

**Comments on Japanese competition policy (... and related regulatory issues)  
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**Key issues:**

- *Inability of the Japan Fair Trade Commission (JFTC) to conduct “forcible investigations of suspected illegal events”* – The JFTC is hamstrung to a certain extent by its inability to pursue suspected anti-competitive behavior as it does not have the judicial power to conduct criminal investigations of suspected wrongdoing. On a more practical level, rules governing JFTC legal investigations (and hesitation on the part of the JFTC to pursue cases with vigor) often prevent the effective collection of information relevant to a particular case – which often leads to cases being dropped for “lack of sufficient evidence”.
- *Lack of effective (monetary) deterrent to anti-competitive behavior* – Fines are currently set at 6% of sales of products involved in the alleged wrong-doing for large firms, and 3% for SMEs. This rate is capped, however, at 10 million yen (approximately 80,000 Euro). This level of sanction is much too low to act as an effective deterrent to anti-competitive behavior.
- *Relationship between the JFTC and an industry’s “primary regulator”* – While the JFTC is theoretically the authority with the primary responsibility to enforce competition policy in Japan (specifically, enforcement of the provisions of the Anti-Monopoly Act), this responsibility in many ways is subordinate to the authority of the “primary regulator” in specific sectors (e.g. the FSA and the MOF for the financial sector, the MHLW for medical products and services, METI for electricity, MPHPT for telecommunications, etc.) Often, the goals of the “primary regulator” do not coincide with the views of the JFTC – often to the detriment of competitive principles (see also “micro-management” below).
- *Tendency of the regulator towards “micro-management”* – In many sectors of the Japanese economy, firms can do very little without first consulting and obtaining the approval of the regulator. This focus on “micro-management”, as opposed to strong enforcement of general competition principles, places a real fetter on the market mechanism.
- *Lack of expert knowledge within the regulator* – There is a shortage of economic and legal skills in both the JFTC and “primary regulators” to perform true economic-based analysis required to determine market power and its abuse, design effective regulatory structures, and perform the tasks necessary to investigate alleged anti-competitive behavior.

- *Procedural inefficiencies* – The investigative and enforcement protocol used by the JFTC in conducting its investigations lacks efficiency. Probes currently average 9 1/2 months. This is due not only to a lack of sufficient manpower, but also the procedures by which companies are notified of investigation, the way in which the investigation is conducted, the way in which results are reported, and the way in which action is enforced (which may entail a complicated “hearings” process depending on the willingness of those being investigated to adhere to the results of the preliminary investigation).
- *Lack of regulatory transparency* – A lack of transparency and clarity in the Japanese regulatory regime is one of the factors most frequently cited by European businesses as inhibiting the development of a truly open market for trade and investment in Japan. A lack of transparency creates uncertainty, and this makes business planning difficult. Unfortunately, the recently established “no-action letter” system has not solved this problem. More disturbing, even, is the general attitude of regulatory authorities towards transparency and clarity in their respective regulatory jurisdictions. Regulators should be proactively seeking out areas that need clarification, and this is not happening in Japan. This has created somewhat of a double standard, especially in the financial services sector: on the one hand, the regulator requires firms to maintain a clear written relationship with their clients, while on the other hand they do not afford this same courtesy to the firms that they regulate.
- *Cultural attitudes and the relationship between the regulator and the regulated* – Many of the problems attributable to a lack of regulatory transparency, over-emphasis on micro regulatory management, etc. can in turn be attributed to bureaucratic culture in Japan and the strong ties between business and government. While things have changed remarkably over the past decade, Japanese bureaucratic culture has yet to fully embrace the spirit of regulatory reform that swept through the US in the 1970s and 80s and then in Europe in the late 80s and early 90s.
- *Public procurement* – Big rigging and other collusive business practices still rampant

### **Consequences of this regulatory / competitive framework:**

- High (sometime prohibitive) entry costs for new players
- In the end, consumers suffer from high prices, lack of choice and product innovation

### **Looking on the bright side:**

The outlook for Japanese competition policy and related regulatory structure is not all “gloom and doom”, however. As mentioned above, there has been a lot of positive change over the past decade, and a number of proposals are in the works that appear to be heading in the right direction:

- JFTA will be transferred from the Home Affairs Ministry to Cabinet Office once the relevant bills have passed the Diet
- JFTA staffing levels are set to rise by 25 in April, to take the total number of employees to 625, and this after increase of 40 in FY02. The new chairman of the JFTC, Mr. Kazuhiko Takeshima, has stated publicly that his goal is to raise staffing levels to 1,000.
- More efficiency has been promised for M&A reviews, with an internal goal of ruling on applications within 30 days.
- Breaks for whistleblowers (i.e. leniency for firms that cooperate with investigations) will likely be written into legislation amending the Anti-Monopoly Act
- Goals to introduce “Kansei Dango” provisions into relevant competition laws – currently only companies are legally to blame for collusive business practices that take place with the explicit consent public employees involved in public procurement decisions.
- Recent JFTC initiatives in tackling alleged anti-competitive behavior in politically sensitive sectors (c.f. recent cases against Japan Highways, NTT).
- Broad-based Council on Economic and Fiscal Policy / Council on Regulatory Reform initiatives related to strengthening the investigative and enforcement powers of the JFTC (e.g. increasing number of expert staff, raising fines, empowering the JFTC to conduct criminal investigations, introducing whistleblower provisions).
- Regulatory reform in specific sectors (e.g. legal services, telecommunications, insurance, financial services, IVDs) and legal infrastructure (e.g. corporate restructuring) that has led to a more competitive market environment.