

JICA- KNOWLEDGE CO-CREATION PROGRAMME ON COMPETITION LAW AND POLICY February 2024

20th March, 2024

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 4 countries: Kenya, Nigeria, Ghana and Tanzania
- The course aimed to provide participants with the theoretical lectures on competition law and policy in Japan

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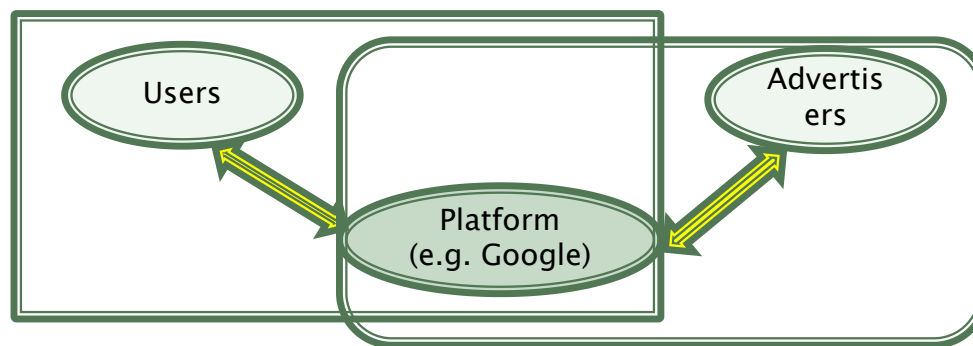


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Digital Mergers – Merger Guidelines

➤ Network effect (digital platform)

- ✓ The JFTC determines the indirect network effects when the parties' competitive power increases in a market as the result of the increase of the value in their product in another market by securing a certain number of users subsequent to the proposed merger.



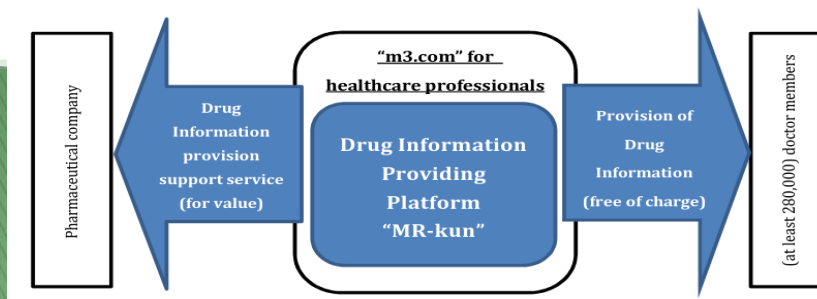
- ✓ The JFTC basically defines a relevant market by each layer of users, and considers the characteristics of the multi-sided market when it determines the influence in the relevant markets by the proposed transaction.

Case Outline

M3 planned to acquire all of the voting rights in Nihon Ultmarc

- Nihon Ultmarc conducts the business of providing medical information databases.
 - ✓ Collect the data on medical institutions and doctors and pharmacists working at medical institutions in Japan
 - ✓ provide such databases with companies or organizations in the fields of medical care, welfare, public health, etc.
- M3 operates (i) the portal site for healthcare professionals such as doctor and pharmacists called “m3.com” and (ii) the platform business known as “Mr-kun” which provide drug information with healthcare professionals as part of its m3.com business.

