

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

[Japan Fair Trade Commission, Japan]

The following template is submitted by **[Japan Fair Trade Commission, Japan]** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

### I. Introduction

*Please add brief presentation/link to agency website.*

The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) is an independent administrative commission established to enforce the Antimonopoly Act (competition law in Japan).

<https://www.jftc.go.jp/dk/guideline/lawdk.html>

[https://www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index.html](https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html)

The JFTC’s major roles are as follows: (1) strictly enforcing the Antimonopoly Act to maintain free and fair competitive environment; (2) amending the Antimonopoly Act or stipulating relevant guidelines in order to improve the competitive environment; and (3) enhancing cooperative relationship with other competition agencies in order to reinforce the competition policy infrastructure.

The general secretariat has been established with the JFTC for the purpose of the administration of its affairs. The Investigation Bureau in the general secretariat is in charge of the investigation.

There are two kinds of investigation procedures of the JFTC: administrative procedures and criminal procedures. Those investigation procedures start when the JFTC obtains the clues of cases. After that, considering the result of the preliminary investigation, the JFTC conducts formal investigation which may include dawn raids, orders to report and interviews. In the administrative procedures, if the JFTC finds violation of the Antimonopoly Act, the JFTC issues a Cease and Desist Order and/or Surcharge Payment Order. In the criminal procedures, if the JFTC is convinced that a criminal offense has taken place, the JFTC files an accusation with the Prosecutor General.

<https://www.jftc.go.jp/dk/dkgaiyo/gaiyo.html>

The JFTC also reviews whether mergers may substantially restrain competition in any particular fields of trade. Economic Affairs Bureau in the general secretariat is in charge of merger review.

### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for*

*the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

## **b) Non-Discrimination**

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

The JFTC applies the same rules to all the Persons that violate the Antimonopoly Act regardless of their nationality.

## **c) Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

The JFTC maintains the Antimonopoly Act and procedural regulations for investigations and enforcement proceedings, publishes them on its website and complies with them.

<https://www.jftc.go.jp/dk/guideline/index.html>

[https://www.jftc.go.jp/en/legislation\\_gls/antimonopoly\\_rules.html](https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.html)

The JFTC also prepares and publishes the relevant procedures which make the standard process of the JFTC's administrative investigation widely known to the public.

<https://www.jftc.go.jp/dk/guideline/unyoukijun/shinsagaiyou.html>

[https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.html](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html)

## **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable*

*opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*

- iii. *Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

At the time of an on-site inspection, investigators of the JFTC shall present its identification card to the relevant person at the site and then deliver a notification that contains provisions that authorize the JFTC to conduct the administrative investigation (Article 47 of the Antimonopoly Act), the title of the case, main point of the alleged fact, applicable provisions of the Act, etc. (Article 20 of Rules on Investigations by the Fair Trade Commission). Furthermore, they shall hand over “Overview of Administrative Investigation Procedures for Alleged Antitrust Cases [Reference Material for Business, etc.]” to a person in charge of the place (Guidelines on Administrative Investigation Procedures under the Antimonopoly Act II 1 (2)).

<https://www.jftc.go.jp/dk/guideline/unyoukijun/shinsashishin.html>

[https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.html](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html)

Regardless of whether an on-site inspection is conducted, when the JFTC issues a submission order and so on, the investigators of the JFTC shall serve the documents including the following items (Article 9 of Rules on Investigations by the Fair Trade Commission):

- i) The title of the investigation case;
- ii) The name or title of the Person;
- iii) Requests to the Person;
- iv) Legal basis;
- v) Legal sanctions in the event of noncompliance with the order; and
- vi) Notice which indicates that the Person is permitted to make a complaint to JFTC or make appeal to the courts about the order.

In a case of criminal investigation procedure, if necessary, JFTC staff members may conduct an on-site inspection, search, or seizure, by virtue of a Warrant issued in advance by a judge of the district court or summary court having jurisdiction over the location of the JFTC (Note: Tokyo District Court and Tokyo Summary Court). (Article 102(1) of the Antimonopoly Act). That warrants for an on-site inspection, search or seizure must be shown to the person that is subject to such measures (Article 105 of the Antimonopoly Act).

Persons subject to the investigation can state their complaints and opinions on the investigative proceedings and other related issues of the alleged case to the case team during the investigation.

The JFTC, when carrying out an order or request to provide information, has set a reasonable period in its response considering the needs to conduct the informed investigation and avoid unnecessary delays.

**e) *Timing of Investigations and Enforcement Proceedings***

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

The JFTC makes efforts to close the investigation procedures within a reasonable period. As part of the policy evaluation efforts, JFTC periodically publishes an average time on the investigation of all cases in which the JFTC finally takes legal measures.

