THE DOMINANCE AND MONOPOLIES REVIEW

NINTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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CONTENTS

PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance. This is driven in large part by developments in the digital sector, as well as an increasing awareness of the urgency of the climate crisis, environmental degradation and loss of biodiversity.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It is] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged, commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorienting the goals of antitrust policy away from the consumer welfare standard towards a broader societal welfare test; reversing the burden of proof in merger control; per se bans on certain categories of conduct in the digital sector (including prophylactic controls on vertical integration); lowering the standard of judicial review to give competition authorities more leeway; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly evolving rules concerning abuse of dominance? Helpfully, this ninth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and sets out a prediction for future developments. From those thoughtful contributions, we identify three main trends to watch out for over the next year.

Sustainability and abuse of dominance

The past year has seen sustainability become a new and important focus for competition regulators. The Dutch competition authority started the trend by setting 'sustainability' as a key priority and proposing a more permissible review for certain environmental agreements. The Hellenic Competition Commission followed, advocating for far-reaching policy changes to promote sustainability goals across all areas of competition policy. The European Parliament has called on the European Commission to 'urgently take the concrete action needed in order to fight and contain the threat of climate and environmental catastrophe before it is too late'. As Commissioner Vestager has noted, 'everyone is called upon to make our contribution to the necessary change – including enforcers'. The European Commission initiated a consultation, and the Organisation for Economic Co-operation and Development held several events to discuss the integration of climate and environmental goals in competition policy. Chinese competition law already provides an explicit exemption for 'agreements between undertakings which they can prove to be concluded for . . . serving public interests in energy conservation, environmental protection and disaster relief'.

At core, the cause of the climate crisis is a market failure: the cost of pollution of air, water and land, and the damage wrought by greenhouse gas emissions to the climate today and in the future are generally not included in the price of goods and services. Because the market price of a polluting product excludes the social cost, production is higher than the social optimum, taking into account that consumption of natural resources now exceeds what the regenerative capacity of the Earth can sustain.

To address this market failure, the discussion around including environmental goals in competition law has, so far, mostly focused on state aid, horizontal cooperation and merger control. For example, it has been argued that the consumer welfare analysis in merger control could include whether the merger could be expected to raise or lower the environmental price that consumers pay, which is not reflected in the market price in monetary terms or in quality (which could take account of non-market externalities such as emissions). Likewise, horizontal guidelines could be revised to allow cooperation in pursuit of environmental goals, where individual producers are willing to invest in greening production, but may be held back by the fear that they will be undercut by those who do not invest, or by cheaper imports.

There is no inherent reason, however, why sustainability could not be incorporated into an abuse of dominance assessment, too. This could be done in a number of ways.

First, pricing analysis (for example, for loyalty rebates, predatory pricing, margin squeeze) could take into account the actual costs incurred by the dominant company and by society, including not only the total costs of production, but also the environmental cost. A company may be able to price lower than its rivals because it is employing polluting or greenhouse gas emitting technology, at great societal cost, which is not reflected in its traditional variable and fixed costs.

Second, a dominant provider with an incumbent polluting technology might commit an abuse by excluding rival, greener technologies by means other than competition on the merits. Such conduct should already violate dominance rules. In this case, however, 'competition on the merits' should be defined so as to exclude competition that relies on avoidable pollution or greenhouse gas emissions. Also, the assessment should take into account that consumer harm would be even higher from the abuse because of the exclusion of a greener technology. The theory would be not dissimilar to that pursued by the European Commission in its *Car Emissions* cartel investigation, albeit that case concerns horizontal collusion to restrict competition on innovation for emission cleaning systems.

Third, there may be *sui generis* abuses that involve unsustainable business practices that also restrict competition. For example, a dominant producer might employ cheap and polluting means of production, and thereby price cheaper than its rivals. A dominant raw materials producer might make misleading representations to an environmental agency to secure a licence to extract minerals. And a dominant chemical producer could illegally dump products in rivers, thereby gaining an advantage over rivals that dispose of waster safely. All these might conceivably be an abuse of dominance because they distort competition, via means other than competition on the merits. The fact that they may also infringe other laws is no bar to bringing an abuse of dominance claim, just as a dominant factory owner burning down a rival's factory can be both arson and an abuse of dominance. Rivals should have a cause of action, especially where environmental rules are inadequate or insufficiently enforced.

Fourth, there may be situations where conduct that might otherwise be abusive could be excused because of sustainability-based objective justification, just as Article 101(3) of the Treaty on the Functioning of the European Union is being considered to exempt otherwise anticompetitive agreements that promote sustainability. For example, a dominant e-commerce platform might prioritise in its ranking green products (including green technologies sold by its downstream subsidiary) over polluting products (sold by its rivals). Provided that greenwashing is avoided, a regulator might consider that even if such conduct has the potential to restrict competition, it should be objectively justified because of the overall benefits it creates for society.

Regulation versus antitrust enforcement

Over the past year, regulators and legislators have moved from consultation to action, as they have set out competing proposals for regulation to address perceived competition problems caused by concentration in digital markets. In broad terms, the concerns with digital markets are that certain market characteristics (such as network effects and tipping, lack of switching, and lock-in effects) lead to high concentration, insurmountable entry barriers and exploitation of market power, especially (but not only) when combined with abusive conduct.

The German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'cross-market significance'. The UK is setting up a digital markets unit to create an enforceable code of conduct for companies with 'strategic market status'. And perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), is formulating *ex ante* dos and don'ts for large 'gatekeeper' platforms.

It is perhaps understandable that regulators and legislators seek to go down the route of regulation, rather than pursuing individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex. As Commissioner

Vestager has explained as the motivation of the DMA: 'We need regulation to come in before we have illegal behaviour and to be able to say these are the rules of the game and this is what you must do.'

At the same time, regulation can also come with risks to competition and society. This is because ill-crafted or insufficiently flexible regulation can impede innovation, snuffing out pro-competitive conduct before it takes place or raising barriers to entry. As the UK Competition and Markets Authority (CMA) has explained, 'Greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.'

Accordingly, it is particularly important that new rules of the road allow companies the opportunity to justify their behaviour, on the grounds of consumer benefits or that alternatives would lead to harm. For example, the CMA recognises that 'conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits', and it has advised that conduct should be exempted under its new code of conduct if it 'is necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings'. Likewise, the new German rules allow a company to justify its practices.

It is therefore troubling that the draft DMA does not contain any analogous provision. As currently framed, the prohibited behaviours and obligations are extremely broad. They touch on almost all aspects of competition and have far-reaching consequences for consumers in Europe. But the draft DMA includes no safeguards to protect against unintended adverse consequences, even to protect users from privacy violations or exposure to fraudulent activity, or preventing other harmful behaviour. It is difficult to see the benefit of this approach. It is positively harmful.

A proportionality safeguard would be a simple way to improve the draft regulation, without impeding any of its objectives. Including a proportionality safeguard would also be consistent with general principles of EU law. Under Article 16 of the Charter of Fundamental Rights (which is a binding source of EU law under Article 6(1) of the Treaty on European Union), companies (even alleged gatekeeper platforms) have a right to conduct their own business. Interference with that right is only permitted if it is proportionate. By implication, it should therefore be open to companies to justify their practices, on the grounds of proportionality. A blanket refusal to engage with justifications at all is disproportionate to the aims of the DMA, and harmful.

Advocate General Pitruzzella rightly commented in March 2021 on the draft DMA that 'too much rigidity could hinder efficiency and introduce a disproportionate limitation on the freedom to conduct a business'. Rather, rebuttable presumptions together with justification defences strike the balance between 'the need for certainty' and 'the need to avoid false positives in antitrust enforcement and undue limitations of fundamental rights'.

Mandatory arbitration as a mechanism to solve FRAND disputes

A third theme of the past few years' dominance enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Refusing a licence or seeking an injunction is considered an abuse of dominance, unless the SEP owner is a 'willing licensor' or the implementer is an 'unwilling licensee'. In August 2020 in the UK, the Supreme Court handed down an important judgment in *Unwired Planet*, finding that an English court can set the royalty rates and

terms of a FRAND licence on a worldwide basis, to determine whether a licensor or licensee is 'willing'. In Europe, the EU Commission's expert group wrote a 230-page report on the licensing and valuation of SEPs on FRAND terms.

A problem has emerged, however, that the current legal framework does not incentivise parties to reach a negotiated outcome as to the FRAND rate. This is because for both implementers and SEP holders, the best alternative to a negotiated agreement (the BATNA) is to litigate: for SEP holders, the BATNA is usually to seek an injunction and offer a high royalty, thus threatening a high penalty while limiting risk by appearing to follow the sequence requirements of the European Court of Justice's *Huawei/ZTE* judgment. Implementers, on the other hand, may have an incentive to challenge the validity or infringement of the patents at issue. So the BATNA of an implementer may therefore be to seek judgment for invalidity or non-infringement, thus threatening long delays, while limiting risk by also appearing to follow the sequence of the *Huawei/ZTE* case.

As a result, parties are not incentivised to reach settlements as to the FRAND rate. In our view, the best way to address this problem is to ensure that the BATNA is no longer a positive outcome, but a possible negative one for each party. This could be achieved by ensuring that, absent agreement within a reasonable time period, a third party sets the rate for the parties (for example, by standard-setting organisations requiring arbitration or rate setting as a fallback for the FRAND undertaking). Parties tend to be much more willing to negotiate and ready to reach agreement on a balanced solution if the fallback is someone else deciding the rate.

For this reason, a refusal to agree to rate setting should be seen as rebuttable presumption of being an 'unwilling' licensor (and an abuse of dominance) for the purpose of the question of whether an injunction is available on an SEP. Conversely, an offer to have an independent third party set the rate and key terms should be seen as a rebuttable presumption of being a 'willing' licensor or licensee. The advantage of such mandatory arbitration as a fallback is that it encourages a reasonable outcome. Both parties have an incentive to agree on a rate to avoid an arbitrator setting a rate for them. And even if they cannot agree on a rate, the rate will be set. Abuse of dominance can thus be avoided. Arbitration in this respect is better than litigation because it is faster, more flexible, reduces forum shopping and results in awards that are enforceable worldwide. Arbitration also allows the parties to address IP rights implicating multiple national jurisdictions in a single proceeding. We believe that this solution could solve the endless FRAND disputes and end abusive hold-up and hold-out.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this ninth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2021

Chapter 16

JAPAN

Yusuke Kashiwagi[1]

I INTRODUCTION

i Characteristics of the regulations on private monopolisation and unfair business practices

The Japanese regulations on dominance and monopolies come in two forms: prohibition on private monopolisation and prohibition on unfair business practices.[2]

Private monopolisation

The concept of 'private monopolisation' is derived from Article 2 of the US Sherman Act, and was enacted at the time of the establishment of the Antimonopoly Act (AMA) in 1947, which is based on US judicial precedents on monopolisation. Two types of conduct are prescribed: 'exclusionary conduct' and 'controlling conduct', with controlling conduct being unique to Japanese competition law. There are also regulations on such conduct being committed by multiple enterprises simultaneously, although there are few actual examples of this. Private monopolisation is defined in the provisions of the AMA as follows:

> *The term 'private monopolisation' as used in this Act means such business activities by which any enterprise, individually or by combination, in conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.*[3]

1 Yusuke Kashiwagi is a partner at Koike & Kashiwagi Law Office.

2 While the Japan Fair Trade Commission (JFTC) translates the Japanese term *fukōsei na torihiki hōhō* as 'unfair trade practices', the term 'business' suits the reality of what is being referred to, and accordingly this translation is used in the chapter.

