Antimonopoly & Unilateral Conduct

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GCR Know-how

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Overview

1 What is the legal framework governing unilateral conduct by companies with market power?

With regard to regulations on dominance, the Japanese Anti-Monopoly Law of 1947, as amended, (AML) has two concepts, which are private monopolisation and unfair trade practices.

Article 3 of the AML provides that no undertaking shall engage in private monopolisation or unreasonable restraint of trade. While the second half of article 3, which prohibits unreasonable restraint of trade, covers horizontal activities such as cartels and bid rigging, the first half of article 3, which prohibits private monopolisation, primarily covers unilateral conduct by dominant firms. Article 2, paragraph 5 of the AML defines 'private monopolisation' as business activities that exclude or control the business activities of other undertakings, thereby causing, contrary to the public interest, a 'substantial restraint of competition' in any particular field of trade. From this definition, it is recognised that there are two types of conduct: exclusionary private monopolisation and private monopolisation by control. This concept comes from the US Sherman Act and is different from the concept of 'abuse of dominant position'.

Article 19 of the AML prohibits unfair trade practices, which mainly cover unilateral conducts similar to but not the same as private monopolisation. Unfair trade practices are defined by article 2, paragraph 9 of the AML and the Designation of Unfair Trade Practices promulgated by the JFTC and the conduct they cover includes, for example, predatory pricing, exclusionary dealing, tying, refusal to deal, discriminatory treatment, and abuse of superior bargaining position. Unfair trade practices apply not only to dominant firms unlike the case of private monopolisation but also to non-dominant firms; however, the Japan Fair Trade Commission (JFTC) has been more successful in establishing such cases against firms with meaningful or significant market power, considering the impact of their conduct on the relevant market.

The types of conduct covered by private monopolisation and unfair trade practices overlap substantially. The JFTC tends to apply private monopolisation to a limited number of cases where the conduct in question creates a more serious adverse impact on competition, typically the conduct of a firm with a larger market share (also, see the answer to question 6 for the different levels of anti-competitive effect required for private monopolisation and unfair trade practices).

2 What body or bodies have the power to investigate and sanction abuses of market power?

The JFTC is responsible for the investigation of violations of the AML including cases of private monopolisation and unfair trade practices. The investigation is initiated based on the JFTC's internal information or information provided by a third party (including a whistle-blower). Under the AML, there is no leniency programme for private monopolisations or unfair trade practices, while the leniency programme applicable to unjust restraint of trade (cartel activities) has been frequently used.

There are two types of investigations for private monopolisation: administrative investigation (also for unfair trade practice cases) and criminal investigation. The administrative investigation is conducted to examine whether the JFTC should issue a cease-and-desist order or a surcharge payment order, or both. Although the JFTC has authority to conduct a criminal investigation for private monopolisation, there have been no such criminal investigations to date for private monopolisation.

After a series of recent amendments to the AML, the JFTC is now obliged to order an undertaking found to be engaged in private monopolisation or certain categories of unfair trade practices to pay administrative surcharges. Please see the answers to questions 47 and 48 for more detail.

The JFTC may issue a cease-and-desist order by which it orders an undertaking engaged in private monopolisation or unfair trade practices to cease and desist such conduct, to dissolve part of its business or to take any other measures necessary to terminate such conduct.

In addition, for a private monopolisation case, the JFTC has discretion to file an accusation with the Chief Prosecutor, although such criminal proceedings have not been implemented to date, and it is unlikely in practice that a party engaging in private monopolisation will actually be criminally charged for such conduct.

Monopoly power

3 What role does market definition play in market power assessment?

First, a party is not required to have a dominant position or market power in the relevant market to be an infringer of the AML either due to private monopolisation or unfair trade practices. As indicated in the definition of private monopolisation, to be deemed an infringer, a party must have restrained competition by excluding or controlling the business activities of other undertakings, but the party need not be dominant in the relevant market. Unfair trade practices are the more generally applicable type of conduct, regardless of dominance in the relevant market. As such, dominance or market power is not a central issue under the AML.

However, market definition plays a key role in assessing whether the conduct in question gives rise to a certain anti-competitive effect, which is a legal requirement for establishing private monopolisation or unfair trade practices.

In addition to assessing the conduct itself, the JFTC also evaluates the actual impact of conduct on the relevant market. In private monopolisation, the AML explicitly makes the creation of the 'substantial restraint of competition' a prerequisite. While private monopolisation requires the creation of the 'substantial restraint of competition', the 'likeliness of impeding fair competition' is sufficient for unfair trade practices.

4 What is the approach to market definition?

With regard to market definition, the Exclusionary Private Monopolisation Guidelines provide the method of defining the relevant market. The basic approach of the test is to identify exclusionary or exploitive conduct first and then define the scope of market to be affected by such conduct as the relevant market. However, if necessary, the JFTC adopts a test similar to the one for merger control, consisting of product or service definition (in light of the purpose of the good or service, price trends and supply volume, and the perception and reactions of consumers) and geographical definition (considering geographical coverage of the supplier's business operations, as well as customers' purchasing habits, the characteristics of the good or service, and transportation method and cost).

Although the Exclusionary Private Monopolisation Guidelines do not include a description of market definition (such as the 'small but significant and non-transitory increase in price' (SSNIP) test) as extensive as in the guidelines in the area of merger control, the same economic approach would be applied in defining the market, as necessary. In practice, however, in past cases of private monopolisation, the application of such an economic approach has not been prevalent in the practice of market definition.

