

# RECENT DEVELOPMENTS IN COMPETITION POLICY IN JAPAN



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The digital economy continues to grow massively worldwide, and agencies around the world have been exploring options for greater regulation in the digital economy, including for digital platforms. Recently, thirteen competition authorities, including those of the G7 and four guest authorities, have worked together to discuss respective approaches to promoting competition in digital markets and published the “Compendium of approaches to improving competition in digital markets” in November 29, 2021. Japan was part of that. This paper looks at some of the major developments in competition policies related to the digital economy in Japan.

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# I. COMPETITION POLICY FOR THE DIGITAL ECONOMY

The digital economy continues to grow massively worldwide, and agencies around the world have been exploring options for greater regulation in the digital economy, including for digital platforms. Recently, thirteen competition authorities, including those of the G7 and four guest authorities, have worked together to discuss respective approaches to promoting competition in digital markets and published the “Compendium of approaches to improving competition in digital markets” in November 29, 2021.<sup>2</sup> Japan was part of that. The following are some of the major developments in competition policies related to the digital economy in Japan.<sup>3</sup>

## A. Act on Improving Transparency and Fairness of Digital Platforms (the “TFDPA”)

On December 24, 2021, the Ministry of Economy, Trade and Industry (the “METI”) held the first session of the Monitoring Meeting on Transparency and Fairness of Digital Platforms (the “Monitoring Meeting”) in order to promote mutual understanding between the specified digital platform providers and the stakeholders and to improve the transparency and fairness of the Specified Digital Platforms (“SDPs”).<sup>4</sup> The meeting was held in accordance with the TFDPA, which is often called the Digital Transparency Act or simply the Transparency Act.

The TFDPA was enacted on May 27, 2020 and came into force on February 1, 2021.<sup>5</sup> It stipulates that digital platform operators should voluntarily and proactively take the initiative to improve transparency and fairness, and that government involvement should be kept to a minimum. It adopts a so-called “co-regulatory” approach, in which the general framework of regulations is established by law, while the details are left to the voluntary efforts of businesses (i.e. digital platform operators).

Under the TFDPA, the Minister of METI designates digital platform operators that require greater transparency and fairness in transactions as SDPs; SDPs are subject to discipline under the TFDPA. Accordingly, the Minister of METI designated SDPs on April 1, 2021: Amazon Japan G.K., Rakuten Group, Inc., and Yahoo Japan Corporation as “Digital platform providers of comprehensive online shopping malls selling goods,” and Apple Inc., iTunes K.K. and Google LLC as “Digital platform providers of application stores.”<sup>6</sup> The SDPs are required to disclose certain information, such as terms and conditions, develop procedures and systems to ensure their fairness, and submit a report with a self-assessment of the measures taken and the outline of the business every year.

The TFDPA stipulates that the Minister of METI review and evaluate the transparency and fairness of the SDPs and make the results of the evaluation public. In preparation for the evaluation, the METI started holding the Monitoring Meeting last December, as mentioned above. An annual report will be submitted by the SDPs by the end of May of this year, and the Monitoring Meeting will compile its evaluation around Fall 2022.

The SDPs designated by the Minister of METI previously did not include digital platform operators that provide digital advertising. However, discussions have been held on whether platform providers of digital advertising should also be subject to regulation (see the next section as well). On June 18, 2021, the Cabinet made the decision to add digital platform operators that provide digital advertising as SDPs to those subject to the regulation under the TFDPA.<sup>7</sup> The Minister of METI has not yet designated any digital platform operator providing digital advertising as an SDP as of February 15, 2022.

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<sup>2</sup> <https://www.jftc.go.jp/houdou/pressrelease/2021/nov/Compendium.pdf>.

<sup>3</sup> A summary of the JFTC’s efforts in the digital market “Approaches in the digital market” is available in English on the JFTC website at [https://www.jftc.go.jp/en/policy\\_enforcement/digital/index.html](https://www.jftc.go.jp/en/policy_enforcement/digital/index.html).

<sup>4</sup> The METI press release of December 21, 2021, is available in Japanese at <https://www.meti.go.jp/press/2021/12/20211221001/20211221001.html>; some meeting materials from the December 24, 2021, session are available in Japanese at [https://www.meti.go.jp/shingikai/mono\\_info\\_service/digital\\_platform\\_monitoring/001.html](https://www.meti.go.jp/shingikai/mono_info_service/digital_platform_monitoring/001.html).

