ANTIMONOPOLY & UNILATERAL CONDUCT 2020 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. Also, the Digital Platform Transaction Transparency Act gives the Ministry of Economy, Trade and Industry (the "METI") the authority to request the JFTC to take appropriate measures pursuant to the AML against the digital platform operators' conduct that impedes transparency and fairness and violates the regulation on unfair trade practices. In a case where such violation is considered to be a serious situation, the METI is obliged to make such request to the JFTC.

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:

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. In addition, recently, the JFTC has repeatedly stated in the tribunal cases that where the JFTC has found abusive conduct, or conduct imposing disadvantages on counter-parties, such finding itself presumes the existence of the "superior bargaining position" of the suspected company; thus, the JFTC is not necessarily required to specifically prove "superior bargaining position" separately (Toys R Us-Japan, Ltd case on 4 June 2014; Sanyo-Marunaka K.K. case on 22 February 2019; Direx Corporation case on 27 March 2019; Ralse K.K. case on 28 March 2019; Edion K.K. case on 4 October 2019). How to integrate this concept into the prevalent theory of competition law in a harmonious way is debated among antitrust lawyers and scholars.

According to the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc, which was enacted on 17 December 2019, a digital platform operator is normally in a superior bargaining position over the consumers; (i) when there is no other digital platform operator that provides services alternative to the said service for the consumers; (ii) when other digital platform operators providing the alternative service exist, but it is practically difficult for the consumers to stop using the said service; or (iii) when the digital platform operator providing the said services is in a position to control the trade terms, such as prices, qualities and quantities somewhat freely.

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 examines the same factors as the test for "substantial restraint of competition" and 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.*

As for the superior bargaining position, according to the Guidelines on Abuse of Superior Bargaining Position (as of 16 June 2017), the position is measured based on needs for counter-party to carry out transactions (eg, degree of dependency of counter-party on transactions) rather than the market share.

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" and "the likeliness of impeding fair 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, although there is a safe harbour threshold that conduct by a company that has less than 20 per cent market share is not generally considered as being anticompetitive in a relevant market. 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. In fact, in the Toys R Us-Japan, Ltd case on 4 June 2014. the JFTC found that the suspected enterprise had a superior bargaining position against a counterparty even where the counterparty had only less than 0.1 per cent of the transaction value of all the transactions.

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 March 2020, there are 17 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. After conducting the hearings of shipping companies in conjunction with the Ministry of Land, Infrastructure and Transportation (MLIT), the JFTC requested that the MLIT urge shipping companies to abolish such arrangements. In conclusion, however, the MLIT decided to maintain the exemption for the time being.

Also, at least one law (the Act on Japan Tobacco Inc) in Japan mandates a manufacturing monopoly and Japan Tobacco Inc. 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 METI, 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.

Further, on 20 May 2020, the act stipulating the new exemption of merger control regulations on mergers between local motor buses and local banks and the new exemption of the unfair restraint on trade (ie, cartel conduct) on the joint management relating to local motor buses has been enacted. If the local motor bus or local bank plans to implement mergers tat are subject to the merger control regulations of the JFTC, the local motor bus or local bank can submit its plan for the merger describing the necessity of the merger to maintain the service, the contribution of the merger to improve the service, and the assurance that the merger does not impose disadvantages on consumers of the service to the Competent Minister. Then, if the Competent Minister authorises the plan by the local motor bus or local bank, the planned merger will not be subject of the merger review by the JFTC, although the Competent Minister needs to consult with the JFTC before issuing such authorisation.

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 of products, 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 but does not apply to e-books.

20 Can companies be deemed to hold collective monopoly power?

Under the AML, there is no explicit concept of "collective dominance" or "relative dominance". To date, however, 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 and there has been no actual case in which the JFTC found such dominance by multiple parties thus far.

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 published four 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 16 June 2017), the Guidelines Concerning Distribution Systems and Business Practices (as of 16 June 2017), and the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc (as of 17 December 2019). These four 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.

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.