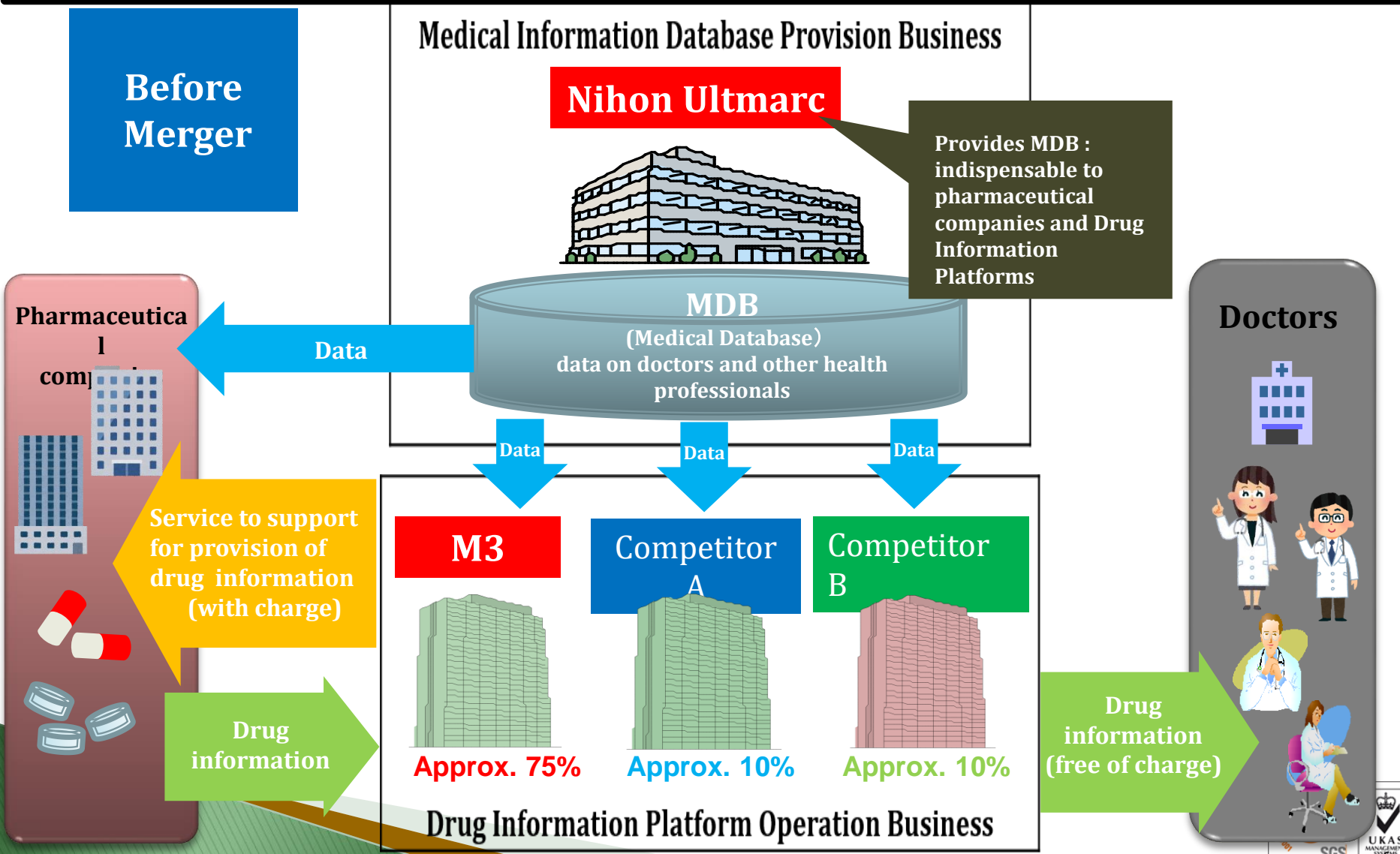
[Figure 1] Business model of m3.com and MR-kun