<sup>5</sup> The Key Points of the TFDPA is available in English at the METI’s website: [https://www.meti.go.jp/english/policy/mono\\_info\\_service/information\\_economy/digital\\_platforms/tfdpa.html](https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html).

<sup>6</sup> Please see the METI press release of April 1, 2021, in English at [https://www.meti.go.jp/english/press/2021/0401\\_001.html](https://www.meti.go.jp/english/press/2021/0401_001.html).

<sup>7</sup> The June 18, 2021, Cabinet decision of the “Basic Policy for Economic and Fiscal Management and Reform 2021” is available in English at [https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/2021\\_basicpolicies\\_en.pdf](https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/2021_basicpolicies_en.pdf); its overview is available in English at [https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/summary\\_en.pdf](https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2021/summary_en.pdf); “Action Plan of the Growth Strategy” is available in English at <https://www.cas.go.jp/jp/seisaku/seicho/pdf/ap2021en.pdf>.

## **B. Digital Advertising**

Digital advertising has been one of the particular digital areas that has been the subject of debate as to whether it should be regulated and if so, how it should be regulated.

On February 17, 2021, the Japan Fair Trade Commission (the “JFTC”) published a final report regarding digital advertising.<sup>8</sup> Subsequently, on April 27, 2021 the Secretariat of the Headquarters for Digital Market Competition under the Cabinet Secretariat of Japan (“Digital Headquarters”) published a final report on the “Evaluation of Competition in the Digital Advertising Market.”<sup>9</sup>

Previously, the Government of Japan established the Digital Headquarters on September 27, 2019, in order to implement policies to promote competition and innovation in the digital market in a timely and effective manner.<sup>10</sup> The Headquarters hosted the Digital Market Competition Council and Digital Market Competition Working Group in order to study and deliberate on important matters concerning the digital market.

Both the JFTC and Digital Headquarters, respectively, conducted research in the field of digital advertising and published interim reports on April 28, 2020 and June 16, 2020, respectively, and then published a final report, as mentioned above.

In principle, the reports recognize that digital advertising provides benefits. For example, digital advertising creates opportunities for a variety of businesses, including small and medium-sized companies (“SMEs”), to reach out to customers they could not reach otherwise. Consumers also benefit from digital advertising. They are able to use various services on the Internet for free because of revenues from digital advertising.

However, at the same time, both reports indicate that the digital advertising market has some issues. In recent years, it is said that oligopoly has been progressing in the digital advertising market globally by vertical mergers. Accordingly, concerns about transparency and fairness in the digital advertising market, as well as anti-competitive conduct in the digital advertising market, have been raised. In addition, there are concerns about the collection of personal data used for profiling consumers’ attributes and preferences.

As mentioned above, digital advertising will be subject to regulation by the TFDPA.

## **C. Cloud Services**

The JFTC started market research on Cloud services in April 2021.<sup>11</sup> It is part of the JFTC’s continuous market research project in the digital area; it published reports on online malls and app stores in October 2019 and on digital advertising in February 2011, as mentioned above. Cloud services are becoming the foundation of business activities, due in part to the trend toward digital transformation and the promotion of remote work in the COVID-19 pandemic. At the same time, it has been pointed out that there may have been a growing oligopoly of a few digital platform operators. Therefore, the JFTC thought it necessary to understand the market situation and to analyze potential issues from the perspective of improving the competitive environment. Accordingly, the JFTC set up an information desk to collect information on a wide range of Cloud services, and also recruited an expert in the field of Cloud computing.<sup>12</sup> The JFTC will likely be publishing the results of its market research.

## **D. Mobile Operating Systems (“Mobile OS”)**

In October 2021, the JFTC started market research on the mobile operating system (“mobile OS”).<sup>13</sup> It is also part of the JFTC’s continuous market research project in the digital area, as mentioned in the previous paragraph. The JFTC investigates the market structure and competitive

8 The JFTC press release of February 17, 2021. in English is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html>; English translation of the report is available at [https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217\\_3rev2.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_3rev2.pdf); a one-page overview in English is available at [https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217\\_2rev2.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_2rev2.pdf); a 24-page summary in English is available at [https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217\\_3rev2.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217_3rev2.pdf).