3 AMA, Article 2, Paragraph 5. While 'any particular field of trade' is the JFTC's English translation, this has the same meaning as the term 'relevant market', which is generally used globally. Cartels and bid rigging are defined in Article 2, Paragraph 6 of the AMA as follows: 'The term "unreasonable restraint of trade" as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.' Although Paragraph 6 requires fact-finding regarding 'a substantial restraint of competition in any particular field of trade', in actual cartel and bid-rigging cases, 'relevant market' is often defined very narrowly according to the effect of the conduct. Therefore, cartel and bid-rigging regulation in Japan is very similar to that of the rest of the world.

In actual practice, the provisions against controlling-type conduct are rarely applied, and eight of the nine private monopolisation cases that have taken place since 2000 have been exclusionary-type cases. While the title 'private monopolisation' is used, there is also no requirement for the subject of the conduct to be monopolising the market in the economic sense of the term (that is, having only one seller or one buyer).

Unfair business practices

While unfair business practice means conduct that has a likelihood of impeding fair competition, and is derived from Article 5 of the US Federal Trade Commission Act, a notable feature of the provisions on such practices is that they prescribe various types of conduct.[4] Essentially, while an unfair business practice is the same as private monopolisation in that the AMA regulates against anticompetitive conduct impeding the function of competition in the relevant market, it differs from private monopolisation in that the AMA also prohibits unfair business practices that have a 'likelihood' of having such an effect. There are debates over what constitutes such a likelihood, as described below.[5]

Unfair business practices are defined in the provisions of the AMA as follows:

> *The term 'unfair trade practices*[6] *as used in this Act means an act falling under any of the following items:*
>
> *(i) engaging, without justifiable grounds, in any of the following acts, in concert with a competitor:*
>
> *(a) refusing to supply to a certain enterprise or restricting the quantity or substance of goods or services supplied to a certain enterprise*
>
> *(b) causing another enterprise to refuse to supply a certain enterprise, or to restrict the quantity or substance of goods or services supplied to a certain enterprise*
>
> *(ii) unjustly and continually supplying goods or services at a price applied differentially between regions or between parties, thereby tending to cause difficulties to the business activities of other enterprise*

4 Conduct is designated as unfair business practices by the AMA or the JFTC (AMA, Article 2, Paragraph 9, Items 1–6; JFTC General Designations (GD), Paragraphs 1–16). The JFTC is authorised to designate additional prohibited practices by the AMA and there are two types of JFTC designations; one is a general designation, which is applicable across sectors; the other is a specific designation, which is applied to a specific sector. Three specific designations, applicable to newspapers, freight transportation and retail businesses, are enacted currently.

5 A likelihood of impeding fair competition was theoretically categorised as three 'forms' in the 1982 AMA study group report: (1) lessening free competition; (2) use of unfair methods of competition; or (3) infringing the foundation of free competition. Form 1 is a core impediment, as it has essentially the same meaning as impeding the function of competition in the relevant market; form 2 relates to a substantially supplemental act of the AMA (the Act Against Unjustifiable Premiums and Misleading Representations, which is enforced by the Consumer Affairs Agency. The Consumer Affairs Agency and the JFTC sometimes cooperate in handling misleading cases); and form 3 mainly relates to abuse of superior bargaining position (exploitative abuse). Additionally, the JFTC considers that the use of unfair methods of competition (form 2) must be prevalent to find a likelihood of impeding fair competition. In relation to unfair business practices cases, the JFTC sometimes rejects defining the relevant market, alleging that a likelihood of impeding fair competition would fall within form 2. There are many criticisms of this attitude, which does not match the international trend.

6 In this excerpt, 'unfair business practices' is used.

(iii) *without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises*

(iv) *supplying goods to another party who purchases the relevant goods from oneself while imposing, without justifiable grounds, one of the restrictive terms listed below:*

- (a) *causing the party to maintain the selling price of the goods that one has determined, or otherwise restricting the party's free decision on selling price of the goods*
- (b) *having the party cause an enterprise that purchases the goods from the party maintain the selling price of the goods that one has determined, or otherwise causing the party to restrict the relevant enterprise's free decision on the selling price of the goods.*

(v) *engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices:*

- (a) *causing the counterparty in continuous transactions (including a party with whom one newly intends to engage in continuous transactions; the same applies in (b) below) to purchase goods or services other than those to which the relevant transactions pertain*
- (b) *causing the counterparty in continuous transactions to provide money, services or other economic benefits*
- (c) *refusing to receive goods in transactions with the counterparty, causing the counterparty to take back such goods after receiving them from the counterparty, delaying payment to the counterparty or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty*

(vi) *any act falling under any of the following items, which tends to impede fair competition*[7] *and which is designated by the Fair Trade Commission, other than the acts listed in the preceding items:*

- (a) *unjustly treating other enterprise in a discriminatory manner*
- (b) *engaging in transactions at an unjust price*
- (c) *unjustly inducing or coercing the customers of a competitor to deal with one*
- (d) *dealing with another party on such conditions that will unjustly restrict the business activities of the counterparty*
- (e) *dealing with the counterparty by making use of one's superior bargaining position unjustly*
- (f) *unjustly interfering with a transaction between an enterprise in competition with one in Japan or a corporation of which one is a shareholder or an officer and another transaction counterparty; or, if such enterprise is a corporation, unjustly inducing, instigating or coercing a shareholder or officer of such corporation to act against the corporation's interests.*[8]

Based on Article 2, Paragraph 9(vi), the regulation named the Japan Fair Trade Commission (JFTC) General Designations (GD), Paragraphs 1–16 also exists.[9] The regulations regarding unfair business practices are quite complicated. However, they are roughly divided into three types.

7 'A likelihood of impeding fair competition' has the same meaning as 'which tends to impede fair competition'.

8 AMA, Article 2, Paragraph 9.

9 www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html.

First, most types of conduct can be categorised as exclusionary, which destroy fair inter-brand competition, as with private monopolisation (exclusionary type). Second, some conduct can be categorised as vertical types that restrain intra-brand competition. Third, some conduct can be categorised as exploitative abuse, that is abuse of superior bargaining position.

Market share

While with private monopolisation there are no provisions imposing requirements on a company's market share, under the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act[10] enacted by the JFTC (the Private Monopolisation Guidelines), companies with a share of approximately over 50 per cent are subject to the regulations, and in actual cases to which private monopolisation has applied, the share of companies in the relevant market has been high.

For instance, from a general overview of cases since 2000, we see examples including a share of approximately 85 per cent in *NIPRO*,[11] 70 per cent and above in *NTT East*[12] (NTT's share of fibre-optic lines in the east Japan region), 72 per cent in *USEN Corporation*[13] (up from 68 per cent owing to an implementation of exclusionary conduct), 89 per cent in *Intel*[14] (up from 76 per cent, again owing to the implementation of exclusionary conduct) and approximately 99 per cent in *JASRAC*[15] (managing operator for music copyright). These cases are described in more detail in Sections II and IV.

This illustrates that all cases of private monopolisation since 2000 have identified exclusionary conduct by companies with a market share of over 50 per cent as a violation of the prohibitions thereon. However, even companies that do not have a market share of 50 per cent or more are regulated by the rules against unfair business practices.

Exclusionary conduct and controlling conduct (private monopolisation)

In recent years, there has been a series of important Supreme Court judgments concerning exclusionary conduct, in which the concept of 'excluding the business activities of other enterprises' was defined as 'an artificial nature which deviates from normal competitive methods, as seen in terms of them creating, maintaining or strengthening their own market power, and it can be said that this had the effect of significantly making it difficult for those competitors to enter the market'.[16] While this definition has become generally accepted, views are divided when it comes to the actual finding of exclusionary conduct. However, there is no disputing the fact that there is no need for a company to completely expel a competitor from the market, or to bar it completely from entering it, for such conduct to be considered exclusionary. In addition, in the same judgment, a 'substantial restraint of competition' is defined as 'creating, maintaining or strengthening market power', and so is consistent with actual practice to date.

10 www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/guidelines_exclusionary.pdf.

11 JFTC hearing decision, 5 June 2006.

12 Supreme Court judgment, 17 December 2010.

13 JFTC recommendation decision, 13 October 2004.

14 JFTC recommendation decision, 13 April 2005.

15 JFTC cease-and-desist order, 27 February 2009.

16 Judgment of the Supreme Court in *NTT East*, Supreme Court decision, 17 December 2010, Minshu Vol. 64, No. 8, p. 2,067.

On the other hand, controlling conduct is generally defined (albeit not in a Supreme Court judgment) as 'conduct which imposes restrictions on another enterprise's decision-making concerning their business activities, and so causes them to comply with one's own wishes'.

Other matters

While a company that creates market power is essentially free to raise prices, if these price rises prevent competitors from entering the market, the company may be violating the regulations on private monopolisation.

There are provisions that enable measures to be taken where a market is in a situation whereby it is monopolised by a large company[17] to remove such a situation; however, these have not actually been used in practice, and it is extremely unlikely that they will be in the future, either.

ii Relationship between private monopolisation and unfair business practices

It might be difficult for readers in countries that do not have a system of dual regulations to understand the relationship between private monopolisation and unfair business practices. While the enactment of regulations on unfair business practices was influenced by the US Federal Trade Commission Act,[18] the AMA is distinct from this Act in that it has provisions on a diverse range of different types of conduct, such as:

a concerted refusal to supply;[19]
b discriminatory prices;[20]
c unjust low prices;[21]
d resale price maintenance (RPM);[22] and
e abuse of superior bargaining position.[23]

17 AMA, Article 8-4.

18 Although in Japan, the only enforcing body is the JFTC.

19 AMA, Article 2(9)(i); GD, Paragraph 1. Because 'concerted refusal to deal' is not treated as unilateral conduct in general competition law, it is referred to only briefly in this chapter. The JFTC treats 'concerted refusal to deal' as illegal in principle. The nature of it is exclusionary conduct by collusion of horizontal competitors.

20 AMA, Article 2(9)(ii); GD, Paragraph 3.

21 AMA, Article 2(9)(iii); GD, Paragraph 6.

22 AMA, Article 2(9)(iv). Because resale price maintenance (RPM) is not treated as unilateral conduct in general competition law, it is referred to only briefly in this chapter. The JFTC treats RPM as illegal in principle. However, the JFTC recently evaluated the illegality by comparing and balancing the anticompetitive effect on intra-brand competition and the pro-competitive effect on inter-brand competition. Having said that, the JFTC tends to dislike to admit the pro-competitive effect on inter-brand competition in the actual case. Formal RPM cases arise approximately once every two years. So it is somewhat difficult to say that the enforcement is aggressive. Recent products subject to RPM were child care products (a stroller, child seat and cradle manufactured by Aprica and Combi), camping equipment (manufactured by Coleman Japan), sports shoes (manufactured by Adidas Japan) and a herbicide (manufactured by Nissan Chemical).

