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# **THE SETTLEMENTS GUIDE**

**Editor**

Mark H Hamer

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## **Editor**

Mark H Hamer

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This article was first published in January 2021

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Published in the United Kingdom by Global Competition Review

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

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[www.globalcompetitionreview.com](http://www.globalcompetitionreview.com)

First edition

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ISBN 978-1-83862-263-3

Printed in Great Britain by Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

# Acknowledgements

The publisher acknowledges and thanks the following contributors for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ALLENS

BAKER MCKENZIE

BREDIN PRAT

CUATRECASAS

FERRADANEHME

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## Publisher's Note

For many clients, a quick and easy settlement is infinitely preferable to a protracted and rambunctious legal battle, but settlements gain little time in the spotlight within the world of competition enforcement. Equally, while there may be common themes across some jurisdictions, there are also enough significant local variations in settlement processes and procedures to trip up a global antitrust matter.

For these reasons, *Global Competition Review* is delighted to bring this, the newest addition to its stable of resources designed to help practitioners through the complex world of competition law, to our community. *The Settlements Guide* draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field. GCR thanks our editor, Mark H Hamer, and his distinguished panel in helping us provide such essential guidance for all competition professionals.

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# **PART IV**

# JURISDICTIONAL GUIDANCE FOR ANTITRUST SETTLEMENTS

## Japan

**Toshiyuki Nambu, Nobuaki Mukai and Takashi Kobayashi<sup>1</sup>**

### **Introduction**

#### **Antitrust investigations in Japan**

The Japan Fair Trade Commission (JFTC) is the primary enforcement authority for violations of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade, commonly known as the Anti-Monopoly Act (AMA),<sup>2</sup> and can issue cease-and-desist orders to enterprises that have violated the AMA. The JFTC is obligated to issue surcharge orders – resulting in administrative fines (surcharges) – to enterprises that have committed certain types of violations of the AMA.

An appeal against a JFTC cease-and-desist or surcharge order may be filed exclusively with the Tokyo District Court and thus is subject to judicial review.<sup>3</sup>

#### **Settlement and commitment**

Following EU competition law, two different procedures – settlement and commitment – have been considered in Japan (especially in recent law-making discussions among practitioners and academics) as administrative procedures to resolve competition concerns by voluntary agreement between the competition authority and enterprises under investigation. Currently, however, only commitment procedures are utilised in Japan.

The settlement procedure is typically considered to be an administrative procedure where the competition authority commences discussions with an investigated enterprise after determining that the case is suitable for settlement. If the authority agrees to the investigated

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1 Toshiyuki Nambu is an adviser, and Nobuaki Mukai and Takashi Kobayashi are partners, at Momo-o, Matsuo & Namba.

2 The JFTC's English translation of the Anti-Monopoly Act (AMA) is available at [www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index\\_files/The\\_Antimonopoly\\_Act\\_2.pdf](http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index_files/The_Antimonopoly_Act_2.pdf).

3 Article 85 of the AMA.

enterprise's proposal containing an acknowledgment of its liability for the violation, and the enterprise commits to follow the settlement (i.e., simplified) procedure, the investigation procedures shall be simplified and administrative fines reduced. Note that, while the EU introduced a settlement procedure for cartel cases in 2008 to expedite the procedure leading up to the competition authority's formal decision, Japan has decided not to introduce a settlement procedure, at least for the time being. In the 'Report of the Study Group on the Antimonopoly Act'<sup>4</sup> issued by the Study Group on the Antimonopoly Act<sup>5</sup> in April 2017, it was concluded that, '[i]n Japan, handling of cases has been carried out promptly from a global standard, and there seems no urgent need to introduce a new system [of settlement] to make such period of procedures shorter'.<sup>6</sup>

The commitment procedure is also typically an administrative procedure in which the competition authority determines whether an investigated enterprise intends to offer an effective proposal. If the investigated enterprise proposes a remedy to resolve competition concerns and the competition authority approves the remedy, the approved proposal (to implement the remedy) would be binding on the investigated enterprise. The investigation is then closed without determining whether the investigated enterprise has committed a violation. The EU introduced a commitment procedure for non-cartel cases in 2005. In Japan, the commitment procedure for cases other than hardcore cartels<sup>7</sup> was incorporated into the AMA in 2018.