9 The report is available in Japanese at <https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryous3s.pdf>; an English summary is available at [https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryous2\\_e.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai5/siryous2_e.pdf).

10 The website of the Headquarters in English is available at [https://www.kantei.go.jp/jp/singi/digitalmarket/index\\_e.html](https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html).

11 The Secretary General of the JFTC’s briefing on April 14, 2021, is available in Japanese at [https://www.jftc.go.jp/houdou/teirei/2021/apr\\_jun/210414.html](https://www.jftc.go.jp/houdou/teirei/2021/apr_jun/210414.html).

12 *Ibid.*

13 The Secretary General of the JFTC’s briefing on October 6, 2021, is available in Japanese at [https://www.jftc.go.jp/houdou/teirei/2021/oct\\_dec/211006.html](https://www.jftc.go.jp/houdou/teirei/2021/oct_dec/211006.html).

pressures of the mobile OS market and the app distribution market in Japan, respectively, and if there is no effective competition in these areas, seeks to understand the cause and the harm caused by this.<sup>14</sup> The JFTC will likely publish the results of its market research.

In addition to the JFTC, the working group of the Digital Headquarters also discussed the competitive environment for mobile OS, including at its September 7, 2021 and November 12, 2021 meetings.

## ***E. Data Markets***

On June 25, 2021, the Competition Policy Research Center (the “CPRC”) of the JFTC issued a report by the Study Group on Competition Policy for Data Markets.<sup>15</sup>

The CPRC is a research center at the JFTC that was established in 2003 to conduct research on competition policies jointly by legal scholars, practitioners, and economists.<sup>16</sup> The Study Group was established on November 13, 2020, to discuss measures to stimulate more active competition in data-driven businesses from the perspective of competition policy. In the rapidly changing digital age, competition is shifting from “cyberspace,” where online platform-type businesses provide services, to “Second Stage,” where businesses are expected to compete in the “fusion of cyber and physical,” using data analyzed in cyberspace to enhance business in the physical space, such as with automated driving, medical and nursing care and agriculture.<sup>17</sup>

## **II. “NEW CAPITALISM” BY THE KISHIDA ADMINISTRATION**

On October 4, 2021, Fumio Kishida was appointed the 100<sup>th</sup> Prime Minister of Japan, and was reelected the 101<sup>th</sup> Prime Minister of Japan on November 11, 2021. The Kishida Administration established the New Capitalism Headquarters to achieve the “New Capitalism,” based on the concept of “a virtuous cycle of growth and distribution” and “the development of a new society after the COVID-19 pandemic,” and started discussions on October 26, 2021.

On November 8, 2021, the Kishida Administration announced “The Urgent Proposal – ‘New Capitalism’ for the Future and its Launch” (the “Proposal”).<sup>18</sup> The Proposal consists of two core pillars: Growth Strategies and Distribution Strategies.

### ***A. New Capitalism Urgent Proposal***

#### **1. Growth Strategies**

Promotion of Digital Transformation (“DX”) is one of the Growth Strategies. As part of it, the Proposal suggests improving the cashless payment environment by making settlement fees transparent. Interchange fees (i.e. fees paid by a settlement company that contracts with a store to a settlement company that contracts with a user when payment is made by credit card) apparently account for 70 percent of credit merchant fees. The JFTC is conducting a fact-finding survey on the status of standard rate disclosures, etc., and will submit a report on whether there are any competition policy issues by the end of this fiscal year (i.e. March 2022). In addition to the JFTC, other relevant ministries and agencies (e.g. METI) will examine effective ways to disclose information to expand the cashless payment society.

With regard to the revival of the dynamism of Japanese companies and provision of thorough support for startups, the Proposal aims to strengthen competition policy to promote fair competition. In order to advance the New Capitalism, it is important to create a prosperous middle class, including SMEs, subcontractors, and startups. The effectiveness of the advocacy function of the JFTC should be strengthened, including as to appropriate transactions for startups and SMEs as well as in the infrastructure sectors, such as digital markets (e.g. telecommunications) and energy markets (e.g. electricity). The JFTC should be strengthened in a focused and systematic manner by qualitative

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<sup>14</sup> *Ibid.*

<sup>15</sup> The JFTC press release of June 25, 2021, in English is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/210625.html>; a tentative English translation of the report is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/210812.pdf>; an outline of the report in English is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2021/June/21062502.pdf>.