With regard to the unfair trade practices, there is the regulation against the abuse of a superior bargaining position. Under the regulation against the abuse of a superior bargaining position, according to the Guidelines on Abuse of Superior Bargaining Position (as of 16 June 2017), whether there is abusive conduct is examined from the perspective of the degree of disadvantageous conduct and the predictability to such disadvantages. More specifically, the following conduct is considered to be abusive conduct; (i) causing such other party to purchase goods or services irrelevant to the relevant transactions; (ii) causing the other party to provide money, services or other economic benefits; or (iii) refusing to receive goods pertaining to the transactions from the other party, causing the other party to take back the goods pertaining to the transactions after the undertaking has received the goods from the other party, delaying the payment for the transactions to the other party or reducing the amount of the payment, or otherwise establishing or changing trade terms or executing transactions in a way that is disadvantageous to the other party. In addition, according to the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc (as of 17 December 2019), conduct that breaches the Act on Protection of Personal Information also may be considered abusive conduct.

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. Under the regulation against the private monopolisation, exclusionary conduct or controlling conduct from a dominant position may be considered abusive conduct. Also, under the regulation against the abuse of a superior bargaining position, in general, conduct done from a superior bargaining position that may impose excessive disadvantages in an unforeseeable manner may be considered abusive conduct.

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 16 June 2017) 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), the Guidelines for the Use of Intellectual Property (as of 21 January 2016) and the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc (as of 17 December 2019).

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 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, while the threshold is only set out for certain types of conduct, 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 general 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. If the superior bargaining position is abused against individual general consumers, the disadvantages that are imposed on the consumers will be examined.

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" and the Guidelines Concerning Distribution Systems and Business Practices as of 16 June 2017 also have a similar gist.

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. Having said that, the Patent Office published the guidelines as to how the negotiations for the licensing of SEPs should proceed on 5 June 2018, both in English and Japanese.

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.

The JFTC has not referred to the essential facility doctrine in the actual case thus far, and recently, the JFTC, Ministry of Economy, Trade and Industry and Ministry of Internal Affairs and Communication's task force that has been established to tackle issues related to digital platforms is considering the effective applicability of the essential facility doctrine to the abusive conduct concerning big data, and the working group established under the task force revealed its view on 21 May 2019, stating that the essential facility doctrine is not necessarily the appropriate measure to deal with competition issues relating to big data, and may not apply to them. Having said that, the discussions about this point are continuing.

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, in light of the Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers 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 on 17 December 2010).

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 also constitute private monopolisation.

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, the regulation against the unfair trade practices expressly includes the regulation against excessive pricing. In addition, according to the Guidelines on Abuse of Superior Bargaining Position (as of 16 June 2017), unilateral price setting can be regarded as one of the types of abusive conduct. In fact, the JFTC cautioned Tokyo Electronic Power Corporation Inc on 22 June 2012, alleging that Tokyo Electronic Power Corporation Inc.

unilaterally raised electronics prices even though the agreements with its customers required consent on the price increases in advance.

Also, 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. Also, there are discussions as to whether the personalised price-setting may be considered to be unduly discriminatory price-setting and/or abuse of a superior bargaining position against consumers.

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.

Further, according to the Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination as of 17 December 2019, if a platform mediates business transactions between different user segments and causes strong indirect network effects, there would be some cases where the single relevant market comprising each user segment will be defined in an overlapping manner.

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 owing 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.

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

	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Private monopolisation	None	None	None	None	None
Unfair trade practices*	None	None	None	None	None

* All the cases so far have pertained to the regulation against the abuse of a 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, 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.

Further, upon petition by the JFTC, if the court finds there to be an urgent necessity to do so, the court may order the person engaging in an act suspected of violating the regulations against private monopolisation and abuse of superior bargaining position to temporarily stop engaging in the act, or may rescind or modify such order.

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 at the same time as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP also known as TPP11) comes into force, and which incorporated, by reference, most of the provisions of the TPP in December 30, 2018, and certain provisions of the AML have been amended to implement the commitment procedure (Commitment Procedure). In addition, the JFTC introduced the administrative regulation governing the Commitment Procedure on 25 January 2017, and the JFTC also published the guidelines to further clarify the ways to conduct the Commitment Procedure on 26 September 2018. The Commitment Procedure enables an alleged violator to voluntarily resolve violations of the AML through the conclusion of agreements with the JFTC. This is an alternative to the standard procedure, under which the JFTC issues a cease-and-desist order. Now, when the JFTC finds that a transaction substantially restrains competition in the relevant market, the JFTC can offer the parties to the transaction a choice between:

- The current practice of voluntarily offering remedies to the JFTC, which the JFTC will then take into account when it considers whether to issue a cease-and-desist order.
- The new Commitment Procedure, under which appropriate remedies are determined, in the form of a cease-and-desist plan that is authorised by the JFTC.