## **Commitment procedures for cases other than hardcore cartels**

### **Resolving competition authority conduct investigations and obtaining regulatory approvals**

The AMA sets out commitment procedures by which the JFTC and an investigated enterprise may agree to resolve an alleged violation.

Commitment procedures were introduced into the AMA and took effect on 30 December 2018, following the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the TPP11 Agreement),<sup>8</sup> which was signed by 11 countries (including Japan) on 8 March 2018. The JFTC also published the Policies Concerning Commitment Procedures (the Policies)<sup>9</sup> on 26 September 2018 to ensure transparency and predictability in the enforcement of the law related to commitment procedures.

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4 The JFTC's English translation of the report is available at [www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425\\_files/170425-3.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425_files/170425-3.pdf).

5 The Study Group on the Antimonopoly Act was convened by the JFTC and consists of experts, including Dr Nobuaki Mukai, one of the authors of this chapter, from various sectors to reconsider the surcharge system from the viewpoint of practitioners and academics.

6 See JFTC English translation of the report (footnote 4), p. 34.

7 'Hardcore cartels', as per the Policies Concerning Commitment Procedures cited in footnote 9, are defined as unreasonable restraints of trade that are subject to surcharge orders, such as cartels involved in bid rigging, price-fixing and quantity-fixing.

8 According to Article 16.3, Paragraph 5 of the TPP11 Agreement, each party shall authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. A party may provide for such voluntary resolution to be subject to judicial or independent tribunal approval or a public comment period before becoming final.

9 The JFTC English translation of the Policies is available at [www.jftc.go.jp/en/legislation\\_gls/antimonopoly\\_rules\\_files/policies\\_concerning\\_commitment\\_procedures.pdf](http://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/policies_concerning_commitment_procedures.pdf).

While there were cases prior to the introduction of the commitment procedures in which the JFTC terminated the investigation after the investigated enterprise had proposed certain remedial measures, the introduction of the commitment procedures to the AMA has systemised these practical measures and has clarified the legal basis, procedure and effects of such measures.

An outline of commitment procedures is as follows.

### *Commencement of commitment procedures*

If, after an investigation into the suspected violation of the AMA has been initiated by the JFTC (in practice, an investigation is deemed initiated when the JFTC conducts a dawn raid against a suspected enterprise), the JFTC believes there to be a violation of the AMA and recognises that it is necessary for the promotion of fair and free competition (i.e., finds it appropriate to apply commitment procedures to the activities leading to such suspicion (suspected violation)), the JFTC may commence commitment procedures by issuing a written notice (notice of commitment procedures) of the following matters to the enterprise that is conducting (or has conducted) the suspected violation (notified enterprise):

- overview of the suspected violation;
- details of laws and regulations of which there is suspicion of violation; and
- advising of the fact that it is possible to make an application (application for commitment approval) for the approval of a plan that would eliminate the suspected violation or to ensure that the suspected violation has been eliminated (commitment plan).<sup>10</sup>

The notice of commitment procedures can be issued until a notice of a hearing of opinions<sup>11</sup> has been given by the JFTC to the notified enterprise.<sup>12</sup>

Once the notice of commitment procedures has been issued by the JFTC, the JFTC will not, in principle, make any further investigation of the notified enterprise or give a notice of hearing of opinions to the notified enterprise until such time as the administrative disposition related to the application for commitment approval in question has been issued by the JFTC.<sup>13</sup>

### *Application for approval*

The notified enterprise that seeks to use commitment procedures must submit a commitment plan to the JFTC and make an application for commitment approval within 60 days of the date of the notice of commitment procedures.<sup>14</sup> The content of the measures to be included in the commitment plan (commitment measures) may be determined by the notified enterprise on a case-by-case basis. The 60-day period for making the submission of the commitment plan to the JFTC and making an application for commitment approval cannot be extended as a matter of statute.

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10 Article 48-2 or Article 48-6 of the AMA.

