ANTIMONOPOLY & UNILATERAL CONDUCT 2018 KNOW HOW

Japan

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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 Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 14 April 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 Japan Fair Trade Commission (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 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 question 6 for the different levels of anticompetitive 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 de jure leniency programme for private monopolisations or unfair trade practices, but there is room to be relieved in practice from enforcement by the JFTC via voluntary reports of conduct in violation of the AML, and the leniency programme applicable to unjust restraint of trade (cartel activities) has been frequently used.

In addition, the conduct that is prohibited under the Act against Delay in Payment of Subcontract Proceeds, Etc to Subcontractors (Act No. 120 of 1 June 1956, as amended) is largely similar to the conduct that constitutes abuse of superior bargaining position, and enforcement against such conduct by the JFTC can be avoided through the voluntary reporting system. In this regard, the JFTC revised the rules on its application and published the guidance on 14 December 2016 in coordination with the Small and Medium Enterprise Agency with the aim to strengthen the enforcement of the Act against Delay in Payment of Subcontract Proceeds, Etc, to Subcontractors. Among other things, the JFTC encourages relevant undertakings to conduct subcontracting transactions as cash transactions in principle.

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. See 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 to that, even if conduct in violation of the AML has already ceased, the JFTC may issue a cease-and-desist order if the JFTC finds it to be particularly necessary in cases where the conduct in violation of the AML is likely to be repeated or the competitive process is not sufficiently restored due to negative effects of the conduct remaining, among other cases, in order to prevent repeats of such conduct or to remove such negative effects.

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 (as of 28 October 2009) and the Guidelines Concerning Distribution Systems and Business Practices as of 16 June 2017 provide the method of defining the relevant market. The basic approach of the test is to identify exclusionary or exploitative 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 (as of 28 October 2009) and the Guidelines Concerning Distribution Systems and Business Practices as of 16 June 2017 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.

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 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 a 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 "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 (as of 28 October 2009) 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 anticompetitive 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 (as of 28 October 2009) 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 question 6, market share is one of the basic factors used to assess anticompetitive 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 anticompetitive 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 (as of 28 October 2009) 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 (as of 28 October 2009) 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 that 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 (as of 28 October 2009) 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 (as of 28 October 2009) 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 (as of 28 October 2009) 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 (as of 28 October 2009) 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 August 2016, 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. In 2016, the JFTC published a report recommending the abolition of the exemption of certain types of arrangement of shipping companies from the AML granted for international ocean shipping. The report states that certain types of arrangements of shippers such as conferences and discussion agreements should not be exempted from the AML after considering the scope and content of the exemption granted in the US and in the EU, among other things. This issue will be further discussed by the JFTC and the Ministry of Land, Infrastructure and Transportation.

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 was 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 that 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 as of 21 January 2016.)

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 literally 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 that 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 as of 16 June 2017, in several places, imply that this theory could be applied when assessing "the likeliness 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.

This theory was also mentioned in the JFTC's recent report which discusses the anticompetitive contractual practices in supply and purchase agreements of liquefied natural gas (LNG) transactions imported into Japan. (For additional explanation of this case, see question 63.)

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

In relation to the regulation on dominant firms, the JFTC publishes three important sets of guidelines, among others: the Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) the Guidelines on Abuse of Superior Bargaining Position (as of 30 November 2010), and the Guidelines Concerning Distribution Systems and Business Practices (as of 16 June 2017). These three sets of guidelines were introduced to achieve more visibility for the 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 anticompetitive conduct in the applicable 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 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 (as of 28 October 2009), the Guidelines on Abuse of Superior Bargaining Position (as of 30 November 2010) and Guidelines Concerning Unjust Low Price Sales (as of 23 June 2011). Some guidelines are sector- or issue-specific, and those also shed some light on what kind of unilateral conduct may be 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 (as of 23 June 2011) and Guidelines for the Use of Intellectual Property (as of 21 January 2016).

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 anticompetitive 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 (as of 28 October 2009) 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 (as of 28 October 2009) 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 anticompetitive effect than that required under private monopolisation. Further, with respect to the Unfair trade practices, the JFTC published partial amendments to the Guidelines Concerning Distribution Systems and Business Practices with regard to the criteria for the safe harbour of certain vertical restraints, such as the restriction on dealing with competitors, strict territorial restriction and tie-in sales, on 27 May 2016. As a result of the amendment, the threshold for market share was raised from 10 per cent to 20 per cent, and the threshold for market position (ie, ranking in the market) was abolished.

