



# DEPARTMENT OF JUSTICE

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## **The History of Japanese-American Cooperation on Competition Enforcement**

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## **I. Introduction**

I am delighted to be speaking with you all today. I would like to begin by expressing sincere regrets on behalf of the Assistant Attorney General of the Antitrust Division, Makan Delrahim. Makan was scheduled to be here and give remarks today, and had been very much looking forward to this event for a long time. Unfortunately, he was unable to take a long flight abroad as he is still recovering from a minor procedure. The good news is that Makan is going to be fully recovered very soon and looks forward to revisiting Japan very soon. He asked me to share his warm greetings with all of you, and also thank the American Chamber of Commerce for sponsoring this program.

It is an honor and a privilege to be here in Tokyo at such an important and historic moment. In less than a week, Japan will witness – in the most literal sense – the end of one era and the beginning of a new one. When Crown Prince Naruhito accedes to the throne on May 1, Japan will transition from the “Heisei” era to the new “Reiwa” era. As Prime Minister Abe explained, the name “Reiwa,” which I understand is translated as “beautiful harmony,” was chosen for very special reasons. The name evokes Japan’s long history, rich culture, natural beauty, and captures Japan’s hope for a bright future.

In the spirit of this momentous occasion, I would like to take this opportunity to reflect on the past and the history of the Japan- U.S. relationship on competition enforcement. I will then conclude with a few thoughts on our future, including new challenges posed by digital markets. If history is any indicator, in this new era, we enforcers should have the collective wisdom and experience to know that success is about making the right decisions for the long term.

## II. History of Japanese-American Cooperation on Competition Enforcement

One of Japan's powerful business leaders, Shigeharu Suzuki, the Beatles-loving chairman of Daiwa Securities, said that the "Japanese economy has been on a long and winding road."<sup>1</sup> One just as easily could say that the United States and Japan have been on a long and winding road in effective antitrust cooperation.

Japan Fair Trade Commission is one of the world's oldest and largest competition agency. The relationship between the JFTC and the U.S. antitrust agencies reflects a long history of working together on competition enforcement.

Japan's Antimonopoly Act, which recently celebrated its 70<sup>th</sup> anniversary last year, was enacted in 1947, soon after the end of the Second World War. The Antimonopoly Act, or AMA, was part of the United States and other Allied Forces' efforts to promote economic development and encourage democracy in Japan.<sup>2</sup> "The idea of enacting an antitrust law might have come from the United States, but the actual content of that legislation was very much a product of Japan's government."<sup>3</sup> The Japanese economy was highly concentrated by a few powerful families, known as *zaibatsu*. In the postwar period, 56 persons from 10 *zaibatsu* families controlled key markets for 72 million Japanese consumers.<sup>4</sup> The introduction of competition laws in Japan helped to change the mindset that "what was good for the *zaibatsu* was good for Japan."<sup>5</sup>

An early draft of the AMA eloquently described the new competition law as necessary because "immunity from competition is a narcotic, and rivalry is a stimulant to industrial

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<sup>1</sup> Peter Tasker, *Why Japan's 'Beatles Moment' Still Matters, 50 Years On*, *Mikkei Asian Review*, (June 23, 2016), available at <https://asia.nikkei.com/NAR/Articles/Why-Japan-s-Beatles-moment-still-matters-50-years-on>.

<sup>2</sup> Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1 (2000).

<sup>3</sup> *Id.* at 69.

<sup>4</sup> Eleanor M. Hadley, *Antitrust in Japan*, 44-45 (1970).

