

## Chapter 15

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# JAPAN

*Kozo Kawai, Futaba Hirano and Tomoyuki Numata<sup>1</sup>*

### I OVERVIEW

#### i Substantive rules under Japan's competition laws

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade<sup>2</sup> ('the Act') comprises four major categories of regulations:

- a the prohibition of unreasonable restraint of trade (latter clause of Article 3);<sup>3</sup>
- b the prohibition of private monopolisation (former clause of Article 3);
- c the prohibition of unfair trade practices (Article 19); and
- d regulations on business concentrations (e.g., mergers and acquisitions) (Chapter 4).

The regulations concerning the unreasonable restraint of trade basically control horizontal anti-competitive activities, such as cartels and bid rigging. The private monopolisation regulations prohibit excluding and controlling behaviour<sup>4</sup> that has the effect of substantially restraining competition. Unfair trade practices refer to certain business activities listed in Article 2, Paragraph 9 of the Act, which include certain types of 'concerted boycotts,' 'discriminatory pricing,' 'unjust low-price sales,' 'resale price restriction,' 'abuse of superior bargaining position,' and other business activities that are designated by the Japan Fair Trade Commission ('the JFTC'), the primary regulatory authority governing Japanese competition law. Violations under the unfair trade practices category of regulations require a lower standard of anti-competitive effect than those

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1 Kozo Kawai is a senior partner, Futaba Hirano is a counsel and Tomoyuki Numata is an associate at Nishimura & Asahi.

2 Act No. 54 of 14 April 1947. The latest amendment of the Act came into effect in 2010.

3 Unless described otherwise, Articles in this chapter refer to Articles of the Act.

4 'Control' refers to the conduct of one business that causes another business to follow its will (e.g., a corporate majority shareholder of a company controlling the company).

required under the unreasonable restraint of trade and private monopolisation categories.<sup>5</sup> The JFTC also regulates business concentrations. The Act provides requirements for filing merger reports, shareholding reports, and other related documents. Even when a filing is not required, however, the JFTC may investigate the transaction if it is likely that the transaction substantially restrains competition in the relevant market. In this chapter, we focus primarily on the recent trend in Japanese competition law of increased enforcement against unreasonable restraint of trade, private monopolisation, and unfair trade practices. The Act is normally enforced by the JFTC through administrative procedures, such as cease-and-desist orders and surcharge payment orders, but in some cases, criminal and civil procedures in court may be instituted. Sanctions or procedures applicable to each violation of the Act vary depending on the category of the infraction, as is briefly summarised in the following table.

		<i>Unreasonable restraint of trade</i>	<i>Private monopolisation</i>	<i>Unfair trade practices</i>
<i>Administrative sanctions by the JFTC*</i>	Cease-and-desist order	Applicable	Applicable	Applicable
	Surcharge payment order	Applicable to price cartels and other types of cartels that affect price	Applicable to (1) 'exclusion' type private monopolisation and (2) 'control' type private monopolisation pertaining to or affecting price	Applicable to certain types of (1) concerted boycotts, discriminatory pricing, unjust low-price sales and resale price restrictions (if second offence of the same type of infringement within 10 years) and (2) abuse of superior bargaining position (if a continuous offence)
* <i>Instead of formal administrative orders, the JFTC sometimes issues administrative warnings. These warnings are normally made public in the JFTC's press release, which includes the names of the companies involved.</i>				
<i>Criminal Sanctions</i>		Applicable	Applicable but no precedents	Not applicable†
† <i>Note that violators who do not follow cease-and-desist orders that require ceasing illegal conduct falling into any of the three categories of infractions, including unfair trade practices, may be subject to criminal sanctions.</i>				

5 An activity does not have to actually restrain competition in the market in order to be considered an unfair trade practice by the JFTC.

		<i>Unreasonable restraint of trade</i>	<i>Private monopolisation</i>	<i>Unfair trade practices</i>
<i>Civil Procedure</i> ‡	Injunctive relief	Not stipulated in the Act	Not stipulated in the Act	Applicable
	No-fault compensation	Applicable	Applicable	Applicable
‡ <i>In addition to the procedures provided under the Act, plaintiffs can bring other civil claims, such as tort claims, and ask for injunctive relief or compensation under Japan's Civil Code and general civil law principles.</i>				

The no-fault compensation action (Article 25) is a private lawsuit specifically prescribed under the Act. This mechanism is not frequently used (e.g., only 30 actions related to six cases (one private monopolisation case, four bid-rigging cases and one abuse of superior bargaining position case) were pending at the end of the 2010 fiscal year), primarily because of inconveniences for the plaintiff, such as exclusive jurisdiction residing with the Tokyo High Court and the requirement that the JFTC's order against the violator must have become final and binding before filing a suit (Article 85, Item 1 and Article 26).