23 AMA, Article 2(9)(v); GD, Paragraph 13.

Except for RPM, the above types of conduct are dually regulated in the AMA and the JFTC GD, with slight differences between the regulations.[24] The main types of conduct, dealt with only in the GD and often applied by the JFTC, are as follows:

a refusal to deal ('[u]njustly refusing to trade, or restricting the quantity or substance of goods or services pertaining to trade with a certain entrepreneur, or causing another entrepreneur to undertake any act that falls under one of these categories');[25]

b tie-in sales ('[u]njustly causing another party to purchase goods or services from oneself or from an entrepreneur designated by oneself by tying it to the supply of other goods or services, or otherwise coercing the said party to trade with oneself or with an entrepreneur designated by oneself');[26]

c trading on exclusive terms ('[u]njustly trading with another party on condition that the said party shall not trade with a competitor, thereby tending to reduce trading opportunities for the said competitor');[27]

d trading on restrictive terms ('[i]n addition to any act falling under the provisions of Article 2, Paragraph (9), item (iv) of the Act and the preceding paragraph, trading with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party');[28] and

e interferences with a competitor's transaction ('[u]njustly interfering with a transaction between another entrepreneur who is in a domestic competitive relationship with oneself or with the corporation of which one is a stockholder or an officer, and its transacting party, by preventing the effecting of a contract, or by inducing the breach of a contract, or by any other means whatsoever').[29]

The major difference from private monopolisation is in the extent to which there is an anticompetitive effect on the market, and for private monopolisation to be realised, there must be a 'substantial restraint of competition' in the 'relevant market'.

On the other hand, it is enough for there to be a 'likelihood of impeding fair competition' for unfair business practices. The question of to what extent a 'likelihood' there should be to satisfy this requirement is, in some cases, the most contested issue. While it also depends on the case in question, the JFTC often sets a low bar in cases to ensure that it wins, while on the other hand companies tend to set a high bar in a way that is substantially the same as a 'substantial restraint of competition'.

24 For example, 'unjust low price' is defined in Article 2(9)(iii) of the AMA as follows: 'without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises'. However, it is defined in Paragraph 6 of the GD as follows: 'in addition to any act falling under the provisions of Article 2, Paragraph (9), Item (iii) of the Act, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other entrepreneurs'.

25 GD, Paragraph 2.

26 id., Paragraph 10.

27 id., Paragraph 11.

28 id., Paragraph 12.

29 id., Paragraph 14.

On this point, while the JFTC ruled in the administrative hearing decision for the *Microsoft* case[30] that 'the quantitative or substantive effect on competition of the relevant conduct should be determined on a case-by-case basis', this became the largest point of argument in the actual case.

In many cases, if private monopolisation applies, it will also constitute one of the types of unfair business practice. On the other hand, the relationship between them is such that conduct does not necessarily constitute private monopolisation just because it is an unfair business practice.

II YEAR IN REVIEW

On 12 December 2017, the Supreme Court, albeit in an international cartel case, indicated that even where cartel agreements are reached outside Japan, the AMA will apply where these infringe Japan's free competitive economic order. Although this is self-evident in actual practice, it makes sense that this was made explicitly clear, and it is surmised that this is also applicable to private monopolisation and unfair business practices.

On 15 March 2018, according to press reports, the JFTC conducted an on-site inspection (dawn raid) of Amazon Japan's offices on suspicion of the unfair business practice, 'abuse of superior bargaining position'. It seems that the investigation will look into Amazon Japan's conduct in demanding that its supplier companies pay the cost of a discount provided to consumers as a form of support money. It seems this case was closed, but it is not clear how this case was settled.

On 13 June 2018, according to press reports, the JFTC conducted an on-site inspection of Nihon Medi-Physics Co, a dominant company providing cancer examination test drugs for positron emission tomography, which is effective in early detection of cancer, on suspicion of private monopolisation (of the exclusionary type). Nihon Medi-Physics Co was suspected of disrupting the entry of new entrants into the market by putting pressure on the administration developer and manufacture not to use competitors' test drugs. On 12 March 2020, the JFTC approved the commitment plan submitted by Nihon Medi-Physics Co. See Section VI.

On 11 July 2018, the JFTC announced the closure of its investigation against Apple into a suspected violation of the AMA regarding its agreement with mobile operators (see Section IV).

On 30 December 2018, in accordance with the enactment of the Act on the Development of Related Legislation Following the Conclusion of the Trans-Pacific Partnership Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, a scheme to resolve suspected violations against the AMA voluntarily by consent between the JFTC and the enterprise (commitment procedures) was introduced into the AMA. See Section V.

On 15 March 2019, after hearing procedures that took almost 10 years, the JFTC revoked its own cease-and-desist order against Qualcomm, which was issued in 2009. This was a highly unusual step, as in the *JASRAC* case discussed in Section IV. On 28 September 2009, Qualcomm was determined by the JFTC to have committed violation of unfair business practices (trading on restrictive terms) by forcing a 'royalty-free clause' and 'non-assertion provisions clause' to mobile terminal manufacturers in the licence agreements of code-division multiple access (CDMA) intellectual property rights it owned. The JFTC evaluated in its cease-and-desist order in 2009 that the manufacturers would, as a result of these clauses, lose

30 16 September 2008.

the desire to research and develop technologies related to CDMA, etc., and, accordingly, their positions would be weakened, while on the other hand, Qualcomm would strengthen its position. However, the JFTC hearing examiner ruled that the clauses had a property similar to cross-licence agreements, and finally found that the claimants had failed to show evidence to support the existence of violation. The JFTC commissioners approved the hearing decision.

On 10 April 2019, according to press reports, the JFTC conducted on-site inspections of Rakuten Travel Co, Booking.com Japan and Expedia Japan, companies providing online hotel booking websites, on suspicion of unfair business practices (forcing most-favoured nation (MFN) clauses on hotels). On 25 October 2019, the JFTC approved a commitment plan submitted by Rakuten Travel. See Section V.

On 10 April 2019, according to press reports, Amazon Japan made public that it would withdraw its measure of service point reduction system returning to consumers over 1 per cent of the purchase amount of all items at the seller's expense. After Amazon Japan initially made this measure public in February 2019, the JFTC started investigations on suspicion of abuse of superior bargaining position.

On 17 December 2019, the JFTC released the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. See 'Exploitative abuse (abuse of superior bargaining position)' in Section IV.

On 28 February 2020, the JFTC filed a petition for an urgent injunction to the Tokyo District Court in accordance with the provision of Article 70-4, Paragraph 1 of the AMA, seeking an urgent injunction against shipping inclusive programme measures proposed by Rakuten, Inc (Rakuten), by which all the merchants of 'Rakuten Ichiba (market)' would be prevented from receiving delivery fees from purchasers.

The JFTC alleges that Rakuten's conduct violates Article 2(9)(v) (abuse of superior bargaining position) of the AMA. Recognising that Rakuten stated that, in consideration of influences of covid-19 on merchant staff resources, etc., it allowed the merchants to decide whether or not to participate in the measures, the JFTC withdrew its petition for an urgent injunction on 10 March 2020. However, the JFTC continues its investigation on Rakuten's measures.[31]

On 2 June 2020, the JFTC closed its investigation into a suspected violation of the AMA against Osaka Gas Co, Ltd (Osaka Gas). The JFTC investigated Osaka Gas in accordance with the provisions of the AMA. Osaka Gas has been suspected[32] of unjustly excluding competitors in the relevant market, where gas retailers supply gas to LCPs (large consumption points subject to an annual gas contract of not less than 100,000m^3) in the area of distribution network of Osaka gas, by the following:

a unjustly supplying gas for a low price, or supplying gas for a lower price only after Osaka Gas encounters a competition;

b concluding a contract to discount gas prices under the condition of supplying gas to two or more LCPs (hereinafter 'multipoint contract') with the stipulation that the total

31 www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html.

32 Suspected violation of the Article 3 (Private Monopolization) or the Article 19 (Unfair Business Practices stipulated in the Article 2, Paragraph (9), Item (ii) [Discriminatory Price] or Item (iii) [Unjust Low Price Sales] of the AMA, or Paragraph 3 [Discriminatory Price], Paragraph 6 [Unjust Low Price Sales], Paragraph 12 [Trading on Restrictive Terms] or Paragraph 14 [Interference with a Competitor's Transactions] of GD.

amount of the discounts should be reimbursed to Osaka Gas if any of the individual gas contracts on the LCPs subject to the multipoint contract would be cancelled during the contracted period, and

c concluding a gas supply contract with the stipulation that the customer should pay a cancellation charge to Osaka Gas if the customer cancelled the contract during the contracted period.

The JFTC decided to close the investigation in light of the facts, including the fact that it has not found a violation against the AMA on point (a), above, and that Osaka Gas voluntarily offered the JFTC a revision of the stipulations of the multipoint contract and gas supply contract mentioned in points (b) and (c), above, to reduce customers' payments accompanying a change of a gas supplier from Osaka Gas to a competitor.

On 7 June 2020, the JFTC issued a cease-and-desist order to Mainami Aviation Services Co Ltd (following an on-site inspection carried out by the JFTC on 22 May 2018). In this case, the JFTC alleged that Mainami Aviation Services had been committing a violation of Article 3 of the AMA (exclusionary private monopolisation) in its sale of 'into-plane fuelling' aviation fuel at Yao Airport, by:

a allegedly stating that it would not bear responsibility for aircraft-related accidents caused by mixing its aviation fuel with that of SGC Saga Aviation, and notifying its customers that it would discontinue fuelling their aircraft if these are refuelled by SGC Saga Aviation; and

b making it a condition of sale that customers sign a document confirming that they would not seek Mainami Aviation Services' liability for aircraft-related accidents caused by mixing its aviation fuel with that of SGC Saga Aviation.

Mainami Aviation Services' conduct excluded SGC Saga Aviation's business activities and caused, contrary to public interest, a substantial restraint of competition in the field of into-plane fuelling of aviation fuel Yao Airport. Although international standard specifications exist, the Civil Aeronautics Act[33] and other related ordinances do not prohibit or restrict the mixture of the same type and grade of aviation fuel. Although the same type and grade of aviation fuel provided by different fuelling companies are normally mixed within aircraft fuel tanks, no accidents caused by this have been reported in the aircraft accident investigation reports (from 1974 to 31 January 2020) published by the Japan Transport Safety Board. In relation to this order, on 19 February 2021, the JFTC issued a surcharge payment order against Mainami Aviation Services. The amount of the surcharge payment is ¥6.12 million. This is the first case in which the JFTC has issued a surcharge payment order for conduct of exclusionary private monopolisation since the JFTC introduced the system of surcharge payment orders against conduct in violation of exclusionary private monopolisation in 2009 (which entered into force in 2010). Mainami Aviation Services ceased the conduct on 21 August 2020.

Although the surcharge is very small because of the narrowness of the relevant market, it is assumed that the JFTC will not hesitate to issue higher surcharges in subsequent cases. Mainami Aviation Services has appealed for revocation of both administrative orders to the Tokyo District Court.