<sup>16</sup> The CPRC’s website in English is available at <https://www.jftc.go.jp/en/cprc/index.html>.

<sup>17</sup> The November 13, 2020 JFTC press release is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113\\_2.html](https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113_2.html).

<sup>18</sup> The Proposal is available in Japanese at [https://www.cas.go.jp/jp/seisaku/atarashii\\_sihonsyugi/pdf/kinkyuteigen\\_honbun\\_set.pdf](https://www.cas.go.jp/jp/seisaku/atarashii_sihonsyugi/pdf/kinkyuteigen_honbun_set.pdf).

enhancement (e.g. improvement of professional knowledge) as well as quantitative enhancement (e.g. a drastic expansion of organizations and personnel).

Previously, the JFTC and METI jointly formulated the “Guidelines on Business Partnership Contracts with Startups” on March 29, 2021.<sup>19</sup> The Guidelines aim to present ideal approaches to contracts concluded with startups. Further, on December 23, 2021, the JFTC and METI issued a draft of “Guidelines for Business Collaboration with Startups and Investment in Startups” and sought comments from the public.<sup>20</sup> The finalized guidelines have not been published yet as of [February 15, 2022.]

In addition to the above, the Proposal aims to promote transparency and fairness in the digital advertising market, including adding digital platform operators that provide digital advertising to the subject of the TFDPA (see above as well).

Further, consideration of the initial public offering (“IPO”) process and special purpose acquisition company (“SPAC”) system is also one of the Growth Strategies with regard to reviving the dynamism of Japanese companies, providing thorough support for startups, the leaders of innovation. Currently, Japan’s listing system is not friendly to entrepreneurs who would like to take on new changes. It has been pointed out that the Japanese listing system is structured in such a way that customers of securities companies, not startups, make money and there is not enough money going to startups. Specifically, in the case of IPOs, a share price on the first day of listing (opening price) tends to be significantly higher than the price (“IPO price”) at which entrepreneurs sold their shares, and the entrepreneurs tend to earn less money compared to foreign countries. In light of this situation, the JFTC should work to understand the reality of the situation regarding the process of setting IPO prices. Accordingly, on January 28, 2022, the JFTC published a report called “Understanding the reality of the public offering price setting process in the initial public offerings (IPOs).”<sup>21</sup>

## **2. Distribution Strategies – Strengthening Investment in “People” that will Bring Security and Growth**

One of the Distribution Strategies is strengthening distribution to non-regular workers by new legislation to protect freelancers. The COVID-19 pandemic has had a major impact on freelancers. In order to create an environment where freelancers can work with peace of mind, a new law for protecting freelancers will be submitted to the Diet as soon as possible. At the same time, the JFTC’s enforcement structure should be developed accordingly.

In this regard, previously, the JFTC and METI, along with the Cabinet Secretariat, the Small and Medium Enterprise Agency and the Ministry of Health, Labour and Welfare (the “MHLW”) issued the “Guidelines for Creating a Safe Working Environment as a Freelancer” on March 26, 2021.<sup>22</sup>

### ***B. Measures to Facilitate Pass-on for Value Creation through Partnerships***

As a part of the New Capitalism, on December 27, 2021, the New Capitalism Headquarters at the Cabinet Secretariat of Japan, the Consumer Affairs Agency (the “CAA”), the MHLW, the METI, the Ministry of Land, Infrastructure, Transport and Tourism (the “MLIT”) and the JFTC jointly published the “Package of Measures to Facilitate Pass-on for Value Creation through Partnerships” (the “Proposed Measures”).<sup>23</sup>

With the aim of achieving a virtuous cycle of growth and distribution, wage increases are expected as much as possible at labor-management negotiations, based on each company’s own ability to pay. Due to the impact of the COVID-19 pandemic, some industries continue to be adversely affected while others (e.g. manufacturing businesses) may have recovered to pre-pandemic levels or higher; performance recovery varies by industry. In order for SMEs to secure the resources to raise wages, the Government of Japan will take the Proposed Measures to create

19 The METI’s press release of “Guidelines on Business Partnership Contracts with Startups Formulated” (March 29, 2021) is available in English at [https://www.meti.go.jp/english/press/2021/0329\\_003.html](https://www.meti.go.jp/english/press/2021/0329_003.html); the Guidelines are available only in Japanese at <https://www.meti.go.jp/press/2020/03/20210329004/20210329004-1.pdf>.