<sup>5</sup> *Id.* at 44.

progress.”<sup>6</sup> More recently, the JFTC described the aim of the legislation as restoring “the Japanese economy under the concept of a market economy in the post-war environment....The AMA stipulates the basic rules of market economy as an ‘economic constitution’ with its role to function as a foundation for realizing a prosperous economy for our country through vitalizing competition.”<sup>7</sup>

After the Allied Forces’ occupation ended in 1952, however, Japan’s Antimonopoly law was rolled-back in important respects. *Per se* prohibition of cartels was removed from the law. Various business interests pushed for laws granting cartel exemptions for exporters and small and medium enterprises, and special “bypass statutes” were enacted to exempt application of the Antimonopoly Laws under specific circumstances. Through the 1970s, proposed acquisitions by foreign parties could face nearly insurmountable obstacles due to the Foreign Exchange and Trade Control Law.

The U.S. – Japan relationship was not the easiest during this time. Japan faced pressure from the United States and other nations to strengthen the enforcement of its antitrust laws as a means to improve the competitive environment in Japan. Over time, however, competition policy became increasingly important to Japan and we saw a number of important developments.

First, in response to criticism of its exclusive market, JFTC took on a stronger role encouraging deregulation and promoting competition. The JFTC published guidelines for deregulated and privatized markets, believing it was important to secure a competitive environment that enabled new entrants to compete effectively.<sup>8</sup>

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<sup>6</sup> First, *supra* n. 2, at 36.

<sup>7</sup> 2017 JFTC Press Release, Remarks as We Celebrate the 70<sup>th</sup> Anniversary of the Antimonopoly Act, *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2017/July/170720.html>.

<sup>8</sup> *Id.*

The push for deregulation and market liberalization also was an important part of the United States history around the same time. The waves of deregulation starting in the 1970s brought many benefits for consumers, including lower prices, more choice, and higher quality. Today, of course, the U.S. Antitrust Division continues in our competition advocacy efforts to identify regulations that hinder competition without offsetting benefits.

Second, to resolve growing trade tensions with the United States, Japan agreed to address non-tariff barriers that limited foreign access to Japanese markets. Beginning in 1989, as part of the Japan–US Structural Impediments Initiative (SII), Japan developed new guidelines that helped to further improve market access.<sup>9</sup>

Third, the JFTC strengthened the scope and enforcement capability of the AMA. For example, in 1992, the AMA was revised to enhance criminal penalties imposed on corporations for competition law violations, particularly with respect to cartels. In 2005, the JFTC established a Criminal Investigation Department and introduced a leniency program to help detect cartels and develop facts.

Finally, cooperation between the US antitrust agencies and the JFTC has grown and strengthened during the Heisei era. Ten years ago, in 1999, the JFTC entered into an antitrust cooperation agreement with the U.S. competition agencies in the belief that it could “improve antimonopoly law enforcement in both countries” and “lead to improved relations between our governments.”<sup>10</sup> The agreement proved auspicious, and today Japan is one of our closest antitrust enforcement partners. In fact, the DOJ and JFTC forged a close relationship on intellectual property issues in antitrust by entering into a working group in 2004. The DOJ, FTC,

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<sup>9</sup> *Id.*

<sup>10</sup> Douglas Melamed, An Important First Step: A U.S./Japan Bilateral Antitrust Cooperation Agreement (Nov. 12, 1998), *available at* <https://www.justice.gov/atr/speech/important-first-step-usjapan-bilateral-antitrust-cooperation-agreement>.

and JFTC hold regular bilateral antitrust consultations, and our meeting tomorrow will be our 36<sup>th</sup> formal consultation, our longest running consultation with any foreign antitrust agency.

Cooperation between the JFTC and the U.S. agencies on enforcement and policy issues is now routine. Cooperation helps us to identify areas of common interest, understand relevant facts, and achieve consistent outcomes in our merger investigations. Cooperation also helps to promote efficiency, not only for us, but for the parties to our investigations. Cooperation helps to ensure that investigations and remedies are consistent and predictable, which benefits firms engaged in international business, and, ultimately, consumers.<sup>11</sup> In our cartel matters, case cooperation helps us to understand on-the-ground facts and conditions, as well as help to make our parallel investigations more efficient and less burdensome by coordinating document searches and consolidating agency interviews.