33 Act No. 231 of 15 July 1952.

On 7 August 2020, the JFTC approved the commitment plan submitted by drugstore Genky Stores, which was being investigated for violation of Article 19 (abuse of superior bargaining position).

On 10 September 2020, the JFTC approved the commitment plan submitted by Amazon Japan, which was being investigated for suspected abuse of superior bargaining position.

On 14 September 2020, Kazuyuki Furuya was inaugurated as chair of the JFTC, as successor to Kazuyuki Sugimoto, who had served as chair for seven and a half years. Mr Furuya has a strong reputation for his practice standards and political coordination.

On 15 November 2020, the JFTC approved the commitment plan submitted by SEED Co, Ltd, which is a manufacturer of products including contact lenses, headquartered in Tokyo. On 26 March 2021, the JFTC approved the commitment plan submitted by Alcon Japan, an importer of products including contact lenses, headquartered in Tokyo.

On 15 November 2020, the JFTC closed its investigation into a suspected violation of the AMA by Nippon Professional Baseball (NPB). The NPB is the top Japanese professional baseball organisation, which consists of two leagues, the Central League and the Pacific League, with six teams in each league. The JFTC investigated allegations that the NPB forced the 12 teams to refuse to sign contracts with certain baseball players. Specifically, the NPB decided that if an amateur baseball player who was eligible for selection in the NPB draft refuses to sign up at the draft or refuses to join the team that gains negotiating rights to the player through the draft, contracts with a foreign baseball team, the 12 NPB teams may not select the player at future NPB drafts for a specific period of time after the foreign baseball team terminates the contract with the player. During the JFTC's investigation, the NPB reported to the JFTC that the NPB took voluntary measures such as repealing the agreement, publicising the repeal and informing related organisations of its action. Because the JFTC recognised that these measures would eliminate the suspected violation, it decided to close the investigation.

On 30 November 2020, three major convenience stores, 7-Eleven, Lawson and Family-mart, announced the improvement of franchisee agreements. The JFTC strongly recommended that they immediately improve the content of agreements, including in terms of a lack of explanation of profitability at the point of recruiting member stores, a restriction on discount sales, compulsory 24-hour operation and dominant strategies in specific areas. These types of conduct were suspected of abuse of superior bargaining position.

On 11 December 2020, the Tokyo High Court completely revoked a JFTC hearing decision, which, other than reducing the surcharge payment amount, approved its own cease-and-desist order and surcharge payment order against Sanyo-Marunaka supermarket, based on a violation of abuse of superior bargaining position in relation to conduct including requiring its suppliers to dispatch their employees on secondment to them for free, demanding cooperation fees from them for new store opening celebrations and returning products according to its own sales deadline. The reason for the revocation was that the JFTC's description of disadvantaged suppliers was incomplete. The JFTC accepted this judgment. The JFTC has since improved this description, and it seemed, at first glance, that the issue was settled. However, it is expected to create a big problem for the JFTC when it issues formal orders against digital platform operators such as Google, Apple, Facebook and Amazon because the list of disadvantaged users could be extensive.

Contrary to *Sanyo-Marunaka Supermarket*, on 3 March 2021, the Tokyo High Court completely accepted the JFTC hearing decision on *RALSE* (see 'Exploitative abuse (abuse of superior bargaining position)' in Section IV).

On 17 February 2021, the JFTC published the Final Report Regarding Digital Advertising, which requires the transparency of publication criteria for internet advertising by large IT companies. The report specifies actual conduct that may violate the AMA, such as the discontinuation of advertising for unjust reasons. Despite the Report not being formal JFTC guidance, it includes strong recommendations for companies.

On 12 March 2021, the JFTC recognised that the commitment plan submitted by BMW Japan would conform to the approval requirements and approved it. BMW Japan was investigated by the JFTC on suspicion of abuse of superior bargaining position for forcing sales targets that seemed unachievable considering dealers' past sales results.

Albeit a cartel case, on 13 April 2021, according to press reports, the JFTC conducted on-site inspections of Chubu Electric Power Co, Kansai Electric Power Co and Chugoku Electric Power Co on suspicion of, inter alia, cartels in the super-high voltage field. The surcharge payment amount for this can be very high. While Japanese electric power companies once tended to dominate certain areas for long periods of time, the regulations were gradually eased to accommodate new market entrants. In particular, in recent years a liberalisation of retail electricity has begun, starting with the super-high voltage field (such as for large-scale power plants), then office buildings and finally low-voltage domestic electricity (from April 2016), resulting in the Japanese electricity retail market becoming completely liberalised. The JFTC has made it clear to the energy industry (including electricity and gas) that it will proactively investigate the situation going forward.

i Enactment of the Act to Amend the AMA

The amendments to the AMA mainly relate to cartels and bid rigging, not to unilateral conduct, but still remain very important.

On 19 June 2019, the bill to amend the AMA, which was submitted to the National Diet on 12 March 2019, was approved by the House of Councillors and enacted. The purpose of the amended Act is to deter 'unreasonable restraint of trade' effectively, invigorate the economy and enhance consumer interests by fair and free competition, through increasing incentives for enterprises to cooperate in the JFTC's investigation and imposing an appropriate amount of surcharges according to the nature and extent of the violation. Outlines of the enacted Act are as follows:

a amendment of leniency programme:
- the introduction of a system that allows the JFTC to reduce the amount of surcharges when enterprises submit information and documents that contribute to the fact-finding of the case, in addition to the reduction according to the order of application; and
- abolishing the current limit on the number of applicants in the leniency programme;

b revision of the calculation methods: addition of, inter alia, the basis of calculation of surcharges and extension of the calculation term;

c revision of penal provisions: raising the limit of the amount of criminal fine for a juridical person charged with the offence of obstructing an investigation; and

d other necessary revisions.

All amendments had entered into force by the end of 2020.

As an approach to attorney–client privilege, rules pursuant to the provisions of Article 76 of the AMA, and guidelines, were to be established by the effective date of the bill from the perspective of making the new leniency programme more effective by, inter

alia, protecting confidential communication regarding legal advice between an enterprise and independent attorneys substantially and ensuring the appropriateness of administrative investigation procedures.[34]

ii Enactment of the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms

On 27 May 2020, the bill for the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms, which was submitted to the National Diet on 18 February 2020,[35] was approved by the House of Councillors and enacted. On 1 April 2021, Amazon Japan, Rakuten, Yahoo, Apple Inc, iTunes and Google LLC were designated as specified digital platform providers by the Ministry of Economy, Trade and Industry (METI).

Purpose of the Act

In recent years, digital platforms have dramatically improved users' access to markets and have become ever more important. Meanwhile, concerns are emerging, such as: low transparency in trading as seen in changes in terms and conditions and no provision of reasons for refusal to deal; and insufficient procedures and systems for addressing rational requests of platform users providing goods and services.

In light of this situation, METI will take necessary measures to improve transparency and fairness in trading on digital platforms, such as those for requiring digital platform providers to: disclose terms and conditions of trading and other information, secure fairness in operating digital platforms, submit a report on the current situation of business operation and conduct self-assessment of the report as well as those for requiring the government to publicise the results of its assessment of the report and to take other actions.

In addition, the Act is to require the government, when implementing these measures, to encourage digital platform providers and platform users providing goods and services to establish mutual understanding in terms of trading relationships on the basis of digital platform providers making voluntary and proactive efforts with minimal involvement by the government.

Outline of the Act

The major measures to be taken under the Act are as follows.

Measures targeting specified digital platform providers

The Act is to designate digital platform businesses whose transparency and fairness in trading should be improved as 'specified digital platform providers' under cabinet order and, thereby, such specified providers, whether they are domestic or overseas businesses, are to be subject to the following rules:

a requiring specified digital platform providers to disclose their information (e.g., terms and conditions of trading). The Act is to require specified digital platform providers to disclose terms and conditions and give prior notices of any change thereof to the platform users;

34 www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html.

35 www.meti.go.jp/english/press/2020/0218_002.html.

b requesting these providers to develop procedures and systems in a voluntary manner: The Act is to request such providers to develop procedures and systems in accordance with the guidelines specified by METI; and

c requiring these providers to submit a report on the results of self-assessment and requiring the METI Minister to assess the report.[36]

The Act is to require such providers to submit a report, every fiscal year, on their current situations of items (a) and (b), above, with the results of self-assessment on such situations to the METI Minister, and then the Minister to assess the situations of business operation based on the report and publicise the assessment results.

Collaborating with the JFTC

The Act is to require METI to establish a system in which METI should request the JFTC to exercise certain measures under the AMA if METI finds any cases that are suspected of violating the AMA.

III MARKET DEFINITION AND MARKET POWER

i Market definition

A market is defined in terms of its product scope and geographical scope. However, markets are sometimes defined very narrowly when compared to merger control, such as in terms of specific areas, services or customers.

The most noteworthy case regarding market definition is *NTT East*. The JFTC defined the market somewhat narrowly as '[fibre to the home] services for detached residential properties in the East Japan region'. While the company naturally countered that the market should be defined as the broadband services market (including asymmetric digital subscriber line services), the Supreme Court affirmed the JFTC's decision.[37]

Markets have been defined as:

a 'the field of supply for glass tubes in the West Japan region for which the consumers are ampoule processing companies with headquarters in the same region and the suppliers are NIPRO and processing companies', in the later *NIPRO* case;

b the 'transmission of music to retail shops in Japan' in the *USEN Corporation* case;

c 'the market for the sale of CPUs to computer manufacturers in Japan' in the *Intel* case; and

d 'the Molybdenum-99 market in Japan' in the *Nordion* case.

There is also debate as to whether market definition is required for unfair business practices, and the JFTC's position is to define markets as necessary on a case-by-case basis. That is to say, its basic position is that this is not necessary. However, in *Microsoft*, the JFTC did

36 The categories and sizes of businesses are to be stipulated under cabinet order.

37 The Court stated: 'Given it is clear that there actually existed consumers who prefer [fibre to the home (FTTH)] services in terms of the communications side, etc., regardless of the price difference with other broadband services such as [asymmetric digital subscriber line services], and so it can be understood that for such persons there was almost no demand substitutability as regards other broadband services, so the FTTH services market can be assessed independently as being the "relevant market" for the purposes of Article 2, Paragraph 5 of the AMA.'

not shy away from defining the market, but instead defined it as the computer audiovisual technology trading market. Even for unfair business practices, it is not possible to consider the anticompetitive effect if the market is not defined, and so there are many situations where companies and the JFTC contest the point.

ii Market power

As mentioned previously, under the Private Monopolisation Guidelines a company is required to have a share of approximately over 50 per cent in the relevant market for private monopolisation to apply.

Private monopolisation is established where these companies 'create, maintain or strengthen their market power' through either exclusionary conduct or controlling conduct. There are many cases where private monopolisation is committed by companies that already have market power, and in doing so maintain or strengthen that power. While in this sense it is rare for such companies to create market power, there are cases where, for instance, an enterprise that already has market power in another market uses that position to create new market power in another separate market; that is to say it makes use of its leverage.

In the case of unfair business practices, there is no need for the company committing the conduct to have market power, and it is enough for them to have a strong position within that market. The Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act[38] contain safe harbour provisions whereby an enterprise is not considered to have a strong position where it has a share of 20 per cent or less in respect of some types of conduct. Whether the safe harbour provisions apply varies depending on the type of conduct that is alleged to be an unfair business practice, and the aforementioned Guidelines should be consulted accordingly.