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, while benefits to the consumers arising from certain conducts can be used as a justification of the conduct in question.

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

It is generally understood that prima-facie anticompetitive 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 (as of 28 October 2009) 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?

See question 31.

33 What objective justifications have been successful?

See 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 (as of 28 October 2009).)

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 as of 21 January 2016).

On 21 January 2016, the JFTC introduced an amendment to the guiding principle on SEPs. According to the amendment, a refusal to license or bringing an action for injunction against a party who is willing to take a licence by a FRAND-encumbered SEP holder may constitute the exclusion of business activities of other entrepreneurs as it may hinder R&D, production or sale of the products adopting the standards. Whether a party is a "willing licensee (willing to take a licence on FRAND terms)" should be judged based on the individual situation of each case in light of the behaviour of both sides in licensing negotiations. Unlike in the Huawei case in the EU (Case C-170/13, on 7 July 2015), however, there is no concrete guidance on how parties undertaking licensing negotiation can avoid violating the AML.

37 Do these abuses require an essential facility?

The Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) 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 anticompetitive 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, as of 23 June 2011, and the Exclusionary Private Monopolisation Guidelines, as of 27 May 2016.

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 (as of 28 October 2009)).

One high-profile private monopolisation case was the case against Intel KK, a wholly owned Japanese 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.

The JFTC established a study group within its think-tank, the Competition Policy Research Centre (CPRC), to examine the issue of bundled discounts under competition law and published a report on 14 December 2016. In the report, the CPRC analyses both the anticompetitive effect and procompetitive effect arising from the bundled discount in the sectors of electricity, gas and mobile phone services, among other products and services. The report states that the "discount attribution test" (this test considers the total amount of discount as the cost of tied products or services and compares the sales price of its tied products or services with its cost) would be an important indication as to whether a bundled discount has an unjust exclusionary effect in the relevant market.

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) causing 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 anticompetitive conduct are felt?

As explained in question 6, the AML requires a certain anticompetitive 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 question 8, the Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) 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 anticompetitive 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 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%		

**Unlike with other unfair trade practices, the sales amount of the relevant goods or services is calculated based on the receipt of supplied goods or services or the purchase amount of the relevant goods or services, regardless of whether they are produced as a result of the conduct in violation of the AML.

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 10 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 10 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.

	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	2017
Private monopolisation	None	None	None	None	None	None
Unfair trade practices*	None	¥1.3 billion	¥1.3 billion	None	None	None

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

51 Can the 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. In addition to that, even if the conduct in violation of the AML has already ceased, the JFTC may issue a cease-and-desist order if the JFTC finds it to be particularly necessary

in cases where the conduct in violation of the AML is likely to be repeated or the competitive process is not sufficiently restored due to negative effects of the conduct remaining, among other cases, in order to prevent the repeat of such conduct or to remove such negative effects. 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 anticompetitive 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 competition 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 so far. An amendment to AML introducing a voluntary resolution system, however, was passed by the Diet in accordance with the Trans Pacific Partnership (TPP) article 16.2.5 and will come into force as of the date when the TPP becomes effective in Japan. In addition, the JFTC introduced the regulation governing the voluntary resolution system on 25 January 2017. Hereafter, the JFTC plans to draft a guideline concerning ways to conduct a competitive assessment under the voluntary resolution system. It appears to be based on the commitment decision system of the EU (Council Regulation No.1/2003 article 9) and is a system to resolve competition concerns by agreement between the JFTC and companies. It is expected that competition concerns can be resolved more quickly with expanded cooperation between the JFTC and companies, achieving effective and efficient enforcement of the AML under this new voluntary resolution system. The procedure under the system would proceed as follows: (i) Investigation begins, (ii) written notice containing a description of suspicions, etc, is served by the JFTC, (iii) the suspected companies voluntarily draft and apply a plan to cease and desist the conduct at issue, (iv) the JFTC reviews whether it is sufficient to assuage competition concerns and whether the suspected companies will put such plan into action and (v) the JFTC adopts or rejects the plan. In the case of the JFTC adopting the plan, whether the conduct at issue violates the AML will not be determined (no fines and surcharges). Unlike with a consent decree or consent order in the US or a commitment decision system in the EU, there will not be a procedure for collecting public comments.