5 How is market power or monopoly power defined?

As mentioned in the answer to question 3, there is no clear definition of dominance or market power under the AML, which was enacted in 1947 under pressure from the US government, because those are not among the legal requirements for establishing private monopolisation or unfair trade practices, and US competition laws have no equivalent concepts.

As a separate matter, as one category of unfair trade practice, abuse of superior bargaining position under article 2, paragraph 9, item 5 of the AML, the JFTC provides guidelines for the meaning of 'superior bargaining position' as follows:

> *In order for Party A to have superior bargaining position over the other party (Party B), Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position equivalent thereto, but only needs to have a relatively superior bargaining position as compared to the other transacting party. When Party A has superior bargaining position over Party B, who is a transaction counterpart, it means such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.*

As shown above, 'superior bargaining position' is different from the concept as 'dominant position' as recognised in Europe. This concept does not require a market dominance, but rather focuses on an absolute or relative superior position in terms of the relationship between the relevant parties. How to integrate this concept into the prevalent theory of competition law in an harmonious way is debated among antitrust lawyers and scholars.

6 What is the test for finding of monopoly power?

Monopoly power per se is not a part of the legal requirements for unilateral conduct under the AML. Instead the AML provides a certain requirement of effect for both private monopolisation and unfair trade practices. The status of the undertaking in question, including its market share, is one of the important factors used to evaluate this effect requirement.

In private monopolisation, article 2, paragraph 5 of the AML explicitly makes the creation of the 'substantial restraint of competition' a prerequisite. The courts have held that 'substantial restraint of competition' means 'establishing, maintaining, or strengthening the state in which a certain entrepreneur or a certain group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and other various conditions after competition itself has lessened'. The Exclusionary Private Monopolisation Guidelines provide basic factors for the assessment of such effect, including the market share and ranking of the undertaking in the relevant market, the conditions of competition and competitors, entry barriers, users' countervailing bargaining power, efficiencies and other consumer welfare protection concerns.

With regard to unfair trade practices, the AML is understood to make the 'likeliness of impeding fair competition' a prerequisite. The court and the JFTC's guidelines evaluate 'the likeliness of impeding fair competition' according to the context of each specific category of conduct listed as an unfair trade practice. In general, it is understood that this test requires a lower standard of anti-competitive effect than that required under private monopolisation.

7 Is this test set out in statute or case law?

As explained in the answer to question 6, the statute imposes an effect requirement for both private monopolisation and unfair trade practices, and the court and the JFTC's guidelines elaborate the content of such requirement.

8 What role do market shares play in the assessment of monopoly power?

Monopoly power is not a central issue under the AML when establishing private monopolisation or unfair trade practices. However, a market share of over 50 per cent is generally considered by the JFTC in setting its enforcement priorities. The Exclusionary Private Monopolisation Guidelines provide that:

> *[T]he JFTC, when deciding whether to investigate a case as Exclusionary Private Monopolization, will prioritize the case where the share of the product that the said undertaking supplies exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry.*

9 Are there defined market share thresholds for a presumption of monopoly power?

Please see the answers to question 6 and 8 for the significance of market share in the context of unilateral conduct under the AML. There is no presumption attached to market share.

10 How easily are presumptions rebutted?

There is no presumption attached to market share.

11 Are there cases where companies with high shares have been found not to exercise monopoly power?

There has been no such case published by the JFTC or the court. However, as mentioned in the answer to question 6, market share is one among many basic factors used to assess anti-competitive effect, and thus it is theoretically possible for companies with high shares to be found not to be causing 'substantial restraint of competition' in light of other factors affecting competition and consumer welfare.

12 What are the lowest shares with which companies have been found to exercise monopoly power?

Under the AML, unilateral conduct is disciplined by not only private monopolisation but also by unfair trade practices. With regard to unfair trade practices, it is understood that the AML makes the 'likeliness of impeding fair competition' a prerequisite. In general, it is understood that this test requires a lower standard of anti-competitive effect than that required under private monopolisation. Thus, an undertaking with insignificant market share could be found to engage in unfair trade practices. In particular, according to the JFTC's guidelines, 'superior bargaining position', one type of unfair trade practice, does not require a market dominance or an absolutely dominant bargaining position, but only needs a relatively superior position in terms of the relationship between the relevant parties.

13 How important are barriers to entry and expansion for the assessment of monopoly power?

The Exclusionary Private Monopolisation Guidelines provide basic factors for the assessment of the 'substantial restraint of competition', which is a prerequisite to establishing private monopolisation. Potential competitive pressure, among others, is raised as one of the important factors, and the JFTC will comprehensively consider the factors, such as degree of institutional entry barriers and degree of entry barriers in practice, to assess the potential competitive pressure.

14 Can the lack of entry barriers negate a finding of monopoly power?

The Exclusionary Private Monopolisation Guidelines indicate that the lack of entry barriers could be a factor preventing the undertaking from substantially restraining competition in the relevant market. The guidelines give one particular example, stating:

> *With regard to Exclusionary Conduct by below-cost pricing, there is a case where even if the alleged entrepreneur increases price of the traded products, the entry of a competitor who has the ability to constrain against it could be realistically expected within a short period of time, because there are almost no entry barriers due to regulations based on legislations, or conditions such as locations, technical issues, and conditions of purchasing raw materials. In such a case, it would not be concluded that competition is substantially restrained.*

15 What kind of barriers to entry are typically considered in the analysis?

The Exclusionary Private Monopolisation Guidelines provide that the JFTC will consider institutional entry barriers, such as regulations and legislation, and practical entry barriers putting potential new entrants in disadvantageous position, obstacles such as scale of capital necessary for entry, location, technical issues, procurement of raw materials and sales terms.