**ii Prioritisation and resource allocation of enforcement authorities**

The JFTC announced that it places a priority on its enforcement in the following areas:<sup>6</sup>

- a* hard-core cartels, such as those involved in price fixing and bid rigging that have a significant effect on consumers;
- b* abuses of superior bargaining position, unjust low price sales and discriminatory pricing that are unfair and prejudicial to small and medium-sized enterprises; and
- c* interference with new entries into the markets for information technology, public works projects, intellectual property and other markets that are important for Japan's economic growth.

Most of the cases in which the JFTC has been undergoing formal proceedings and reaching formal decisions have been hard-core cartel or bid-rigging cases in accordance with priority (a) *supra*. In accordance with priority (b) the JFTC has investigated and issued a number of cease-and-desist orders in connection with cases involving abuses of superior bargaining position, unjust low price sales and resale price restrictions, such as in *Seven-Eleven Japan*,<sup>7</sup> *Yamada-Denki*,<sup>8</sup> and *Toys 'R' Us Japan*<sup>9</sup> and *EDION*.<sup>10</sup>

6 JFTC press release, 1 June 2011.

7 JFTC cease-and-desist order, 22 June 2009. Also, see *The Public Competition Enforcement Review* (First Edition), pp. 215, 216.

8 JFTC cease-and-desist order, 30 June 2008. Also, see *The Public Competition Enforcement Review* (First Edition), p. 215.

9 JFTC cease-and-desist order and surcharge payment order, 13 December 2011.

10 JFTC cease-and-desist order and surcharge payment order, 16 February 2012.

Recent notable cases under priority (c) include *NTT East Japan*,<sup>11</sup> *JASRAC*,<sup>12</sup> *Microsoft*,<sup>13</sup> *Qualcomm*,<sup>14</sup> the *Google and Yahoo! Japan* case, in which the JFTC did not issue any orders regarding the proposed business partnership in the algorithm search business and the ad search business, while it expressed its intent to continuously monitor the conduct of Google by collecting information through specially established e-mail addresses<sup>15</sup> and the *DeNA* case, in which the JFTC found that DeNA Co Ltd forced game providers not to provide games through GREE Inc, the mobile SNS company competing with DeNA, and was thereby in violation of Article 19 of the Act.<sup>16</sup>

### iii Enforcement agenda

#### *Amendment of the Act*

The latest amendments to the Act in 2009 ('the Amendments') include several substantive changes, such as (1) an expansion of the categories of infractions that are subject to the surcharge, (2) an improvement and expansion of the leniency programme, (3) a revision of the filing requirements for mergers and share acquisitions, and (4) a strengthening of the system by which plaintiffs can collect evidence (via court order) in proceedings seeking injunctive relief with regard to unfair trade practices, thus allowing plaintiffs greater access to evidence, including some business secrets.<sup>17</sup> The Amendments demonstrate the Japanese government's intent to step up enforcement of the Act and to follow the recent trend in the EU and the US, where authorities are increasingly exercising more stringent control over anti-competitive activities.

In March 2010, a bill to amend the Act was submitted, but it remains under deliberation as at March 2012. The proposed amendments include the abolition of the JFTC's tribunal system and changes to the litigation system regarding cease-and-desist orders, and changes to the hearing system regarding cease-and-desist orders.

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- 11 Shinketsu (JFTC definitive final decision through JFTC tribunal procedure) 26 March 2007. Also, see *The Public Competition Enforcement Review* (First Edition), p. 214.
  - 12 JFTC cease-and-desist order, 27 February 2009. Also, see *The Public Competition Enforcement Review* (First Edition), p. 214 and and Section III, *infra*.
  - 13 Shinketsu (JFTC definitive final decision through JFTC tribunal procedure), 16 September 2008. Also, see *The Public Competition Enforcement Review* (First Edition), p. 217.
  - 14 JFTC cease-and-desist order, 28 September, 2009.
  - 15 JFTC press release, 2 December 2010 [www.jftc.go.jp/e-page/pressreleases/2010/December/101213.pdf](http://www.jftc.go.jp/e-page/pressreleases/2010/December/101213.pdf).
  - 16 JFTC Cease-and-desist order, 9 June 2011. After the order by the JFTC, GREE Inc brought a claim for damages against DeNA on 21 November 2011.
  - 17 A summary of the Amendments can be found at [www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf](http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf).

### *Important tasks for the JFTC in 2012*

The JFTC has announced that the following issues are among the JFTC's most important tasks of 2012:<sup>18</sup>

- a* to enforce the amended Act that came into effect on 1 January, 2010;
- b* to ensure and promote fair trade with small and medium-sized enterprises;
- c* to follow the global trend and enhance international cooperation.