**f) *Confidentiality***

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The JFTC officials are subject to Article 100 (1) of the National Public Service Act, which stipulates the duty of confidentiality for government officials. Government official who violates the confidentiality obligation in the provision shall be liable to imprisonment of up to one year or a fine of up to 500,000 yen (Article 109 (xii) of the act). Furthermore, Article 39 of the Antimonopoly Act imposes the confidentiality obligation on "the chair, commissioners and staff members of the JFTC and any person who once held such a position." A JFTC official who violates the confidentiality obligation shall be liable to imprisonment of up to one year or a fine of up to 1 million yen (Article 93 of the Antimonopoly Act).

In principle, the JFTC does not disclose any confidential information during the investigation procedures but confidential information may be subject to the requests of information disclosure from the public. The JFTC decides whether it discloses the information considering the relevant factors such as the public interests and the possibility of infringing the interests of a third party.

**g) *Conflicts of Interest***

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

The chair and commissioners of the JFTC exercise their authority independently (Article 28 of the Antimonopoly Act). JFTC officials are subject to the National Public Service Ethics Act, and Article 3 of the Act prohibits that government officers give unjust and discriminatory

treatment to citizens such as handling information obtained in their work for the mere benefit of only some citizens. They are also prohibited to concurrently hold the position of an officer, advisor or councilor in a company or any other organization established for the purpose of operating a commercial, industrial, financial or other for-profit private enterprise, nor shall they operate, on their own account, any profit-making enterprise (Article 103 (1) of National Public Service Act). If they are to hold concurrently the position of an officer, advisor or councilor in any undertaking other than a profit-making enterprise, or to engage in any other undertaking or to carry on a business, by receiving remuneration, they shall require the permission of the Prime Minister and the head of the government agency employing that official (Article 104 of National Public Service Act).

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

When the JFTC seeks to issue a Cease and Desist Order, it must conduct a hearing of opinions with the would-be addressee of the Cease and Desist Order (Article 49 of the Antimonopoly Act). In a hearing set forth in Article 49, the JFTC must notify the would-be addressee of the Cease and Desist Order of the following matters in writing, by a reasonable period of time prior to the date of hearing: (i) the expected contents of the Cease and Desist Order; (ii) the facts found by the JFTC; and the application of laws and regulations thereto, etc (Article 50 (1) of the Antimonopoly Act). The Party may, between the time when notice of a hearing is given and the time when the hearing is concluded, submit a request to the JFTC to inspect or copy the evidence proving the facts found by the JFTC with respect to the case for hearing (Article 52 (1) of the Antimonopoly Act) (as for copy, only limited to evidence prescribed by the Rules of the Fair Trade Commission as one that was submitted by the relevant Party or its employees or that records the statements of the relevant Party or its employees) . The same procedure applies to the anticompetitive mergers which have been notified to the JFTC (see also the Rules on Hearing of Opinions by the JFTC.).

<https://www.jftc.go.jp/dk/guideline/lawdk.html>

<https://www.jftc.go.jp/dk/guideline/ikentyousyu/ikentyousyukisoku.html>

[https://www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index.html](https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html)

[https://www.jftc.go.jp/en/legislation\\_gls/antimonopoly\\_rules.html](https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.html)

The Person who has received the notice of hearing may appear on the date of hearing, state its opinions and submit evidence and also address questions to the investigators, etc. with the permission of the Designated Staff Member (Article 54 (2) of the Antimonopoly Act).

**i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

(i) The Persons who are subject to the investigation may be represented by qualified legal counsel of their choosing. Especially, it is legally admitted that the Person who has received the notice of hearing may be represented by attorneys ([Article 51 \(1\) of the Antimonopoly Act](#)).

(ii) When the JFTC seeks to issue a Cease and Desist Order, it must conduct a hearing of opinions with the would-be addressee of the Cease and Desist Order (Article 49 of the Antimonopoly Act) directly or through attorneys. The Persons or attorneys may appear on the date of hearing, state their opinions and submit evidence and also address questions to the investigators, etc. with the permission of the Designated Staff Member (Article 54 (2) of the Antimonopoly Act).

(iii) Regarding protection on communication between lawyers and clients, in Japan, specific laws such as Article 23 of [Attorney Act](#) or Article 197 (1) (ii) etc. of [Code of Civil Procedure](#) prescribe attorney's right and obligation to keep their clients' confidential information which they may have learned in the course of performing their duties.

