

# Competition law fact sheet

Japan

June 2021





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## Main features of the law

Prohibition on cartels, abuse of market power and unfair trade practices

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High fines and criminal sanctions

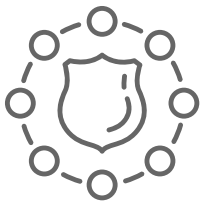
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Extraterritorial effect

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Wide-ranging investigation powers

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## Enforcement trends

Close to US\$700 million in administrative fines in last three years

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Focus on cartels and bid-rigging

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Focus on digital marketplaces, online sales restrictions and exclusivities

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## Substantive provisions

### Main rules

The Antimonopoly Act provides for four main types of prohibitions:

- unreasonable restraints of trade (cartels);
- private monopolization (abuse of market power);
- unfair trade practices; and
- mergers and acquisitions that restrict competition.

### Unreasonable restraints of trade (cartels)

The prohibition generally applies to “horizontal” coordination amongst independent competitors at the same level of trade (i.e. it does not apply to intragroup relationships). The rules prohibit any agreement or understanding among competitors to eliminate or restrict competition among them that substantially restrains competition in a particular field of trade. Conduct caught under this provision typically includes cartels and bid-rigging, which are nearly always prohibited, although the prohibition also applies to other cooperation arrangements such as joint R&D, collaboration and alliances between competitors, which will be found to be legitimate if their pro-competitive effects outweigh their restrictive effects.

### Private monopolisation (abuse of market power)

This prohibition applies specifically to parties with significant market power (under current guidance from the Japan Fair Trade Commission (JFTC), the prohibition mainly applies where a party has a market share exceeding 50 per cent). Under this regime, parties that have significant market power should not engage in the following conduct:

- They are prohibited from seeking to exclude competitors by adopting conduct that forecloses them or prevents them from entering the market. Examples of prohibited exclusionary conduct include below-cost pricing, exclusive dealing, tying, refusal to supply and discriminatory treatment; and
- They are prohibited from seeking to control competitors (by restraining their decision-making ability regarding their business activities).

### Unfair trade practices

This prohibition applies both to “horizontal” relationships between competitors and to “vertical” supplier-distributor-customer relationships. It applies to types of conduct that are specifically identified by the JFTC. The main such practices are:

- Resale price maintenance: resale price maintenance is unlawful where the wholesaler or retailer is required to maintain wholesale or resale price without justifiable cause. The prohibition does not apply where there is an agency relationship. Purely recommended resale prices are permitted. However, a restriction on maximum resale prices without justifiable cause is not permitted.
- The abuse of a superior bargaining position: the prohibition on the abuse of a superior bargaining position applies to parties in a position of strength, but has a broader scope of application than the prohibition on private monopolisation. A superior bargaining position does not mean that a party has a dominant market, but that it has a relatively superior bargaining position as compared to the other transacting party. Whether or not a party has superior bargaining position in transactions with another party is determined on the basis of four factors: degree of dependence by the other party on the transactions; position of the party in the market; possibility of the other party to easily switch counterparts; and other circumstances showing dependence of the other party on the former. Prohibited abuses of superior bargaining position consist of: forced purchase/use; request for economic benefits; and other conduct including refusal to receive goods, return of goods, delay in payment, price reduction and other establishments, etc. of trade terms in a way disadvantageous to the weaker party.
- Other prohibited practices include price discrimination; boycotts; unfairly low prices; tying arrangements; exclusive dealing; trading on restrictive terms; and interference with a competitor’s transactions.

### Mergers and acquisitions

Share acquisitions, mergers, joint ventures, asset acquisitions and joint business transfers involving companies with significant assets or sales in Japan must receive clearance from the JFTC prior to their implementation.

### Sanctions

The Antimonopoly Act provides for administrative surcharges as well as criminal sanctions (fines and imprisonment).

#### High administrative fines for cartels and abuse of market power

The Act sets out in a relatively detailed fashion the levels of administrative surcharge, which vary according to several factors including the types of violation, the size of the party’s business, the role the party played in the infringements, and whether there are repeated infringements. By way of example, administrative surcharges for cartels may amount up to 20 per cent of the relevant sales during the cartel period, the start date of which can be traced back to a maximum of ten years from the start of the investigation. Administrative fines for private monopolization (where it involves control of other enterprises’ business activities) may amount to up to 15 per cent of such sales.

#### Criminal fines for cartels and abuse of market power

Individuals who engage in unreasonable restraints on trade (cartels) or private monopolization (abuse of market power) may be sentenced to imprisonment for up to five years or face fines of up to JPY5 million (around US\$46,000). Similarly, companies face fines of up to JPY500 million (around US\$4.6 million).

#### Sanctions for unfair trade practices

Sanctions can also be imposed for certain (but not all) unfair trade practices, although the statutory maximum is lower than for other violations and the JFTC imposes sanctions less often.

#### Extraterritorial effect

An agreement made or conduct that occurred in a foreign country will be subject to Japanese jurisdiction under the Antimonopoly Act so long as it affects the Japanese market. Activities of a foreign subsidiary within Japan are directly subject to the Antimonopoly Act in the same manner as a Japanese entity.



## Enforcement regime

### Public and private enforcement

The Antimonopoly Act is mainly administered by the Fair Trade Commission (JFTC), which is an independent administrative body. The JFTC's powers include the power to investigate, adjudicate and dispose of a case and to issue cease-and-desist orders and surcharge payment orders to enterprises that violate the Antimonopoly Act. Some of the infringements under the Antimonopoly Act are criminal in nature. They are investigated and prosecuted by the public prosecutor's office and decided by the courts. Finally, aggrieved parties can bring civil suits under the Antimonopoly Act for injunctions as well as for damages suffered as a result of conduct in breach of the Antimonopoly Act.