For instance, safe harbour provisions are not available in the case of restrictions on resale prices or abuse of a superior bargaining position, and so may be violated even where the JFTC considers the company in question to have a market share of only 10 per cent. Further, the market share is dependent on the market definition, so it is important to be mindful of the fact that a company's relative market share will increase where the market is narrowly defined.

IV ABUSE

i Overview

While conduct constituting private monopolisation may be either exclusionary conduct or controlling conduct, the former is at the heart of such conduct, and one should also be mindful of the following: it is highly likely that the JFTC makes its decisions regarding private monopolisation not only by paying attention to the anticompetitive nature of each such conduct, but also by considering overall the strength and weakness of factors such as: (1) the company's power in the market; (2) the anticompetitive nature of the conduct in question; and (3) the effect on the relevant market, as well as the causal relationship between the three, and further, taking into account the existence or absence of any pro-competitive effects, and the extent thereof.

38 www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/DistributionSystemsAndBusinessPractices.pdf.

For point (1), the JFTC takes into account not only the company's market share itself, but also the characteristics of the market, the difference in share between the company and the player ranking second in the market, and, where necessary, the extent of excess profits, the existence of potential new entrants, brand strength and so on.

Concerning point (2), while the Supreme Court has proposed 'practices of an artificial nature which deviate from methods of normal competition', this can simply be taken to mean anticompetitiveness. The extent of the anticompetitive nature of a conduct can be taken instead to mean the extent of the deviation from normal competition based on price and quality, that is to say from competition on the merits of the relevant products or services.

The effect on the relevant market (point (3)) refers to effects such as competitors failing to enter or being delayed in entering a market, withdrawing therefrom, experiencing fluctuations in their share, or increases or decreases in customer trading.

Because points (1) to (3) act on each other, if an anticompetitive effect is quantitatively assessed and given a numerical value, the anticompetitive effect is likely determined not through a summing up of such values, but by multiplying them and subtracting any pro-competitive effects instead. Once this is understood, the following examples become easier to comprehend.

In the Private Monopolisation Guidelines, four typical examples of exclusionary conduct constituting private monopolisation are given:

a predatory pricing;
b exclusive dealing;
c tie-in arrangements; and
d refusal to deal or discriminatory conduct.

While this is a simple way to classify such conduct, a much more broad and diverse range of types of conduct can be given. Additionally, the following classification of conduct is based on the JFTC's law applied to actual cases; however, this is fluid, and dependent on the details of each case. In many cases, if private monopolisation applies, this also constitutes a type of unfair business practice. However, the converse is not true.

As the JFTC has tended to enforce the regulations on private monopolisation in waves, it is worth looking back at previous events to understand the current situation in Japan. There were no such cases between 1972 and 1996, and prior to 1972, there were only a few. During this period, conduct that met the requirements for private monopolisation was regulated as an unfair business practice, as they were generally understood to be at the time, for which the evidential burden was low.

From 1996 to 2009, private monopolisation was actively enforced, with one case a year on average. However, the JFTC lost the *JASRAC* case. JASRAC, which was the monopolistic managing operator for music copyright in Japan, was initially determined by the JFTC in 2009[39] to have committed a violation of private monopolisation by adopting a blanket collection method for broadcaster licensing fees, whereby it charged a fee by applying its prescribed rate to broadcasters' broadcasting business revenue as a comprehensive licence for all music managed by JASRAC, regardless of the number of times that music was actually used.

39 JFTC cease-and-desist order, 27 February 2009.

JASRAC contested the cease-and-desist order in the hearing procedure[40] held by the JFTC, which resulted in the JFTC taking the highly unusual step of revoking its own cease-and-desist order of violation.[41]

While it seemed the matter would then be concluded, an action for revocation of administrative disposition was subsequently brought against the JFTC by JASRAC's competitor, e-License, which claimed that it was excluded by JASRAC. The Tokyo High Court and the Supreme Court both determined that exclusionary conduct had taken place, and the case was referred back to the JFTC.[42]

In 2016, the case finally came to a close, with the withdrawal of JASRAC's petition for redress, and during the period from 2009 to 2016, shackled as it was by its ongoing conflict with JASRAC, the JFTC did not expose any cases of private monopolisation, with the exception of one small and local case of a controlling-type private monopolisation. However, in recent years, the JFTC has become more active again. It has exposed a string of cases that are fascinating from a competition law standpoint (see Section II).

ii Exclusionary conduct (private monopolisation)

Predatory pricing

According to the Private Monopolisation Guidelines, a price is highly likely to constitute exclusionary conduct where it is lower than the 'costs required to supply the product', which is a similar concept to average variable costs. On the other hand, where the price is lower than the total costs required to supply a product, but greater than the 'costs which does not arise if the product is not supplied', and there are no special circumstances such as that the product is being supplied over a long period of time and in high volume, there is a low possibility of such pricing constituting exclusionary conduct.

The *USEN Corporation* case[43] is a typical example of this. USEN Corporation, which had a market-leading share in cable music broadcasting to retail offices (68 per cent, rising to 72 per cent as a result of exclusionary conduct), lowered the monthly listening fee that it charged to customers of its largest rival, Cansystem (26 per cent, decreasing to 20 per cent as a result of USEN's exclusionary conduct) as a condition of the customers switching to use its own service, and also extended its promotional campaign to those customers (whereby those monthly fees were made free) from the standard three months to six, and so was determined to have engaged in exclusionary conduct.

40 The practice of which has since been abolished.

41 JFTC hearing decision, 12 June 2012.

42 Supreme Court decision, 28 April 2015, Minshu, Vol. 69, No. 3, p. 518. The ruling was as follows: *A collection method which does not take into account the amount of broadcast usage when calculating broadcasting licence fees will cause the overall amount of music usage fees borne by broadcasters to increase where they are paying music usage fees to other managing operators. Accordingly, coupled with the fact that the broadcasting usage of music is essentially interchangeable in nature, this has the effect of suppressing the usage by broadcasters of music which is managed by other managing operators, and when one takes into account that the scope of such suppression extends to almost all broadcasters, and that the continuation period thereof extends over a considerably long period of time, one should say that this method clearly has the effect of making it difficult for other managing operators to enter this market.*

43 See footnote 13.

Margin squeeze

Margin squeeze means conduct whereby a company that does business in both an upstream market and a downstream market tries to bring the price of an upstream product close to that of a downstream product. In some cases, it is regulated as a refusal to deal.

The Supreme Court's judgment in *NTT East* is a typical example of this. When providing new communication services using fibre optics to detached residential properties, NTT East, which owns more than 70 per cent of the fibre-optic lines in the east Japan region, provided users with such communication services under a system whereby one person used a single fibre-optic line (central wire direct connection system). However, the fact that the usage fee for this was less than the connection fee for other communications providers, when using the same central wire direct connection system, was treated as them being excluded. While the monthly usage fee was ¥5,800, the monthly connection fee was ¥6,328.[44]

Exclusive dealing

In *Nordion*, the Canadian company Nordion, which held the majority of global production volume and a large part of the sales for Molybdenum 99 (a substance used in radiation therapy) and 100 per cent of the market share in Japan, required its Japanese business partners to purchase all of the products they required from it over the course of 10 years, and accordingly, was found to have excluded its competitors.[45] This is an exclusive purchasing obligation, which is one type of exclusive dealing.

See Section II regarding exclusive dealing by Mainami Aviation Services, to whom a cease-and-desist order was issued on 7 June 2020 and a surcharge payment order was issued on 19 February 2021. Mainami Aviation Services has appealed for revocation of both administrative orders to the Tokyo District Court.

Rebates

The Private Monopolisation Guidelines attempt to draw a line under whether conduct is illegal by listing a diverse range of factors, including loyalty rebates, but are unsuccessful in doing so. As such, analysis of exclusionary conduct is at a developing stage, whereby factors such as the discount aspect of rebates and pro-competitive effects are also taken into account.

A representative example of this is *Intel*.[46] Intel, which has a larger share of the market for central processing units (CPUs) installed in computers (rising from 76 per cent to 89 per cent as a result of exclusionary conduct), provided its business partner computer manufacturers with rebates, etc., on the condition that they would use Intel CPUs for 90 per cent to

44 The Supreme Court ruled as follows: 'in the case of the conduct concerned, NTT East directly provided subscriber fibre optic equipment installed by it to its subscribers, and at the same time, when providing this equipment to other telecommunications providers with which it competed for connection purposes, made use of its position as effectively the sole supplier in the equipment connectivity market for subscriber fibre optics to set and present them with connectivity terms and conditions which those providers could not accept as reasonable in economic terms. This unilateral and one-sided act of refusal to deal and predatory pricing has an artificial nature which deviates from normal competitive methods, as seen in terms of them creating, maintaining or strengthening their own market power, and as it can be said that this had the effect of significantly making it difficult for those competitors to enter the market, this should be considered as constituting exclusionary conduct in that same market.'

45 *Nordion*, JFTC recommendation decision, 3 September 1998.

46 See footnote 14.

100 per cent of their computers, and would not use CPUs from Intel's competitor, AMD (with a share of 22 per cent falling to 10 per cent as a result of Intel's exclusionary conduct), for computers with a high production volume. Intel's conduct in causing them not to adopt the CPUs of its competitor was deemed to be exclusionary.

Mixed conduct

There are some situations in which various different types of exclusionary conduct are mixed together, or combine to form a consecutive series.

NIPRO[47] is a typical example of mixed conduct. In this case, NAIGAI Group, a business partner of NIPRO that produces and sells glass tubes for use in ampoules (and has a share of 85 per cent), began dealing in non-Japanese made glass tubes, which were competitor products to NIPRO's. To restrain the expansion of NAIGAI's dealing in such glass tubes, and with the intention of imposing sanctions on it, NIPRO raised the sale price for glass tubes to NAIGAI Group only (price discrimination); refused to accept orders placed by NAIGAI Group (refusal to deal); and required NAIGAI Group alone to provide security or to settle invoices with cash payments (abuse of superior bargaining position).

The JFTC decided that exclusionary conduct had taken place after taking into account a series of conduct by NIPRO over some four years. While *NIPRO* was the first case of private monopolisation in which the JFTC's findings were contested, it also alleged in the course of the hearing as a preliminary claim that NIPRO's same series of conduct also constituted unfair business practices.[48]

As NAIGAI Group had not decreased its dealings in imported glass tubes despite such course of conduct, NIPRO was able to exclude the imported tubes, but only slightly, and accordingly, the JFTC added an allegation of unfair business practices, which have a low evidential burden and for which it is sufficient to show that there was a 'likelihood of impeding fair competition'. Finally, the JFTC returned to its claim of private monopolisation and won its case.