16 Can countervailing buyer power negate a finding of monopoly power?

The Exclusionary Private Monopolisation Guidelines acknowledge countervailing buyer power as one of the important factors in assessing the existence of a 'substantial restraint of competition'. The guidelines clearly indicate that where users acquire price bargaining powers, such powers weigh against the finding of a 'substantial restraint of competition'.

17 What if consumers can easily switch between suppliers?

The Exclusionary Private Monopolisation Guidelines provide for the dispersion of suppliers, users' means of procurement and the ease of switching suppliers as factors in assessing countervailing buyer power.

18 Are there any other factors that the regulator considers in its assessment of monopoly power

The Exclusionary Private Monopolisation Guidelines provide other factors for assessing the existence of a 'substantial restraint of competition', including efficiencies and other concerns that protect consumer welfare.

19 Are any entities or sectors exempt from the antimonopoly regime?

As of April 2015, there are 16 laws that explicitly provide exemptions from the AML. Those laws mainly provide exemptions from the application of the AML for cartel activities (not unilateral conduct) to certain sectors, such as insurance, maritime transportation and aviation. Some of the exemptions, such as those for the aviation industry, have been criticised as outdated, and the JFTC has shown an interest in abolishing or modifying them.

Also, at least one law in Japan mandates a manufacturing monopoly and Japan Tobacco is granted a domestic monopoly on the manufacturing of tobacco under the law. However, this does not extend to the sales of tobacco.

In Japan, the electricity and gas markets had been long kept as local monopolies, but the liberalisation of the electricity and gas market has been gradually introduced since 2000. Such liberalisation is planned to be completed in 2016 for the electricity market and in 2017 for the gas market. The JFTC, in conjunction with the Ministry of Economy, Trade and Industry, enacted guidelines for appropriate trade for each of the electricity market and gas market and made it clear that some conduct, such as refusing to deal or discriminatory treatment by the entity which controls the essential facilities, could constitute private monopolisation or unfair trade practices.

In addition to such sector-specific exemptions and treatment, the AML itself provides some exemptions. For example, article 21 of the AML provides that 'conduct exercising intellectual property rights' is exempted from the AML. However, an abuse of IP which harms the relevant market is not regarded as 'conduct exercising intellectual property rights' and is sanctioned under the AML. (See the Guidelines for the Use of Intellectual Property.)

Article 23, paragraph 4 of the AML provides an exemption for some literary and musical works from the prohibition on resale maintenance, one of the categories of unfair trade practice. It is generally understood that such exemption only applies to newspapers, books, magazines, phonograph records and music CDs.

20 Can companies be deemed to hold collective monopoly power?

Under the AML, there is no concept of 'collective dominance' or 'relative dominance'. To date, the AML has covered either single-firm dominance or dominance of multiple parties connected by way of mutual agreement or arrangement. If a firm actually controls the conduct of other undertakings by any means, that combined power can constitute a dominant position, while the AML does not provide a definition of dominance or dominant position.

21 Can the exercise of joint monopoly power or tacit oligopolistic collusion be treated as an infringement?

Even if the acts are independently conducted in parallel by individual undertakings who do not hold dominant positions, it is still possible to find a violation of the AML on the grounds that these acts are creating an exclusionary effect, by applying the 'theory of accumulation of parallel conduct'. The theory of accumulation of parallel conduct is a theory according to which a violation of the AML can occur where the conduct in question, in parallel and independently, builds up and accumulates in effect to generate a negative exclusionary effect in the relevant market.

The Guidelines Concerning Distribution Systems and Business Practices, in several places, imply that this theory could be applied when assessing 'the likeli-

ness of impeding fair competition'. In 2009, the JFTC issued a press release to foster competition in the biomass fuel market and the press release seemingly relied on the theory of accumulation of parallel conduct to identify the problem in the biomass fuel market in Japan.

22 Has the national competition authority published guidance on how it defines markets and assesses market power?

In relation to the regulation on dominant firms, the JFTC publishes two important sets of guidelines, among others: the Exclusionary Private Monopolisation Guidelines and the Guidelines on Abuse of Superior Bargaining Position. These two sets of guidelines were introduced to achieve more visibility for the JFTC's enforcement policy in view of the introduction of administrative surcharges for exclusionary private monopolisation and certain unfair trade practices including superior bargaining position through the amendment of the AML, which became effective in January 2010.

Abuse of monopoly power

23 Is there a general definition for what constitutes abusive conduct? What does it entail?

The concept of abuse under the AML is different from that in Europe, because there is no general rule prohibiting 'abuse of dominant position' in Japan, although certain typical types of abuse of dominant position, such as tying, are explicitly prohibited as private monopolisation or unfair trade practices. As noted above, the AML provides for two concepts in regulating dominant firms: private monopolisation and unfair trade practices.

With regard to private monopolisation, there are two types of conduct are provided by the AML: exclusionary conduct and controlling conduct. Both types of conduct are prohibited if they cause a certain anticompetitive effect (ie, the 'substantial restraint of competition'). Exclusion is interpreted as making it difficult for other firms to continue their business activities or preventing them from entering the market. Control means depriving other firms of their freedom to make decisions concerning their business activities and forcing or luring them into obeying the controller.

Exclusionary conduct may include certain types of conduct similar to the types of conduct that may constitute unfair trade practices, such as predatory pricing, tying, exclusionary dealing, refusal to deal and discriminatory treatment. Controlling conduct may include conduct similar to or the same as resale price maintenance, which may also constitute unfair trade practices.