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 has been 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 Commitment Procedure consists of five steps: (i) formal investigation begins, (ii) a written notice containing the outline of the suspected violation of the AML and the related provisions is served by the JFTC on suspected companies, (iii) the suspected companies voluntarily draft and apply a plan to the JFTC to eliminate the suspected violation, (iv) the JFTC reviews whether it is sufficient to eliminate competition concerns and whether the suspected companies will surely 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, the AML does not stipulate a procedure for collecting public comments as a mandatory procedure, but the JFTC can initiate such a procedure under its own discretion.

The JFTC excluded cartel cases from the scope of this system.

In a practical sense, the undertaking could influence the outcome of the investigation by the JFTC by offering commitments through the investigation process. For example, 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?

Three cases have been published since the formal commitment procedure was introduced in 2018, although the total number of cases where the JFTC took legal action was thirteen during FY 2019. For example, in the contracts between Rakuten Inc (Rakuten) and travel accommodation operators which place information about accommodations on the website "Rakuten Travel" operated by Rakuten, Rakuten set the conditions to require the operators to provide the most favoured provisions, such as the prices and the number of rooms, compared to other distribution channels with a minimum number of rooms requirement, and the JFTC alleged that such MFN clauses may constitute one kind of unfair trade practice. However, the JFTC approved Rakuten's commitment plan on 25 October 2019, which ceases the said MFN clauses and commits not to introduce similar types of MFN clauses for three years, and closed its investigation. Also, the JFTC approved the commitment plan submitted by Nihon Medi-Physics Co, Ltd on 12 March 2020 in response to the suspicion that Nihon Medi-Physics Co, Ltd may exclude competitors from the prescription drug manufacturing and sales market by refusing to supply, among other acts. In addition, the JFTC approved the commitment plan submitted by Cooper Vision Japan, Inc on 4 June 2020 in response to the suspicion that Cooper Vision Japan, Inc. may request its partner retailers not to display the sales price of contact lenses in the advertisement and requested its partner retailers not to sell contact lenses on the internet even if patients receive a prescription (ie, instruction paper that describes the product name and standard of the contact lenses, effective period, etc) from doctors, and thus engages in trading on restrictive terms.

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. However, 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 regardless of whether they are against domestic and foreign companies 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). To date, 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 still 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 the first judgment concerning the unilateral conduct case under the new legislation was issued on 28 March 2019, and the plaintiff, Japan Agricultural Cooperatives (JA) of Tosa-Aki, has lost the case. The JFTC found that the JA of Tosa-Aki unduly restrains sales of eggplant farmers who are members of the JA to distributors other than JA of Tosa-Aki. Reportedly, the JA of Tosa-Aki is appealing to the Tokyo High Court.

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 five 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 annual reports of the JFTC, during the fifteen-year period from 2006 to 2020, 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 118 cases in total from April 2018 to March 2029.

Further, the JFTC issued a cease-and-desist order to Qualcomm Inc in September 2009 for certain restrictive clauses including the "non-assertion patent (NAP) 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 and the tribunal has finally reversed the order of the JFTC on 15 March 2019, after almost 10 years have passed since the cease-and-desist order was issued. The tribunal found that the JFTC's analytical framework on the competition assessment applied to Qualcomm's NAP clause, which solely focused on the NAP clause itself, was not appropriate. It also noted that it should be examined by taking into account the relationships between the NAP clause and other contract clauses, and balance the pros and cons of Qualcomm and its licensees. And thus, the tribunal concluded that the contracts between Qualcomm and the Japanese companies were not out of balance, and not in violation of the AML.

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 June 2011, the JFTC issued a surcharge payment order and a cease-and-desist order against a local supermarket, and the JFTC also issued 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 again. (All cases have been appealed, and the JFTC's tribunal has partly reversed the orders in four cases, and reduced the amount of surcharge payments.)

The regulation against abuse of a superior bargaining position has been actively used for actions against digital platform operators. The JFTC filed a petition to temporality stop the introduction of a free shipping fee campaign across all sellers prepared by Rakuten to the Tokyo District Court on 28 February 2020, alleging that such campaign may be found to be abuse of a superior bargaining position. Thereafter, the JFTC withdrew its petition on 10 March 2020 as Rakuten voluntarily suspended the introduction of the campaign and is seeking to make changes in response to the concerns raised by the JFTC and sellers, as necessary.