### *Extraterritorial application of the Act*

The JFTC has announced its intent to actively exercise its powers against foreign companies, as well as in cross-border cases if the case has a large enough effect on competition in the Japanese market. The JFTC has been emphasising movement of Japan's competition law policy towards meeting the global standard and increased cooperation with foreign competition authorities.<sup>19</sup>

There are several recent examples of the JFTC taking a proactive approach in enforcing the Act against foreign companies. In *Marine Hose*,<sup>20</sup> the JFTC, for the first time in its history, issued orders (in this case, a cease-and-desist order) to foreign companies located outside Japan in an international cartel case. In *Cathode Ray Tubes for Televisions*,<sup>21</sup> discussed in Section II *infra*, the JFTC went a step further and ordered both a cease-and-desist order and a surcharge payment order to foreign companies located outside Japan.

Another example of the JFTC's proactive approach towards international cases can be seen in the area of merger regulations. In the *BHPB-Rio TOB* case, the JFTC initiated an investigation into BHPB's plan to acquire shares of Rio Tinto, despite the fact that the parties involved in the transaction were non-Japanese companies.<sup>22</sup>

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18 See message from Chairman Takeshima in January 2012, [www.jftc.go.jp/kouenkai/nentou24.html](http://www.jftc.go.jp/kouenkai/nentou24.html).

19 See message from Chairman Takeshima in January 2012 *supra*, and statements of the Secretary General of the JFTC at a news conference on 11 January 2012, [www.jftc.go.jp/teirei/h24/kaikenkiroku120111.html](http://www.jftc.go.jp/teirei/h24/kaikenkiroku120111.html).

20 Cease-and-desist order and surcharge payment order, 22 February 2008, [www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf](http://www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf). Also, see *The Public Competition Enforcement Review* (First Edition), p. 211.

21 Cease-and-desist order and surcharge payment order, 7 October 2009, [www.jftc.go.jp/e-page/pressreleases/2009/October/091007.pdf](http://www.jftc.go.jp/e-page/pressreleases/2009/October/091007.pdf).

22 BHPB withdrew its plan to take over Rio Tinto after the issuance of the statement of objection by the EU regulator in November 2008. In June 2009, BHPB and Rio Tinto announced their joint venture regarding the production of iron ore, and, this time, they voluntarily engaged in the pre-consultation process supervised by the JFTC under the merger regulations of the Act. In September 2010, the JFTC sent a notice to the parties and pointed out that the proposed joint venture would substantially restrain competition. BHPB and Rio-Tinto withdrew their plan to establish a production joint venture and the JFTC closed its prior consultation review on the proposed joint venture. JFTC press release, 18 October 2010, [www.jftc.go.jp/e-page/pressreleases/2010/October/101018rev.pdf](http://www.jftc.go.jp/e-page/pressreleases/2010/October/101018rev.pdf).

The Amendments also provided grounds and conditions for the exchange of information between the JFTC and overseas competition authorities, making it easier for the JFTC to take action towards various sorts of international cases.

## II CARTELS

### i Unreasonable restraint of trade and cartels

#### *Definition*

The regulations governing unreasonable restraints of trade basically cover agreements<sup>23</sup> between competitors designed to eliminate or restrict market competition (as well as activities following such agreements), for example, bid-rigging, price-fixing, limits on production and market/customer allocation. Even without specific conduct, such an agreement in itself would constitute a prohibited unreasonable restraint of trade.<sup>24</sup> In practice, such agreements between competitors can be proved by an accumulation of indirect evidence, most typically, by a showing of parallel conduct between competitors following certain contacts between them. Moreover, although the Act clearly stipulates that competition must be substantially restrained and be contrary to the public interest for the collusion to be considered illegal, in reality, the JFTC is usually able to establish this requirement fairly easily in the case of hard-core cartels.<sup>25</sup>

The regulations governing unreasonable restraints of trade apply primarily to horizontal restraints and not to vertical restraints, which are normally regulated as unfair trade practices, as discussed more fully below.

#### *Sanctions: cease-and-desist orders and administrative surcharges*

The JFTC has broad authority to order violating companies to cease and desist from prohibited acts, transfer a part of their business to a third party, or take any other measures necessary in order to restore competition in the market (Article 7). Recently, the JFTC has been increasingly ordering violating companies to conduct various types of activities, such as (1) passing a board resolution confirming the termination of the cartel activities, (2) notifying customers in Japan of the termination of all cartel activities, (3) promoting compliance of its officers and employees, including those of its subsidiaries, and (4) excluding employees involved in the cartel activities from divisions in which contacts with competitors are necessary.

