

***Zaibatsu* Break-ups**

The Legacy of Post-war Economic Reform in Japan and Digital Economies

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After World War II, Japan underwent economic reform; it broke up large conglomerates, known as *zaibatsu*,¹ and also 18 dominant companies in order to restore competition. Combined with the newly implemented competition law, the Antimonopoly Act (AMA),² the economic reform established an economic system based on free competition. The AMA contains several features that reflect Japan's economic history, including its focus on avoiding aggregated economic power and disparity of bargaining power.

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- 1 There are various definitions of *zaibatsu*. See T. KIKKAWA, *Nihon no kigyō shūdan* [Corporate Groups in Japan] (1996) 16–21; H. TAKEDA, *Nippon keizai no hatten to zaibatsu honsha* [Economic Growth of Japan and Zaibatsu Headquarters] (2020) 9–14. Here they are defined as conglomerates characterised by family control that exert a significant impact on the Japanese economy. See S. YASUOKA, *Nihon zaibatsu no rekishiteki henshen* [The Historical Development of Zaibatsu in Japan], in: Yasuoka (ed.), *Nihon no zaibatsu* [Zaibatsu in Japan] (1976) 14.
- 2 私的独占の禁止及び公正取引の確保に関する法律 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu* [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (The Antimonopoly Act)], Law No. 54/1947.

In the digital sector, data accumulation, network effects and substantial economies of scale lead to significant competition law issues. Outside Japan, lawmakers and competition authorities are considering strengthening their competition law regimes and introducing structural measures to restore competition.³ In Japan, the AMA's features as described above could be useful when addressing issues arising in digital markets.

In this paper, I first describe the wartime structure of the Japanese economy and assess the changes brought about by post-war economic reform. After presenting the features of the AMA, the way the AMA is actually enforced in Japan is examined and a discussion is included on how the AMA and the Japan Fair Trade Commission (JFTC) can address existing issues in the digital sector.

I. THE CONCENTRATION OF ECONOMIC POWER BEFORE AND DURING WW II

Active competition existed in Japan for several decades after the transition from feudalism to a market economy in the 1870s.⁴ However, in the absence of competition law, market concentration increased. Most viewed business consolidation and cartels as effective ways for the Japanese economy, which was believed to be lagging behind the advanced Western countries, to catch up.⁵ Pre-war Japan also believed that cartels and consolidation would help tackle the social distress caused by the boom-and-bust cycle.⁶ The advent of the second Sino-Japanese War in 1937 and the Pacific War in 1941 increased the need for government control of economic activities in order to mobilise economic resources for war.⁷ Inspired by the 1933

3 U.S. HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW (US ANTITRUST SUBCOMMITTEE), *Investigation Of Competition In Digital Markets: Majority Staff Report and Recommendations* (6 October 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519; EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM/2020/842 final, 15 December 2020.

4 J. TERANISHI, *Nihon no keizai shisutemu* [The Economic System in Japan] (2003) 118–21.

5 See, e.g., MITI, *Shōkō seisaku-shi* [History of Commerce and Industrial Policies] IX (1961) 12–31, 158.

6 See, e.g., Y. TAKATA, *Keiki hendō-ron* [Theories of Economic Fluctuation] (1928) 77–78.

7 T. MINEMURA, *Senji kokka no keizai-hō* [Wartime Government and Economic Law] (1937) 127–334.

German legislation legalising cartels,⁸ the government issued the Major Industries Association Ordinance in 1941⁹ and installed a controlling association system as a means of economic regulation. The Ordinance led to the establishment of cartels in virtually every sector of the economy.¹⁰ Under the regime, companies were expected to act in the national interest under the leadership of controlling associations.¹¹ Large *zaibatsu* retained, however, a strong influence over the controlling associations.¹²

When the war ended, the economic structure in Japan was characterised by the dominance of a small number of large *zaibatsu* and corporations across all sectors. *Zaibatsu* were characterised by a pyramid structure with a holding company at the top, which allowed them to bring many companies under their control with only a small amount of capital.¹³ The top two *zaibatsu*, Mitsui and Mitsubishi, were particularly powerful, each of which accounted for more than 5% of the total capital stock of all Japanese companies.¹⁴ Mitsui and Mitsubishi also dominated trade; Mitsui accounted for around 18% of all of Japan's exports and imports, and Mitsubishi approximately 10%.¹⁵ Furthermore, Mitsui had become a leading player in mining, chemicals, finance, distribution and machinery,¹⁶ while Mitsubishi was a leader in the machinery, mining, finance and marine transportation sectors.¹⁷ In the sectors where the dominance of Mitsui and Mitsubishi was not

8 Act Amending the Cartel Ordinance of July 15, 1933 [1933] Reichsgesetzblatt 487. The act attracted attention in Japan. See, e.g., H. MÜLLENSIEFEN, *Doitsu ni okeru shin karuteru hōrei to kakaku torishimari-rei* [New Cartel Law and Price Regulation Order in Germany] (1934) 9–12.

9 重要産業団体令 *Jūyō sangyō dantai-rei*, Imperial ordinance No. 831/1941. This was issued under the 国家総動員法 *Kokka sōdō-in-hō* [National Mobilisation Act], Law No. 55/1938.

10 JŪYŌ SANGYŌ KYŌGI-KAI [MAJOR INDUSTRIES COUNCIL], *Tōsei-kai hikkei* [Controlling Association Essentials] (1944).

11 S. KOJIMA, *Keizai Nihon* [The Japanese Economy] (1943) 150.

12 *Zaibatsu* have had a strong influence on cartels since their inception. R. MINOBE, *Karuteru, torasuto, kontserun* [Cartels, Trusts and Concerns] (1931) 470–472, 475–492. SUZUKI asserts that cartels control markets, while *zaibatsu* control cartels. M. SUZUKI, *Kokusai keizai to nihon shihon shugi no gen-dankai* [International Economy and the State of Japan's Capitalism], in: Kawazu (ed.), *Gendai Nihon keizai no kenkyū I* [Research on the Modern Japanese Economy I] (1929) 249.

13 K. TAKAHASHI / J. AOYAMA, *Nihon zaibatsu-ron* [On Zaibatsu in Japan] (1938) 101–111; K. ŌSUMI, *Kontserun kankei ni tsuite* [On Combines] (1953) 9–10.

14 Holding Company Liquidity Committee (HCLC), *Nihon zaibatsu to sono kaitai* [Zaibatsu in Japan and their Resolution] (1951) 94, 112.

15 HCLC, *supra* note 14, 545.

16 HCLC, *supra* note 14, 94–95.

17 HCLC, *supra* note 14, 112–113.

apparent, particular companies such as Nippon Steel,¹⁸ Oji Paper¹⁹ and Dainippon Beer²⁰ controlled the markets.

The dominance of a few *zaibatsu* and select companies was further cemented through the control of raw materials²¹ and exclusive distributorship. For instance, Mitsui Mining controlled coal fields accounting for 26.8% of all coal produced by Japanese companies,²² and Oji had exclusive access to the main ingredients for paper and pulp.²³ Meanwhile, Mitsui and Mitsubishi expanded their dominance through exclusive distributorship.²⁴

Zaibatsu were also influential in policy making. Mitsui and Mitsubishi sponsored the most powerful political parties,²⁵ which repeatedly formed the cabinets from the early 1900s until 1940, when the wartime government abolished them to create a one-party system.²⁶ Participation in policy making through government committees was a way to strengthen the power of large *zaibatsu*.²⁷ For example, the regulatory committee established under the Major Industry Association Ordinance included personnel working for *zaibatsu*.²⁸ At Kōeki Eidan, a corporation established by the government in 1943 to control trade activities, more than half of the board members were from Mitsui and Mitsubishi.²⁹ Dominant *zaibatsu* abused their influence to obtain favoured treatments and to harass their rivals.³⁰

18 HCLC, In re *Nippon Steel*, Fact Findings, 9 October 1948.

19 HCLC, *supra* note 14, 333.

20 HCLC, In re *Dainippon Beer*, Fact Findings, 22 November 1948.

21 TAKAHASHI / AOYAMA, *supra* note 13, 13, 227–231, 240.

22 HCLC, In re *Mitsui Mining*, Fact Findings, 30 July 1949.

23 R. IWAI, *Nihon dokusen sangyō monogatari* [Tales of monopolised industries in Japan] (1934) 56–58.

24 TAKAHASHI / AOYAMA, *supra* note 13, 114–118; I. HATADE, *Nihon no zaibatsu to Mitsubishi* [Zaibatsu in Japan and Mitsubishi] (1978) 275–277, 289; H. MATSUMOTO, *Mitsui zaibatsu no kenkyū* [Studies on Mitsui Zaibatsu] (1979) 427–495.