With regard to unfair trade practices, a number of specific types of conduct are listed in the AML and the JFTC's Designation of Unfair Trade Practices. These include refusal to deal, discriminatory treatment, unjust low price sales, resale price maintenance, abuse of superior bargaining position, tying, exclusive dealing, dealing with restrictive terms and interference in transactions of competitors. This conduct is prohibited if it amounts to a certain anticompetitive effect (ie, 'the likeliness of impeding fair competition').

24 What are the general conditions for finding an abuse?

The concept of abuse under the AML is different from that in Europe because there is no general rule prohibiting 'abuse of dominant position' in Japan.

25 Is there a list of categories of abusive or anti-competitive conduct in the applicable national legislation?

As explained in the answer to question 23, certain specific types of conduct are listed as unfair trade practices under the AML. On the other hand, private monopolisation can cover various types of exclusionary or controlling conduct. Although the relevant guidelines provide for several types of conduct that may constitute private monopolisation, the lists are not exhaustive, but merely provide for typical problematic conduct.

26 Is this list open or closed?

Please refer to the answer to question 25.

27 Has the national competition authority published any guidance on what constitutes abusive conduct?

The JFTC has published a number of guidelines to explain in some detail what sorts of conduct are deemed private monopolisation and unfair trade practices. Some examples are Exclusionary Private Monopolisation Guidelines, the Guidelines on Abuse of Superior Bargaining Position and Guidelines Concerning Unjust Low Price Sales. Some guidelines are sector- or issue-specific, and those also shed some light on what kind of unilateral conduct may prohibited under the AML. Examples of such guidelines are the Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers and Guidelines for the Use of Intellectual Property.

28 Is certain conduct per se abusive (without the need to prove effects) and under what conditions?

In private monopolisation, article 3 of the AML explicitly makes the creation of the 'substantial restraint of competition' a prerequisite. In this regard, this is not an 'illegal per se' type of conduct. With regard to unfair trade practices, a very similar two-step approach including both assessment of the conduct itself and evaluation of its impact on the competition is generally applied. Again, they are not 'illegal per se' types of conduct. While private monopolisation requires the creation of the 'substantial restraint of competition', the likeliness of impeding fair competition is sufficient for unfair trade practices.

29 To the extent that anti-competitive effects need to be shown what is the standard to demonstrate these effects?

In private monopolisation, article 2, paragraph 5 of the AML explicitly makes the creation of the 'substantial restraint of competition' a prerequisite. The Exclusionary Private Monopolisation Guidelines set out some guidance on how to assess the impact of the conduct at issue on competition. The court has held that 'substantial restraint of competition' means 'establishing, maintaining, or strengthening the state in which a certain entrepreneur or a certain group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and other various conditions after competition itself has lessened'. The Exclusionary Private Monopolisation Guidelines provide basic factors for assessing such effect, including market share and ranking of the undertaking in the relevant market, conditions of competition and competitors, entry barriers, users' countervailing bargaining power and efficiencies.

With regard to unfair trade practices, it is understood that the AML makes the 'likeliness of impeding fair competition' a prerequisite. The court and the JFTC evaluate 'the likeliness of impeding fair competition' according to the context of each specific category of conduct listed as an unfair trade practice. In general, it is understood that this test requires a lower standard of anti-competitive effect than that required under private monopolisation.

30 Does the abusive conduct need to harm consumers?

Showing concrete harm to consumers is not a requirement to establish private monopolisation or unfair trade practices.

31 What defences are there to allegations of abuses of monopoly power?

It is generally understood that prima-facie anti-competitive conduct can be justified if it has a legitimate purpose and is necessary to achieve such purpose. According to past cases, examples of such legitimate purpose are exclusion of unqualified or improper undertakings or products/services, assurance of incentives to promote innovation, efficiencies and public welfare. The Exclusionary

Private Monopolisation Guidelines explicitly indicate that the JFTC considers factors such as efficiencies and safety and health assurance when assessing whether the conduct in question creates a 'substantial restraint of competition'.

32 Can abusive conduct be objectively justified?

Please refer to the answer to question 31.

33 What objective justifications have been successful

Please refer to the answer to question 31.

34 How is the burden of proof distributed in an abuse analysis?

The JFTC bears the burden of establishing each element of private monopolisation and unfair trade practices. As to the justification, the undertaking (ie, respondent) has a responsibility to raise it before the court, but the JFTC still bears the burden of proving that any such justification does not stand.

35 What are the legal conditions to establish an abusive tie?

Tying (or leveraging) may constitute exclusionary private monopolisation or an unfair trade practice if the tying (or leveraging) may cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market for the tied product, based on:

- conditions in the entire market for the tying and the tied products;
- position of the undertaking in the market for the tying product;
- positions of the undertaking and its competitors in the market for the tied product;
- duration of the conduct, number of trade partners, and quantity of products to be traded; and
- other conditions of the conduct. (See the Exclusionary Private Monopolisation Guidelines).

36 What are the legal conditions to establish a refusal to supply or refusal to license?

An undertaking basically has the discretion to select to whom and on what conditions it supplies products. However, if an undertaking, beyond a reasonable degree, refuses to deal or imposes restrictions on the quantity or contents concerning a product necessary for the trading customers to carry out business activities in the downstream market, such refusal or imposition of restrictions may constitute exclusionary private monopolisation or an unfair trade practice.

Refusal to license patents, know-how or other types of intellectual property does not usually constitute private monopolisation or an unfair trade practice, although if a holder of intellectual property abuses its right and unreasonably harms competition, such an abuse could be a violation of the AML. For example, if members of a patent pool regarding intellectual property essential for manufacturing certain products refuse to license to particular parties without justification, such refusal may be considered a private monopolisation or an unfair trade practice (see the Guidelines for the Use of Intellectual Property).