Our mutual friendship continues to grow. In recent years, the Antitrust Division hosted three visiting international enforcers from JFTC as part of our Visiting International Enforcer Program (VIEP), and we look forward to hosting two enforcers from JFTC later this year. One of our Antitrust Division attorneys spent two weeks learning from his counterparts at JFTC.

JFTC also is a valuable partner in multilateral competition efforts. JFTC was a founding member of the International Competition Network, and remains tireless in its efforts to facilitate cooperation and mutual understanding among agencies. We appreciate JFTC's support for a new multilateral framework on procedures, recently announced as the ICN Framework for Competition Agency Procedures.<sup>12</sup> From the beginning of our efforts last spring, JFTC was an

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<sup>11</sup> See also, Patty Brink, A View from the Trenches, Remarks Before the Inst. for Consumer Antitrust Studies, *Int'l Cooperation at the Antitrust Div.* (Apr. 19, 2013), available at <http://www.justice.gov/atr/public/speeches/296073.pdf>.

<sup>12</sup> See also Matthew Perlman, "Int'l Competition Group Adopts DOJ's Fairness Framework," Law360 (April 5, 2019), available at <https://www.law360.com/articles/1146921/int-l-competition-group-adopts-doj-s-fairness-framework>; Makan Delrahim, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Fresh

active participant and supporter. In fact, it was the JFTC's Framework for Merger Review Cooperation that served as a model for how to incorporate the MFP into the ICN using an opt-in mechanism.<sup>13</sup> The Framework for Competition Agency Procedures is a remarkable and historic achievement.<sup>14</sup> It sends the clear signal that competition agencies across the globe – despite the differences between their legal systems and procedural rules – are committed to fundamental due process in competition enforcement. Since the Framework was announced on April 5, we have been in contact with almost a hundred competition agencies. Their reactions have been overwhelmingly positive. We anticipate widespread support for the Framework and a genuine celebration at the inaugural event on May 15 in Colombia.

As we depart this Heisei era, I will say that it has been a good one for our bilateral relationship. JFTC has become, in many respects, a beacon for sound enforcement and a model for other competition agencies in the region.

### **III. Future Challenges for Competition Enforcement in the Digital Age**

I'd like to turn now to a challenge of the coming Reiwa era: the application of competition law to digital markets and tech platforms, an area of interest to many of you in the audience. Digital markets has become a hot topic in the United States, as well as for jurisdictions around the world. Competition agencies across the globe are grappling with questions about whether existing policy and enforcement tools are flexible enough to address new challenges of the digital age.

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Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement (June 1, 2018), available at <https://www.justice.gov/opa/speech/file/1067582/download>.

<sup>13</sup> ICN Framework for Merger Review Cooperation, (2012) available at <https://www.internationalcompetitionnetwork.org/portfolio/icn-framework-for-merger-review-cooperation/>.

<sup>14</sup> See Matthew Perlman, "Int'l Competition Group Adopts DOJ's Fairness Framework," Law360 (April 5, 2019), available at <https://www.law360.com/articles/1146921/int-l-competition-group-adopts-doj-s-fairness-framework>.

JFTC also is interested in these issues. In late 2018, JFTC, the Ministry of Economy, Trade and Industry (METI), and the Ministry of Internal Affairs and Communications (MIC), launched a study group to examine digital platform operators and related issues in Japan. On the basis of the group's findings, the JFTC published Fundamental Principles for improving JFTC's review of issues related to digital platforms. Soon after, the JFTC launched a market study focusing on the practices of digital platform operators. One focus of the study is whether a level playing field exists between businesses in Japan and digital platform operators, many of which are U.S. companies.<sup>15</sup>

In digital markets, as in all markets, the U.S. Antitrust Division advocates for a careful application of the competition laws that takes into account both the short-term and long-term effects on innovation.