25 TAKAHASHI / AOYAMA, *supra* note 13, 129–130; K. SETO, *Dokusen shihon shugi zokuhen* [Monopoly Capitalism II] (1931) 129–134; J. MASUMI, *Nihon seitō shiron* [Historical Studies on Political Parties in Japan] V (1979) 377.

26 M. SHIRAKI, *Nihon seito-shi* [History of Political Parties in Japan] (1949) 318–320.

27 K. TAKAHASHI, *Nihon zaibatsu no kaibō* [An Anatomy of Zaibatsu in Japan] (1930) 26–27.

28 T. KOMIYAMA, *Tōsei-kai to zaibatsu* [Controlling associations and Zaibatsu] (1942) 65–112.

29 HCLC, *supra* note 14, 550.

30 See, e.g., HCLC, *supra* note 14, 480–481, 490, 494. *Zaibatsu* and cartels also encouraged the government to raise tariffs to protect them. TAKAHASHI / AOYAMA, *supra* note 13, 131; MINOBE, *supra* note 12, 574–578.

II. THE DISMANTLING OF CONGLOMERATES AND DOMINANT COMPANIES

After Japan's defeat in World War II, the General Headquarters (GHQ) initiated a reform of the Japanese economy. The GHQ instructed the Japanese government to establish the Holding Company Liquidity Committee (HCLC) and began dismantling *zaibatsu* and dominant companies.³¹ They also dissolved or reorganised controlling associations;³² these were later subject to the Trade Association Act³³ and Art.8 AMA.

The SCAP and the HCLC imposed particularly radical structural measures on the ten largest *zaibatsu*. The HCLC transferred the shares held by the head office to itself before selling them publicly.³⁴ To cut personal ties, the government prohibited owner families and officers of these companies from becoming officers in subsidiary companies.³⁵ The Mitsui and Mitsubishi trading companies not only dominated foreign trade but also controlled various companies through shareholding and exclusive distributorship. The SCAP broke up Mitsui into 170 companies and Mitsubishi into 120 companies;³⁶ dismantling *zaibatsu* was done to address aggregated economic power.

Meanwhile, the HCLC also implemented measures to resolve the dominance in specific sectors and split up 18 dominant companies under the Act for the Elimination of Excessive Concentration of Economic Power,³⁷ with such power being defined as:

“Any private enterprise conducted for profit, or combination of such enterprises, which by reason of its relative size in any line or the cumulative power of its position in many lines, restricts competition or impairs the opportunity for others to engage in business independently, in any important segment of business.”³⁸

31 E. M. HADLEY, *Antitrust in Japan* (1970); C. D. EDWARDS, *The Dissolution of the Japanese Combines*, *Pacific Affairs* 19 (1946) 227.

32 Imperial Ordinance No. 74/1947.

33 事業者団体法 *Jigyō-sha dantai-hō*, Act No. 191/1948.

34 GHQ, *History of the Nonmilitary Activities of the Occupation of Japan, 1945–1951* Vol. 28 (1990) V.

35 財閥同族支配力排除法 *Zaibatsu dōzoku shihai-ryoku haijo-hō* [Act of Termination of Zaibatsu Family Control], Act No. 2/1948.

36 GHQ, Directive to the Japanese Government to take steps for the immediate dissolution and liquidation of the Mitsubishi Trading Company and Mitsui Trading Company (SCAPIN 1741) (3 July 1947).

37 過度経済力集中排除法 *Kado keizai-ryoku shūchū haijo-hō* [The Act for the Elimination of Excessive Concentration of Economic Power] (EECA), Act No. 207/1947, abolished by 過度経済力集中排除法等を廃止する法律 *Kado keizai-ryoku shūchū haijo-hō-tō o haishi suru hōritsu* [The Act Abolishing the EECA], Act No. 87 of 1955.

38 Art. 3 EECA.

Under the provision, the HCLC examined not only the potential to harm consumers but also the power to engage in exclusionary practices.³⁹ The HCLC split Nippon Steel,⁴⁰ Oji Paper,⁴¹ Dainippon Beer⁴² and Toyo Can horizontally into multiple competing companies. It vertically disintegrated Daiken Industries by separating its manufacturing business from its trading business,⁴³ and it required Mitsui Mining,⁴⁴ Mitsubishi Mining,⁴⁵ Ika Mining⁴⁶ and Teikoku Fibre⁴⁷ to establish separate companies in each sector.

III. LEGACY OF POST-WAR ECONOMIC REFORM

Japan recovered and grew after its post-war economic reform. Although it is not easy to measure the extent to which the reform helped this growth as it coincided with a number of other events, certain observations can be made concerning the competition policy and law at the time.

1. *Recovery of Competition and Establishment of Competition Policy*

Post-war economic reforms brought about immediate changes in Japan's market structure;⁴⁸ large conglomerates and companies were dismantled, and controlling associations disappeared.

In parallel with dismantling dominant companies, the GHQ prompted the Japanese government to draft the AMA.⁴⁹ In 1947, the AMA was enacted and

39 For instance, the HCLC found that Nippon Steel and Dainippon Beer had hindered the opportunities of others to compete independently, and that other dominant companies were capable of doing so. HCLC, In re *Nippon Steel*, Fact Findings, 9 October 1948; HCLC, In re *Dainippon Beer*, Fact Findings, 22 November 1948.

40 HCLC, In re *Nippon Steel*, Orders, 17 December 1948.

41 HCLC, In re *Oji Paper*, Orders, 7 January 1949.

42 HCLC, In re *Dainippon Beer*, Orders, 7 January 1949.

43 HCLC, In re *Daiken Industries*, Orders, 15 April 1949.

44 HCLC, In re *Mitsui Mining*, Orders, 28 August 1949.

45 HCLC, In re *Mitsubishi Mining*, Orders, 28 August 1949.

46 HCLC, In re *Ika Mining*, Orders, 3 August 1949.

47 HCLC, In re *Teikoku Fibre*, Orders, 20 January 1950.

48 JFTC, *Dokusen kinshi seisaku 20-nenshi* [20-year History of Antimonopoly Policy] (Printing Bureau of the Ministry of Finance 1968) 80–81; T. NAKAMURA, *The Postwar Japanese Economy* (2nd ed., 1995) 25–26; I. TAKAHASHI, *Kado keizai-ryoku shūchū haijo-hō (1947–1954) to nihon ni okeru kyōsō chitsujo no rekishiteki keisei* [The Act for the Elimination of Excessive Concentration of Economic Power and Historical Formation of Competitive Economic Order in Japan], *Hōritsu Ronsō* 89 (4–5) (2017) 133, 173.