20 The JFTC’s press release of December 23, 2021 is available in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211223pressrelease.html>; the draft of guidelines subject to the public comment is available in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211223\\_pressrelease2.pdf](https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211223_pressrelease2.pdf).

21 The JFTC press release of January 28, 2022, is available in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128\\_IPO.html](https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO.html); the Report is available in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128\\_IPO/220128\\_report.pdf](https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO/220128_report.pdf); a summary of the Report is available in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128\\_IPO/220128\\_summary.pdf](https://www.jftc.go.jp/houdou/pressrelease/2022/jan/220128_IPO/220128_summary.pdf).

22 The JFTC press release of March 26, 2021, is available in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210326.html>; the Guidelines are available in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2021/mar/210326free03.pdf>.

23 The Package of Measures to Facilitate Pass-on for Value Creation through Partnerships is available only in Japanese at [https://www.cas.go.jp/jp/seisaku/atarashii\\_sihon-syugi/pdf/partnership\\_package\\_set.pdf](https://www.cas.go.jp/jp/seisaku/atarashii_sihon-syugi/pdf/partnership_package_set.pdf).

an environment in which SMEs can appropriately pass on increases in labor, material and energy costs through partnerships among all business partners.

Measures to be taken by the JFTC are: (i) establishing a scheme to facilitate price pass-on; (ii) clarifying the application of the Anti-Monopoly Act (the “AMA”); (iii) conducting a survey and strengthening enforcement against “abuse of superior bargaining position” (“ASBP”) under the AMA; (iv) taking measures to avoid “abuse of buying power” under the Subcontract Act,<sup>24</sup> (v) conducting a survey on transactions between large companies and startups and strict enforcement; (vi) strengthening systems of related government agencies; and (vii) amending the JFTC’s “Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act”<sup>25</sup> (the “ASBP Guidelines”).<sup>26</sup>

### III. MERGER CONTROL

There was a change in the JFTC’s merger review organizational structure and authority in April 2021. One additional post was added to the previous two positions of Senior Officer for Merger and Acquisition, bringing the total to three.<sup>27</sup> The Merger and Acquisition Division now has authority to investigate matters; it needed to involve the Investigation Bureau previously, including when dealing with a cease-and-desist orders (e.g. blocking a merger), a reporting order, and/or commitment procedures.<sup>28</sup>

The digital market is one of the areas upon which the JFTC, including the Merger and Acquisition Division of the JFTC continues to focus. Globally, how competition authorities treat transactions involving nascent competitors, or so-called killer acquisitions, has been the focus of attention, and the same goes for Japan. In December 2019, the JFTC amended the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” (the “Merger Guidelines”) and the “Policies Concerning Procedures of Review of Business Combination” (the “Merger Policies”), mainly in order to conduct reviews appropriately in accordance with developments in the digital market.

The amended Merger Policies clarify that the JFTC conducts reviews of merger cases, including for those where notifications are not required, but when the transaction value is large (i.e. more than JPY 40 billion, which is approximately USD 370 million) and is expected to affect domestic consumers. Further, the amended Merger Policies suggest the parties consult with the JFTC voluntarily when the transaction value exceeds JPY 40 billion and when one or more of the following factors is met: (i) when an acquired company has an office in Japan and/or conducts R&D in Japan; (ii) when an acquired company conducts sales activities targeting domestic consumers, such as providing its website and/or pamphlet in the Japanese language; or (iii) when the total domestic sales of an acquired company exceed JPY 100 million (approximately USD 8.6 million).

24 An English translation of the Subcontract Act is available at [https://www.jftc.go.jp/en/legislation\\_gls/subcontract.html](https://www.jftc.go.jp/en/legislation_gls/subcontract.html).

25 An English translation of the ASBP Guidelines is available at [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/101130GL.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf).

26 Please also refer to the White & Case Client Alert at <https://www.whitecase.com/publications/alert/new-capitalism-japan-measures-facilitate-pass-value-creation-through>.

27 Article 3 of the Rules of the JFTC Secretariat Organization.

28 Article 14 of the Order for the JFTC Secretariat Organization.



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