Preserving incentives to innovate is also important to Japan, a leader in innovation and technology. American consumers benefit greatly from Japanese inventions across different industries. The Sony Walkman was a breakthrough technology that gave music lovers like me a way to listen to music on the go. Japanese scientists invented the blue LED light in the early 1990s, which paved the way for today's energy-efficient screens, monitors, and lightbulbs. My children, along with millions of others, continue to be entertained by video games advancements by Japanese companies like PlayStation and Nintendo.

Innovation undoubtedly benefits consumers by bringing new goods and services to the market, reducing costs, increasing efficiency, and fueling economic growth. It is therefore important to protect incentives to innovate through our countries' laws and policies.

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<sup>15</sup> Fundamental Principles for Improvement of Rules Corresponding to the Rise of Digital Platform Businesses (Dec. 18, 2018), [https://www.jftc.go.jp/en/policy\\_enforcement/survey/index\\_files/190220.1.pdf](https://www.jftc.go.jp/en/policy_enforcement/survey/index_files/190220.1.pdf)

Strong protection of intellectual property, for example, is key for unlocking innovation. Intellectual property rights provide incentives for innovators to invest in research and development by guaranteeing them an ability to profit from their invention's success. Intellectual property rights are so fundamental to Americans, it is the only "right" referenced explicitly in the original United States Constitution.

The U.S. Antitrust Division recognizes the valuable role of intellectual property rights and has sought to curb the misapplication of antitrust law in this area. In our view, there should be no free-standing obligation to license patent rights under antitrust law. Similarly, we believe that an unconditional refusal to license a patent, on its own, does not give rise to antitrust liability. We are concerned that using the antitrust laws to police the exercise of an exclusive intellectual property right ultimately will undermine the incentives to innovate and engage in dynamic competition.

Sound and timely antitrust enforcement also is key to promoting innovation by ensuring the integrity of the marketplace. Competition laws should encourage and enable the creation of better products and services to the benefit of society. At the same time, we must police against the lazy monopolist who seeks to block entry and innovation through anticompetitive practices instead of competing vigorously on the merits.

Antitrust enforcers must distinguish between hard-fought competition and anticompetitive behavior. Vigorous competition in a free market results in winners and losers. If a firm becomes successful by making a product or services that consumers want and buy, they should be rewarded, not punished. Running an inefficient competitor out of the market by building a better mousetrap is not anticompetitive, rather it is competition at work. In the digital market, as in all other markets, success alone does not merit sanction.

For antitrust enforcers to strike the right balance on innovation, we must look at the facts and understand the real-world competitive dynamics. I therefore appreciate Japan's efforts to engage in careful study of digital markets and online platforms before deciding on new enforcement or regulatory action.

There is no one-size-fits all solution for the digital world. Digital companies today often are involved in different products and services. These differences are relevant to our antitrust analysis. A firm with market power in one service, could be a small, disruptive new entrant in another market. Conversely, a seemingly-small player may have tremendous market power with respect to a particular product or set of consumers. The heart of the antitrust inquiry should be on the alleged conduct and its competitive effects, not simply the size of the firm.

Japan is one of the great innovator nations of the world, and the JFTC one of our strongest enforcement partners. I have confidence that in this new Reiwa era, both our agencies will have the fortitude and experience to take the long view, and assess concerns in the digital space on a case-by-case basis. We must be vigorous when the facts and economics support the action, but be cautious not to take actions that harm innovation.

I have spoken today at length about the history of cooperation between the JFTC and the U.S. competition agencies. If history has taught us anything, it is that by working together, our agencies can overcome challenges and solve common problems.

As Prime Minister Abe has remarked, the Reiwa name symbolizes hope and a wish for "Japan to proudly bloom like plum blossoms . . . ." To my friends in Japan—my JFTC counterparts, as well as Japanese and American practitioners working in Japan, may this new Reiwa era bring years of "beautiful harmony," and may the creativity and innovation in Japan

that has for decades been a source of inspiration for the entire world, continue to “bloom like plum blossoms.”

Thank you.