11 If the JFTC seeks to issue a cease-and-desist order, it must conduct a hearing of opinions with the would-be addressee of the order (Article 49 of the AMA).

12 Article 48-2 or Article 48-6 of the AMA.

13 Section 12(1) and (2) of the Policies.

14 Article 48-3, Paragraph 1 or Article 48-7, Paragraph 1 of the AMA.

The decision of whether to make an application for commitment approval is a matter that is to be independently determined by the notified enterprise. If the notified enterprise does not make an application for commitment approval in a timely manner, the investigation made by the JFTC prior to the notice of commitment procedures will resume. The notified enterprise will not be treated adversely in the subsequent investigation for not having made an application for commitment approval.<sup>15</sup>

### *Public comments*

The JFTC may seek public opinion on the commitment plan submitted by the notified enterprise if it thinks it necessary to do so in assessing whether or not an applied commitment plan conforms to the approval requirements discussed below. The time period for seeking opinions is 30 days.<sup>16</sup> It is not clear from the Policies under what circumstances the JFTC would find it necessary to seek public opinion.<sup>17</sup> Although there have been five cases, to date, in which the JFTC approved the commitment plans,<sup>18</sup> it did not seek public opinion on any of these.

If the JFTC does not seek public opinion, it may still take action such as confirmation of the facts related to the commitment plan with the notified party's competitors, trade partners, etc.<sup>19</sup>

### *Approval or dismissal by the JFTC*

When there has been an application for commitment approval, the JFTC will approve the application if it finds that the commitment plan conforms to both of the following (the approval requirements):

- the commitment measures are sufficient for eliminating the suspected violation or for ensuring that the suspected violation has been eliminated; and
- the commitment measures are expected to be reliably conducted.<sup>20</sup>

If the commitment plan is approved, the JFTC will not issue a cease-and-desist or surcharge order concerning the suspected violation and the act related to the commitment measures.<sup>21</sup> Approval of the commitment plan by the JFTC does not represent a determination that the suspected violation constitutes a violation of the provisions of the AMA. If the JFTC finds that the commitment plan does not conform to any of the approval requirements, it must render a decision to dismiss it.<sup>22</sup> In such a case, the investigation made prior to the notice of commitment procedures will resume.<sup>23</sup>

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15 Section 6(1) of the Policies.

16 Section 7 of the Policies.

17 According to the JFTC, factors to be considered when determining whether to seek opinions from the public vary depending on the particular case, and it is not possible to specify uniform standards.

18 *In re Rakuten, Inc.* (date of approval: 25 October 2019), *In re Nihon Medi-Physics Co., Ltd.* (date of approval: 12 March 2020 (*Nihon Medi-Physics*)), *In re Cooper Vision Japan, Inc.* (date of approval: 4 June 2020), *In re Genky Stores, Inc.* (date of approval: 5 August 2020 (*Genky*)), and *In re Amazon Japan G.K.* (date of approval: 10 September 2020 (*Amazon*)).

19 Section 7 of the Policies.

20 Article 48-3, Paragraph 3 or Article 48-7, Paragraph 3 of the AMA.

21 Article 48-4 or Article 48-8 of the AMA.

22 Article 48-3, Paragraph 6 or Article 48-7, Paragraph 5 of the AMA.

23 Section 8(1) of the Policies.

### *Revocation of approval*

Failure to implement the commitment measures in accordance with an approved commitment plan may result in the revocation of approval, in which case the approval shall no longer be in effect and the investigation by the JFTC will resume. No penalties apply for a failure to implement a commitment plan.

### **Requirements for factual submissions or admissions**

According to the AMA, the commitment plan must contain the following:

- details of the commitment measures;
- the deadline for conducting the commitment measures; and
- other matters specified by the JFTC Rules (documents showing the feasibility and reliability of the commitment measures).<sup>24</sup>

Making an application for commitment approval by the notified enterprise does not constitute an admission on the part of the notified enterprise that the suspected violation constitutes a violation of the provisions of the AMA. The notified enterprise does not need to acknowledge its liability for the violation or make factual submissions as evidence to prove violations of the AMA when making an application for commitment approval. However, for the JFTC to determine whether specific remedial measures proposed in the commitment plan conform to the approval requirements, it is possible that it may have to make a fact-specific evaluation thereof, and it could require the notified enterprise to make certain factual submissions depending on the nature of the case in question.