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?

The Chairman of the JFTC stated in his message for 2020 that it is necessary for the JFTC to monitor the behaviour of digital platform operators, 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 established the Digital Market Policy Making and Market Research Division in April 2020. In addition, the JFTC and the Ministry of Economy, Trade and Industry (METI) 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.

The Japanese government has continued to consider how the AML addresses issues relating to data and digital platform business, and the study group established under the JFTC, METI, and MIC published the fundamental principles for rule-making to address the rise in platform businesses on 18 December 2018, and it referred to the importance of ensuring transparency to achieve fairness between digital platform operators and their users and their business counterparts, and ensuring fair and free competition in digital markets. Moreover, the working group established under the study group has published specific options to achieve those principles, on 21 May 2019, and among them, called for the enactment of new legislation to ensure transparency and fairness on the side of online digital platforms, to an extent similar to the EU's Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, which was enacted on 12 July 2019. According to the Growth Plan of the Future Investment Strategy Conference and the Basic Policy on Economic and Fiscal Management and Reform 2019, which was adopted by the Cabinet Office, the Cabinet Office submitted the Digital Platform Transaction Transparency Bill to the ordinary Diet session in 2020, and then the Digital Platform Transaction Transparency Act was enacted on 27 May, 2020 and promulgated on 3 June 2020, although the effective date has not been determined yet.

In order to ensure the transparency and fairness on the side of digital platform operators and apply proper competition policies to the digital economy, the JFTC and the Digital Market Competition Council, which were newly established by the Cabinet Office to tackle a wide range of digital economy related issues, including competition policy, have conducted series of market research from 2019 to 2020. According to the interim report concerning future prospects on the digital market which was prepared by the Digital Market Competition Council on 16 June 2020, the Digital Market Competition Council will continue to conduct market research on digital economy.

The JFTC first published the market research on e-commerce and app stores on 31 October 2019, and identified various conduct which may have problems from the perspective of transparency and fairness as well as

from the competition policy, such as acts that could do sellers harm (e., change in business terms due to contract revision, calculation methods and grounds for commission fees, tasks requested towards sellers, withholding sales proceeds, actions against damaged or lost products in the warehouse, handling consumers returns or refund requests, purchase requests for advertisement spots, penalty systems for violations of business terms), acts that could exclude competitors (eg, restrictions on using other app stores, direct sales using transaction data collected by each seller, varying treatment between seller and digital platform operators or their affiliated companies (self-preferencing)), acts which could restrict sellers' business (eg MFN clause, restrictions on sales promotional activities, setting a commission on electronic payments through an app purchase and restrictions on payments outside of an app, setting of retail prices) and acts that could lack fairness or transparency (eg, arbitrary algorithms of search results, explanation and disclosure of information to sellers, unclear screening criteria and its application to sellers, consultation system or means of dispute resolution). Further to the market research on e-commerce and app stores, the JFTC also published the report on the consumer survey regarding the e-commerce on 29 January 2020. Then, the JFTC published a report of market research on how portal sites compare restaurants on 18 March 2020, and indicated various kinds of conduct that may be a problem from the perspective of transparency and fairness and the competition policy, such as unilateral changes in terms and conditions, unilateral or arbitrary changes in ranks in search results and refusal of access to reservation management service providers by certain restaurant. The report also refers to the issue where the general search engine provider may leverage its market power in the general search engine market to the relevant vertical service market, such as an online restaurant comparison portal site, and such leveraging of its own services may have anticompetitive effects. In addition, the JFTC published a report of market research on loyalty programmes for consumers (called the "point service" in Japan) on 12 June 2020. The report describes issues relating to restrictions on a competitor's loyalty programme that may have an exclusionary effect, the abuse of a superior bargaining position toward member stores of the program and unduly data collection and utilisation that may constitute abuse of a superior bargaining position toward member stores of the programme and consumers who use the programme.