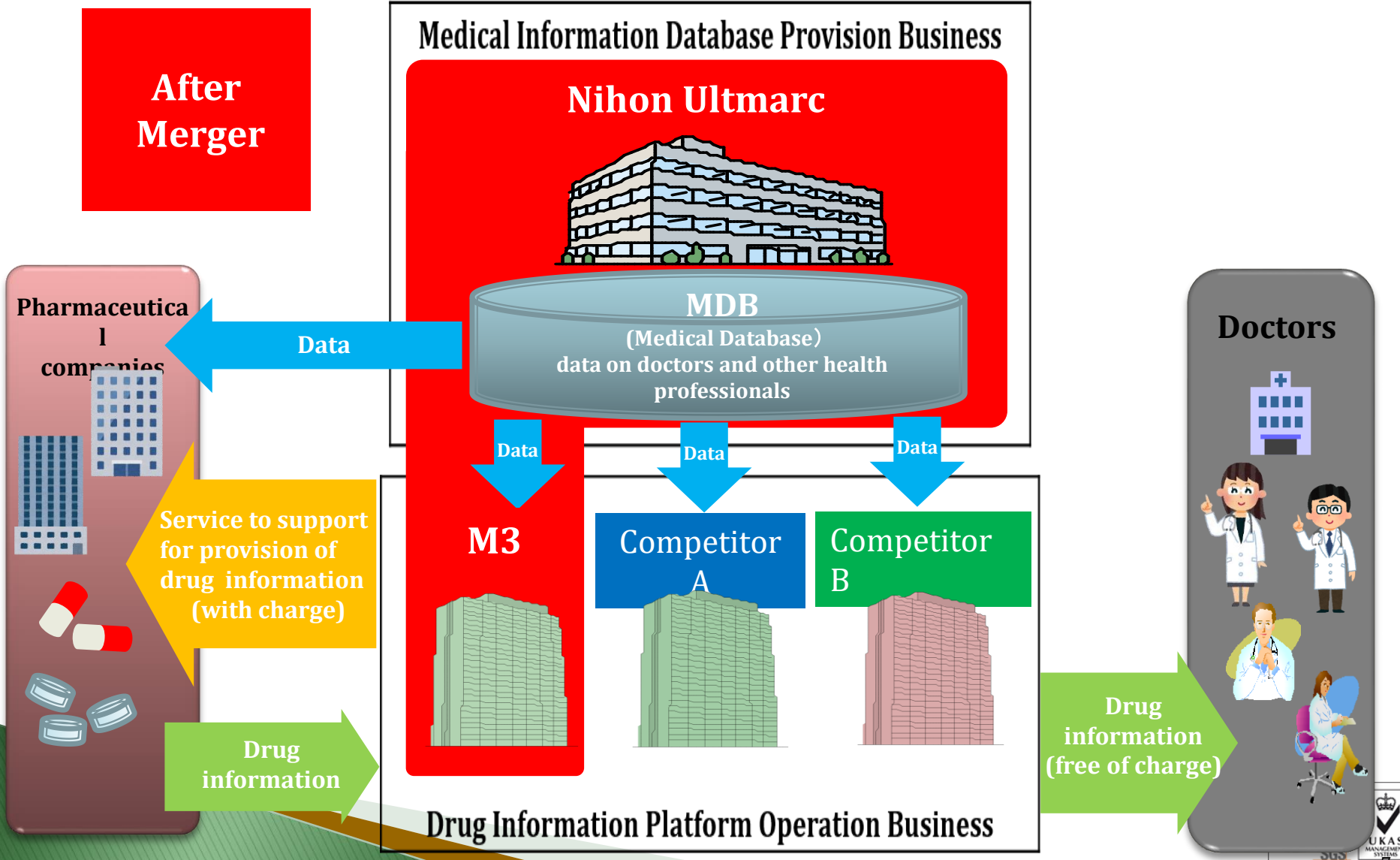


Case Study 1 – M3/Nihon Ultmarc

Case outline

Nihon Ultmarc acquires shares (100%) of M3.
The case concerned on Vertical and Conglomerate mergers, and approved with remedies.






Case Outline

Google LLC acquired shares (100%) of Fitbit, Inc.