Hokkaido Shimbun[49] is also an interesting example of a mixed conduct case. The *Hokkaido Shimbun* newspaper covered the entire Hokkaido area, and had a dominant position even within newspaper sales in the Hakodate region (which is located within the Hokkaido area). Given that *Hakodate Shimbun* was established in the same region with the aim of publishing an evening paper, *Hokkaido Shimbun* both filed a trademark on title lettering that the new market entrant, *Hakodate Shimbun* newspaper, was likely to use, and also greatly reduced its newspaper advertising fees in the same region and put pressure on the press agency not to broadcast news to *Hakodate Shimbun*. It further demanded that the TV stations would not broadcast its commercials. This conduct was treated as *Hakodate Shimbun* being excluded.

Other examples of mixed conduct are outlined below. While these types of conduct are difficult to typify under the Private Monopolisation Guidelines, they are clear examples of exclusionary conduct.

In *Japan Medical Foods Association*, the Association, which exclusively carried out inspection work on medical food products (that is, it had a share of 100 per cent) through the public inspections system, colluded with Nisshin Healthcare Food Service Co, Ltd, a primary

47 See footnote 11.

48 Trading subject to restrictive conditions, GD, Paragraph 12.

49 JFTC recommendation decision, 28 February 2000.

seller of food products for medical use, to construct a production and sale system that made it clearly difficult for new players to enter the market, such as requiring registration for medical food products and certification for production plants, and so was deemed to have excluded new market participants from producing and selling medical food products.[50]

In *Pachinko Machine Production Patent Pool*, 10 pachinko machine producers that held key patents on the manufacturing of these machines (and together held approximately 90 per cent of the pachinko machine market), and that had gathered their patents together and were managing them as a patent 'pool', were deemed to have committed exclusionary conduct for not granting new participants licence rights to those patents.[51]

In *Paramount Bed*, Paramount Bed placed pressure on the person in the Tokyo metropolitan government in charge of placing orders for medical-use beds (Paramount had an almost 100 per cent share of this market) to enable delivery only of beds for which Paramount Bed had utility model rights, so that competing providers could not supply other beds, and accordingly was found to have committed exclusionary conduct.[52]

iii Controlling conduct (private monopolisation)

There are few cases concerning controlling-type conduct; nor are there any guidelines thereon from the JFTC. An example that constitutes controlling is a company using a given investment in another company to restrict its sales areas against its wishes, and to prohibit the establishment of new factories.[53] Also, while there are very few examples of this (just five cases to date), cases such as the *Japan Medical Foods* case and the *Paramount Bed* case involved both exclusionary conduct and controlling conduct. Since the *Toyo Seikan* case, there has been only one case of controlling conduct alone – the 2015 *Fukui Agricultural Cooperative* case.

While *Fukui Agricultural Cooperative*[54] is a controlling-type case, the scale thereof was small, and it was extremely local in nature. Furthermore, this case could be treated as bid rigging.

iv Unfair business practices

Price discrimination

In *Hokkaido Electric Power*, the company set different fees for returning consumers that were higher than those for new consumers, and accordingly the JFTC issued a warning on suspicion of price discrimination.[55]

The JFTC has made it clear to the energy industry (including electricity and gas) that it will proactively investigate the situation going forward.

50 *Japan Medical Foods Association*, JFTC recommendation decision, 8 May 1996.

51 *Pachinko Machine Production Patent Pool*, JFTC recommendation decision, 6 August 1997.

52 *Paramount Bed*, JFTC recommendation decision, 3 September 1998.

53 *Toyo Seikan*, JFTC recommendation decision, 18 September 1972.

54 16 January 2015.

55 JFTC warning, 30 June 2017.

Tying

Microsoft Japan licensed its word processing software, Word, to computer manufacturers together with Excel (the spreadsheet software for which it has the leading market share) at the same time as licensing the latter, and accordingly was deemed to have engaged in 'tying'.[56] Following this, Ichitaro, competing word processing software, suffered a notable reduction in its market share.

Non-assertion provisions clause

The *Microsoft* case is a typical example of this. Microsoft US was found to have created an anticompetitive effect in the computer audiovisual technology market by including in its contracts for licensing Windows (its core software for PCs) original equipment manufacturer (OEM) sales provisions whereby the OEM providers entering into those contracts promised not to sue Microsoft or other OEM providers for breaches of patent infringement by Windows (non-assertion provisions), and so this conduct was found to constitute trading subject to restrictive conditions.[57]

In the decision, it was determined that the non-assertion provisions were extremely unreasonable given that it enabled the OEM providers' worldwide patents to be incorporated into the Windows series for free, and accordingly that there was a high probability of OEM providers losing the desire to research and develop new computer audiovisual technology.

In addition, given that the OEM providers and Microsoft are competitors in the computer audiovisual technology market, the OEM providers would, as a result of the non-assertion provisions, lose the desire to research and develop computer audiovisual technology if they had such powerful technology in their possession, and accordingly, their position would be weakened, while on the other hand, Microsoft could rapidly and widely distribute its computer audiovisual technology on a global scale by installing it within the Windows series.

Accordingly, it was determined that the non-assertion provisions had a likelihood of excluding competition in the computer audiovisual market, or causing it to stagnate, and so there was a high probability of an anticompetitive effect being extended to that market.

See Section II regarding *Qualcomm* (the JFTC lost this case).

Breach of fair, reasonable and non-discriminatory terms

One-Blue, LLC manages and operates the patent pool for the standard essential patents for Blu-ray disc standards. Despite declaring that it would license these under fair, reasonable and non-discriminatory (FRAND) conditions, it did not reach an agreement with Imation Corporation, which wished to receive a licence under the FRAND conditions, and furthermore told its business partners that the Blu-ray discs produced and sold by Imation would infringe One-Blue's patent rights. Accordingly, this conduct was determined to constitute unfair interference with a competitor's transactions.[58]

56 GD, Paragraph 10; JFTC recommendation decision, 14 December 1998.

57 GD, Paragraph 12; JFTC hearing decision, 16 September 2008.

58 GD, Paragraph 14; JFTC press release, 18 November 2016.

Most-favoured nation clause

Amazon Japan was found to have included in its seller display contracts for Amazon Marketplace (its electronic shopping mall) an MFN clause that required sellers to set prices and terms and conditions for products sold by them on Amazon Marketplace at whichever were the most favourable prices and terms and conditions of the same product as sold by other sales routes, and accordingly was investigated by the JFTC on suspicion of trading subject to restrictive conditions.[59] However, as Amazon Japan made a petition to the effect that it would take voluntary measures itself, and those measures, including deleting MFN clauses from the contracts and not introducing the clauses in new contracts, dispelled the suspicion, the JFTC broke off its investigation.[60] It could be said that Amazon took commitment procedures in advance.

Unfair interference with a competitor's transactions

DeNA is an online game platform that uses mobile phone and social network services (SNS), was ranked top in sales of SNS game software and was also in hot pursuit of its rival, Gree. DeNA planned to disrupt SNS game developers from providing software to Gree by eliminating their links to the DeNA platform when they provided software to Gree. DeNA was determined to have engaged in unfair interference with a competitor's transactions.[61]

Exploitative abuse (abuse of superior bargaining position)

The provisions on unfair business practices contain prohibitions on abuse of superior bargaining position that are unique to Japan. One aspect to these provisions is the traditional Japanese industrial policy of protecting small and medium-sized companies, and, while they are somewhat hard to understand in terms of pure competition law theory, the JFTC makes frequent use of these provisions, therefore making them a key part of the regulations against unfair business practices.[62] It is enough for a company to have a superior bargaining position relative to its suppliers, and there is neither any need for the relevant company to have market power nor to have a strong position in the relevant market. Of course, if such elements exist, the possibility of the company being targeted by the JFTC will increase.

As such, the company is an important trading partner for suppliers; if they have a relationship with such company whereby they must accept any demand made by the company, no matter how unreasonable, the company in question will be deemed to have a superior bargaining position. Theoretically, the key factor in finding a superior bargaining position is the degree of dependence by the supplier on the transaction with the company, and the degree of dependence is generally evaluated by dividing the supplier's volume of sales to the company by the supplier's total amount of sales. However, in practice, the JFTC often finds dependency, even if the ratio is less than 5 per cent.

59 GD, Paragraph 12.

60 JFTC press release, 1 June 2017.

61 JFTC cease-and-desist order, 9 June 2011.

62 The regulation on abuse of superior bargaining position is also implemented by the Subcontract Act, the supplemental act of the AMA. The Act applies to subcontract transactions related to the commission of manufacturing, repairing or making information-based products or providing services and only where the capital falls under the criteria in the Act. When the JFTC find a violation of the Subcontract Act, it first issues a recommendation. If the company does not comply, the JFTC issues a cease-and-desist order after evaluating the conduct in light of abuse of superior bargaining position.

The rules primarily regulate against large companies, such as mass electronics retailers, supermarkets, department stores, and home and convenience stores, demanding cooperation fees or support money from their suppliers, requiring them to dispatch their employees on secondment to them for free, returning products that are not faulty or reducing payments without due cause.

In *7-Eleven*, involving the largest franchisor in the convenience store sector, 7-Eleven prevented franchisees from discounting unsold foods such as lunch boxes, and its conduct was deemed to be abuse of superior bargaining position.[63]

In *Toys 'R' Us*, which involved the largest Japanese retailer specialising in goods for children and infants at that time, Toys 'R' Us reduced prices and returned products to suppliers. Toys 'R' Us's conduct was deemed to be abuse of superior bargaining position.[64]

Note that there are no restrictions on the types of industry that may be targeted, and in the past, there have also been cases of banks being investigated. In *Mitsui Sumitomo Bank*, the JFTC found that Mitsui Sumitomo Bank forcing borrowers to purchase financial products was unlawful.[65] Note that the JFTC tends to apply this regulation readily.

There have been only five cases in which cease-and-desist orders and surcharge payment orders have been issued since 2010, when surcharges were incorporated for certain types of unfair business practices, including abuse of superior bargaining position. All of these cases involved abuse of superior bargaining position.

a In *Sanyo-Marunaka Supermarket*, although the surcharge payment order first issued in 2011 was for ¥222.16 million, it was reduced to ¥178.39 million by a JFTC hearing decision in 2019.[66] However, on 11 December 2020, the Tokyo High Court completely revoked the 2019 hearing decision because the JFTC did not provide a complete description of the suppliers disadvantaged by Sanyo-Marunaka (see Section II).

b In *Toys 'R' Us*, although the surcharge payment order first issued in 2011 was for ¥369.08 million, it was reduced to ¥222.18 million by a JFTC hearing decision in 2017. This case was settled.

c In *EDION*, although the surcharge payment order first issued in 2012 was for approximately ¥4 billion, it was reduced to approximately ¥3 billion by a JFTC hearing decision in 2019. This case has been appealed to the Tokyo High Court.

d In *RALSE*, the surcharge payment order first issued in 2013 was for approximately ¥1.2 billion and was confirmed at this level by a JFTC hearing decision in 2019. Contrary to *Sanyo-Marunaka Supermarket*, on 3 March 2021 the Tokyo High Court accepted the JFTC's hearing decision.

e In *Direx*, although the surcharge payment order first issued in 2014 was for approximately ¥1.2 billion, it was reduced to approximately ¥1.1 billion by a JFTC hearing decision in 2020. This case was also appealed to the Tokyo High Court.