The JFTC may exclude cartel cases from the scope of this system.

In a practical sense, at present, the undertaking could influence the outcome of the investigation by the JFTC by offering commitments through the investigation process. For example, recently, in August 2016, the JFTC reportedly launched an investigation against Amazon Japan GK (AJGK) and the JFTC closed the investigation in June 2017, since AJGK voluntarily implemented proposed measures, such as removing parity clauses (as well as the "most favoured nation" clauses). Although the regulation governing the voluntary resolution system still does

not take effect in Japan, it seems that the JFTC's termination of the investigation was practically similar to the commitment system in the EU.

Further, the JFTC has publicly announced that AJGK has voluntarily removed the parity clauses from the e-book related agreements, as well.

55 What proportion of cases have been settled in the past 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 August 2016, 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 and there has been no judgment under the new system so far.

Topical issues

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

As noted above, while there is no concept of abuse of dominant position under AML 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, "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 10 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 "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, but the order was partially rejected in the JFTC tribunal procedure finding that there was appreciable agreement on returns and discounts between the parties, and the amount of surcharge was reduced. On the other hand, the tribunal indicated that the existence of abusive conduct practically proves a superior bargaining position. This part of the tribunal decision was criticised as a circular logic by some of the practitioners. 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 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 its enforcement actions in this area. Having said this, the Chairman of the JFTC stated in his message for 2018 that it is necessary for the JFTC to monitor the risk of certain undertakings dominating certain data, which could eventually lead to fair competition being impeded. This showed that the JFTC would continuously focus on the digital economy sectors, such as IoT, AI and the utilisation of big data.

In fact, the JFTC and the Ministry of Economy, Trade and Industry (METI) recently published a series of important reports regarding competition and digital economy. The JFTC published a report on a survey with respect to the issues for competition policy in the mobile phone market in August 2016 and analysed issues in the communication services market (subscriber identity module lock system, among other things), the mobile phone device market (restrictions on distribution of second-hand devices, among other things) and the application market (requirements not to pre-install competitors' applications, among other things). After that, in February 2018, the JFTC decided to launch an additional survey with regard to the issues with competition policy in the mobile phone market, in order to follow-up on the progress in the improvement of the competitive situation in the mobile phone market. The JFTC has published a follow-up report, in June 2018, and the report indicates that conduct that may have an anticompetitive effect, such as setting a subscriber identity lock system, restrictions on the distribution of second-hand devices, and the two-year term locked-in contract, still exist, and four-year term locked-in contracts have been newly appeared, taking into account the results of the questionnaire to the consumers.

In addition, METI published a report regarding the Fourth Industrial Revolution and competition law and policy in September 2016. Specifically, the report reveals eight business practices used by platformers and pointed out that, among the eight practices, restrictions on certain forms of online payment and the non-transferability

of transactions using virtual currencies may constitute violations of the AML. Furthermore, METI and the JFTC's think-tank, the CPRC, both established a study group with respect to data and competition policy in parallel in January 2017. METI published a report with descriptions with regard to the actual data-related business models and provides analysis on possible effect on competition between undertakings that conduct data-related business by each type of business model. The CPRC also published a report that outlines the competitive concerns surrounding data related transactions in June 2017. In particular, it stated that based on its recognition that certain undertakings hold a large volume of data, if such a situation restricts competition and harms the interests of consumers, a prompt response would be required under the AML.