The JFTC has the authority to issue surcharge payment orders, requiring violators to pay a surcharge as penalty for violating the Act, provided, that the cartel in question affects the consideration of subject goods or services. The surcharge amount

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23 The regulations cover not only explicit agreements, but also implied mutual understandings. (*Toshiba Chemical Case*, Tokyo High Court, 25 September 1995).

24 *Petroleum Cartel Case*, Supreme Court, 24 February 1984.

25 In the price-fixing case regarding TFT-LCD modules for the Nintendo DS (cease-and-desist order and surcharge payment order, 18 March 2009), the JFTC defined the relevant market extremely narrowly as the specific TFT-LCD module supplied for the Nintendo DS in Japan, and found that competition in that market was substantially restrained.

is determined using a formula provided in the Act.<sup>26</sup> The violator must pay a certain percentage (generally 10 per cent)<sup>27</sup> of the turnovers in the relevant market during the period in which the cartel is determined to have been active, which shall not exceed three years (Article 7-2, Paragraph 1). If a violator is subjected to another surcharge within 10 years, the applicable surcharge will be increased by 50 per cent (Article 7-2, Paragraph 7). Also, the Amendments introduced a rule that increases the surcharge for leading enterprises of a cartel by 50 per cent (Article 7-2, Paragraph 8).<sup>28</sup>

The Amendments further extended the statute of limitations for these two categories of administrative orders from three years to five years (Article 7, Paragraph 2 and Article 7-2, Paragraph 27).

### *Criminal penalties*

A violating company may face criminal fines of not more than ¥500 million for a single violation (Article 95, Paragraph 1, Item 1).<sup>29</sup> If both a surcharge and a criminal fine are levied on a violator, half of the amount of the fine is, in principle, deducted from the administrative surcharge (Article 7-2, Paragraph 19. Also see Article 51, Paragraph 1). Individual violators, such as corporate executives and employees of the violating company, may also face criminal penalties of up to five years' imprisonment<sup>30</sup> or fines totalling not more than ¥5 million (Article 89, Paragraph 1), or both. A representative of a violating company who, despite knowing of the plan or the actual illegal activity, fails to take necessary measures to prevent it or rectify it is subject to the same penalties as the violator (natural person) (Article 95-2).

### *Civil liabilities and other penalties*

In addition to criminal penalties and JFTC orders, a violating company may also be subject to civil liabilities as a result of private lawsuits filed by its customers. Corporate executives of a company engaged in a cartel may be required by the company or its shareholders (in the case of derivative suits) to compensate damages caused by their failure to prevent illegal

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26 In Japan, unlike in other jurisdictions, the JFTC does not have discretion to determine the surcharge amount.

27 Reduced penalty percentages are applicable to retailers, wholesalers and small or medium-sized companies.

28 For example, it is stipulated that for those who originate an illegal scheme and request that other firms participate in or not cease to infringe, or continuously set prices or allocate trade partners in response to the conspirator's request, surcharge rates are to be increased by 50 per cent.

29 A violation (e.g., a cartel agreement) committed in one relevant market over a particular period of time can constitute a 'single' violation for purposes of criminal fines. (*Iron Bridge bid-rigging case*, Tokyo High Court, 21 September 2007).

30 The Amendments raised the statutory imprisonment for convicted individuals engaged in cartel activities from three years to five years. This change may encourage the court to issue jail sentences without suspension.

acts of their employees. Moreover, in bid-rigging cases, the company is usually suspended from participating in public procurement for a certain period.

## ii Japan's leniency programme

### *Overview*

Under Japan's leniency programme, companies who may be in violation of the Act are encouraged to apply for leniency, thereby potentially being exempted from or reducing penalties they may face. The Amendments expanded the total number of companies that may apply for the leniency programme from three to five (but once an investigation has been initiated, no more than three companies may apply). When companies file a leniency application before the official initiation of a JFTC investigation, the first applicant is eligible to receive 100 per cent immunity from any subsequent surcharge payment order, the second applicant is eligible to receive a 50 per cent reduction, and the other applicants can receive a 30 per cent reduction. Leniency may also be applied for after the initiation of a JFTC investigation. In that case, each applicant is only eligible to obtain a 30 per cent reduction in any subsequent surcharge payment order. The cap on the total number of companies that can apply for leniency includes all companies that apply, whether before an investigation or after. It is important to note that, unlike in other jurisdictions, the JFTC has no discretion in determining whether immunity from or a reduction in the surcharge payment is granted, other than accepting or declining an application based on its adequacy.<sup>31</sup> Therefore, the most important factor pertaining to Japan's leniency programme is the chronological order in which the application is filed with the appropriate office.<sup>32</sup> During the leniency application process, if the JFTC deems it appropriate (especially in international cartel cases), the applicant may substitute an oral statement for certain entries in the application form, but it must still file the written application (without inserting those entries) and submit certain materials separately. Furthermore, in practice, the JFTC generally will not issue a cease-and-desist order to the first applicant who files for leniency voluntarily before the JFTC becomes aware of the violation.