37 Do these abuses require an essential facility?

The Exclusionary Private Monopolisation Guidelines state:

> *Exclusionary Conduct refers to various types of conduct that would cause difficulty for other entrepreneurs in continuing their business activities or for new market entrants to commence their business activities, and which thereby would be likely to cause a 'substantial restraint of competition' in the relevant market.*

As such, an essential facility is not necessarily required to establish private monopolisation, although it may well be relevant when assessing anti-competitive effect of the conduct in question.

38 What is the test for an essential facility?

Please refer to the answer to question 37.

39 What is the test for exclusivity arrangements?

Exclusionary dealing is covered by both exclusionary private monopolisation and unfair trade practices. If an undertaking deals with its trade partners on the condition of prohibition or restraint of transactions with competitors where the competitors cannot easily find an alternative supply destination to the trade partner, such conduct may constitute private monopolisation or an unfair trade practice.

40 What is the test for predatory pricing?

Predatory pricing may constitute exclusionary private monopolisation or an unfair trade practice. If an undertaking unjustifiably supplies goods or services continuously for a price that is lower than the average variable cost, thereby tending to cause difficulties to the business activities of other undertakings, such sales may constitute predatory pricing. Even where the price is above such average variable cost, if the price is below the average total cost and the price cutting harms the fair competition order, sales at such price may be considered predatory pricing (see the Guidelines Concerning Predatory pricing and the Exclusionary Private Monopolisation Guidelines).

41 What is the test for a margin squeeze?

While margin squeezes are not specifically covered by private monopolisation or unfair trade practices, they could constitute private monopolisation. There is at least one case where the JFTC successfully challenged conduct that could be categorised as a margin squeeze by a dominant telecommunication provider as constituting private monopolisation (*NTT East* case).

42 What is the test for exclusionary discounts?

Giving rebates can be seen as exclusionary dealing in certain circumstances. If an undertaking gives rebates to trade partners on the condition that the amount of purchases from the undertaking or the proportion of the amount of purchases from the undertaking to the total amount of trading partners' purchases reaches or exceeds a particular threshold during a specified period, such rebate may have the effect of restraining the trade partners' dealings with competitors' products and constitute private monopolisation or an unfair trade practice as exclusionary dealing. The JFTC will determine whether rebate-giving has such an exclusive effect by examining the amount or rate of rebates, the threshold for giving rebates, whether the level of rebates is progressively set in accordance with the quantity of trade, etc, in a specified period, whether rebates are given for the entire quantity of trade made thus far where the quantity of trade has exceeded a certain threshold, etc (see the Exclusionary Private Monopolisation Guidelines).

One high-profile private monopolisation case was the case against Intel KK, a wholly-owned subsidiary of Intel Corporation. Intel KK allegedly provided economic incentives, including rebates, to its customers, domestic original equipment manufacturers of personal computers, on condition that the customers used Intel CPUs exclusively, procured Intel CPUs for 90 per cent of their uses, or incorporated exclusively Intel CPUs into all their major personal computer brands, thereby excluding its competitors. Eventually, the JFTC admonished Intel KK to do away with such exclusionary pricing schemes.

43 Are exploitative abuses also considered and what is the test for these abuses?

If an undertaking makes use of its superior bargaining position over the other contracting party, unjustly in light of normal business practices, thereby (i) causing such other party to purchase goods or services irrelevant to the transactions regarding which the undertaking has a superior bargaining position; (ii) caus-

ing the other party to provide money, services or other economic benefits; or (iii) refusing to receive goods pertaining to transactions from the other party, causing the party to take back the goods pertaining to the transactions after the undertaking has received the goods from the party, delaying the payment for the transactions to the party or reducing the amount of the payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the party, such act may constitute an unfair trade practice as an abuse of superior bargaining position and may constitute private monopolisation as well.

Under the AML, the setting of a high price by a dominant firm does not usually constitute private monopolisation or an unfair trade practice because the existence of dominant power itself does not violate the AML. However, if a dominant firm engages in any unreasonable act such as announcing its sharp price increase in public and explicitly or implicitly requiring its distributors and competitors to increase the price where such dominant firm is the market leader and other competitors follow such dominant firm's pricing, such an act may be considered 'controlling the activity of competitors' and constitute private monopolisation (*Noda Shoyu, etc. v the JFTC* (Tokyo High Court, 25 December 1957).

44 Is there a concept of abusive discrimination and under what conditions does it raise concerns?

Setting a different price for different customers usually will not cause an anti-competitive effect if the difference is based on a fair difference in cost (such as a difference in the transaction quantity) or reflects the supply-and-demand balance of the goods. However, if an undertaking supplies goods or services continuously for consideration that discriminates by region or between parties unjustifiably, thereby tending to cause difficulties to the business activities of other undertakings, it may constitute exclusionary private monopolisation or an unfair trade practice as discriminatory pricing.

As mentioned concerning a refusal to deal, an undertaking basically has the discretion to select to whom and on what conditions it supplies products. However, if an undertaking engages in discriminatory treatment beyond a reasonable degree with respect to certain customers concerning a product necessary for the trading customers to carry out business activities in the downstream market, such discriminatory treatment may constitute exclusionary private monopolisation or an unfair trade practice.

45 Are only companies with monopoly power subject to special obligations under unilateral conduct rules?

As explained in the answer to question 3, a party is not required to have a dominant position or market power in the relevant market to infringe the AML either through private monopolisation or unfair trade practices.