63 JFTC cease-and-desist order, 22 June 2009.

64 JFTC hearing decision, 4 June 2015.

65 JFTC recommendation decision, 26 December 2005.

66 This administrative system was abolished.

These cases illustrate that the JFTC is having difficulty arriving at surcharge figures for cases involving abuse of superior bargaining position.

Regardless of JFTC improvements in describing disadvantaged suppliers following *Sanyo-Marunaka Supermarket*, two judgments by the Tokyo High Court are still uncertain. Under these circumstances, although the JFTC is very active in investigating abuse of superior bargaining position, commitment procedures are the main method used for settling cases.

JFTC Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc., 17 December 2019[67]

Background

The services provided by digital platform operators constitute multi-sided markets with multiple user segments, and these services readily expand and promote monopolisation and oligopolisation through their characteristics – such as network effects, low marginal cost, and economies of scale. Furthermore, the data concentration through network effects and economies of scale increases users' benefits, but also the data-based business model as accumulating and utilising data by digital platform operators create cycles that maintain and enhance competitive advantages by further accelerating the accumulation and use of data by digital platform operators. Because some digital platform operators adopt a business model where they provide free goods and services in exchange for the acquisition or use of personal information, for purposes of accumulating data, there are some concerns over the acquisition or use of consumers' personal information by digital platform operators that provide services to consumers. If the digital platform operator's acquisition or use of personal information in unfair ways causes consumers disadvantage and adverse effects on fair and free competition, then issues under the AMA will arise. Therefore, the Guidelines describe what kind of acts related to the acquisition of personal information, or use of acquired personal information, at a digital platform of a digital platform operator will be issues concerning abuse of a superior bargaining position in view of transparency of the AMA enforcement and improvement of predictability for digital platform operators. Note that if conduct described below violates other laws and regulations, interventions under these other laws and regulations will not be prevented.

Types of abuses of superior bargaining position

Types of abuses of a superior bargaining position include:

a unjustifiable acquisition of personal information, including:
- acquiring personal information without stating the purpose of its use to consumers;
- acquiring personal information beyond the scope necessary to achieve the purpose of use;
- acquiring personal data without taking the precautions necessary and appropriate for safe management of personal information; and
- causing consumers in continuous use of services to provide other economic interests like personal information in addition to the consideration provided in exchange for the use of services; and

67 www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html.

b unjustifiable use of personal information, such as:
- using personal information beyond the scope necessary to achieve the purpose of use; and
- using personal data without taking the precautions necessary and appropriate for the safe management of personal information.

Apple case (unfair business practices: mixed conduct)

The JFTC had been investigating Apple Inc (Apple), the ultimate parent company of Apple Japan GK, in accordance with the provisions of the AMA,[68] since October 2016. Apple Japan had, based on its agreements with NTT Docomo KK, KDDI KK and SoftBank KK[69] (collectively, three mobile network operators (3 MNOs)), been suspected of restricting the business activities of 3 MNOs regarding the following:

a quantities of iPhones that 3 MNOs order from Apple Japan;
b telecommunication service plans that 3 MNOs offer iPhone users;
c iPhones that users traded in to 3 MNOs; and
d subsidies that 3 MNOs and others offer users purchasing iPhones.

During the investigation, Apple reported to the JFTC that it would amend a part of the agreements. The JFTC reviewed these amendments. Consequently, on 11 July 2018, the JFTC decided to close the investigation, concluding that the amendments would eliminate the suspicion of the violation mentioned above. The JFTC's evaluations are as follows.[70]

Apple Japan concluded iPhone agreements with, and sold iPhones to, 3 MNOs. The iPhone agreements include provisions regarding 3 MNOs' purchase and sale of iPhone products, iPhone service and support provided to users purchasing iPhones, and telecommunication services provided to users purchasing iPhones. The JFTC investigated the following provisions in the iPhone agreements.

Provisions regarding iPhone order quantities

It was seen that Apple Japan obligating an MNO to order a specific order quantity of iPhones could be a problem under the AMA if, for example, it reduces the sales opportunities of other smartphone makers. However, considering the fact that a specific order quantity was not set out in the iPhone agreements except for during a limited time period and a stipulated order quantity did not appear to oblige an MNO to order the quantity, as well as other facts, it was not recognised that Apple Japan restricted an MNO's business activities.

Apple reported to the JFTC that, when concluding a new iPhone agreement with the MNO, it would stipulate that an order quantity would be a target for the MNO and that a failure to meet an order quantity would not be a breach of contract.

68 Suspected violation of trading on restrictive terms, GD, Paragraph 12.

69 In Japan, the possession of smartphones is increasing trend, with over 60 per cent of consumers owning a smartphone. The number of smartphone shipments exceeds 30 million units per year, out of which the recent share of iPhones shipped by Apple Japan is approximately 50 per cent. SoftBank, KDDI and NTT Docomo launched the sales of iPhones in July 2008, October 2011 and September 2013, respectively.

70 www.jftc.go.jp/en/pressreleases/yearly-2018/July/180711.html.

Provisions regarding iPhone plans

It was seen that Apple Japan obligating an MNO to offer an iPhone plan only could be a problem under the AMA if, for example, it lessens competition on service plans among MNOs. However, considering the fact that it was possible for other service plans to be offered under the iPhone agreements and a stipulated iPhone plan had not been offered, as well as other facts, it was not recognised that Apple Japan restricted an MNO's business activities.

Apple reported to the JFTC that it would amend the iPhone agreements and abolish the provisions regarding iPhone plans.

Provisions on subsidy

Subsidies provided to users purchasing smartphones is considered to lessen the substantial costs to users in purchasing smartphones and to have promoted the wide use of smartphones. However, Apple Japan obligating an MNO to provide a certain amount of subsidy could be a problem under the AMA if, for example, it lessens competition among mobile telecommunication businesses through the smooth offering of low-price and diverse service plans, by constraining the price reduction of telecommunication services and the price combination of smartphones and telecommunication services under the current situation where MNOs bundle smartphones and telecommunication services to many users.

Apple Japan proposed to the JFTC to amend the iPhone agreements with 3 MNOs so that they may offer (even if users purchasing iPhones subscribed to a term contract) service plans without subsidies (alternate plans), on the condition that 3 MNOs provide clear, fair and informed choices to users in their selection of either service plans with subsidies (standard plans) or alternate plans and other conditions. Apple Japan agreed on such amendments with 3 MNOs and then reported them to the JFTC.

Even after the implementation of the above amendments, 3 MNOs' obligation to provide subsidies to users purchasing iPhones would still partly remain. However, it would become possible for 3 MNOs to offer alternate plans to users, which would not breach the iPhone agreements with Apple Japan. However, as long as 3 MNOs' sales promotion activities of alternate plans were not hindered, it was considered that such marketing would provide users with the optimal service plan choice, promoting competition among telecommunication businesses. Considering these points, it was recognised that the amendments would eliminate the suspicion of the violation of the AMA.

V REMEDIES AND SANCTIONS

i Sanctions

The revision of the AMA in 2005 led to administrative surcharges also being levied for controlling a private monopolisation. The JFTC does not have discretion over the amount thereof, but rather surcharges are charged at 10 per cent of the consolidated annual sales affected by the conduct for the past 10 years (maximum). Further, with the 2009 revision of the AMA, administrative surcharges came to be imposed on exclusionary private monopolisation as well. These are charged at 6 per cent of the consolidated annual sales affected by the conduct for the previous 10 years (maximum). However, to date there has been just one case of an administrative surcharge being levied for private monopolisation, *Mainami Aviation Services*. In addition, while criminal charges are also prescribed in respect of private monopolisation, there is no example of these having actually been imposed.

With the 2009 revision of the AMA, administrative surcharges also came to be imposed for certain types of unfair business practices (certain types enacted only in the AMA, not in the GD). The basic rate for these is 3 per cent (but 1 per cent in the case of abuse of superior bargaining position). Actually, administrative surcharges have only been imposed for unfair business practices in five cases of abuses of a superior bargaining position so far. While these surcharges are imposed in respect of the first instance of the conduct in violation of the prohibition on abuse of superior bargaining position, for other unfair business practices they are imposed in respect of the second instance of the offending conduct where it is repeated, within 10 years of its first violation.

With the 2019 revision of the AMA, the period for calculating surcharges for private monopolisation and unfair business practices was extended from three years to a maximum of 10 years.[71]

ii Behavioural remedies

Cease-and-desist orders are formal behavioural remedies. The JFTC has broad discretion to order different measures, which include an enterprise resolving not to repeat the same violation, informing its customers of the violation and implementing a compliance programme. Even where the violation has already been extinguished, the JFTC may, where it deems particularly necessary, order the enterprise, for a period of seven years[72] after the extinguishment thereof, to take such measures as are required to ensure that the relevant conduct is removed, such as disseminating notices to the effect that the offending conduct is no longer taking place

iii Structural remedies

While there is debate over whether the JFTC can order enterprises to take structural measures such as splitting a company, such an order has not been given to date.

VI PROCEDURE

i Overview

Investigations conducted by the JFTC consist of either an on-site investigation (dawn raid) or an order to report. While an on-site investigation is the method normally employed where there is strong suspicion of a violation, in recent years some investigations have been commenced through an order to report instead. Although at the time of commencing an investigation the JFTC gives a written notice of the suspected facts, it is common for the JFTC to describe both grounds for private monopolisation and unfair business practices, thereby investigating with the aim of finding both and proving at least one of the two, and for the applicable law to be determined mid-way through an investigation or indeed at the end thereof.

71 Article 2-2, Paragraph13, Article 7-9, Paragraphs 1 and 2, and Articles 18-2, 20-2, 20-3, 20-4, 20-5 and 20-6, of the AMA.

72 The period was extended from five years to seven years by the amendment of the AMA in 2019. Article 7 Paragraph 2, Article 7-8 Paragraph 6 of the AMA.

When the JFTC reaches a firm position,[73] it will send the enterprise in question a draft of the measures to be taken, and provide the enterprise with an opportunity to refuse the allegations and view or copy evidence held by the JFTC. Formal measures, cease-and-desist orders, are then issued once this process is completed.

Where the enterprise in question objects to measures, it may dispute them through an action for revocation of administrative order made to the Tokyo District Court, the judgment of which may be further appealed to the Tokyo High Court and subsequently to the Supreme Court.

When the JFTC cannot prove a violation, it may issue informal administrative measures in the form of a warning or alert. The JFTC also can conduct sector or industry inquiries, most of which are done with the company's voluntary cooperation. However, the JFTC have the power to order any person to appear before the JFTC, or require them to submit necessary reports, information, materials or documents for their inquiries. This power was used in 2017 in an inquiry on liquid natural gas.

In addition to this formal enforcement, the JFTC may advise on business plans when consulted by the parties. This consultation system plays a very important role in practice.[74]

Note that the company must consult with the JFTC before starting the activities.

Also note that, in spite of the existence of the JFTC consultation system, which requires a written answer from the JFTC, the JFTC dislikes using this formal procedure. In practice, the JFTC gives oral answers in almost every case.

ii Commitment procedures

The purpose of commitment procedures is to ensure the transparency of the application, as well as predictability for businesses, of the law related to commitment procedures by clarifying the policies concerning commitment procedures as much as possible.