Moreover, the JFTC published an interim report regarding market research on digital advertising on 28 April 2020, such as the UK and Australia has done. The JFTC looked into the guaranteed type of advertisements and the programmatic type of advertisements (ie, search advertising and display advertising) by conducting extensive interviews and questionnaires to intermediaries, advertisers, publishers and consumers. While the JFTC plans to further examine the potential competitive issues in the digital advertising market, the JFTC found that there are advertisers and publishers who have been depending on transactions with a specific intermediary, the certain intermediary imposes restrictions on trading with third-parties on the advertisers or publishers, the certain intermediary does not disclose sufficient information which would enable advertisers or publishers to examine the advertising effectiveness and the impact of the ad-fraud, and the certain intermediary may collect and utilise personal information in an abusive manner. Therefore, the JFTC will investigate (i) whether digital platforms are inflicting unfair advantages on counterparties, for example, by changing the terms of contracts unilaterally, (ii) whether digital platforms are unjustly excluding advertising intermediaries (ie, competitors) when the digital platforms play the role of media and advertising intermediary, and (iii) whether digital platforms are unjustly restricting counterparties, for example, by prohibiting the counterparties from advertising other than via the digital platform. In addition to the JFTC's survey, the Digital Market Competition Council also published an interim report regarding the competitive assessment of the digital advertising market on 16 June 2020. According to the interim report, the Digital Market Competition Council requires digital platform operators to ensure transparency and fairness for advertisers, publishers and users by listing the 10 issues for digital platform operators. For example, the interim report expresses publishers' concerns that it is unclear to publishers to what extent payments from advertisers will be shared with publishers by digital platforms, and there is some doubt that publishers would receive appropriate revenue, which may result in publishers having less investment in content creation. Considering this concern, the interim report suggests that digital platforms should enable advertisers and publishers to check the status of ad-fraud and should also give publishers the right to access price information paid by advertisers to digital platforms. In addition, the interim report proposes introducing a mechanism to measure advertising effectiveness by a third party and enable advertisers to effectively compare the quality of digital ads services, as Cairncross Review in the UK suggested. The interim report further indicates there have been issues regarding conflicts of interest (ie, certain intermediaries are not only acting on behalf of advertisers but also behaving as publishers who have its own media), self-preferencing, unilateral changes in the bid system and/or rules which may violate the AML. The interim report also referred the concept of "data/information fiduciary."

By considering these series of market research, the METI plans for the Digital Platform Transaction Transparency Act to be applied to the operators of e-commerce and app stores for the time being, although the other business areas, such as digital advertising, may be additionally designated as applicable business areas for

the Digital Platform Transaction Transparency Act. The specified digital platform operators are required to comply with the information disclosure obligations. More specifically, the specified digital platform operators need to provide information regarding criteria for refusal of transactions, reasons for requests to use its own services, main parameters determining ranks in search results, conditions on the collection and utilisation of data, and the complaint handling system. In addition, the specified digital platform operators are obliged to provide advanced notice regarding requests not described in the terms and conditions, refusal of transactions and reasons for changes in the terms and conditions. Separately, the specified digital platform operators are required to disclose information regarding the main parameters that determine ranking in search results, conditions on the collection and utilisation of data, among other factors, unlike EU's B to B platform regulation. The specified digital platform operators need to prepare annual reports describing its status of compliance with the Digital Platform Transaction Transparency Act and the METI will review the submitted report. Where the specified digital platform operators do not comply with these obligations, the METI will request the JFTC to take appropriate measures pursuant to the AML against the digital platform operators' conduct that impedes transparency and fairness and violates the regulation on unfair trade practices. In a case where such violation is considered serious, the METI is obliged to make such request to the JFTC. With regard to the guidelines, in June 2017, the JFTC 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

- 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)
- 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),
- the position in the market of an enterprise that imposes vertical restraints (in terms of a market share, ranking, brand value, etc),
- 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
- 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, 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.

In addition, the JFTC published the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc, on 17 December 2019. The JFTC confirmed that the regulation against the abuse of a superior bargaining position

can be applied to not only B to B transactions but also B to C transactions, and also can be applied to the free transaction in exchange of receiving personal information of users. According to the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc, a digital platform operator is normally in a superior bargaining position over the consumers; (i) when there is no other digital platform operator that provides services alternative to the said service for the consumers; (ii) when other digital platform operator providing the alternative service exists, it is practically difficult to stop using the said service; or (iii) when the digital platform operator providing the said services is in a position to control somewhat freely the trade terms, such as prices, qualities and quantities. Then, the digital platform operator may be found to be engaged in abusive conduct if the digital platform operator unjustifiably acquires personal information, etc such as acquiring personal information without stating the purpose of use to consumers, acquiring personal information against consumers' intention beyond the scope necessary to achieve the purpose of use, acquiring personal data without taking the precautions necessary and appropriate for safe management of personal information and causing consumers in continuous use of services to provide other economic interests like personal information, in addition to the consideration provided in exchange for the use of services, and unjustifiably use personal information, etc, such as using personal information against the intention of consumers beyond the scope necessary to achieve the purpose of use and using personal data without taking the precautions necessary and appropriate for the safe management of personal information.