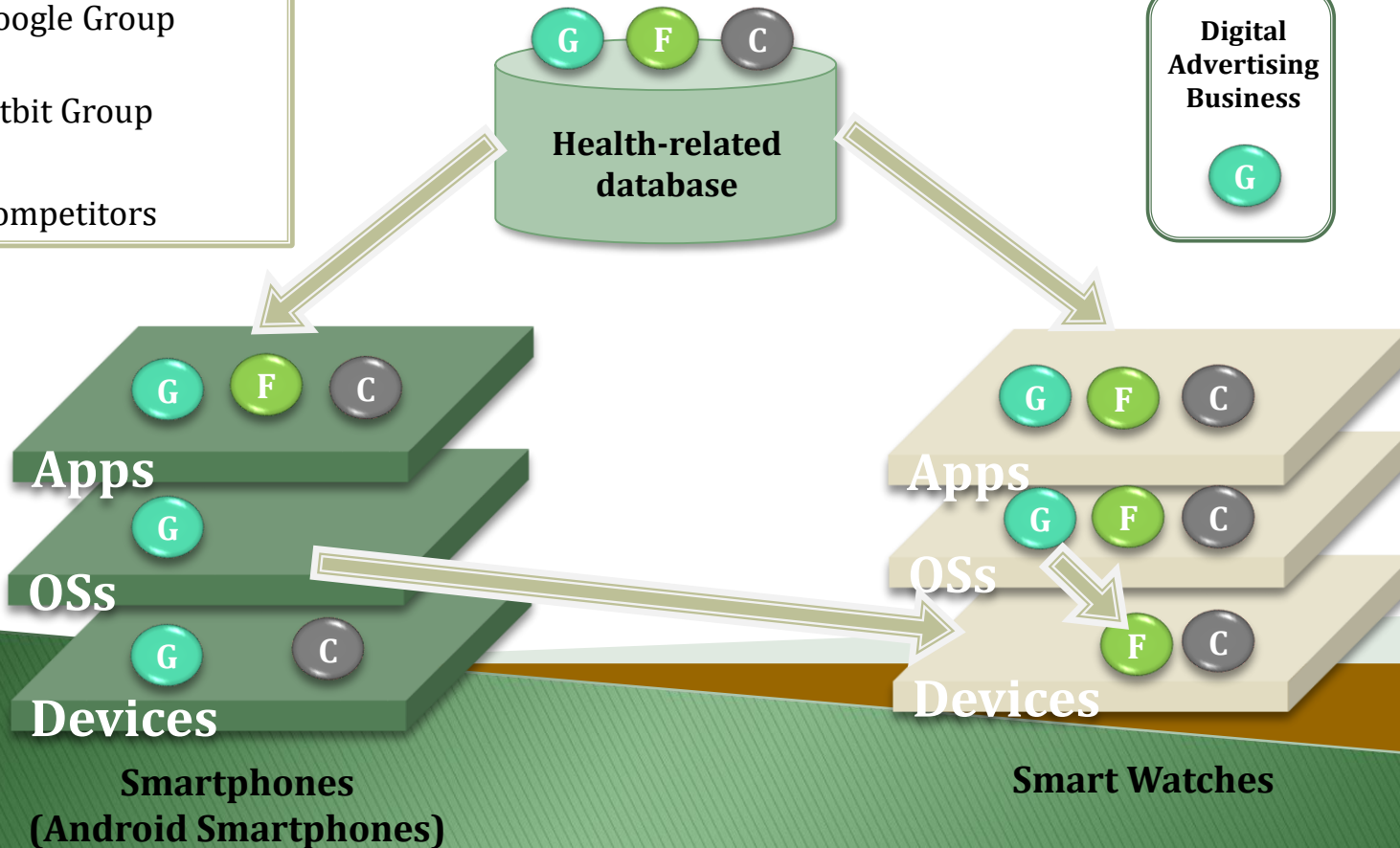


- Fitbit conducts the business of manufacturing and sales of wrist-worn wearable devices. Consumer users of the devices become able to use various services such as data transmission via Bluetooth by connecting their devices with smartphones.
- 
- In order to connect wrist-worn wearable devices with smartphones, Wrist-worn wearable device manufacturers install OSs for the devices with a function enabling such connection on the devices.
 - Google (i) opens Android OS to the public as an “open source” and grant free licenses to smartphone manufacturers, and (ii) developed “Wear OS by Google” and grants free licenses to wrist-worn wearable device manufacturers.
 - The Parties share certain Health-related Data on the Health-related Databases of the Google Fit platform and the Fitbit platform with third-party app providers.