### *Joint application*

Prior to the Amendments, Japan's leniency programme did not accept joint applications by multiple companies in order to prevent collusion among companies in preparing and submitting the applications.<sup>33</sup> The Amendments opened the way to allow joint

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31 The following are grounds for disqualifying a leniency applicant: (1) submission of a report containing false information; (2) failure to comply with the JFTC's request for additional information; and (3) coercion of other companies to engage in cartels or attempts to prevent other companies from ceasing illegal conduct. In addition, without a justifiable reason, a leniency applicant must not disclose the fact that it has filed to third parties (Article 7-2, Paragraph 17).

32 Leniency applications are filed by telefax to a number stipulated in the regulation under the Act.

33 For details, see *The Public Competition Enforcement Review* (First Edition), p. 211.



applications for leniency by companies in the same corporate group. Now, upon certain conditions being met, two or more violators within the same corporate group are permitted to jointly file an application for surcharge reduction or immunity, and all the applicants who jointly file the application will be assigned the same order of application (Article 7-2, Paragraph 13).

### *Criminal prosecution and leniency*

Criminal prosecutions can only be brought against a violator by the public prosecutor on referral from the JFTC. The JFTC has announced that it will not refer the first qualified leniency applicant (including its cooperative executives and employees) to the public prosecutor, and the Ministry of Justice has declared that it will give full regard to the JFTC's decision. In effect, this means that the first leniency applicant (who filed an application prior to the initiation of a JFTC investigation) is exempted, not only from surcharge payment orders but also from any criminal penalties. For the other leniency applicants (and their employees), the JFTC will make a referral decision on a case-by-case basis.

### iii Significant cases<sup>34</sup>

#### *Cathode Ray Tubes for Televisions*<sup>35</sup>

The *Cathode Ray Tubes for Televisions* case involved alleged price fixing among Japanese, Korean and Taiwanese companies and their subsidiaries in south-east Asia regarding supply of cathode-ray tubes to production subsidiaries of Japanese television manufacturers located in south-east Asia. In this case, the JFTC issued a cease-and-desist order and, for the first time in its history, a surcharge payment order to foreign companies located outside Japan.

#### *Galvanised steel sheets*<sup>36</sup>

In the price-fixing cartel among manufacturers and distributors of galvanized steel sheets, the JFTC ordered the alleged violators to pay a surcharge payment amounting to around ¥15.5 billion in total in 27 August 2009, the third largest surcharge payment order in the JFTC's history. While the JFTC filed a criminal charge with Japan's Prosecutor General regarding this case, the first leniency applicant in this case was exempted from any criminal charges in accordance with the policy announced by the JFTC and the Ministry of Justice. The subsequent leniency applicants who applied after the initiation of the JFTC investigation, however, were not exempted, and they (and their employees) were eventually sentenced in the criminal court in 15 September 2009. This case became the first case in which the JFTC revoked part of its past surcharge payment order pursuant

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34 For other recent significant cases other than cases in this section, see *The Public Competition Enforcement Review* (First Edition), pp. 211–212.

35 See footnote 21 and *The Public Competition Enforcement Review* (Third Edition), pp. 287–288.

36 [www.jftc.go.jp/pressrelease/09.august/090827.pdf](http://www.jftc.go.jp/pressrelease/09.august/090827.pdf). Also see the first edition of this *Review*, p. 212. This case was the first criminal allegation made against a price cartel in the past 17 years.

to Article 51, Paragraph 1, which stipulates the deduction of half of the amount of a criminal fine from a past administrative surcharge.<sup>37</sup>

#### *Optical fibre cables*<sup>38</sup>

In the price-fixing cartel involving manufacturers of optical fibre cables, etc., the JFTC ordered the alleged violators to pay a surcharge payment amounting to approximately ¥16 billion in total, on 21 May 2010, the second-largest surcharge payment order in the JFTC's history. Sumitomo Electric Industries Ltd, who was subject to a ¥6.7 billion surcharge payment, was embroiled in a shareholders' lawsuit on the ground that the board members of the company had not applied for leniency, resulting in increased damages to the company.

#### *Wire harnesses*<sup>39</sup>

In the price-fixing cartel involving manufacturers of wire harnesses, etc., the JFTC ordered the alleged violators to pay a surcharge payment amounting to approximately ¥12.8 billion in total, on 19 January 2012. In the press release regarding the cease-and-desist order and the surcharge payment order in this case, the JFTC expressed that they had started the investigation of the case at approximately the same time as the US Department of Justice and the European Commission.