Finally, in June 2017, the JFTC also generally revised the Guidelines Concerning Distribution Systems and Business Practices to address the recent actual situation regarding distribution systems in Japan. This revision clarified the criteria used to determine the illegality of the conduct at issue, by assessing the scope of influence of the transactions, depending on certain factors, and the factors to be considered are (i) the actual inter-brand competition conditions (such as market concentration, characteristics of the products in question, the degree of product differentiation, distribution channels, difficulty of new market entry, etc) (ii) the actual intra-brand competition conditions (such as the degree of dispersion in prices, and business types of distributors, etc, dealing in products in question, etc), (iii) the position in the market of an enterprise that imposes vertical restraints (in terms of a market share, ranking, brand value, etc), (iv) the impact of vertical restrictions on business activities carried out by the affected trading partners (such as the degree and manner of the restraint, etc) and (v) the number of trading partners affected by the restraint, and their positions in the market. When examining these factors, due consideration should be given to not only anticompetitive effects (such as the reduction or elimination of inter-brand or intra-brand competition), but also the pro-competitive effects that result from the vertical restraint, and the JFTC balances the anticompetitive effects against the pro-competitive effects to determine whether the conduct is likely to impede fair competition or not, such as the foreclosure effect and price maintenance effect. With respect to the foreclosure effect, it will be examined by taking into account the situation where such restraints make it difficult for the party to easily acquire alternative trading partners, and cause an increase of their expenses for conduct of business, and/or discouragement from entering the market or developing new products. For the price maintenance effect, it will be examined by assessing whether price competition for products included in the enterprise's brand may be impeded, and whether the restrictions may have price maintenance effects. These examinations should be made also taking other enterprises' actions into consideration. For example, if two or more enterprises impose vertical non-price restraints respectively and in parallel, those restraints are more likely to have a price maintenance effect on the market as a whole than in the case where a single enterprise imposes a vertical non-price restraint.

With respect to the specific type of conduct, while resale price maintenance and restrictions on distributors' trading partners, such as a prohibition of sales to price-cutting retailers, are in principle illegal, as they usually tend to impede price competition, other non-price restrictions are assessed to determine whether they have a foreclosure effect or price maintenance effect, by balancing their anticompetitive effects against their pro-competitive effects, and considering case-specific factors. Further, while the revision introduced a new item, tying, the content of the regulation is almost the same as that set out in the Exclusionary Private Monopolisation Guidelines (as of 28 October 2009). It is noteworthy that the regulation on e-commerce transactions and platform businesses is newly incorporated into the guidelines, and these methods of assessment will be applied to e-commerce transactions and platform business as well. In relation to platform businesses, the Guidelines Concerning Distribution Systems and Business Practices state that the network effect could be an important factor in assessing competitive effects.

Moreover, in January 2018, the JFTC launched market research into e-commerce transactions. According to the JFTC, this market research will focus on the parties to e-commerce transactions, and platform business undertakings, which are intermediaries in the transactions, will not be the main focus of the research.

As a separate matter, on February 2018, CPRC published a report with regard to human resources and competition policy. For example, the report indicates that it would constitute an abuse of superior bargaining position where an employer that has a superior bargaining position imposes non-compete obligations on its employees, and this has an unduly adverse effect on such employees.

With regard to specific cases, the JFTC has aggressively launched several investigations against foreign companies. For example, in the IT sector, the JFTC is said to have launched an investigation against several US internet and platform companies, including Apple.

In addition, as stated above, in August 2016, the JFTC reportedly launched an investigation of AJGK and the JFTC closed the investigation in June 2017, since AJGK voluntarily implemented proposed measures, such as

removing parity clauses (as well as the most favoured nation clauses). Further, the JFTC publicly announced that AJGK voluntarily removed parity clauses in the e-book related agreements as well.

In 2016, the JFTC investigated a standard essential patent case. The JFTC found that a patent pool called One-Blue LLC (One-Blue) violated the AML, by unjustly interfering with the transactions of a competitor, and excluded such competitors. In this case, One-Blue had declared that they would license the BD Standard Essential Patents on FRAND (fair, reasonable and non-discriminatory) terms, but One-Blue sent a notice to major customers of competitors, who were seeking to obtain licences from One-Blue, informing them that One-Blue had the right to seek an injunction against infringement. The court found that One-Blue was not allowed to exercise the right to seek an injunction, because this constituted an "abuse of rights". The above JFTC's announcement came after such court decision, and it announced that the JFTC had closed the investigation, as One-Blue had ceased the conduct at issue.

Recently, the JFTC launched an investigation into an online platform business undertaking (Minna no Pet Online Co, Ltd), which was suspected of operating its online pet shop by dealing on exclusive terms, and announced that the JFTC had closed the investigation, as the online business had voluntarily ceased the suspect activity. The JFTC said that the online business operates two websites that intermediate transactions for dogs and cats between breeders and consumers, and is an influential enterprise operating a pet intermediation website, with a track record of intermediation through its own website. Also, the JFTC announced that the online business was suspected of restricting breeders registered on its site from posting information about dogs and cats on other pet intermediary websites, and that that might cause a reduction in the number of sales distributors using other intermediary websites, and reduce opportunities available to the other similar online businesses. In relation to this case, the JFTC has expressed that, in light of the network effect in the context of online platform businesses, early preventive enforcement would be required.