Outline of the merger

- Vertical and Conglomerate mergers
- Approved with remedies

G : Google Group
F : Fitbit Group
C : Competitors



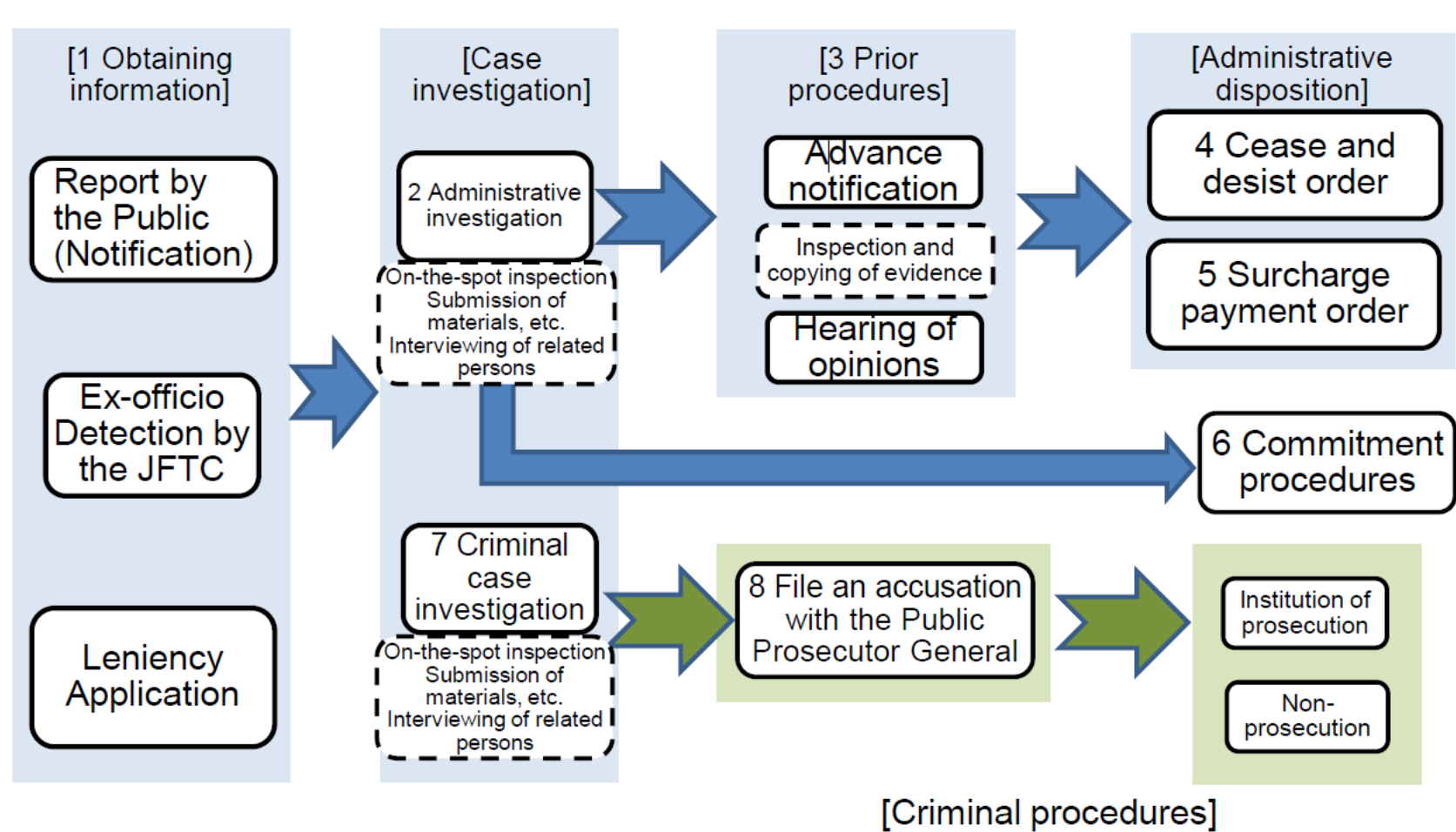
JFTC Administrative & Criminal Investigation Procedures

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Flowchart of JFTC handling of cases



A. Administrative Investigation

JFTC may enforce any of the following modes of collecting information:

- ▶ On-the-spot inspection
- ▶ Ordering to submit documents and keeping them
- ▶ Ordering suspected violators to appear and
- ▶ interrogation and report
- ▶ Ordering expert witnesses to appear to give expert opinions

Penalty: imprisonment with work for not more than 1 year or by a fine of not more than 3 million yen).