### **Waiver of privilege or confidentiality protections**

There is currently no concept of attorney–client privilege under Japanese law and, therefore, the issue of waiver would not arise. For reference purposes, the JFTC has established new procedures for administrative investigations concerning hardcore cartels to address concerns regarding the absence of attorney–client privilege, under which JFTC investigators would not be able to access or use such documents to prove any unlawful conduct, and seized documents would be returned to the client following a specific vetting process. This new procedure will become available on 25 December 2020. However, because the commitment procedure is not applicable to hardcore cartels, this new procedure will have little impact on it.

### **Public disclosure of facts or admissions**

Once the JFTC approves the commitment plan, it must provide a public overview of the approved commitment plan, an overview of the suspected violation related to such approval, and other necessary matters.<sup>25</sup> According to the Policies, this is designed to clarify the kinds of specific acts that would be found by the JFTC as having an adverse effect on free and fair competition (i.e., appropriate to apply commitment procedures) and to ensure the transparency and predictability regarding the enforcement of the law related to commitment procedures. The JFTC must

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<sup>24</sup> Article 48-3 or Article 48-7 of the AMA.

<sup>25</sup> Section 11 of the Policies.

make specific reference in the public announcement that its approval of the commitment plan does not represent a determination that the suspected violation constituted a violation of the provisions of the AMA.

If the JFTC dismisses an application for commitment approval, in principle, no public announcement will be made because the investigation made prior to the notice of commitment procedures will resume.<sup>26</sup> If the JFTC has dismissed an application for commitment approval, it would not need to return materials submitted by the notified enterprise in connection with the application, and it may use such materials as evidence to prove violations of the AMA. Therefore, when the notified enterprise is considering making an application for commitment approval, it needs to bear in mind that if its application is dismissed, the materials submitted to the JFTC may be used against it as evidence to prove a suspected violation or other possible violations of the AMA.

### Remedies, commitments and cooperation for commitment procedures

Under the commitment procedures, a notified enterprise will voluntarily plan the commitment measures. The Policies provide the following examples of commitment measures:

- i cessation of the suspected violation or confirmation that it has already ceased to exist;<sup>27</sup>
- ii notification to trade partners and others or publicising information to users and others;
- iii development of a compliance programme;
- iv amendments of problematic terms and conditions of contracts;
- v transfer of businesses;
- vi financial restitution to trade partners and others;<sup>28</sup> and
- vii reporting on the state of implementation of commitment measures.

There have been five cases, to date, in which the JFTC approved the commitment plans,<sup>29</sup> and in all five cases, items (i), (ii), (iii) and (vii) were included in the commitment plans as the commitment measures. Of the five cases, *Genky* and *Amazon* (which both concerned abuse of superior bargaining position (i.e., unfair trade practices)) also contained item (vi). Therefore, in practice, for a commitment plan to be approved by the JFTC, at least items (i), (ii), (iii) and (vii) seem mandatory, while the other items may also become necessary, depending on the nature of the case in question.

All of the above items are considered typical commitment measures, and the measures that are sufficient for eliminating the suspected violation or to ensure that the suspected violation has been eliminated are not limited to those alone. For example, in *Nihon Medi-Physics*, in addition to items (i), (ii), (iii) and (vii), specific measures to facilitate business between the firm's

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26 id.

27 One necessary measure to ensure the sufficiency of the commitment measures is a resolution by the decision-making body (e.g., the board of directors) of the notified enterprise that both (1) confirms that it will cease or has already ceased the suspected violation and (2) affirms that it will not engage in the suspected violation in the future.

28 This item was controversial and there were dissenting voices from the public when introducing the commitment procedures to the AMA because even the JFTC's cease-and-desist orders (which are to be issued to enterprises that have committed violations of the AMA) have never required the addressees to provide restitution for financial losses incurred by the violations in question.

