

# JICA- KNOWLEDGE CO-CREATION PROGRAMME ON COMPETITION LAW AND POLICY October 2023

**Gideon Sang**  
**24<sup>th</sup> November, 2023**

Vision: "A Kenyan economy with globally efficient markets and enhanced consumer welfare for shared Prosperity"

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# Introduction



- Organized by the Japan International Cooperation Agency (JICA) together with the Japan Fair Trade Commission (JFTC)
- Targeted 8 countries: Kenya, Egypt, Ghana, Indonesia, Mongolia, Viet Nam, Serbia and Ukraine
- The course aimed to provide participants with the theoretical lectures on competition law and policy in Japan as well as practical exercises by JFTC officials

# Objectives

- a) Enhance the participants' knowledge in competition law and policy of Japan and other countries,
  
- a) Enable the participants to consider how to promote effective enforcement of competition law and policy in their respective countries

# Impressive lectures and key points

Economic analysis of mergers

Cartels and Bid Rigging

Case Investigation in Digital Markets

Cross- border investigation of cases

Sustainability Regulations (Green Guidelines)

Handling Competition Law Cases at Law Firm (Mori  
Hamada & Matsumoto)

# Independence of JFTC

| Independence   | Excerpt of the AMA |
|--|--------------------|
| The Japan Fair Trade Commission is administratively attached to the office of the Prime Minister   | Article 27.2       |
| The chair and commissioners are appointed by the Prime Minister with the consent of both Houses of the Diet from among persons aged thirty-five or above who have knowledge and experience in law or economics | Article 29.2       |
| The chair and commissioners of the Japan Fair Trade Commission exercise their authority independently  | Article 28         |
| Cease and Desist Orders, Payment Orders must be reached in meetings of the chair and commissioners   | Article 65         |
|  |                    |

# i. Economic analysis of mergers

- ▶ Employed in two main areas- market definition (price correlation analysis) and competitive analysis (GUPPI)
- ▶ Involves collection of quantitative and qualitative data from various sources:
  - a) Merging parties,
  - b) Government and International organizations,
  - c) Industry organizations,
  - d) Competitors
  - e) Distributors
  - f) Customers
  - g) Research companies selling data such as POS and monitor and consumer surveys



## i. Economic analysis of mergers...

- ▶ Tools used in economic analysis include:



- **Price correlation-** To evaluate whether a good A and good B are in the same market, this method checks the degree of co-movement between price A and price B by calculating correlation coefficient
- **Gross Upward Pricing Pressure Index-** allows for an initial assessment of the risk of unilateral effects resulting from a concentration. A high GUPPI index thus indicates a strong propensity of the new entity to increase its prices following the merger



## ii. Cartels and Bid Rigging

- JFTC has a Digital Forensics Team (DFT) whose mandate is to preserve, analyze and review all seized digital evidence by the JFTC Investigation Bureau
- The DFT gathers evidence needed in Cartel Case investigation which include:
  - ✓ Communication among companies involving price agreements, allocation of customers and bids, estimates and quotations of the other companies
  - ✓ Communication inside companies such as who are the decision makers in the cartel, job description of these decision makers, etc.
- Gather evidence left in digital devices
- Research on the way to handle digital evidence better
- Set standard procedure (software/hardware to use, report formats, etc.) to seize, preserve, analyze and review digital evidence in the JFTC
- Provide training and support for case investigators
- Seize, preserve and analyze digital evidence during and after dawn raids

### iii. Case investigation in digital markets

- ▶ JFTC actively develops and hires officials with specialized knowledge in digital fields to strengthen departments in charge of investigating antitrust violations and reviewing mergers and acquisitions cases
- ▶ Further strengthening cooperation with competition authorities.
- ▶ In cases where there is a need to collect information in digital markets, an outline of the case will be disclosed and information and opinions will be widely solicited from third parties even at the initial stage of the examination
- ▶ Utilization of economic analysis in cooperation with the Office of Economic Analysis in cases where it is difficult to collect information for deciding the commencement of case examination by voluntary methods

## iv. Sustainability Regulations (Green Guidelines)

### Purpose

- Formulated for the purposes of preventing anti-competitive conduct that stifles innovation such as the creation of new technologies, and of encouraging the activities of enterprises, etc. toward the realization of a green society

### Basic concept of the Guidelines

- Activities of enterprises toward the realization of a green society do not pose problems under the Antimonopoly Act in most cases. They include:
  - Joint disposal of facilities- in order to secure the supply system by promoting a facility disposal jointly across the industry
  - Joint purchasing- for procuring scarce resources, it is sometimes essential to establish a strong bargaining power and a stable and efficient procurement system, so enterprises may want to cooperate with other companies in joint purchasing
  - Data sharing- enterprises may like to jointly collect and share data on greenhouse gas emissions, and put those data to good use in each business
  - Establishment of voluntary standards

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# Challenges in Kenya/Authority



- ▶ Inadequate regulatory framework to handle emerging competition issues
- ▶ Inadequate specialized skills to handle emerging competition issues
- ▶ Inadequate capacity in the investigation of cases and analysis of mergers in the digital markets
- ▶ Insufficient data and capacity for economic analysis of mergers and acquisitions
- ▶ Challenges associated with cross- border investigations and cross- border mergers
- ▶ Challenges in evidence gathering for mergers implemented without the Authority's approval
- ▶ Dragging of cases through lengthy judicial processes including appeals

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# Recommended action plan

## a) Policy making and investigations in digital markets-

- Enhance investigation/ analysis know how in the area
- Surveys to understand the status of transactions in digital markets
- Recommending improvements to transaction practices to improve a competitive environment
- Active collaboration with external experts in the digital sector (experts in 5G, AI, digital advertising, and privacy)
- Conduct market studies in digital markets such as; connected Tv, news content distribution, subcontracting transaction in software, cloud services, public procurement of IT systems, digital advertising, online retail, hotel booking portals among others

## b) Investigation of cartels, bid rigging and MIWAs-

- Procure digital forensic equipment and software for obtaining and analyzing digital evidence
- Consider having in place a digital forensics team (DFT) drawn mainly from the E&C, ICT departments and representatives from the technical departments, dedicated to preserve, analyze and review all seized digital evidence by the Authority
- The digital forensics team should be trained on the usage of the digital forensic equipment and software
- Enhance the collection, utilization and storage of digital evidence using modern forensics equipment and software

# Recommended action plan...

## c) Collection of qualitative and quantitative data-

- Conducting more surveys and interviews with competitors and customers, reviewing internal information on prices, quantities, profits, import quantities and market shares, among others, of merger parties to facilitate the application of relevant tools in economic analysis of mergers, to aid in market definition and competition analysis (price correlation, GUPPI, win/loss analysis)

## d) Understanding how law firms handle competition law cases-

- May include site visits and more sensitization of legal representatives especially on the benefits of settling cases outside the judicial processes, and the importance of compliance to business operations

## e) Exchange of information with NCAs in other countries-

- This is mainly in connection with investigations and dispositions, among others, conducted regarding and imposed on a business operator located in those other countries

## f) Procedure for issuing cease and desist orders or penalties to violators outside Kenya

- Consider coming up with a clear procedure for issuing cease and desist orders and imposing penalties where applicable, to a violators outside Kenya

**END  
THANK YOU!**



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