46 Must the monopoly power exist in the same market where the effects of the anti-competitive conduct are felt?

As explained in the answer to question 6, the AML requires a certain anti-competitive effect, the 'substantial restraint of competition' for private monopolisation and the 'likeliness of impeding fair competition' for unfair trade practices, rather than having monopoly power as a requirement. As explained in the answer to question 8, the Exclusionary Private Monopolisation Guidelines place enforcement priority on conduct by an undertaking whose market share exceeds 50 per cent in the market. The same guidelines clarify that such market share does not necessarily pertain to a market where the effects of the anti-competitive conduct are felt by stating that such share refers to the share of 'tying' product (not 'tied' product) in the case of tying and the share of the 'upstream' market (not the 'downstream' market where competition is harmed) in the case of refusal to supply and discriminatory treatment. Nevertheless, as repeatedly explained, the existence of monopoly power is not required for the JFTC to find the conducts in question as unfair trade practices.

Sanctions and remedies

47 What sanctions can the national competition authority impose or recommend?

Administrative surcharges

The JFTC is obliged to order an undertaking found to be engaged in any of the following conduct to pay surcharges:

- Private monopolisation:
  - private monopolisation by control if the relevant activity is (1) pertaining to the payment; or (2) substantially restraining (a) supply volume, (b) market share, or (c) transaction counterparties and thereby affecting payment; and
  - exclusionary private monopolisation.
- Unfair trade practices:
  - concerted refusal to trade;
  - discriminatory pricing;
  - predatory pricing;
  - resale price restriction; and
  - abuse of superior bargaining position.

Behavioural remedies

The JFTC may issue a cease-and-desist order by which it orders an undertaking conducting private monopolisation or unfair trade practices to cease and desist such conduct, to dissolve part of its business or to take any other measures necessary to terminate such conduct.

Criminal sanctions

An individual who has committed private monopolisation or attempted to commit private monopolisation may be subject to imprisonment for not more than five years or a criminal fine of not more than ¥5 million under the AML. Also, a corporation that has committed private monopolisation may be subject to a fine up to ¥500 million. However, unlike with cartel activities, such criminal sanctions have not been implemented to date and it is unlikely in practice that the JFTC will file an accusation with the Chief Prosecutor for private monopolisation.

48 How are fines calculated for abuses of monopoly power?

The amount of surcharge is determined by multiplying the sales amount of the relevant goods or services (in case of abuse of superior bargaining position pertaining to the receipt of supplied goods or services, the purchase amount of the relevant goods or services) during the period for the prohibited conduct (up to three years) by surcharge rates. The method of calculating the sales amount (or purchase amount) and surcharge rates are different for each type of conduct falling under private monopolisation or unfair trade practices. The basic surcharge rate for each type of conduct is as follows:

		Basic rule	Resale business	Wholesale business
Private monopolisation	By controlling the business activities of other undertakings	10%	3%	2%
	By excluding the business activities of other undertakings	6%	2%	1%
Unfair trade practice	Concerted refusal to trade, discriminatory consideration, predatory pricing and resale price restriction	3%	2%	1%
	Abuse of superior bargaining position	1%		

With respect to private monopolisation (limited to controlling the business activities of other undertakings), the surcharge rates will be increased by 50 per cent if the undertaking has been ordered to pay surcharges or subject to a similar order due to private monopolisation or unfair trade restrictions (ie, cartel activities) during the past ten years.

As to unfair trade practices, for the four types of conduct (concerted refusal to trade, discriminatory pricing, predatory pricing, and resale price restriction), a surcharge payment order will be imposed only for a repeated violation of the same conduct in the past ten years. With regard to abuse of superior bargaining position, a surcharge payment order can be imposed for the first violation.

The JFTC is not allowed to issue a surcharge payment order if five years have passed since the relevant private monopolisation or unfair trade practice has ceased to exist.

49 What is the highest fine imposed for an abuse of monopoly power?

The introduction of administrative surcharges for private monopolisation and unfair trade practices was relatively recent: January 2006 for private monopolisation by control; and January 2010 for exclusionary private monopolisation and certain categories of unfair trade practices, and there have not been many cases where administrative surcharges were levied on unilateral conduct. There has been no case for private monopolisation. The highest administrative surcharges imposed for unfair trade practices were around ¥4 billion against Edion, a home electronics retailer, for its abuse of superior bargaining position. This case was appealed by Edion and is now pending before the JFTC tribunal.

50 What is the average fine imposed over the last five years?

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Private monopolisation	None	None	None	None	None
Unfair trade practices*	None	¥1.5 billion	None	¥1.2 billion	¥1.3 billion

* All the cases so far pertain to superior bargaining position.

51 Can the national competition authority impose behavioural remedies?

The JFTC may issue a cease-and-desist order by which it orders an undertaking conducting private monopolisation or an unfair trade practice to cease and desist such conduct, to dissolve part of its business or to take any other measures necessary to terminate such conduct. The JFTC typically orders undertakings (i) to cease and desist the conduct (or to make sure that such conduct has been discontinued); (ii) not to engage in the same or similar conduct in the future; and (iii) to take measures to prevent the reoccurrence of such conduct, such as holding antitrust seminars or implementing antitrust compliance programmes. The JFTC has the authority to order other necessary measures, as well to eliminate such conduct as well as the anti-competitive effects caused by them.

The JFTC is not allowed to issue such orders if five years have passed since the relevant monopolisation or unfair trade practice ceased to exist.