49 N. NISHIMURA / F. SENSUI, *1947-nen Dokusen kinshi-hō no keisei to seiritsu* [The Formation and Establishment of the 1947 AMA], *Kobe Law Journal* 56 (2006) 51–309.

the JFTC began enforcing it. After that, the AMA went through a significant number of twists and turns. Initially, competition was a novel concept for most citizens in Japan,⁵⁰ and the AMA supporters exerted only minor influence at that point.⁵¹ The government cut the JFTC's budget and decreased the number of officials from 305 to 241 in 1952.⁵² Meanwhile, the Ministry of International Trade and Industry (MITI) orchestrated cartels, implemented cartel exempting legislations, and promoted consolidations.⁵³ Over time, however, citizens became more critical of business practices and government policies to protect them.⁵⁴ Japan became the second largest economy in terms of gross national product in 1968,⁵⁵ and businesses became less reliant on the MITI's initiative. The government began expecting the JFTC to tackle inflation and started increasing its budget and staff in 1960. The number of JFTC cartel cases had increased by over a dozen each year since 1963, peaking at 35 cartel investigations in 1973.⁵⁶ By 1974, the AMA revival became apparent when the JFTC filed a criminal case against oil companies over price- and output-fixing cartels facilitated by the MITI.⁵⁷

50 The concept was not totally alien to the Japanese. For example, TAKAHASHI and AOYAMA pointed out that during the war period, Japanese citizens were critical of *zaibatsu* such as Mitsui and Mitsubishi because they held dominant positions due to strong support from the government, extensive business networks and exclusive distributorships, which negated fair play and free competition, and because they exercised their influence without considering its impact on society and the economy. TAKAHASHI / AOYAMA, *supra* note 13, 283–289.

51 JFTC, *Dokusen kinshi seisaku 30-nen-shi* [30-year History of Antimonopoly Policy] (Printing Bureau of the Ministry of Finance 1977) 447 [Ex JFTC official Mr Maruyama on consumer organisations].

52 JFTC, *supra* note 48, 181.

53 JFTC, *supra* note 51, 142–145, 228–235, 762–769. The JFTC often had to compromise and endorsed restrictive policy measures and business practices, which were criticised by academia. See, e.g., H. HIRABAYASHI, *Dokusen kinshi-hō no rekishi* [History of the AMA] (2016) II 46–74. The role of industrial policies in Japan has been actively discussed. See, e.g., R. KOMIYA / M. OKUNO / K. SUZUMURA, *Nihon no sangyō seisaku* [Industrial Policies in Japan] (1984); T. K. CHENG, *Competition Law in Developing Countries* (2020) Ch. 6. Although assessing the issue is beyond the scope of this article, it appears that the MITI's intervention would have been more significant if the AMA had not existed and if people had not pushed for strong competition policy.

54 Consumer groups and farmers particularly disapproved of restrictive practices and business mergers. JFTC, *supra* note 51, 119; MITI, *Tsūshō sangyō seisaku-shi* [History of International Trade and Industrial Policies] V (1989) 410–413.

55 NAKAMURA, *supra* note 48, 209.

56 JFTC, *Reiwa gannen Kōsei Torihiki I'inkai nenji hōkoku* [JFTC FY2019 Annual Report] (2019) 315. The figure does not include the investigation relating to trade associations.

Although attempts to weaken the AMA continued,⁵⁸ competition laws began to be strengthened worldwide, and diplomatic pressure pushed Japan to enforce the AMA more vigorously.⁵⁹ In particular, when access to Japanese markets was a diplomatic issue in the 1980s and early 1990s, the Japanese government committed to strengthen AMA enforcement with the US government, which prompted enhancement of the JFTC's resources and activities.⁶⁰ By the 2000s the AMA had established its position as the fundamental law that sets out the basic principle and rules of the Japanese economy.

2. *Unique Features of AMA Regulation and Enforcement*

The drafters of the AMA intended that Japan would maintain a competitive economic structure. Memories of suppression of freedom by the government and large companies, and unequal wealth distribution, remained fresh in the minds of Japanese citizens for a long time. This background shaped several features of the AMA, including concerns about aggregated economic power and disparity of bargaining powers and the JFTC's authority to take measures to restore competition without finding wrongdoing. The post-war situation also determined the way the JFTC enforces the AMA, by helping businesses to comply without using tough measures.

a) *Aggregated economic power*

The AMA includes two provisions, Art. 9 and Art. 11 AMA, that regulate the creation of aggregated economic power, also referred to as 'general economic concentration'. Art. 9 AMA prohibits acquisition where it creates an excessive concentration of business control,⁶¹ and Art. 11 AMA prohibits financial institutions, such as banks, from holding more than 5% of the shares in other companies (in the case of insurance companies, 10%).

The aggregated economic power concern is also apparent in general merger regulation focusing on market power in a particular relevant market. In assessing whether the merger leads to market power in such a market, the JFTC

57 JFTC, *supra* note 51, 319–321. It was the first criminal accusation filed against a cartel. *Ibid.*

58 JFTC, *Dokusen kinshi seisaku 50-nen-shi* [50-year History of Antimonopoly Policy] (JFTC General Secretariat, 1997) 366–371; HIRABAYASHI, *supra* note 53, II 39–44 (on the Japan Business Federation's attempt in 1982–1983).

59 JFTC, *supra* note 58, 485–92, 496–520.

60 See *infra* note 86 and accompanying text.

61 Art. 9 AMA used to ban the establishment of holding companies and prevent companies from becoming holding companies. The provision has been subject to a number of amendments, and it still survives today despite the business community's campaigns to remove it. HIRABAYASHI, *supra* note 53, II 243–259.

takes into account the general capacity to carry out business (*sōgō teki jigyō nōryoku*). This has the effect that a party's strong footage overall, which is not limited to a particular market, is taken into account in a merger review.⁶²

These regulations reflect the legislative intent to maintain a competitive and democratic economic system devoid of organisations which are excessively powerful in economic terms. Over time, two ways of understanding the issue have emerged. One focuses on the political implications of such power; in other words, economic power tends to create political power and undermine citizens' freedom and welfare. The other aspect focuses on economic impact; those who are powerful overall are more capable of leveraging their strong position from one market to another, or engaging in vertical restrictions, which leads to market foreclosure.⁶³

b) Disparity of bargaining power

Ex Art. 8 AMA authorised the JFTC to order companies to transfer their businesses and implement other measures to restore competition where an unfair disparity in business capacity existed. Ex Art. 15 AMA also prohibited mergers that would create an unfair disparity in business capacity. In these articles, the focus was on disparities between competitors, where such disparities rendered private monopolisation possible for one of the following reasons:

- An enterprise controlled the business in a particular field of trade or controlled the materials used therein to such an extent as to render it extremely difficult for another entrepreneur to start a new enterprise;
- an enterprise controlled the production in a particular field of trade to such extent as to render it extremely difficult for another enterprise to actually compete;
- an enterprise restrained or restricted free competition to such an extent as to render private monopolisation possible.⁶⁴

'Private monopolisation' here is an exclusionary or controlling practice which leads to substantial restrictions in competition in a relevant market,⁶⁵ and indicates that ex Art. 8 AMA was meant to prevent this from taking place.⁶⁶ These provisions were removed by the 1953 AMA amendment,

⁶² See *infra* notes 107 and 108.

⁶³ T. YAMABE, *Dai9-jō* [Article 9], in: Negishi (ed.), *Chūshaku Dokusen kinshi-hō* [AMA Commentary] (2009) 248.

⁶⁴ Ex Art. 2 AMA.