In addition, with the establishment of the Act on Partial Revision of the Antimonopoly Act (Act No. 45 of 2019) in June 2019, a program was introduced to the Antimonopoly Act to determine the rate of reduction of surcharge based upon the degree of voluntary cooperation by enterprises with investigations. As a result, the need of the enterprises to consult with independent attorneys in order to effectively cooperate with the investigation is likely to increase. Therefore, from the perspective of making the new leniency program more effective while substantially protecting confidential legal advice, etc. related to such consultations and ensuring the appropriateness of administrative investigation procedures (Note 1), the JFTC has decided to return to the enterprise, without waiting for the closure of the case, the objects recording the contents of the confidential communications between the attorney and the enterprise without the investigators or other staff members engaged in the investigation of the relevant case (hereinafter referred to as the "Investigator, etc.") having access to the

contents of the object as long as satisfaction of certain conditions is confirmed pursuant to the prescribed procedures in the administrative investigation procedures of the JFTC (Note 2) in accordance with the Rules on Investigations by the Fair Trade Commission (Fair Trade Commission Rule No. 5 of 2005) established pursuant to the provision of Article 76, Paragraph 1 of the Antimonopoly Act (hereinafter referred to as the "Treatment"). In order to clarify the procedures of the Treatment and to ensure transparency of the Treatment and foreseeability of the enterprises, the JFTC has established the "Guidelines on treatment of objects recording confidential communications between an enterprise and an attorney".

The Treatment purports to return the objects recording the confidential communications between an enterprise (Note 3) and an attorney (Note 4) regarding legal advice on an act alleged to be a violation to which the leniency program may apply (Note 5) (hereinafter referred to as an "Alleged Act in Violation to Which the Leniency Program may Apply") immediately without the Investigator, etc. having access to the contents thereof, deeming that detention of them is no longer necessary, when it is confirmed that they are stored appropriately and satisfy certain other conditions.

Such confirmation will be made with respect to an object concerning which the holder of the object requests application of the Treatment in writing when the investigator issues a submission order (referring to the disposition stipulated in Article 47, Paragraph 1, Item 3 of the Antimonopoly Act) to the holder thereof (Note 6) in a case involving an Alleged Act in Violation to Which the Leniency Program may Apply.

See the link below for Note 1 to 6.

[https://www.iftc.go.jp/en/legislation\\_gls/20122503.pdf](https://www.iftc.go.jp/en/legislation_gls/20122503.pdf)

(Reference)

Attorney Act Article 23 (Right and duty to maintain confidentiality) (Note7)

Unless otherwise provided by law, an attorney or a former attorney shall have the right and bear the duty to maintain the confidentiality of any facts which he/she may have learned in the course of performing his/her duties.

Code of Civil Procedure Article 197 (Right to Refuse to Testify) (Note8)

(1) In the following cases, a witness may refuse to testify:

(Omitted)

(ii) a person who is or was a doctor, dentist, pharmacist, pharmaceuticals distributor, birthing assistant, attorney at law (this includes registered foreign lawyers), patent attorney,

defense counsel, notary, or person engaged in a religious occupation is examined with regard to any fact learned in the course of duty that shall remain confidential;

See the link below for Note7.

<https://www.japaneselawtranslation.go.jp/en/laws/view/1878/>

See the link below for Note8.

<https://www.japaneselawtranslation.go.jp/en/laws/view/2834/>

## **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

A Cease and Desist Order and Surcharge Payment Order must be rendered in writing, and the written Cease and Desist Order is to indicate the measures necessary to eliminate the violation or to ensure that the violation is eliminated, the facts found by the JFTC and the application of laws and regulations thereto; and the chair and commissioners who attended the meeting in which the issue of the Cease and Desist Order or Surcharge Payment Order was decided must affix their names and seals thereto (Article 61 (1) and 62 (1) of the Antimonopoly Act). The JFTC publishes the content of all Cease and Desist Orders on its website.

Commitment Procedure is a scheme to resolve suspected violations against the Antimonopoly Act voluntarily by consent between the JFTC and suspected persons. The approval of a Commitment Plan must be rendered in writing, and the chair and commissioners who attended the meeting in which approval of the plan was decided must affix their names and seals on the statement of approval (Articles 48-3 (4) and 48-7 (4) of the Antimonopoly Act). After the approval of a Commitment Plan, in order to make clear what kinds of specific acts could have an adverse effect on free and fair competition and to ensure the transparency and the predictability regarding the enforcement of the law related to the Commitment Procedures, the JFTC shall announce in public an overview of the Approved Commitment Plan, an overview of the Suspected Violation related to such approval, and other necessary matters. It shall be noted in such public announcement that JFTC has not determined a violation of the Antimonopoly Act to have taken place (Paragraph 11 of Policies Concerning Commitment Procedures).

**k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

Persons may file an appeal to the Tokyo District Court when they have complaints to the dispositions made by the JFTC (Articles 3(1) and 14 of the Administrative Case Litigation Act, Article 85 (i) of the Antimonopoly Act).