Subjects of commitment procedures

The JFTC applies commitment procedures to the suspected violation when the JFTC recognises that it is necessary for promotion of free and fair competition. On the other hand, the following cases are not subject to commitment procedures: (1) suspected violations, such as bid-rigging or price-fixing cartels (hardcore cartels); (2) cases in which an enterprise has violated the same provisions within a 10-year period; and (3) cases recognised as constituting vicious and serious suspected violations that are considered to deserve a criminal sanction.

Commitment measures

To ensure the restoration of competition or that the act will not be repeated in the future, commitment measures must satisfy the following requirements: (1) they are sufficient for excluding the suspected violation or to confirm that the suspected violation has been excluded; and (2) they are expected to be reliably conducted.

Typical examples of commitment measures are cessation of the suspected violation, confirmation that it has ceased, notification to trading partners and others or publicising

73 The JFTC may plead to the Tokyo High Court for an emergency interim order when immediate action is necessary. The most recent plea was made in 2020.

74 Prior consultation system for activities of businesses, etc., www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/priorconsultationsystem.pdf.

information to users and others, development of a compliance programme, amendments of contracts, transfer of business, etc., recovery of monetary value provided by trading partners and others and reporting on the state of implementation.

Other key points

Public comments

If the JFTC finds that it needs to invite opinions of third parties for commitment plans, it requests public comments regarding an overview of such.

Public announcements

After the approval of a commitment plan, the JFTC shall publicly announce a summary of the approved commitment plan, a summary of the suspected violation and other matters as necessary.

Exercise of investigatory authority after migration to commitment procedures

After the issuance of a notification of commitment procedures, the JFTC shall not, in principle, conduct any investigation, such as an on-site inspection, report order or seeking testimony of the notified enterprise.

iii Commitment cases

Approval of the commitment plan submitted by Rakuten, Inc[75]

In response to the notice of commitment procedures that the JFTC issued to Rakuten, Inc on 23 July 2019 because the JFTC suspected that activities by Rakuten violated Article 19, Paragraph 12 (trading on restrictive terms) of the AMA, Rakuten made an application for commitment approval. The JFTC recognised that the plan would conform to the approval requirements and approved the commitment plan on 25 October 2019. This is the first commitment case approved by the JFTC.

Note that, this approval of the commitment plan does not represent a determination that the activities of Rakuten constituted a violation of the AMA.

Overview of the suspected violation

In the contracts between Rakuten and accommodation operators that place information about accommodation on the website named 'Rakuten Travel' operated by Rakuten, Rakuten had set the conditions to require the operators to make the prices and the numbers of rooms placed on the website equal to or better than those through other distribution channels with the minimum number of rooms requirement.

Overview of the commitment plan

The commitment plan consisted of the following.

a Rakuten will cease the activities in the contracts between Rakuten and accommodation operators that place information about accommodation on the Rakuten Travel website operated by Rakuten. (Rakuten had set the conditions to require the operators to

75 25 October 2019, www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html.

make the prices and the numbers of rooms that they placed on the website equal to or better than those through other distribution channels with the minimum number of rooms requirement.)

b The board of directors of Rakuten will resolve to cease the activities mentioned in (a), above, and not to perform the activities similar to those mentioned in (a), above, for the next three years.

c Rakuten will notify the operators mentioned in (a), above, of the measures taken based on (a) and (b), above, and thoroughly make the measures known to the employees involved in the Rakuten Travel business.

d Rakuten will publicise (a), above, and (e), below, to general consumers.

e Rakuten will not perform the activities similar to those mentioned in (a), above, for the next three years.

f Rakuten will take measures necessary to do the following: (1) preparation of guidelines for compliance with the AMA concerning transactions with the operators mentioned in (a), above, and thoroughly disseminating them to the employees involved in the Rakuten Travel business; and (2) regular training of the employees involved in the Rakuten Travel business regarding compliance with the AMA concerning transactions with the operators mentioned in (a), above, and regular audit by auditors;

g Rakuten will report on the state of implementation of the measures mentioned in (a) to (d) and (f), above, to the JFTC.

h Rakuten will report annually on the state of implementation of the measures mentioned in (e) and the state of implementation of the measures taken based on (f)(2), above, to the JFTC for the next three years.

Approval of the commitment plan

The JFTC recognised that the commitment plan would conform to the approval requirements, and approved it.

Other approvals of commitment plans

There have been approximately 10 cases in which the JFTC and the investigated company have actively used commitment procedures since the introduction of such procedures.

VII PRIVATE ENFORCEMENT

i Claims for damages

A person who suffers damage as a result of private monopolisation or unfair business practices may make a claim for compensation against the offending person pursuant to Article 25 of the AMA or Article 709 of the Civil Code. In Japan, there is no system of punitive compensation for damages or triple damages, so it will only ever be possible to claim the actual amount of loss suffered.

Claims for compensation made pursuant to Article 25 of the AMA cannot be made unless the JFTC's order has been finalised,[76] and in the first instance the Tokyo District

76 Article 26, Paragraph 1 of the AMA.

Court has exclusive jurisdiction.[77] Negligence is not required to establish liability, so the party engaging in the relevant conduct cannot avoid liability on the basis that it did not act intentionally or negligently.[78]

On the other hand, claims for compensation made pursuant to Article 709 of the Civil Code are made based on unlawful conduct in general, and so a claim can be made regardless of whether the JFTC has made an order.

These two rights of claim are separate from each other, and while it is in practice unusual, it is lawful to both bring a lawsuit pursuant to Article 25 of the AMA and at the same time another pursuant to Article 709 of the Civil Code, and provided the statute of limitations has not taken effect, it is also lawful for a claimant to bring a lawsuit pursuant to Article 25 of the AMA after losing a lawsuit brought under Article 709 of the Civil Code. While the limitation period is three years in either case, the starting point for calculating that period for lawsuits brought under Article 25 of the AMA is from the time at which the JFTC's order is finalised,[79] whereas for lawsuits brought under Article 709 of the Civil Code, it is 'the point in time at which the loss and the party causing that loss are known'.[80]

While at first sight, lawsuits brought pursuant to Article 25 of the AMA, which do not require negligence to establish liability, may seem more advantageous to the affected party, these claims are restricted to violating conduct that is identified by the JFTC, and accordingly it may not necessarily be advantageous to the affected party, inter alia, where the actual violating conduct lasts longer than as identified by the JFTC. For this reason, when one excludes cases that have been statute-barred, affected parties, as often as not, choose to make a claim for compensation pursuant to Article 709 of the Civil Code.

In the *USEN Corporation* case (see Section IV.ii), Cansystem brought a law suit for compensation, pursuant to Article 709 of the Civil Code. A claim for approximately ¥2 billion was approved.[81]

ii Claims for injunction

Injunction lawsuits by private persons were first introduced in 2001. In Article 24 of the AMA, it is prescribed that a person whose interests are harmed owing to unfair business practices, or that are at risk of being harmed thereby, and who clearly suffers loss as a result thereof or is likely to do so, may make a claim against the enterprise or trade association that is harming or at risk of harming its interests to have that infringement stopped or prevented. This system means that the party claiming does not have to wait for the JFTC to take enforcement measures, but can make an injunction claim in its own capacity as the harmed party. In the case of private monopolisation, the harmed party is not specified, and while this is a flaw of the legal system, as mentioned previously, in many cases private monopolisation also constitutes one of the forms of unfair business practices, so if one adjusts the legal configuration, it is in practice possible for a party harmed by private monopolisation to make an injunction claim.

While many lawsuits have been brought since the introduction of the system, there were, for a long time, no successful cases brought by claimants, with the first such case

77 Article 85-2 of the AMA.

78 Article 25, Paragraph 2 of the AMA.

79 Article 26, Paragraph 2 of the AMA.

80 Article 724 of the Civil Code.

81 Tokyo District Court judgment ,10 December 2008.

occurring 10 years after the system was introduced. This was a case in which an enterprise that had an extremely powerful position in the dry ice market (the leading player with a share of 49 per cent) slandered its competitors to the effect that they were breaching their non-compete obligations, or repeatedly made allegations to stir up its exaggerated claim that they were not reliable suppliers, and in doing so weakened their position in the dry ice market, or tried to prevent them from entering the market altogether. In this case, it was deemed that there was 'a likelihood of impeding fair competition'.[82]

Following this was a case of a successful claim in the taxi industry.[83]

Situations where a person's interests are 'clearly harmed' include 'situations where damage arises due to conduct in violation of the Antimonopoly Act that is difficult to recover from, or where financial compensation is insufficient to remedy the situation, such as where the relevant enterprise is at risk of being expelled from the market or is being prevented from entering it as a new participant'.[84]

Going forward, it is expected that private court actions will become more common.

VIII FUTURE DEVELOPMENTS

On 16 September 2020, Yoshihide Suga was inaugurated as prime minister, as successor to Shinzo Abe, who had served in the position for seven years and nine months. Although Mr Abe was very interested in the industrial policy implemented by METI and less interested in competition policy, it seems Mr Suga is more interested in competition policy. Actually, soon after taking office, Mr Suga called for a reduction in call rates from NTT Docomo, KDDI and SoftBank; these were accepted and a new low-priced plan was announced, even though the legal basis for his request was weak. Although it is uncertain how Mr Suga's policy will influence the JFTC's policy, it will be a positive influence.

On 14 September 2020, Kazuyuki Furuya was inaugurated as chair of the JFTC, as successor to Kazuyuki Sugimoto, who had served as chair for seven and a half years. Mr Furuya's previous position was assistant chief cabinet secretary. Prior to that, he had worked for the Ministry of Finance for a long time and also served as commissioner in the National Tax Agency. At a press conference, he said that strict action would be taken to deal with anticompetitive conduct, including abuse of power of digital platforms, as a matter of priority. He has a good reputation for his practice standards and political coordination.

The activities of the JFTC have been affected by covid-19. It is unknown at this point when this impact will end. However, the basic activities of the JFTC are expected to remain the same.

82 Tokyo District Court judgment, 30 March 2011.

83 *Shintetsu Taxi*, Osaka High Court judgment, 31 October 2014, Decisions, Vol. 61, p. 260.

84 *Yamato Transport Postal Service*, Tokyo High Court judgment, 29 November 2007, Decisions, Vol. 24, p. 699.

Appendix 1

ABOUT THE AUTHORS

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From 2004 to 2008, Yusuke Kashiwagi was chief investigator at the Investigation Bureau of the Japan Fair Trade Commission (JFTC), during which time he led the JFTC to victory in its fight against several companies in cases such as *NIPRO* (private monopolisation) and *Microsoft* (unfair business practices, non-assertion provisions). He has also reviewed other cases, such as the *Marine Hose* cartel case. From 2007, he also served in the JFTC's Merger and Acquisitions Division, was responsible for legal revisions of the prior notification system, drafted revised clauses for Chapter 4 of the Antimonopoly Act and conducted a review of *BHP Billiton/Rio Tinto*.

Since 2008, he has obtained both maximum immunities and reductions of fines imposed by various countries on auto part cartels, been involved in numerous cases relating to international cartels, such as auto shipping cartels, and has also been involved in some highly complex merger control cases, as well as in numerous cases of private monopolisation and unfair business practices.

In 2018, Mr Kashiwagi founded a new law firm, Koike & Kashiwagi Law Office.

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