#### **iv Trends, developments and strategies**

Although there is no corresponding or similar system to the United States's leniency-plus or leniency-minus in Japan, Japan's leniency system has been widely used<sup>40</sup> by major Japanese companies, as well as foreign-based companies. One significant consequence of the leniency system is that there appears to be a knock-on effects around the initiation of the JFTC's investigations. This highlights the advantage of filing a leniency application when there is a suspicion that a cartel exists. However, in exchange for immunity, the leniency applicant would be required to cooperate extensively with the JFTC, including submitting all relevant materials, answering all questions posed by JFTC officials, and having its executives and employees participate in lengthy interviews. In Japan, civil litigation against a company that has committed an antitrust violation is not as fierce as in the United States. Still, a company faces the risk of US civil liability if consumers of its products or services are located in the United States.

When representing an alleged violator in a cartel investigation initiated by the JFTC or public prosecutors, there are two crucial matters to note. First, it is important to bear in mind that since attorney–client privilege is not recognised in Japan, communications between the alleged violator and its attorney can be seized (in investigations under

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37 [www.jftc.go.jp/pressrelease/09.november/09111107.pdf](http://www.jftc.go.jp/pressrelease/09.november/09111107.pdf).

38 Cease-and-desist order, 21 May 2010.

39 Cease-and-desist order and surcharge payment order, 19 January 2012.

40 There were 480 leniency filings that have been made from the time the leniency programme was introduced in 2006 until the end of the 2010 fiscal year. See JFTC annual report of 2010, [www.jftc.go.jp/info/nenpou/h22/index.html](http://www.jftc.go.jp/info/nenpou/h22/index.html).

warrants) or are required to be submitted under threat of criminal sanctions (in the case of ordinary JFTC administrative investigations) during the investigation, although attorneys may generally refuse any search of their law offices. Second, individual violators do not generally have the right to have their attorneys present during investigative interviews conducted by JFTC officials or public prosecutors, although they will have access to their attorneys if they are retained under warrants.

## v Outlook

The JFTC declared its intent to vigorously enforce the Act against cartels. It conducted criminal investigations regarding the bearing cartel case in July 2011, three-and-a-half years after it launched the criminal investigation against the aforementioned price-fixing cartel among manufacturers and distributors of galvanised steel sheets in January 2008.

In order to tackle international cartels more vigorously, the JFTC established a new division that deals exclusively with international cartel cases in April 2010, and it currently seems to be in charge of the automotive parts cartel cases that have been under investigation since July 2011.

## III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

### i Private monopolisation

The Act prohibits private monopolisation, which is defined as business activities ‘by which any entrepreneur, individually or in combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in the relevant market’. Generally, this prohibition only applies to business entities with dominant market power in the relevant market.

The JFTC has issued only 16 cease-and-desist orders with regard to the regulations concerning private monopolisation since the Act was first introduced in 1947. The reason for this small number is mainly because (1) in order to establish private monopolisation, the JFTC has to prove dominant market power in the relevant market, and the substantial restraint of competition in the relevant market caused by the exclusion or control of other business entities; and (2) private monopolisation was not subject to surcharge payment orders at all prior to the amendment of the Act in 2005, which introduced surcharge payment orders against companies involved in ‘control’ type private monopolisation activities pertaining to or affecting price.<sup>41</sup> Therefore, since differences in the outcomes were negligible, the JFTC preferred to bring formal proceedings under the unfair trade practices regulations, under which the JFTC could issue cease-and-desist orders and avoid the meaningless burden of proof described in (1) *supra*. However, there are some recent landmark cases in which the JFTC brought charges under private monopolisation

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41 This amendment came into force on 4 January 2006. The surcharge rate against companies involved in ‘control’ type private monopolisation activities is 10 per cent (3 per cent for retailers, 2 per cent for wholesalers) of the sales of goods or services concerned.

regulations against companies with dominant market positions and argued that they substantially restrained competition in such markets. In addition, after the Amendments, a surcharge of 6 per cent (2 per cent for retailers, 1 per cent for wholesalers) of the sales of goods or services concerned is levied against companies involved in 'exclusion' type private monopolisation activities, and the basic surcharge rate against companies involved in private monopolisation activities is higher than those against companies involved in unfair trade practices. This may provide the JFTC with more incentive to make use of the private monopolisation regulations.

### *Significant cases*

In *NTT East Japan*,<sup>42</sup> a case in which the JFTC found that NTT East, having a majority share of the optical fibre broadband market and the essential facilities for telecommunication services, excluded competitors in its market by introducing new lower price services to consumers, the Tokyo High Court dismissed NTT East's appeal on 29 May, 2009. NTT East appealed the case to the Supreme Court, which dismissed the appeal on 17 December 2010. The Supreme Court held that activities leading to the exclusion of other companies must have a degree of artificiality that oversteps the boundaries of normal competition in order to be considered as 'excluding conduct' of the kind that can be distinguished from normal business activities. In relation to this case, it is noteworthy that the 'exclusion' type private monopolisation guidelines described *infra* refer to the decision of the Tokyo High Court and state that a so-called margin squeeze may fall under the category of excluding conduct.