52 Can it impose both negative and positive behavioural obligations?

As explained in the answer to question 51, the JFTC can impose positive behavioural obligations as well. For example, the JFTC in the past has ordered the renegotiation of prices with customers, the relocation of salespersons, and the amendment of particular clauses of relevant agreements. The JFTC also may order an undertaking, when it finds it particularly necessary, even when the relevant monopolisation or unfair trade practice has already ceased to exist, to take measures to make public that such monopolisation or unfair trade practice has been discontinued and any other measures necessary to ensure that such conduct and the anti-competitive effects thereof have been terminated.

53 Can the national authority impose structural remedies?

While the JFTC has the authority to issue a cease-and-desist order requiring an undertaking to take structural remedies when it is necessary to eliminate private monopolisations or unfair trade practices, it has been rare for the JFTC to do so. However, there have been cases where the JFTC has ordered the disposition of shares of the relevant company controlled by the person conducting private monopolisation by control (*Toyo Seikan* case) or the dissolution of a trade association (*Acetic* ether association case).

54 Can companies offer commitments or informal undertakings to settle concerns?

Prior to a 2005 reform, the JFTC needed to make an admonishment before it issued a binding order, and the respondent had the option to accept the admonishment as it was to close the case sooner.

After the reform, there is no formal settlement procedure between undertakings and the JFTC under the AML. In a practical sense, the undertaking could influence the outcome of the investigation by the JFTC by offering commitments through the investigation process.

55 What proportion of cases have been settled in the last five years?

There is no formal settlement procedure between undertakings and the JFTC under the AML.

56 Have there been any successful actions by private claimants?

Parties injured by any violation of the AML, including a private monopolisation or unfair trade practice, are entitled to claim damages in a private action. In the past, private antitrust litigation activity was not prevalent in Japan; however, in recent years, the number of cases has increased, and there are cases in which private parties have taken actions in relation to private monopolisation. In Naigai v Nipro, the Tokyo High Court rendered a judgment ordering Nipro to pay approximately ¥100 million. The *AMD v Intel case*, which related to Intel's private monopolisation, was argued before the Tokyo High Court in June 2005 and was eventually settled in November 2009.

Private parties may pursue general tort claims under article 709 of the Civil Code and damages claims pursuant to article 25 of the AML. In an article 709 action, the plaintiff must prove (i) the intent or negligence of the defendant; (ii) the amount of damages; and (iii) reasonable causation between the defendant's conduct and the damages. On the other hand, in an article 25 action, the plaintiff need not prove the defendant's intent or negligence, although the plaintiff can commence an article 25 action only after a cease-and-desist order or a surcharge payment order by the JFTC is finalised. Under Japanese law, class actions are not available. There is no fixed calculation method for damages to be awarded or punitive or treble damages, either.

Private parties may also seek an injunction against unfair trade practices (such as predatory pricing, discriminatory pricing, and abuse of superior bargaining position). Article 24 of the AML provides that a person whose interests are infringed or likely to be infringed by unfair trade practices and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements. Please note, however, that an article 24 action is not available for private monopolisation, but only for unfair trade practices.

With regard to injunctions, although there have been multiple claims brought before the courts since the coming into force of article 24 of the AML on 1 April 2001, no injunction had been granted until 2011 (the *Dry Ice case*). As of 31 July 2015, there has only been one other case in which an injunction was granted under article 24 (the *Yaita Free Bus* case), and even that judgment was overturned by the Tokyo High Court. This is partly because private plaintiffs bear a heavy burden of proof under the 'extreme damage' requirement in article 24 of the AML.

Appeals

57 Can a company appeal a finding of abuse?

If the JFTC finds a violation of the AML, it will issue a cease-and-desist order or a surcharge payment order, or both. However, before issuing such orders, the JFTC conducts a hearing of opinions with the respondent of such orders. Under the latest AML, which entered into effect on 1 April 2015, in the hearing, the proceedings are presided over by a staff member designated by the JFTC and the investigators explain the desired content of the order, the facts found by them and major evidence thereof. The respondent of the order may state its opinions and submit supporting evidence and also address questions to the investigators. Such respondent is also entitled to inspect or copy the evidence offered to prove the facts found by the JFTC with respect to the case for the hearing (however, it may only copy evidence that was submitted by the respondent or its employees or the interview records of its employees). The JFTC may not refuse such inspection or copying without justification under the law.

An undertaking that wishes to appeal a cease-and-desist order or surcharge payment order issued by the JFTC can file an action directly with the Tokyo District Court. Previously, the undertaking was required to request a hearing at the JFTC tribunal before filing an action with a court. However, the AML was amended to abolish the hearing procedure at the JFTC tribunal in December 2013, and the amendment came into effect on 1 April 2015. If an undertaking or the JFTC wishes to challenge the decision made by the Tokyo District Court, it is entitled to appeal to the Tokyo High Court.

58 Which fora have jurisdiction to hear challenges?

Please refer to the answer to question 57.

59 What are the grounds for challenge?

Previously, when the undertaking was required to request a hearing at the JFTC tribunal before filing an action with a court, the JFTC findings of fact were binding on the court if they were supported by 'substantial evidence'. Thus, the court could not reject reasonable findings even if the court believed that different findings would be more reasonable. But this rule of 'substantial evidence' was abolished when the reform allowing direct appeals to the court was introduced. As such, both findings of fact and legal interpretation by the JFTC can be the grounds for challenge without restriction under the current system.

60 How likely are appeals to succeed?

Previously when the undertaking was required to request a hearing at the JFTC tribunal before filing an action with a court, the general perception was that it was extremely difficult to overturn the basic fact-finding and interpretation of law of the investigation bureau of the JFTC before the JFTC tribunal. It is difficult to predict the likeliness of success in appeal under the new system where an undertaking can directly file an action with the Tokyo District Court, since it was just introduced in April 2015.