⁶⁵ *Ibid.*

⁶⁶ SHŌKŌ-SHŌ KIKAKU-SHITSU [Ministry of Commerce and Industry, Department of Planning], *Dokusen kinshi-hō no kaisetsu* [Explaining the AMA] (1947) 24; R. ISHII, *Dokusen kinshi-hō* [The AMA] (1948) 132.

while the same amendment inserted a provision prohibiting the abusive use of a strong bargaining position.⁶⁷ Currently, Art.2 para. 9(v) and Art. 19 AMA prohibit this by regulating the abuse of a superior bargaining position (ASBP). The ASBP regulation was first introduced to address the circumstances arising from the deletion of Art. 8 AMA.⁶⁸

In retrospect, it may sound odd that ASBP regulation was introduced to replace ex Art 8. In general, disparities can result either in a stronger position to control or exclude other companies, or a stronger bargaining position which enables the owner to obtain better deals. While ex Art. 8 addressed the first type of disparity, the ASBP regulation is primarily concerned with the second type. Combined with the Subcontract Act,⁶⁹ the ASBP is a popular tool for the JFTC to protect SMEs and to regulate unfair trading practices.⁷⁰ Today, few associate the ASBP with private monopolisation. However, the legislative history does not prevent the ASBP from addressing both types of disparity.

c) The JFTC's broad power to take preventive and restorative measures

The JFTC has broad authority to regulate unfair trade practices, which include ASBP, vertical restraints, exclusionary practices such as tie-in sales and exclusive trading, and misrepresentation.⁷¹ The JFTC is permitted to issue a cease and desist order before such practices result in the establishment or maintenance of market power; a finding of a minor lessening of competition is sufficient in most cases, while using an unfair method of competition to one's advantage is enough in other cases. A fine is imposed in cases of ASBP;⁷² no fine is imposed otherwise.⁷³

The JFTC can also impose measures to restore competition, even where a particular company has undertaken no anticompetitive action. At the time of the enactment of the AMA, the JFTC could impose these measures under ex Art. 8 AMA. Although, as discussed, the 1953 amendments removed the pro-

67 JFTC, *supra* note 51, 449–450 [ex-JFTC official Maruyama on deletion of Art. 8 AMA and the regulation of a superior bargaining position].

68 JFTC SECRETARIAT, *Kaisei Dokusen kinshi-hō kaisetsu* [Amended AMA Annotated] (1954) 214.

69 下請代金支払遅延等防止法 *Shitauke daikin shiharai chien to bōshi-hō*, Act No. 120/1955.

70 M. WAKUI / T. CHENG, Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity? *Journal of Antitrust Enforcement* 3-2 (2018) 302.

71 Art. 2 para. 9, Art. 19 AMA.

72 Art. 20-6 AMA.

73 For repeated offences, a fine may be imposed in cases of boycott, unfair low prices and resale price maintenance. Arts. 20-2 to 20-5 AMA.

vision, the JFTC regained its authority to impose such restorative measures in the case of a ‘monopolistic situation’ with the 1977 AMA amendments.⁷⁴ Such a situation exists when a company holds extensive economic power that harms consumer interests, and makes new entry extremely difficult. These criteria reflect Japan’s pre-war as well as wartime experiences.⁷⁵

d) JFTC enforcement through guidance

The JFTC experienced difficulties for decades after the enactment of the AMA and these influenced the way the AMA was enforced. Since its establishment, the JFTC has been the only authority entrusted both to enforce the AMA and to advocate for competition policy.⁷⁶ The latter was imperative in the early days, and vast amounts of resources were used by the JFTC to hinder efforts of the MITI and consult with it. Although a private suit is possible, it is extremely rare as Japan lacks the system to facilitate it.⁷⁷ The public prosecutor acts upon an AMA violation only after the JFTC files an accusation.⁷⁸ The JFTC addresses a wide range of issues in spite of very limited resources. When Japan became the second largest economy in the world in 1968, the JFTC had only 341 staff.⁷⁹ Consequently, the JFTC had no choice but to opt for a soft approach under which it conducted monitor-

74 私的独占の禁止及び公正取引の確保に関する法律の一部を改正する法律 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu no ichibu o kaisei suru hōritsu* [The Law Partially Amending the AMA], Act No. 63/1977. Although the uniqueness of ex Art. 8 AMA was understood by the Japanese people when enacted, not everyone saw it negatively. For instance, ASHINO thought that significant disparities of bargaining power could impede competition, so it was reasonable to have such a provision. H. ASHINO, *Dokusen to torihiki seigen* [Monopolies and the Restriction of Trade] (1950) 82–84, 317. ŌHASHI also understood that dominant companies with political influence can cause issues which US antitrust law cannot easily address, and thus stricter provisions made sense. M. ŌHASHI, *Dokusen kinshi-hō no kaisei to shinten* [Reform and Development of the AMA] (1949) 26–27, 185–86.

75 Another legacy is the new Art. 8 AMA, which regulates the activities of business associations. Reflecting the Japanese experience that associations can be powerful tools in suppressing competition, business associations are subject to stricter regulations; they must neither engage in activities that would reduce the number of enterprises nor unfairly restrict member activities and functions.

76 The HCLC ceased to exist in 1951. From 1950, the JFTC enforced the Act for the Elimination of Excessive Concentration of Economic Power. TAKAHASHI, *supra* note 48, 170–171.

77 Although the AMA was modelled on US antitrust law, it did not adopt most of the US civil procedures available to antitrust plaintiffs. S. VANDE WALLE, *Private Antitrust Litigation in the European Union and Japan* (2013) 60, 62–70.

78 Art. 96 AMA.

79 And only 67 belonged to the investigation bureau. JFTC, *supra* note 51, 555.

ing, offered administrative guidance and issued reports and guidelines to promote AMA compliance.⁸⁰ Later, the JFTC intentionally avoided confronting or prosecuting businesses and pushed for prevention instead.⁸¹

JFTC activities which lead to reports and guidelines may result in effective AMA enforcement based on an adequate understanding of the sector or practices, and greater transparency.⁸² Raising awareness and establishing the assessment framework are essential steps when the JFTC encounters novel issues, and reports and guidance are a good way to follow such steps.⁸³ At the same time, the JFTC needs public support. Even though the JFTC is an independent administrative body, it is up to the National Diet (parliament) of Japan to allocate its budget and staff, and cooperation from politicians is also necessary when the JFTC wishes to amend the law. Furthermore, the JFTC may be hamstrung by businesses and politicians who establish special AMA-exempting legislation. In light of these facts, the JFTC's soft approach may have been inevitable.

However, experience indicates that formal measures are necessary to restore competition and deter future anticompetitive practices.⁸⁴ Unless the JFTC adopts formal measures, the court cannot review the case and the rules remain unclear.⁸⁵ Although aggressive enforcement may lead to a backlash from politicians, maintaining an ineffective AMA would be pointless. Scholars criticise the JFTC's lenient stance and emphasise the need for enforcement through the judicial system. In the 1980s, the approach became a diplomatic issue, and this resulted in the Japanese government making a com-

80 JFTC, *supra* note 48, 390.

81 HIRABAYASHI, *supra* note 53, II 10–14, 108–109; A. UESUGI, *Dokkin-hō no koshikata yukusue* [The AMA Past and Future] 309 (2007) 89. See also M. MATSUSHITA, *Dokusen kinshi-hō no shikkō* [Enforcement of the AMA], Japan Association of Economic Law (JAEL) Annual 13 (1992) 17–18; O. TANIHARA, *Dokkin-hō no shikkō jitsugen o meguru taikai-ron* [Theories of AMA enforcement], in: JAEL, *Dokkin-hō no riron to tenkai* [AMA Theories and Developments] (2002) II 234–236; M. KURITA, *Dokkin-hō no gyōsei-teki enfōsumento* [Administrative Enforcement of the AMA], JAEL Annual 60 (2017) 69–81; C. IKEDA, *Hōkoku gaiyō: kigyō ketsugō kisei* [Merger Regulation: Summary of Presentation], JAEL Annual 61 (2018) 97.

82 JFTC, *supra* note 58, 352, 524–525, 764–765.

83 HIRABAYASHI, *supra* note 3, II, 144–145.

84 HIRABAYASHI, *supra* note 3, II 15, 20; T. TAKIGAWA, *Dai 48 jo* [Article 48], in: Kikuchi et al. (eds.), *Zoku konmentāru Dokusen kinshi hō* [AMA Commentary II] (1995) 76.