29 See footnote 18.

competitors and its downstream customers (hospitals and wholesalers) were also included in the commitment plan as one of the commitment measures. These specific measures are prepared by taking into account the technical characteristics of the product concerned and are not something that can be covered by a cease-and-desist order issued by the JFTC.

## Availability of partial commitments for multiparty investigations

According to the Policies, partial commitments are available for multiparty conduct investigations other than for the investigations listed below.<sup>30</sup> However, there are no precedential cases in which commitment procedures have been used for multiparty conduct.<sup>31</sup>

The following cases are not subject to commitment procedures:

- unreasonable restraint of trade that is subject to surcharge orders, such as bid rigging, price-fixing or quantity-fixing (hardcore cartels);
- repeated violations (i.e., where the suspected enterprise has been subject to legal measures for a violation of the same provision of the AMA within 10 years); and
- vicious and serious violations that are considered to have widespread influence on people's lives (i.e., equivalent to criminal accusations).<sup>32</sup>

## Tips for dealing with the enforcer or regulator when negotiating commitments

While commitment procedures constitute a method for the voluntary resolution of a suspected violation through consent between the JFTC and the investigated enterprise, it is the JFTC, not the investigated enterprise, that must take the initiative to commence commitment procedures by issuing a notice of commitment procedures. In practice, therefore, for the investigated enterprise to apply for commitment procedures, it is necessary to first convince the JFTC that the case in question is appropriate for commitment procedures. Accordingly, to enable the swift application of the law related to commitment procedures and to maximise the chances of JFTC approval, it is very important for, and beneficial to, the investigated enterprises to have close communication, and to substantially reach a consensus, with the JFTC in advance of the formal commencement of the commitment procedures (i.e., JFTC issuance of a notice of commitment procedures to the investigated enterprises). Therefore, an enterprise under investigation by the JFTC for a suspected violation should – even before the JFTC issues a notice of commitment procedures – consult with the JFTC if it desires to apply for commitment procedures.

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30 Under the AMA, commitment procedures can be theoretically applied to cases of violation of the AMA including private monopolisation (Article 3), unreasonable restraint of trade (Article 3 or Article 6), unfair trade practices (Article 6 or Article 19) and prohibited business combination (i.e., merger control provisions of the AMA).

31 In fact, although there have been five cases, to date, in which the JFTC approved the commitment plans (see footnote 18), the suspected violations in these cases concerned single-firm conduct (i.e., private monopolisation or unfair trade practices) only.

32 Section 5 of the Policies.

## **Hardcore cartels**

### **Administrative proceedings**

#### *Settlement unavailable*

As mentioned above, hardcore cartels are not subject to commitment procedures. In addition, unlike in the EU, a settlement procedure has not been introduced in Japan. Therefore, with respect to hardcore cartels, there is no administrative procedure available for resolution by voluntary agreement between the competition authority and investigated enterprise.

#### *Amendment to the leniency programme*

In Japan, a leniency programme is available for hardcore cartels. The reduction rates for each leniency applicant are calculated uniformly and impartially by the order in which the application is submitted, and the JFTC cannot factor in the degree of assistance and cooperation given when making decisions on the surcharge amount, nor impose an appropriate surcharge amount reflecting the nature and extent of the AMA violation. In this regard, a new mechanism that allows the JFTC to reduce surcharges based on its evaluation of the cooperation made by leniency applicants at the specific rate, or within the certain range (as the case may be), which has been discussed and agreed between the JFTC and leniency applicants, will be introduced by an amendment to the AMA that will come into effect on 25 December 2020.

This new mechanism is different from settlement or commitment (i.e., administrative procedures to resolve competition concerns by voluntary agreement between the competition authority and investigated enterprises) in that it only gives the JFTC greater discretion to determine reduction rates based on its assessment of the evidence voluntarily submitted by leniency applicants. This is merely an investigation tool and is not something that will terminate or simplify the JFTC's investigation, or resolve competition concerns by voluntary agreement between the JFTC and investigated enterprises. The JFTC will continue investigations and will issue cease-and-desist or surcharge orders against leniency applicants even after they have submitted information and documents that contribute to the fact-finding of the case.