Hearing of Opinions

- ▶ A would be addressee of the administrative disposition is explained to the tentative contents of the administrative disposition and major evidence, etc. by an Investigation Bureau 's staff member.
- ▶ The would be addressee may express their opinion on the tentative contents of the administrative disposition, produce evidence, and put a question to the investigator.
- ▶ JFTC will resolve on the administrative disposition after due consideration of the result of the procedure for the hearing of opinions.

Administrative Disposition & Commitment Procedures



- ▶ After the hearing of opinions, JFTC may take the following administrative dispositions:
 - ▶ 1. Cease & Desist order; and
 - ▶ 2. Surcharge payment order

Commitment Procedures - procedures to resolve suspected violations against the AMA voluntarily by consent between JFTC and the enterprise.



B. Criminal Investigations

- ▶ Acts subject to criminal investigation:
 - ▶ Unreasonable restraint of trade (price cartels, bid rigging, etc.)
 - ▶ Private monopolization
 - ▶ Substantial restraint of competition by a trade association
 - ▶ Others (cease and desist order violations, etc.)
- ▶ Investigators for criminal cases may conduct visit, search, or seizure by virtue of a warrant issued in advance by a judge of the competent court.

Criminal Penalties

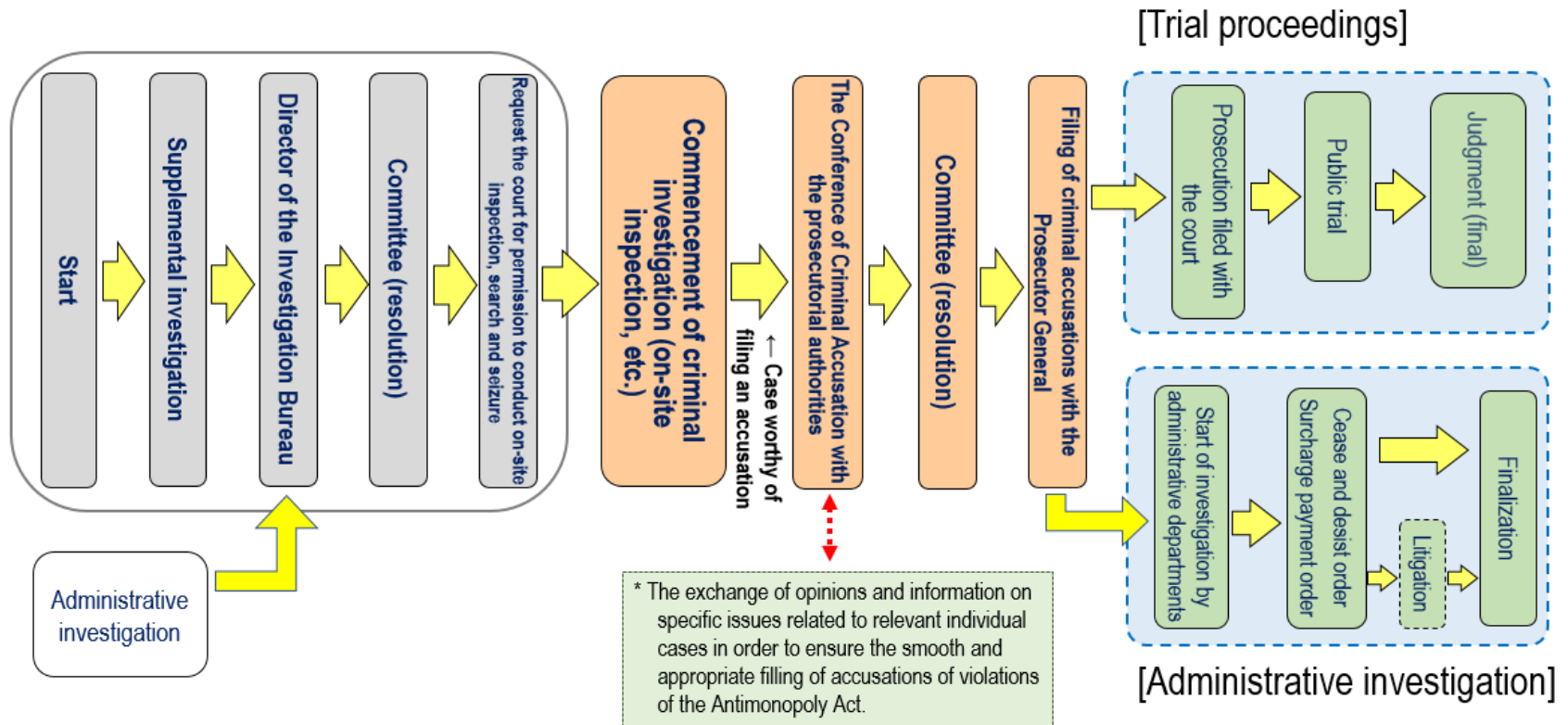
Examples	Individual	Corporation or organization
Unreasonable restraint of trade	Imprisonment with work of up to 5 years or fine of up to 5 million yen	Fine of up to 500 million yen
Private monopolization	Same as above	Same as above
Violation of cease-and-desist order (Unfair trading cases, etc.)	Imprisonment with work of up to 2 years or fine of up to 3 million yen	Fine of up to 300 million yen