85 JFTC, *supra* note 58, 744 [Ex JFTC official, Mr. Tōdō, on the lack of court cases]; UESUGI, *supra* note 81, 309; KURITA, *supra* note 81, 77; M. KURITA, *Dokkin hō no gyōseiteki enfōsumento no sai-hyōka* [Revisiting Administrative Enforcement of the AMA] in: Uesugi / Yamada (eds.), *Dokkin-hō no furontia* [The AMA's Frontier] (2019) 38.

mitment to enforce the AMA by ‘resorting more to formal actions’ as announced by the US–Japan Structural Impediments Initiative (SII) Final Report in 1990.⁸⁶ Since then, the number of JFTC officials has increased every year;⁸⁷ in 2013, the number of officials had reached approximately 800.⁸⁸ However, developments stopped there. Although the JFTC began to crack down on hardcore cartels,⁸⁹ they did not implement major reforms that would enable the JFTC to tackle other types of practices and mergers.⁹⁰

IV. HISTORICAL LEGACY AND CURRENT CHALLENGES

Currently, the AMA faces problems similar to those that existed at the end of the war. A few platforms dominate in digital advertising,⁹¹ online retail services and other digital sectors,⁹² and their dominant positions make it impossible for businesses partners and consumers to avoid using big tech as trading partners.⁹³ They have established their leading positions through mergers and acquisitions.⁹⁴ In an environment in which data represents the new capital in the modern economy, big tech has overwhelmingly better access to data.⁹⁵ Big tech does business in many related sectors,⁹⁶ leverag-

86 The Final Report of the Structural Impediments Initiative submitted to President Bush and Prime Minister Kaifu on 28 June 1990, <https://worldjpn.grips.ac.jp/documents/texts/JPUS/19900628.OIE.html>.

87 The number of staff working for the Investigation Bureau increased from 129 in 1989 to 236 in 1996. JFTC, *supra* note 53, 490.

88 JFTC, Staff and Budget (FY 1995–2021), https://www.jftc.go.jp/en/about_jftc/statistics.html.

89 The SII report emphasised the JFTC’s formal actions specifically in relation to hardcore cartels. On JFTC activities related to hardcore cartels, see JFTC, *supra* note 53, 513–20. For a comprehensive review of the effect of the SII talks, see M. TANAKA, *Nihon ni okeru Dokusen kinshi-hō no un’yō no henka* [Changes to enforcement of the AMA] in: Yokota et al. (eds.), *Nichibei kōzō kyōgi no eikyō no saiken-tō* [Studies on the Changes in Competition Policies after the SII Talks with the US] (2013) I 4–47.

90 TANAKA, *supra* note 89, 10–11, 46; HIRABAYASHI, *supra* note 53, II 498–500; KURITA, *supra* note 81, 77.

91 JFTC, Fact-finding survey report on digital platform operators’ trade practices: Final report regarding digital advertising (17 February 2021), <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217004pdf.pdf>, 46–47 (Google).

92 JFTC, Report regarding trade practices on digital platforms (Business-to-Business transactions on online retail platform and app store) (31 October 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf>, 19.

93 JFTC, *supra* note 91, 49; JFTC, *supra* note 92, 23–25.

94 JFTC, *supra* note 91, 48–49.

95 JFTC, *supra* note 91, 106–121.

96 JFTC, *supra* note 91, 21–32.

ing their strong position to achieve economic power in other markets. Several in the tech industry design their own ecosystems, and are, thus, rule-setters for those who operate businesses which are reliant on them.⁹⁷ Their rules often favour their own business,⁹⁸ and they often require the businesses with which they work not to deal with their competitors.⁹⁹ From this, it can be seen that there are certain common features between big tech and the dominant companies that ruled pre-war Japan.

Of course, not everything is similar to the wartime economy. At that time, cartels eliminated competition from the market, but now problems generally relate to a monopoly in a differentiated market. In pre-war Japan, cartels acted in concert with the government, whereas, now, digital platforms are extensive enough that they do not need to collude with government. However, the features of the AMA as described in Sections III.2.a)–c, above, should still make it easy for the JFTC to counter the current challenges. In reality, however, the JFTC has not been active in the digital sector up to this point. In the section that follows, I assess the JFTC activities and discuss ways for the JFTC to revitalise competition in the digital economy.

1. Merger Regulations

The JFTC modernised its merger guidelines in 2019 in order to address the digital economy adequately.¹⁰⁰ The revision clarifies that, where the primary mode of competition relates to quality, the market definition should focus on how users react to decreasing quality rather than increasing prices. The revision has also added the need to consider multi-sidedness and network effects, as well as the importance of users' affiliation with more than one platform (multihoming). In the revision process, the JFTC also clarified that it would consider data accumulation as part of the 'general capacity to carry out business'.¹⁰¹ In addition, the JFTC explained that it has the authority to intervene even where parties do not satisfy the notification thresholds.¹⁰²

97 JFTC, *supra* note 92, 89–99; JFTC, *Inshoku-ten pōtaru saito ni kansuru torihiki jittai chōsa hōkoku-sho* [Report regarding restaurant portal sites] (18 March 2020), <https://www.jftc.go.jp/houdou/pressrelease/2020/mar/200318-2.pdf>, 30–31, 42–75 accessed 21 February 2021; JFTC, *supra* note 91, 60–63, 80–92.

98 JFTC, *supra* note 91, 64–66; JFTC, *supra* note 92, 64–70.

99 JFTC, *supra* note 91, 66–79; JFTC, *supra* note 92, 57–60.

100 JFTC, Amendments to 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations' and 'Policies Concerning Procedures of Review of Business Combinations' (17 December 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>.

101 JFTC, *Iken no gaiyō oyobi soreni taisuru kangaekata* [Outlines of Submitted Comments and JFTC responses] (17 December 2019), <https://www.jftc.go.jp/houdou/pressrelease/2019/dec/kiketu/attachment3.pdf>.

Thus, the JFTC is well-equipped with substantive rules. However, significant challenges exist in enforcement. So far, not only has the JFTC never blocked a merger from taking place in the digital sector, it has – in only a few cases – imposed nothing more than a behavioural remedy, such as non-discrimination obligations.¹⁰³

The JFTC is generally reluctant to adopt stringent formal measures (see III.2.d)). Several additional factors are likely to reinforce this tendency concerning mergers. The Chicago School, which claims that most antitrust regulations are unnecessary, has begun to influence US antitrust law.¹⁰⁴ Although both the JFTC and most in academia do not endorse these views, the Chicago School has affected Japan by influencing the US approaches which the JFTC, practitioners and Japanese scholars closely follow and try to learn from.¹⁰⁵ In addition, there is the perception that Japanese companies have been facing fiercer global competition.¹⁰⁶ A tough stance from the JFTC would have triggered harsh criticism.

The JFTC is also cautious about applying a ‘general capacity to carry out business’ concept. While the JFTC publishes more than a dozen merger cases every year, it has taken general capacity into account in only eight cases since 1998, in which financial strength, broad coverage of closely related business sectors and strong buying power were thought to indicate such capacity.¹⁰⁷ Such factors do not cause an anticompetitive effect under the conventional theory of harm, but they may under other circumstances.¹⁰⁸

102 JFTC, Policies Concerning Procedures of Review of Business Combinations (14 June 2011, as last amended 17 December 2019), https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf.

103 JFTC, In re *Z Holdings Corporation and LINE Corporation* (4 August 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/200804.html>; In re *Proposed Acquisition of Fitbit, Inc. by Google LLC* (14 January 2021), <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html>. In general, the JFTC rarely requires merging parties to commit to structural measures unless competition authorities abroad (the United States and the European Union in particular) do so. M. TAHIRA, *Kigyō ketsugō kisei ni okeru shinsa to tetsuzuki no arikata* [How Does Merger Control Work in Japan?], JAEL Annual 63 (2020) 50, 53.