In *JASRAC*,<sup>43</sup> a case in which the JFTC found that JASRAC, a dominant copyright management organisation, excluded other copyright management entities from the market by entering into 'comprehensive contracts' with broadcasting companies, JASRAC requested the commencement of tribunal procedures in order to challenge the cease-and-desist order levied by the JFTC, and the JFTC commenced the procedures in May 2009. The JFTC has not made a final decision, but it has delivered a draft decision that concludes that the cease-and-desist order will be rescinded, the outline of its reason being that there is no evidence to acknowledge that JASRAC's royalty collection method had the effect of damaging the business activities of other copyright management organisations.<sup>44</sup>

### *Guidelines for 'exclusion' type private monopolisation*<sup>45</sup>

Because of the difficulty in distinguishing excluding conduct, which is subject to a surcharge, from normal business activities leading to the exclusion of other companies, it

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42 See footnote 11.

43 See footnote 12.

44 See the press release by JASRAC, 2 February 2012, [www.jasrac.or.jp/ejhp/release/2012/0203\\_1.html](http://www.jasrac.or.jp/ejhp/release/2012/0203_1.html).

45 The full text of the guidelines is available at [www.jftc.go.jp/e-page/pressreleases/2010/January/100107.pdf](http://www.jftc.go.jp/e-page/pressreleases/2010/January/100107.pdf). A summary of the guidelines is available at [www.jftc.go.jp/e-page/pressreleases/2009/October/091028-1.pdf](http://www.jftc.go.jp/e-page/pressreleases/2009/October/091028-1.pdf) and [www.jftc.go.jp/e-page/pressreleases/2009/October/091028-2.pdf](http://www.jftc.go.jp/e-page/pressreleases/2009/October/091028-2.pdf).

has been pointed out that the introduction of a surcharge against 'exclusion' type private monopolisation might have a chilling effect on business activities and interfere with the freedom with which companies conduct business activities. The JFTC therefore prepared guidelines to ensure transparency of law enforcement and improve predictability by clarifying the JFTC's interpretation of the requirements that constitute an 'exclusion' type private monopolisation. The guidelines first describe the JFTC's enforcement policy as to 'exclusion' type private monopolisation, stating that the JFTC will prioritise investigations of cases in which the market share of the company with respect to a certain product or service exceeds approximately 50 per cent and where the allegedly excluding conduct is deemed to have a serious impact on the lives of the citizenry. Also, in the guidelines, the JFTC clarifies, *inter alia*, that excluding conduct refers to 'various conducts that would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities,' thereby likely causing a substantial restraint of competition.

## ii Unfair trade practices

The Act prohibits unfair trade practices, which include certain types of 'concerted boycotts,' 'discriminatory pricing,' 'unjust low-price sales,' 'resale price restriction' and 'abuse of superior bargaining position,' and other business activities that are designated by the JFTC.<sup>46</sup> They cover a wide range of, more or less, anti-competitive like conduct, and it is said that the requirements under the regulations governing unfair trade practices (i.e., a 'tendency to impede fair competition') can be established more easily than those under the regulations governing unreasonable restraints of trade or private monopolisation (i.e., a 'substantial restraint of trade'). In practice, establishing a violation under the unfair trade practices regulations does not require the JFTC to unequivocally define the relevant market. Also, these regulations are broad enough that they clearly apply to vertical restraints, which are not normally covered by the unreasonable restraint of trade regulations. Thus, these unfair trade practices regulations are able to cover a broader range of conduct, including those that do not fall within the realms of unreasonable restraint of trade or private monopolisation.

The Amendments introduced a surcharge against certain types of the following five categories of unfair trade practices: 'concerted boycotts,' 'discriminatory pricing,' 'unjust low-price sales,' 'resale price restrictions' and 'abuses of superior bargaining position'. Regarding certain types of 'concerted boycotts,' 'discriminatory pricing,' 'unjust low-price sales' and 'resale price restrictions', a surcharge of 3 per cent (2 per cent for retailers and 1 per cent for wholesalers) of the sales of goods or services concerned is levied against companies that are determined to have committed a second offence of the same type of infringement within a 10-year period. Regarding certain types of 'abuses of superior bargaining position', a surcharge of 1 per cent of the amount of the transaction with the trade partners that suffered the abuse is levied against a company that commits a continuous offence.

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46 The JFTC public notice containing the 15 categories of unfair trade practices can be found at [www.jftc.go.jp/e-page/legislation/ama/unfairtradepractices.pdf](http://www.jftc.go.jp/e-page/legislation/ama/unfairtradepractices.pdf).