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 Amazon and Apple.

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. However, recently, AJGK has been further investigated by the JFTC. Reportedly, in March 2018, the JFTC conducted a dawn raid against AJGK on the suspicion that AJGK unduly forces sellers in its marketplace to provide deposits under the guise of "cooperative money," and such conduct may constitute the abuse of a superior bargaining position. Also, although AJGK planned to newly launch the loyalty programme (point programme) for users of its marketplace, and thus to impose the economic burden on sellers on the platform, it is reported that the JFTC showed interest in AJGK's business plan and informally investigated them; thereafter, AJGK withdrew the plan in advance on 10 April 2019. The JFTC officially confirmed that it had closed the investigation on 11 April 2019.

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.

Further, 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 on 23 May 2018. 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.

Besides, the JFTC publicly announced that the JFTC closed the investigation against Airbnb Japan Co. Ltd and Airbnb Ireland UC (collectively, Airbnb) on 10 October 2018. The JFTC launched the investigation to examine whether Airbnb unduly imposes restrictions on hosts for the usage of other competitors' application programming interfaces (API), and it may constitute private monopolisation, trading on exclusive terms or trading on restrictive terms. As a consequence, Airbnb voluntarily waived its right to restrict hosts' usage of other competitors' API, and the JFTC determined to close this investigation.

Further, the JFTC conducted on-site investigation against Rakuten. under the suspicion that in the contracts between Rakuten and accommodation operators that place information about accommodations on the website named "Rakuten Travel" operated by Rakuten, Rakuten set the conditions to require that the operators provide the most favoured provisions, such as the prices and the numbers of rooms, compared to other distribution channels with the minimum number of rooms requirement, and the JFTC alleged that such MFN clauses may constitute one kind of unfair trade practice. In conclusion, the JFTC approved Rakuten's commitment plan on 25 October 2019 which ceases the said MFN clauses and commits to not introduce similar types of clauses for three years, and closed its investigation. Also, the JFTC conducted onsite investigation against Rakuten again under the suspicion that Rakun unilaterally imposed shipping fees on sellers by uniformly introducing a campaign to set the shipping fee at no cost without giving a choice for sellers, which was suspected of violating the regulation against the abuse of its superior bargaining position to the sellers. The JFTC filed a petition to the court to temporarily stop Rakuten from engaging in the act on 28 February 2020, but, the JFTC withdrew its petition on 10 March 2020 as Rakuten voluntarily suspended the introduction of the campaign and is seeking to make changes in response to the concerns raised by the JFTC and sellers as necessary.

These behaviours show a strong interest in major internet platform companies, as described in the Chairman's message for 2020.

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 has been starting to successfully take place.

Also, the JFTC is continuously revising guidelines regarding the electric power and gas transaction markets, to facilitate liberalisation for their market. The JFTC has investigated Osaka Gas Co, Ltd ("Osaka Gas") under the suspicion that Osaka Gas unjustly forced distributors to buy Osaka Gas branded fan heaters, and warned that such conduct may be in violation of the regulation against the abuse of a superior bargaining position on 24 January 2020. Also, the JFTC has investigated Osaka Gas under the suspicion that Osaka Gas has been unjustly excluding competitors in the relevant market, but the JFTC decided to close the investigation on 2 June 2020, as Osaka Gas voluntarily offered the JFTC revisions of the stipulations of the multipoint contract and gas supply contract to reduce customers' payment, accompanying a change of the gas supplier from Osaka Gas to a competitor.

As a separate matter, in February 2018, the CPRC published a report with regard to human resources and competition policy. The report indicates that, for example, a situation 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, would constitute an abuse of a superior bargaining position. In addition, the JFTC published a statement with regard to the restrictions on the transfer of athletes in the field of sport businesses on 17 June 2019, and sounded an alarm on the fact that at least the excessively broad restrictions on the transfer of athletes would not have justifiable grounds, and thus such restrictions may violate the AML. The Japanese government

further plan to establish guidelines concerning protection on freelances by the AML, Subcontract Act and labour laws.

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 Amazon, 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 and platform regulation.

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