104 See, e.g., The US Department of Justice, 1982 Merger Guidelines, <https://www.justice.gov/archives/atr/1982-merger-guidelines>.

105 HIRABAYASHI, *supra* note 53, II 157–158.

106 See, e.g., HIRABAYASHI, *supra* note 53, II 457 [on the merger of JAL and JAS].

107 JFTC, *Kōhyō jirei ni oite sōgōteki na jigyō nōryoku ni tsuite kentō o okonatta rei* [The List of Cases in which General Capacity to Carry Out Business was Considered], <https://www.jftc.go.jp/dk/kiketsu/toukeishiryō/sougou/index.html>.

108 F. SENSUI, *Sōgōteki na jigyō nōryoku* [General capacity to carry out businesses], in: Kawahama et al. (eds.), *Kigyō ketsugō gaidorain no kaisetsu to bunseki* [Merger Guidelines. Commentary and Analysis] (2008) 174–176.

When it comes to the digital economy, however, such a cautious stance is not necessarily warranted. Positive feedback can make a strong player more vital. The digital market often tips in favour of particular platforms leading to their dominance, and dominances tend to endure for a long time due to network effects, data accumulation and lock-in effects. The importance of data and the way a limited number of big tech companies stretch their dominance from one market to others makes the general capacity concept more relevant.¹⁰⁹

Of course, not every merger in the digital sector is anticompetitive, even when global big tech is involved. The JFTC is not the only competition authority which has never blocked mergers; neither the US nor EU competition authorities have done so in the digital sectors to date. Admittedly, it is difficult to assess mergers in the digital sector; the competitive landscape changes rapidly, and innovative services often undermine dominance. Assessing competitive impact is even trickier in Japan as rivalries exist between global players (eg Google, Amazon, Booking.com, WhatsApp) and local players (Yahoo!, Rakuten, Rakuten-travel, Line).¹¹⁰ If we consider big tech in the neighbouring Chinese market (eg Baidu, Alibaba), assessing the practices of big platforms is even more tricky.

In light of the above, the JFTC first needs a greater capability to deal with mergers in the digital sector.¹¹¹ The JFTC carries out merger review only with 35–40 officials and spent about USD 120,000 in 2020 for these activities.¹¹² Given that the JFTC hires only a few economists across all its divisions,¹¹³ extensive economic analysis would need to be outsourced. However, the budget is too small for the JFTC to engage on this level. There should also be a system to review the effectiveness of JFTC merger decisions ex-post.¹¹⁴

109 See *Yahoo!/Ikyu* (JFTC Merger Report FY2015, Case 8) (The JFTC examined whether the merger would cause an anticompetitive effect through data accumulation in line with the ‘general capacity to carry out business’ consideration, but refuted such a possibility).

110 See, e.g., JFTC, *supra* note 92, 16; JFTC, *supra* note 103 (Z Holdings/LINE).

111 M. WAKUI, *Digital platform mergers and the Antimonopoly Act*, Concurrences 3-2021 (Art. N° 101227) (2021) 4–5.

112 *Reiwa 2-nenndo saishutsu gaisan yōkyū-sho* [FY2020 budget appropriation request], https://www.jftc.go.jp/soshiki/kyotsukoukai/yosan/yosankessan/r2_files/r2sandanhyou.pdf, 50. The number of officials includes assistants.

113 NERA ECONOMIC CONSULTING (ed.), *Wagakuni oyobi shuyō-koku de no kigyō ketsugō shinsa tō ni okeru keizai bunseki no katsuyō ni kansuru chōsa* [Economic Analysis in Merger Reviews: Japan and other Major Countries], https://www.meti.go.jp/eti_lib/report/2019FY/000811.pdf, 77. Only two have PhDs in economics. This is in stark contrast to about 50 and 80 PhD holders at the US Department of Justice Antitrust Division and Federal Trade Commission.

114 TAHIRA, *supra* note 103, 57.

2. *Aggregation of General Economic Power*

Art. 9 para. 1 AMA prohibits the creation of an ‘excessive concentration of economic power due to shareholding in other companies in Japan’, and Art. 9 para. 2 AMA prohibits an entity from transitioning into such a company. Art. 9 para. 3 AMA states ‘excessive concentration of economic power’ may exist in any of following cases: i) an ‘extremely large’ company controls several large-scale companies across a ‘considerable number of major business fields’ [Type A]; ii) a ‘large-scale financial company has a great amount of power to influence other large-scale companies’ through transactions with their funds [Type B]; or iii) a company maintains influential positions by controlling companies in ‘leading positions’ in a ‘considerable number’ of interrelated ‘major business fields’ [Type C]. In the following section, I focus on Types A and C as these relate to the digital sector.

The current JFTC guidelines state that ‘extremely large’, as in Type A, refers to companies holding assets in excess of JPY 15 trillion. With regard to Type C, the JFTC guidelines state that a ‘leading position’ is found where the company has 10% or more of the share in its field of business. For both, a ‘considerable number’ means five or more and a ‘major field of business’ refers to a three-digit classification under the Japan Standard Industrial Classification in cases where shipment volume exceeds JPY 600 billion.¹¹⁵ To find an excessive concentration of economic power, the JFTC must further establish that the situation has a significant effect on the national economy and impedes free and fair competition.¹¹⁶

It is necessary to notify the JFTC when one of these three situations is likely to arise.¹¹⁷ Although the JFTC has never found such a violation, the regime may prove useful in terms of self-assessment as it is relatively straightforward to see if an acquisition meets the above criteria. Art. 9 AMA also requires companies in excess of a specific size to submit a report every year,¹¹⁸ which enables the JFTC to monitor their influence over the economy.

However, the usefulness of this regulation is limited in the digital sector. While more than a hundred companies across sectors submitted reports in FY2019, only two domestic IT companies, Softbank and Rakuten, did so.¹¹⁹

115 JFTC, Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power (12 November 2002), https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/Company_Concentration.pdf.

116 Art. 9 para. 3 AMA.

117 Art. 9 para. 7 AMA.

118 Art. 9 para. 4 AMA.

119 JFTC, *Reiwa gannen ni okeru kigyō ketsugō kankei todokede no jōkyō oyobi shuyō na kigyō ketsugō jirei ni tsuite* [The Status of Notifications Regarding Business Combinations and the Results of Reviews of Major Business Combinations in Fis-

This may be because the reporting criteria are based on assets a company holds in Japan. Finding excessive concentration of economic power is possible only where a company obtains such power ‘due to shareholding in other companies in Japan’. The regulation creates an asymmetric regulatory burden on Japanese companies and hinders the JFTC from conducting effective oversight in the digital sector. Legislators must consider amending Art. 9 AMA to broaden its coverage.

The aim of Art. 9 AMA should be considered as well. Reflecting on wartime experiences, the AMA drafters included Art. 9 AMA, and the basic idea it was created to address has survived through amendments. AMA scholars, at one point, considered active enforcement of Art. 9 AMA unnecessary in light of democratic systems established in Japan.¹²⁰ However, facing novel circumstances in the digital economy, the JFTC should be alert to changes that may necessitate active enforcement of Art. 9 AMA.

3. *Unilateral Conduct*

The JFTC has conducted substantial studies and produced reports,¹²¹ and it has issued and amended guidelines on unilateral conduct in the digital sector.¹²² In contrast, the JFTC has only issued one order, in the *DeNA* case in 2011.¹²³ Although the JFTC has resolved several cases through a commitment procedure since its introduction in 2018, this is an informal procedure and the JFTC does not publish the details, thus precedential value is limited.¹²⁴ As explained

cal Year 2019] (22 July 2020), <https://www.jftc.go.jp/houdou/pressrelease/2020/jul/kiketsu/03R1doukoupressrelease.pdf>. Softbank provides telecommunication services, a search engine (Yahoo!), smartphone services, online shopping and other digital services. Rakuten is the second largest e-commerce operator in Japan after Amazon and an online travel agency and mobile communication services provider.

