the world, last October, the new chairman of the JFTC clearly stated that Japan had joined forces with the U.S. and the EU to take on big tech companies' abuse of their dominant market position. This June, as a part of the effort, the government decided to increase the number of personnel at the JFTC and hire experts familiar with the digital market and other prioritized areas at the JFTC, and strengthen antitrust enforcement. The JFTC also formed a study group and issued a report regarding algorithms, AI, and competition. Algorithms are indispensable for online merchants to survey the market and test optimal prices in reaction to varying market demand. The report points out that algorithms can be used to facilitate collusive conduct and as antitrust violations. For the details, please check out the post I co-wrote with Jeff.

**Kevin Goldstein:** It's a great blog post, and I encourage everyone to read it. Another topic that's been of interest is the "abuse of superior bargaining position" violation in Japan, which is sort of a unique regulation in Japan. Some of our listeners may also be familiar with the concept of "abuse of dominance" in European law. Does "abuse of superior bargaining position" in Japan also require that a firm have a dominant market position? Can you tell us a little bit about the regulation?

**Tomonori Maezawa:** Before explaining abuse of superior bargaining position, we need a hypothetical. Let's say there are two parties, Party A and Party B. If Party B has no choice but to accept disadvantageous requests from Party A because refusing would make it difficult to continue its transaction and thereby impedes Party B's business, then Party A has a superior bargaining position over Party B. So though you asked whether Party A must have a dominant market position, the answer is no, it doesn't require a dominant market position. And another difference between the superior bargaining position and dominant market position is that it doesn't require exclusionary conduct. Instead, it prohibits Party A from making use of its superior bargaining position over Party B and requesting Party B to do something disadvantageous to Party B unjustly in light of normal business practices.

**Kevin Goldstein:** That's really interesting and I think would be great to hear more about examples of this "abuse of superior bargaining position" type of claim. Are there actual cases where this regulation has been applied to a platform provider in particular?

**Tomonori Maezawa:** Yes, a dominant online shopping mall provider which announced a new policy to relieve consumers of shipping fees by imposing them on third-party sellers instead – it finally gave up because the JFTC accused it of abuse of superior bargaining position. Another online shopping mall provider was also accused of requesting discounts and return of products without reasonable grounds. Both cases occurred last year, which reflects JFTC's proactive attitude to enhance antitrust enforcement in this field.

**Kevin Goldstein:** Thanks for explaining. It certainly sounds like there's a lot of activity going on with the JFTC and the Japanese legislature. We'll be watching closely, looking at your blog posts and looking for further developments as they come. As we come to the end of our podcast, I want to thank you again for being here with us today. I guess we're not coming just to the end of our podcast. We're also coming toward the end of your secondment at Winston and you'll be returning to Japan. Are there any lessons or experiences from your time practicing in the U.S. that you'll take back with you to benefit your clients in the future?

**Tomonori Maezawa:** Thank you for asking. Throughout my secondment, I have immersed myself with international cases that require cooperation with co-counsel across the globe and understanding of laws in various jurisdictions, such as difference in method of service and protection of attorney-client communications. By the way, I wrote an [article](#) about new protection for attorney-client communications in Japan with Jeff. Above all what I believe is the most important is that I built the tight relationship with Winston lawyers. I'd love to stay longer here, but I'm thrilled to move on to the next stage in Japan with the experiences at Winston.

**Kevin Goldstein:** Thank you, Maezawa-san. We would certainly love to have you stay longer here too, but likewise are looking forward to continuing to work with you in the next chapter in your career. So thank you for joining us here on Competition Corner today. I encourage all of our listeners to check out the Competition Corner website for more content and for Maezawa-san's blog posts that he referenced here today. Thanks again, everyone.

**Tomonori Maezawa:** Thank you so much.

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Kevin B. Goldstein

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