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Criminal Investigation Flow

Flow of Criminal Investigation



Firewall between Administrative Investigations & Criminal Investigations

- ▶ Separation of departments: the Criminal Investigation Department is separate from the administrative investigation section.
- ▶ Staff members conducting criminal investigations are designated only from among staff members of the Criminal Investigation Department.
- ▶ Staff members of the Criminal Investigation Department may not enforce the administrative investigation authority.

Regulations on abuse of superior bargaining position

- 2009 Task Force.
- Superior Bargaining Position
- Abuse of Superior Bargaining Position

Superior Bargaining Position

- ▶ Refers to a case where one party is in a “superior bargaining position” over the other party
- ▶ **Transaction** where the latter has **no choice** but to **accept a request** that is **significantly disadvantageous to itself** in the transaction, because the difficulty in continuing the transaction with the former would be a major obstacle to the latter’s business management.



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Requirements are necessary for certification



- i. The violator is in a superior bargaining position;
- ii. Using that position to the detriment of the counterparty to the transaction (act of abuse);
- iii. The act is found to inhibit fair competition.

Abuse of the superior position.

- ▶ Compulsory purchase and use
- ▶ Requests for bearing sponsorship funds
- ▶ Request for dispatch of employees
- ▶ Requests for provision of other economic benefits
- ▶ Refusal to accept
- ▶ Return of products
- ▶ Delayed payment
- ▶ Reduction
- ▶ Unilateral determination of the consideration for a transaction
- ▶ Request for redoing a transaction



Tools in the enforcement

- ▶ Cease and desist order - Order the elimination of violations.
- ▶ Certification of commitment (Settlement)
- ▶ Surcharge payment order



Consumer Protection in Japan




Functions of CAA

- Gathering information in a centralized way and investigating and analyzing cases;
 - Communicating information/recommendations and orders/warnings in a swift manner;
 - Raising public awareness and notification; and
 - Administration and enforcement of laws relevant to consumer lives.
- ▶ As consumer issues became more diversified and complex, Consumer Affairs Agency was established in 2009.
- ▶ CAA was charged with planning food labelling.

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CAA is the organization that steers and leads Japan's consumer administration. On the other hand, Japan Fair Trade Commission (JFTC) steers competition policy. The two agencies (JFTC and the Consumer Affairs Agency) fall under the Cabinet office with their distinct mandates.

- ✓ CAA is charged with operations relating to price changes of public utilities. That is, in cases where public utility charges are newly set and changed, it is a requirement to obtain CAA's agreement in advance. E.g. revision of electricity charge.
- ✓ CAA investigates and deliberates consumer-related problems and offers recommendations and opinions to the Prime Minister, the minister of State for Consumer Affairs and Food Safety, and heads of relevant government ministries/agencies, based on the investigation results as well as in response to their request for advice.

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- ▶ CAA has authority of the following:
 - i. laws that are related to Representation (administrative regulation against Misleading representations-Act against Unjustifiable Premiums and Misleading Representations;
 - ii. Food Labelling-Food Labelling Act), Transaction (Planning legal system regarding consumer protection especially civil rules-Consumer Contract Act);
 - iii. Administrative regulation against business operators who solicit consumers by illegal or malicious ways-(Act on Specified Commercial Transactions); and
 - iv. Safe goods and services (Product Liability Act).