Topical issues

61 Summarise the main abuse cases of the last year in your jurisdiction.

As noted above, the cases actually enforcing the law against private monopolisation conduct are very limited. In 2014, there was no enforcement against private monopolisation. In January 2015, for the first time in a long time, the JFTC issued a cease-and-desist order to the JA Fukui Prefectural Economic Federation of Agricultural Cooperatives for private monopolisation, finding that they substantially restrained competition in the field of country elevator works ordered by the agricultural cooperatives in Fukui prefecture by controlling the business activities of bid participants through designating successful bidders and managing to have the designated successful bidders win the biddings.

From 2009 to 2014, there was only one case in which the JFTC took enforcement action for private monopolisation: the case against the Japanese Society of Authors, Composers and Publishers (JASRAC), a dominant copyright collective society in Japan, in which the JFTC issued a cease-and-desist order against JASRAC to cease its exclusionary pricing schemes, so called 'comprehensive contracts' (ie, fixed fee amount for unlimited use) for copyright licensing fees, for which JASRAC was alleged to have taken advantage of its dominant position in the market. JASRAC appealed the order at the JFTC tribunal and the tribunal issued a decision to rescind the order on 12 June 2012, which is very rare in the tribunal's practice. Thereafter, e-License, Inc., JASRAC's competitor, appealed the JFTC tribunal's decision to the Tokyo High Court. The Tokyo High Court overturned the JFTC Tribunal's decision and remanded the case back to the JFTC in its decision on 1 November 2013. JASRAC and the JFTC appealed this ruling to the Supreme Court, but the Supreme Court

dismissed the appeal on 28 April 2015. This means that the determination of private monopolisation against JASRAC was upheld.

In the past ten years, there have been only four enforcement proceedings for private monopolisation. One high-profile private monopolisation case was the case against Intel KK, which was admonished by the JFTC in March 2005 to do away with an exclusionary pricing scheme, including rebates, with regard to its chip supply to domestic original equipment manufacturers of personal computers. Another high-profile case was the case against NTT East, in which the JFTC admonished NTT East in December 2003 for its exclusionary conduct in optical-fibre internet communication services. The conduct consisted of providing its services effectively at a lower price than its access charges so as to margin squeeze its competitors. Despite the NTT East's appeals to the Tokyo High Court and eventually to the Supreme Court, the JFTC's decision in December 2011 was upheld.

With regard to unfair trade practices, the JFTC is particularly active in pursuing cases involving abuse of superior bargaining position. According to the latest annual report of the JFTC, during the five-year period from 2009 to 2013, the JFTC issued seven orders in cases involving abuse of superior bargaining position (a detailed explanation is provided in the answer to question 62), and initiated investigations in 58 cases from April 2013 to March 2014, which is the largest number of investigations in a one-year period to date. Further, the JFTC issued a cease-and-desist order to Qualcomm Inc. in September 2009 for certain restrictive clauses including the so-called 'non-assertion clause' included in its licensing agreements with mobile phone handset makers, alleging that such clauses violate the prohibition on unfair trade practices. Although this case did not relate to private monopolisation, it did also involve issues regarding dominant firms. The order was appealed by Qualcomm at the JFTC tribunal, but the tribunal has not yet issued a decision.

62 What is the hot topic in unilateral conduct cases that antitrust lawyers are excited about in your jurisdiction?

The JFTC is repeatedly expressing its active stance on taking action against abuse of superior bargaining positions, which is now subject to surcharge payment orders, the amount of which can be substantial. Although this prohibition does not apply only to dominant firms, it is important for dominant firms to pay attention to their day-to-day business activities with smaller counterparties. After the introduction of surcharges against abuse of superior bargaining position in January 2010, the JFTC issued the first surcharge payment order and a cease-and-desist order to Toys"R"Us-Japan, Ltd, a large toy retailer, in December 2011 and again, a surcharge payment order and a cease-and-desist order against Edion, a home electronics retailer in February 2012. In 2013 and 2014, the JFTC issued surcharge payment orders and cease-and-desist orders against two local supermarkets.

In addition, seeing that the issues of standard essential patents (SEPs) and FRAND have been taken up by the Japanese Intellectual Property High Court and by many other jurisdictions and competition authorities, the JFTC conducted a survey on issues surrounding SEPs and FRAND and, based on the results of the survey, proposed some modifications to its Guidelines for the Use of Intellectual Property to partially address these issues in July 2015. This has attracted significant attention among antitrust lawyers in Japan.

63 Are there any sectors that the national competition authority is keeping a close eye on?

It is difficult to predict the JFTC's policy direction, in particular with regard to private monopolisation, due to the scarcity of their enforcement actions in this area. Having said this, the Chairman of the JFTC expressed his will to prioritize some sectors, which has significance in today's Japanese economy as a matter of competition policy in general, in his message for 2015. Those sectors are social welfare, agriculture, medical care, energy and infrastructure construction, and digital economy and intellectual property.

64 What future developments can we expect?

As the JFTC is strengthening the enforcement of the AML concerning not just domestic cases but also international cases, this may have an impact on future developments of the regulations on dominance. For example, global companies such as Intel and Qualcomm have been subject to investigation for private monopolisation and abuse of dominant power in several jurisdictions, including Japan. In these types of international cases, more and more competition authorities around the world, including the JFTC, will be involved in the investigation in the future. Indeed, the JFTC has in many occasions stressed that it intends to further strengthen international cooperation and convergence in the area of competition law.

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