120 A. GOTŌ, *Ippan shūchū no kisei* [Regulation of General Concentration], in: Suzumura / Gotō (eds.), *Nihon no kyōsō seisaku* [Competition Policy in Japan] (1999) 242.

121 JFTC, *supra* note 91; JFTC, *supra* note 92; JFTC, *supra* note 97; JFTC, Survey Report Regarding Transactions in B2C E-Commerce (9 April 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/April/190409_1.html; JFTC Study Group on Competition Policy in Digital Markets, Report on Algorithms/AI and Competition Policy (31 March 2021), <https://www.jftc.go.jp/en/pressreleases/yearly-2021/March/210331004.pdf>.

122 JFTC, Amendments to ‘Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act’ (16 June 2017), <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170616.html>; release of the ‘Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.’ (17 December 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html.

123 DeNA, Cease and Desist Order, 9 June 2011, 58-I Shinketsu-shū 189.

earlier, the AMA gives the JFTC the authority to issue cease and desist orders in numerous situations.¹²⁵ The small number of cases is puzzling.

A concern surrounding over-deterrence may be one reason for the small number of cases. The JFTC has been reluctant to apply the AMA to unilateral conduct and non-price vertical restraint for a long time, which corresponds to the general trend observed in the US.¹²⁶ However, under-regulation is as serious as over-regulation in the digital sector. To begin with, the risk of over-regulation is lower in Japan generally because an AMA violation results in neither a severe fine nor damages. On the other hand, there is a need to clarify how to assess practices in the digital sector. Only cases in which the JFTC has taken measures formally and publicly illustrate how it evaluates a practice in concrete terms. The courts' evaluation of the JFTC's decisional practices would further clarify how competition rules should be applied in the digital economy.

4. *The Monopolistic Situation*

Under Art.8-4 AMA, the JFTC can break up a company and take other measures to restore competition where no functioning competition exists nor is likely to emerge. The JFTC does not need to prove a merger or exclusionary practice has brought about such a situation. Instead, it must establish that: i) the total turnover in the 'field of business' exceeds one hundred billion yen; ii) a single company's share of a field of business exceeds 50%, or more than one company's share of a field of business ex-

124 JFTC, Approval of the Commitment Plan Submitted by Rakuten, Inc. (25 October 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html>; Approval of the Commitment Plan Submitted by Amazon Japan G.K. (10 September 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html>. There are also several cases in which the JFTC has closed an investigation, noting that the parties have voluntarily implemented the remedial measures before the introduction of the commitment procedure. JFTC, Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan G.K. (1 June 2017), <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html>; Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Airbnb Ireland UC and Airbnb Japan K.K. (10 October 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/October/181010.html>; Report on e-Books Agreements from Amazon Services International, Inc. (15 August 2017), <https://www.jftc.go.jp/en/pressreleases/yearly-2017/August/170815.html>; Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Minna no Pet Online Co, Ltd (23 May 2018), https://www.jftc.go.jp/en/pressreleases/yearly-2018/May/180523_1.html.

125 K. FUCHIKAWA, Regulations of digital platform markets under the Japanese Antimonopoly Act: Does the regulation of unfair trade practices solve the gordian knot of digital markets?, *Antitrust Bulletin* 65(1) (2020) 102, 116.

126 US ANTITRUST SUBCOMMITTEE, *supra* note 3, VI.B.3.

ceeds 75%; iii) entry into the particular field of business is substantially difficult; iv) there has been a significant price increase, or a decrease in price is excessively small, in light of changes to the price of inputs and the supply and demand in that field; v) enterprises operating in the field are earning profit at a rate far exceeding the normal profit rate for that field, or those enterprises' expenses far exceed such expenses in that field. The term 'field of business' differs from the relevant market and includes the same or substantially similar goods or services.¹²⁷ Once these conditions are met and where there is no alternative measure to restore competition, the JFTC may demand the company transfers some of their business to a third party or takes other measures to restore competition in the business field,¹²⁸ unless such measures would bring about any of following situations: i) the scale of business would be reduced, resulting in a dramatic increase in the price of the goods or services; ii) financial strength would be undermined; and iii) international competitiveness could not be maintained.¹²⁹

Critics of Art. 8-4 AMA point out that the bar is so high as to make it extremely difficult to apply.¹³⁰ The present author considers that, although invoking Art. 8-4 AMA should be the last resort in light of its drastic nature, the JFTC should not hesitate to apply it where necessary. A situation may occur where both the government and the market fail to control the emergence of a dominant company. Art. 8-4 AMA, namely the possibility of severe consumer harm where there is no alternative to restore competition, should justify JFTC measures to restore competition.¹³¹

127 JFTC, Guidelines Concerning Companies Which Constitute an Excessive Concentration of Economic Power, 12 November 2002 as last amended 13 November 2018.

128 Art. 8-4 para. 1 AMA.

129 Art. 8-4 para. 2 AMA. The JFTC used to publish a list of business fields that satisfy turnover and share requirements. The list, last published in 2016, included an operating system for personal computers, integrated office software and security software. JFTC, *Dokusenteki jōtai no teigi kitei no uchi jigyo bunya ni kansuru kangaekata ni tsuite no ichibu kaitei ni tsuite* [On Revision of 'Guidelines Concerning the Interpretation of a "Specific Business Field" as Defined in the Provisions of "Monopolistic Situation" in the Antimonopoly Act'] (11 October 2016), https://www.jftc.go.jp/houdou/pressrelease/h28/oct/161011_1_files/16101103.pdf. In 2018, the JFTC changed its policy and stopped creating such lists. JFTC, *Dokusenteki jōtai no teigi kitei no uchi jigyo bunya ni kansuru kangaekata ni tsuite no ichibu kaitei ni tsuite* [On Revision of 'Guidelines Concerning the Interpretation of a "Specific Business Field" as Defined in the Provisions of "Monopolistic Situation" in the Antimonopoly Act'] (13 November 2018), <https://www.jftc.go.jp/houdou/pressrelease/h30/nov/181113.html>.

130 K. SANEKATA, *Kasen taisei to Dokkin-hō* [Oligopoly and the AMA] (1983) 114.

131 A report published by the JFTC's research unit in 2017 stated the JFTC might need to invoke the provision if the accumulation of data results in excessive concentra-

Several adjustments would be necessary to trigger situation-specific monopolistic regulation in the digital economy. First of all, big tech companies offer search and communication services at no charge to general consumers, so the focus should not be only on price increases. Diminishing service quality by lowering privacy protection levels is as harmful as a price increase, for example. Second, the way in which share is calculated must be modified so that the JFTC may refer to data other than sales revenue. Again, this is necessary because tech giants often provide their services for free. Third, the JFTC should be able to take into account consumer harm arising in a different but closely related business field in assessing whether a monopolistic situation exists. For example, when determining whether a monopolistic situation exists in a digital advertising field, it should be possible for the JFTC to consider that the same platform imposes unfair trading terms on social networking or search services. Finally, the reference to international competence is no longer relevant and should be deleted.

5. *AMA Enforcement in the Global Setting*

The JFTC's power to collect evidence from abroad is limited.¹³² Although global big tech companies have branches in Japan, which the JFTC can investigate, the country-specific evidence obtained may be insufficient. Ensuring that unwilling foreign companies comply with the JFTC order would also be difficult. Violation of a JFTC cease and desist order results only in a fine of up to JPY 500,000 (about EUR 4,000) unless the JFTC opts for criminal prosecution.¹³³ Japanese entities typically comply with the JFTC order due to the reputational harm that accompanies an investigation. Most foreign companies would not do the same. On the other hand, the JFTC must also be free of any protectionism that pushes it to attempt to enforce the AMA against foreign companies. The situation thus suggest that the promotion of international cooperation is imperative.