- CAA also promotes various consumer policies such as;
- Supporting/strengthening local consumer administration, Promoting Food loss and Waste (Act on Promotion of Food Loss and Waste Reduction),
- Operations related to prices (Act on Emergency Measures for Stabilizing Living Conditions of the Public),
- Consumer organizations litigation system (Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers),
- Planning and Promoting systems for Whistleblower Protection (Whistleblower Protection Act) and promoting consumer education (Act on Promotion of Consumer Education).

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Functions of local Consumer Affairs Centers- 856

- ▶ Advising related organizations on how to handle difficult cases while providing consultation services to consumers who are unable to reach their nearest Consumer Affairs Centers;
- ▶ Collecting information on consultation cases at Consumer Affairs Centers and other organizations across the nation through the Practical Living Information Online Network System (PIO-NET);
- ▶ Analyzing the collected information on consumer consultation and conducting product tests to prevent the occurrence and expansion of consumer damage
- ▶ Utilizing the analysis and test results for educating consumers, issuing alerts to consumers and making requests and providing information to related organization including administrative organs and business organizations;

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NCAC



- ▶ The National Consumer Affairs Center (NCAC) of Japan was established in 1970.
- ▶ The roles of NCAC includes; consultation with CAA, Training, Product Testing, gathering information, analyzing information and providing information, public relations and ADR. It also operates the PIO-NET, which is a centralized system that gathers and analyses consumer information.
- ▶ Consumers reach the CAA via local Consumer Affairs Centers (Consumer Hotline number 188), who are under the local government for advice and enlightenment.

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- ▶ Approximately 900,000 consultation information per year are received at Local Consumer Affairs Centers by 3313 Consumer Affairs Consultants.
- ▶ Japan prepared a new Act (Act on the Protection of Consumers Who Use Digital Platforms for Shopping) to protect online consumers' interests.
- ▶ The contents of the new Act include; Obligations of the Digital Platform Providers, Suspension of listing unsafe products, Right to Request Disclosure of Seller's or equivalent Person's Information and the Public-Private Council Reporting System

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Cont'd

- ▶ The Target of the Digital Platform Consumer Protection Act (B-to-C) includes; Search engines like Bing, online malls like amazon or shops, Auction sites like ebay, Service provision sites like Uber eats and Airbnb, Apps like App store and Google Play, and Social media platforms like Instagram and Skype.
- ▶ Digital platform providers have an obligation to take the following measures to contribute to the optimization of transactions and the promotion of dispute resolution in relation to mail order sales using their digital platform for shopping:

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- i. Measures that enable smooth communications between consumers and sellers or equivalent persons;
- ii. Measures to secure the appropriateness of representations of their sales conditions, etc. if any complaints have been filed by consumers; and
- iii. Measures requesting to provide information helpful for identifying the seller or equivalent person

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Sustainability Regulations (Green Guidelines)

▶ Objectives

- Developed 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

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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
 - Joint purchasing
 - Data sharing
 - Establishment of voluntary standards

Recommendations

- ▶ Fast-track the amendment of the Act to include provisions on Abuse of Superior Bargaining Position;
- ▶ Conducting more surveys and market studies to understand the market structure and conduct in digital markets e.g. e-commerce platforms, digital finance;
- ▶ Bring on-board and collaborate with external experts in the digital sector to enhance market studies and investigations i.e. digital analyst and digital sector advisor;
- ▶ Increase cooperation with KNBS and other relevant government agencies for exchange of market information;
- ▶ Build more capacity in the enforcement of digital markets;

Recommendations.....

- ▶ Developing green sustainable guidelines for competition and consumer protection.
- ▶ CAK can amend the Act to include other Acts on Consumer Protection that have no agency enforcing them e.g. consumer Protection Act of 2012, just like the CAA enforces all Acts relating to Consumer Protection;
- ▶ CAK can set up local consumer affairs centers in counties that it can oversee and which can assist in quick resolution of Consumer Complaints.

**END
THANK YOU!**



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