Moreover, on 11 July 2018, the JFTC publicly announced that the JFTC closed the investigation against Apple Japan G.K. and Apple Inc. (Apple), which has been ongoing since October 2016. Among the suspected contract terms in the supply contacts of iPhones (iPhone Agreements) with the major three mobile network operators, NTT DoCoMo, Softbank and KDDI (3 MNOs), the JFTC found that the mandatory minimum subsidies that 3 MNOs provide to end users purchasing iPhones could restrict the reduction of telecommunication fees and hinder the provision of low and diverse fee plans by telecommunication service providers, including 3MNOs and thus it likely violates AML. In this regard, as Apple modified the iPhone Agreements with 3MNOs and the modified term provides that 3MNOs provide end users with the plan with subsidies and the plan without subsidies (Alternate Plans) in a fair and clear manner with sufficient information provided to end users, the JFTC concluded that, as long as 3MNOs' sales promotion activities of Alternate Plans are not hindered, this form of presentation will enable users to select the optimal service plans from a variety of service plans, promoting competition through users' reasonable choice of telecommunication services. Therefore, the JFTC determined to close this investigation.

These behaviours show a strong interest in major internet companies, as described in the above Chairman's message for 2018.

In relation to a separate sector, the energy sector, in June 2016, the JFTC published a report regarding liquefied natural gas (LNG) transactions. In that report, the JFTC clearly indicates that certain types of destination clauses, destination restrictions, profit share clauses and take-or-pay clauses are likely to be in violation of the AML. With regard to FOB contracts, providing destination clauses is likely to be in violation of the AML, and restrictions on diversions, as well as providing destination clauses, are highly likely to be in violation of the AML. In addition, in terms of DES contracts, providing profit share clauses is not in itself problematic under the AML. However, (i) when such clauses contribute to unreasonable profit sharing with a seller, or (ii) when such clauses prevent a buyer from reselling due to a seller's request to disclose the profit or cost structure, these are likely to be in violation of the AML. The JFTC has strongly expressed that in the future it will expect parties to renegotiate and amend existing contracts and new contracts, to remove anticompetitive clauses and trading customs, and it appears that this is starting to successfully take place.

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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Kozo Kawai is a senior partner at Nishimura & Asahi and renders a wide range of services to both domestic and overseas clients, covering every area of competition law. He represented the Japanese companies that filed the first and second leniency applications with the JFTC, and he represented foreign companies in connection with the first international cartel cases ever handled by the JFTC. Mr Kawai graduated from the University of Tokyo (LLB) in 1984 and earned a law master's from Columbia University School of Law in 1993 and an LLM in EC law from Katholieke Universiteit Leuven in 1994. He also worked at Cleary, Gottlieb, Steen & Hamilton in Brussels from 1994 to 1995 and the Ministry of International Trade and Industry in Tokyo from 1995 to 1997, and has taught competition law at the University of Tokyo School of Law since 2006.

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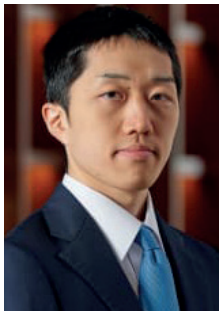
Kojiro Fujii advises clients on various matters of competition law for both domestic and international cases. This includes both international cartel cases and merger cases. His practice also covers private monopolisation, unilateral conduct and unfair trade practices, including vertical restraints and abuse of superior bargaining position. He is also active in advising clients on issues relating to competition law in internet industries, and energy and natural resources sectors. Mr Fujii graduated from the University of Tokyo (LLB) in 2004 and earned a LLM from NYU School of Law in 2011 with the Betty Bock Prize in Competition Policy. He also worked at Cleary, Gottlieb, Steen & Hamilton in Washington, DC from 2011 to 2012 and the Ministry of Economy, Trade and Industry in Tokyo from 2012 to 2014.



Tatsuya Tsunoda

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Tatsuya Tsunoda is an associate at Nishimura & Asahi. He handles a broad range of competition law matters, including Japanese and international merger filings, cartels and unfair trade practices. He also handles international transactions, litigation and general corporate cases. Mr Tsunoda graduated from the Keio University (LLB) in 2011 and the University of Tokyo School of Law (JD) in 2013.

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