The global context increases the need for the JFTC to change its lenient approach. Businesses focusing on markets abroad are less likely to listen to what the JFTC suggests. It is the repeated and reciprocal nature of the interventions that makes the soft approach effective, if ever. The Japanese government may have various ways to reward and punish businesses that

tion in the future. JFTC Competition Policy Research Centre, Report of Study Group on Data and Competition Policy (6 June 2017), https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-4.pdf.

132 H. MAKUTA, *Kotori jitsumu kara kangaeru Dokusen kinshi-hō* [AMA and JFTC Practice] (2017) 401.

133 Arts. 90 (iii), 95 para. 1 (ii), 97 AMA. Note that the amount is not the daily maximum.

misbehave in Japan, but the same does not hold for a company less interested in the various forms of aid offered by the Japanese government. The JFTC needs to force them to comply with the AMA by issuing orders. Such enforcement requires extensive resources, meaning the JFTC needs a larger budget and more staff.

V. CONCLUSIONS

The pre-war Japanese economy was dominated by a small number of *zaibatsu* and companies. Post-war economic reforms created a competitive market structure in Japan and established competition law and policy for the first time in the country. Despite the radical nature and scale of these reforms in the Japanese economy, Japan recovered and grew under the new order.

The particular features of the AMA reflect this legislative history, including a focus on the capacity of large businesses and the disparity of capability among businesses. The JFTC is also able to take measures to restore competition where it has found neither an anticompetitive merger nor practice. Such features of the AMA should make it easy for the JFTC to counter the current challenges posed by the digital economy, big tech and digital platforms.

In reality, however, the JFTC is not making use of its legal tools to the fullest possible extent. In particular, the soft approach that the JFTC takes towards enforcing the AMA in relation to mergers and unilateral conduct undermines the effectiveness of the AMA regulatory regime both domestically and globally. To revitalise competition policy in the modern digitalised economy, the JFTC needs to change the way it enforces the AMA so as to take a tougher and more formal stance. AMA provisions relating to the aggregation of economic power and a monopolistic situation also need to go through digital transformation by focusing more on a strong market position across countries, extensive network effects and the capability to access a vast amount of personal data. Enhancing the JFTC's capability to collect evidence from foreign jurisdictions and ensuring that foreign companies comply with JFTC orders are also pressing issues that need to be addressed.

SUMMARY

After World War II, Japan underwent economic reform; large conglomerates, known as zaibatsu, and 18 dominant companies were broken up in order to restore competition. Combined with the newly implemented competition law, the Antimonopoly Act (AMA), this economic reform established an economic system based on free competition. The AMA includes several characteristics that reflect Japan's economic history, including concerns about aggregated economic power

and a disparity of bargaining power. The Japan Fair Trade Commission (JFTC) also has the authority to take measures to restore competition without finding wrongdoing. At the same time, the JFTC experienced a lack of political support and difficulties for decades after the enactment of the AMA, which also influenced the way the AMA is enforced. For mergers and unilateral conduct, the JFTC tends to opt for soft approaches, encouraging businesses to comply with the AMA through its guidelines and through voluntary commitments.

Currently, data accumulation, network effects and substantial economies of scale are creating significant competition law issues in the country. Outside Japan, lawmakers and competition authorities are considering strengthening their competition law regimes and introducing structural measures to restore competition. In Japan, the features of the AMA, as described above, should make it easy for the JFTC to counter the current challenges. In reality, however, the JFTC is not making full use of its legal tools to address these challenges. The lack of formal cases also undermines the effectiveness of the AMA regulatory regime.

To revitalise competition policy in the modern digitalised economy, the JFTC needs to change how the AMA is enforced, moving from an administrative-guidance-based soft approach to a tougher one. AMA provisions relating to the excessive concentration of economic power and monopolistic situations also need to undergo digital transformation by focusing on more extensive network effects and the capability to access vast amounts of personal data. Where concentration is taking place at a global scale and Japan is a part of it, the AMA threshold of intervention needs to be changed to refer to global turnover, rather than the total assets held in Japan. Enhancing the JFTC's capability to collect evidence from foreign jurisdictions and ensuring that foreign companies comply with JFTC orders are also essential.

ZUSAMMENFASSUNG

Nach dem Zweiten Weltkrieg kam es in Japan zu umfassenden Wirtschaftsreformen. Um den Wettbewerb wiederherzustellen wurden große Konglomerate, die sogenannten zaibatsu, ebenso zerschlagen wie 18 marktbeherrschende Unternehmen. Mit dem neu eingeführten Wettbewerbsrecht, dem Antimonopolgesetz (AMG), etablierte diese Wirtschaftsreform ein auf freiem Wettbewerb basierendes Wirtschaftssystem. Das AMG weist mehrere charakteristische Merkmale auf, die Japans Wirtschaftsgeschichte widerspiegeln, einschließlich einer kritischen Haltung gegenüber aggregierter Wirtschaftskraft und ungleicher Verhandlungsmacht. Insbesondere ist die Japan Fair Trade Commission (JFTC) befugt, Maßnahmen zur Wiederherstellung des Wettbewerbs auch dann zu ergreifen, wenn kein Fehlverhalten festgestellt ist. Nach Inkrafttreten des AMG erfuhr die JFTC allerdings jahrzehntelang Schwierigkeiten und einen Mangel an politischer Unterstützung, was auch die Art und Weise beeinflusste, wie das AMG durchge-

setzt wird. Bei Zusammenschlüssen und einseitigen Verhaltensweisen tendiert die JFTC zu weichen Ansätzen, indem sie Unternehmen durch Richtlinien und freiwillige Selbstverpflichtungen zur Einhaltung des AMG anzuhalten sucht.

Vor dem Hintergrund der Digitalisierung führen Datenakkumulation, Netzwerkeffekte und erhebliche Skaleneffekte derzeit zu gravierenden wettbewerbsrechtlichen Problemen. In anderen Ländern erwägen Gesetzgeber und Wettbewerbsbehörden, ihre wettbewerbsrechtlichen Regelungen zu verschärfen und strukturelle Maßnahmen zur Wiederherstellung des Wettbewerbs einzuführen. In Japan sollten die oben beschriebenen Merkmale des AMG es der JFTC an und für sich leicht machen, den aktuellen Herausforderungen zu begegnen. De facto schöpft die JFTC ihr rechtliches Instrumentarium jedoch nicht aus. Auch das Fehlen tatsächlich durchgeführter Verfahren untergräbt die Wirksamkeit des Regelungsregimes des AMG.

Um die Wettbewerbspolitik in der modernen digitalisierten Wirtschaft wiederzubeleben, muss die JFTC die Durchsetzung des AMG ändern und von einem auf Verwaltungsleitung basierenden weichen Ansatz zu einem härteren Vorgehen übergehen. Auch die AMG-Bestimmungen bezüglich übermäßiger wirtschaftlicher Machtkonzentration und Monopollagen müssen den Realitäten der digitalisierten Wirtschaft angepasst werden, indem sie auf weitreichende Netzwerkeffekte und die Möglichkeit des Zugriffs auf riesige Mengen personenbezogener Daten ausgerichtet werden. Dort, wo eine Konzentration auf globaler Ebene stattfindet und auch Japan betroffen ist, muss die Schwelle für ein Eingreifen auf der Grundlage des AMG geändert werden; sie sollte sich auf den weltweiten Umsatz statt auf das in Japan gehaltene Gesamtvermögen beziehen. Ebenfalls von großer Bedeutung ist es, die Fähigkeit der JFTC zu verbessern, Beweise aus dem Ausland zu sammeln und sicherzustellen, dass auch ausländische Unternehmen den Anordnungen der JFTC Folge leisten.

(Die Redaktion)