### **Criminal proceedings**

If the JFTC decides to pursue criminal sanctions, it can file a criminal accusation with the public prosecutor. According to its 2005 policy statement entitled 'The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations', it will actively pursue criminal accusations if the cartel conduct is a vicious and serious violation with a widespread impact on people's lives, or if the participants are repeat offenders and administrative sanctions will not be effective as a deterrent.

In this regard, a plea-bargaining system that creates an incentive to report criminal offences committed by others was introduced to the Code of Criminal Procedure and took effect on 1 June 2018. Under this system, a prosecutor can negotiate to drop or reduce charges if an accused or a defendant provides testimony or evidence for certain types of crimes (such as bribery, fraud, embezzlement, tax and antitrust-related wrongdoings and criminal offences concerning financial trading) committed by other individuals or enterprises.<sup>33</sup> Unlike the plea-bargaining system

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<sup>33</sup> Article 350-2 of the Penal Code.

in the United States under which an accused is entitled to bargain with a prosecutor in relation to a criminal offence he or she has committed, this plea-bargaining system can only be used for a criminal offence committed by someone else (which includes accomplices). Therefore, enterprises or individuals under investigation may use this plea-bargaining system and provide testimony or evidence for activities of hardcore cartels committed by others. However, in Japan, the leniency programme has been widely used among investigated enterprises with respect to hardcore cartels, yet there have been no precedential cases in which the plea-bargaining system has been used for such cartels.

# Appendix 1

## About the Authors

### **Toshiyuki Nambu**

#### **Momo-o, Matsuo & Namba**

Toshiyuki Nambu joined Momo-o, Matsuo & Namba as an adviser in December 2019. Before joining the firm, Mr Nambu worked for the Japan Fair Trade Commission (JFTC) for over 35 years. During his career at the JFTC, he held various positions relating to enforcement of the Antimonopoly Act, including senior investigator (1996–1997), director of the surcharge affairs office, director general of the criminal investigation department (2011) and director general of the investigation bureau (2018–2019). Mr Nambu also oversaw the work on the bilateral and multilateral international-related affairs of the JFTC including the ICN and the OECD as director of the international affairs division (2004–2007) and deputy secretary general for international affairs (2011–2016).

### **Nobuaki Mukai**

#### **Momo-o, Matsuo & Namba**

Since joining Momo-o, Matsuo & Namba in 1996, Nobuaki Mukai has, from a competition law perspective, advised on numerous business alliance projects and M&A transactions; on strategic business planning, including strategic IP policymaking and branding or distribution policy planning; and on the introduction or implementation of corporate group compliance programmes. He has also handled internal investigations for clients on antitrust or competition law, represented corporations and individuals in defence of international and domestic antitrust violations (administrative and criminal) and litigated or defended civil antitrust cases in industries such as construction, manufacturing, retail and transportation (e.g., the *Freight-forwarders* case, the *Auto Parts* cases, the *Maritime Transporters* case and the *Electronic Parts* case).

Dr Mukai is also a patent attorney and has handled transactions and disputes for clients involving intellectual property, including patents and copyrights. He also advises clients on general corporate and commercial law matters. Dr Mukai's recent recognitions include in

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Takashi Kobayashi's practice comprises international and domestic antitrust, M&A, litigation, intellectual property and general corporate matters. His antitrust experience includes international cartel investigations, merger filings, unfair trade practices, licences and strategic alliances. He regularly advises clients on M&A matters, with a particular focus on acquisitions and expansion in Asia and other regions. He also routinely provides compliance advice on anti-corruption/bribery and international trade law.

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Whether, where, why, when and how to settle global antitrust matters is fundamental to the successful counselling of a client facing competition enforcement issues, and yet surprisingly little practical guidance exists to help lawyers understand the process and how to best protect the company's interests in navigating it. *The Settlements Guide* brings together expert practitioners from 17 leading institutions around the world to fill that gap and debate the key issues in negotiating a successful settlement in antitrust matters.