### Leniency

The JFTC has adopted a leniency program specifically for the detection of unreasonable restraints on trade, i.e. cartels. Under the leniency program, there is immunity from or a

reduction in administrative surcharge payments if a party applies for leniency by notifying the JFTC of sufficient information concerning the violation it was involved in. The reduction rate each leniency applicant can receive varies depending on the time at which it applied for leniency and the degree of cooperation with the JFTC's investigation. The leniency program does not offer immunity or lenient treatment in relation to criminal fines, but in practice the JFTC does not refer leniency applicants and their employees to the public prosecutor's office.

### Investigation powers

The JFTC has wide-ranging investigation powers, including the power to hear witnesses, to request the production of information and documents, and to conduct on-site inspections of business premises (so-called "dawn raids").

## Recent enforcement trends

Year	Total fines	Number of cases	Main types of cases
2015	JPY2.3 billion (around US\$21 million)	4	Bid-rigging
2016	JPY9.8 billion (around US\$90 million)	6	Cartels and bid-rigging
2017	JPY7.5 billion (around US\$69 million)	5	Bid-rigging
2018	JPY2.2 billion (around US\$20 million)	8	Cartels and bid-rigging
2019	JPY69.3 billion (around US\$636 million)	6	Cartels and bid-rigging
2020	JPY4.3 billion (around US\$39 million)	3	Bid-rigging

### Public and private enforcement

#### Cartel and bid-rigging

The JFTC continues to routinely impose significant fines for cartel conduct and bid-rigging, often in the context of trade or professional associations. In December 2020, the JFTC imposed total fines of JPY4.3 billion (around US\$40 million) on two companies. It also regularly refers individuals and companies to the public prosecutor's office for criminal investigation. In recent cases prosecutors sought jail sentences of up to two years (with a suspended sentence) for individuals who were found to have participated in bid-rigging activity.

Cartels and bid-rigging conduct have long attracted the highest administrative fines in Japan, with fine amounts being set in relation to the value of sales affected by the conduct. This leads to wide variations in the amount of fines in each case.

### Most-favoured nation clauses and exclusivities

In recent years the JFTC has investigated many arrangements, particularly involving online marketplaces, whereby parties are obliged to offer "most favoured" terms or to enter into exclusivities. Most of these cases ended with the parties agreeing to change their terms following the investigation. The JFTC also conducted several market surveys, highlighting possible abuses of superior bargaining position and unfair trade practices arising from these types of contractual arrangements across several industries.

Other recent enforcement action has targeted resale price maintenance as well as the restriction on online sales and advertisement.

### Mergers and acquisitions

The JFTC reviews around 300 M&A transactions per year, including foreign-to-foreign mergers.

Year	Number of cases	Phase 1 approvals		Phase 2 approvals		Domestic	Foreign/ domestic	Foreign to foreign
		(in number and % of cases)	(in number and % of cases)	(in number and % of cases)	(in number and % of cases)			
2015	295	281	95.2%	4	1.4%	242	8	45
2016	319	308	96.6%	3	1.0%	260	12	47
2017	306	299	97.7%	1	0.3%	263	12	31
2018	321	315	98.1%	3	0.9%	281	6	34
2019	310	315	96.8%	0	0%	259	12	39

### Latest enforcement priorities

- Digital marketplaces: abuse of superior bargaining power in digital platforms and marketplaces, particularly in respect of consumer rights including privacy.
- Merger and acquisitions: the JFTC revised its Merger Guidelines in December 2019, enhancing its merger enforcement tools in relation to digital markets, notably allowing the JFTC to focus on so-called "killer acquisitions" whereby large companies acquire small targets that may become strong competitors. These acquisitions would typically not need to be notified to the JFTC for merger review on account of the small size of the target.

In January 2021, the JFTC made a first application of its revised guidance and conditionally approved Google's acquisition of Fitbit. The transaction did not reach the mandatory notification thresholds on account of Fitbit's small value of sales in Japan. However, the JFTC still reviewed the transaction on account of its large value and expected significant impact on Japanese domestic customers.

## Key information

### Relevant legislation

Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade (1947)

### Competition authority

#### Japan Fair Trade Commission

International Affairs Division (16th floor)  
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Website: <https://www.jftc.go.jp/index.html>

### Relevant officials and contacts

#### Japan Fair Trade Commission Members of the Commission

- Kazuyuki Furuya (Chairman of the Commission)
- Takashi Yamamoto (Commissioner)
- Akiko Mimura (Commissioner)
- Reiko Aoki (Commissioner)
- Yoshiharu Ojima (Commissioner)

#### Executives of the Commission

- Shuichi Sugahisa (Secretary General)
- Koichi Higashide (Senior Deputy Secretary General)
- Tetsuya Fujimoto (Senior Deputy Secretary General for Policy Management)
- Masaru Ogo (Deputy Secretary General for International Affairs)
- Isao Kasubuchi (Director General of Economic Affairs Bureau)
- Osamu Tanabe (Director General of Trade Practices Department)
- Wataru Kobayashi (Director General of Investigation Bureau)
- Yukinari Sugiyama (Deputy Director General of Investigation Bureau)
- Takeshi Shinagawa (Deputy Director General of Investigation Bureau)
- Sadaaki Suwazono (Director General of Criminal Investigation Department)
- Katsunori Inaguma (Director, International Affairs Division)
- Takatoshi Iwashita, Director (Mergers and Acquisitions Division)

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<sup>2</sup> Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP

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