### *Abuse of superior bargaining position*

In a practical sense, the purpose of this restriction is not necessarily to prohibit anti-competitive activity as much as it is to protect small and medium-sized companies from pressures from business entities that have superior bargaining position and with which they may have entered into long-term contractual and non-contractual relationships.

In *Seven-Eleven Japan*,<sup>47</sup> the JFTC issued a cease-and-desist order and found that Seven-Eleven Japan forced some franchisees to stop discount sales of fresh food products, thereby causing them to lose opportunities to reduce losses in the amount of the costs of such fresh food products by disposing of them based on their rational business judgement. The JFTC determined that this conduct fell under the category of abuse of superior bargaining position.

Other recent abuse of superior position cases include *Toys 'R' Us Japan* and *EDION*, where the JFTC issued cease-and-desist orders and surcharge payment orders against Toys 'R' Us Japan Ltd, retailer of goods for children and babies<sup>48</sup> and EDION Corporation, one of the giants among the electronic retailers in Japan.<sup>49</sup>

### *Unjust low price sales*

If goods or services are continuously supplied for a consideration that is excessively below the cost incurred in supplying such goods or services, such conduct may constitute 'unjust low price sales'.<sup>50</sup> Because the Amendments introduced surcharges against unjust low price sales, the JFTC revised its guidelines concerning unjust low price sales<sup>51</sup> in order to ensure transparency of law enforcement and improve predictability. In the revised guidelines, the JFTC clarifies, *inter alia*, that 'the cost incurred in the said supply' consists of variable costs (i.e., costs that would not be incurred if the goods or services were not supplied) and costs other than variable costs, and if the price of the goods or services is set below the variable costs, the JFTC assumes that such a price is a consideration 'excessively below the cost incurred in the said supply'. In 2011, the JFTC issued administrative warnings regarding unjust low price sales of alcoholic beverages for the first time in seven years.

### *Other categories of unfair trade practices*

Recent cases of other categories of unfair trade practices include *Microsoft* case,<sup>52</sup> *Qualcomm*,<sup>53</sup> *DeNA*<sup>54</sup> and *Adidas Japan*, in which the JFTC issued a cease-and-desist

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47 See footnote 7.

48 See footnote 9.

49 See footnote 10.

50 Recent unjust low price sales cases include *Yamato v. Japan Post*, Supreme Court, 17 February, 2009. See *The Public Competition Enforcement Review* (Third Edition), p. 216.

51 Full text of the guideline (in Japanese) is available at [www.jftc.go.jp/pressrelease/09.december/09121801besshi1.pdf](http://www.jftc.go.jp/pressrelease/09.december/09121801besshi1.pdf).

52 See *The Public Competition Enforcement Review* (Third Edition), p. 282 and p. 293.

53 Id.

54 See footnote 16.

order against Adidas Japan KK finding that it had caused retailers to sell its toning shoes at a designated retail price that it fixed, and that this conduct fell under the category of resale price restriction.<sup>55</sup>

### **iii Outlook**

Now having a greater incentive to make use of the private monopolisation regulations because of the amendment to the surcharge system, the JFTC may take an aggressive approach in enforcing the private monopolisation regulations going forward. Recently, the global economic crisis, which has also affected the Japanese economy, has heightened political concerns of protecting small and medium-sized enterprises, thus strengthening the regulations and enforcement regarding unjust low price sales and abuses of superior bargaining position.<sup>56</sup> Reflecting this trend, the Amendments include a revision to include these two categories of unfair trade practices (i.e., certain types of repetitive ‘unjust low price sales’ and continuous ‘abuse of superior bargaining position’) into the types of conduct that are subject to a surcharge. Some of the terms in the provisions regarding the surcharge, including the term ‘the amount of the transaction with trade partners that suffered the abuse,’ which is the amount used for calculating the surcharge amount against abuse of superior bargaining position cases, are still open to interpretation, and this may cause interpretational problems in cases in the future.

## **IV CONCLUSIONS**

### **i Pending cases and legislation**

Currently, in order to challenge a JFTC order, the alleged violator must first file its complaint with the JFTC tribunal before it can bring it to court. The court’s review of the case is limited only to legal issues (substantive evidence rules) because it is bound by the factual findings of the JFTC; the court, thus, can only examine whether the findings by the JFTC are supported by ‘substantive evidence,’ and whether there is any illegality in the JFTC’s decision. Statistics show that it is very difficult to have a court reverse the decision made by the JFTC through its tribunal procedure. The JFTC’s review process continues to be strongly criticised and an amendment to completely abolish the JFTC’s tribunal system was submitted to the Diet but has yet to be discussed by the legislators.<sup>57</sup>

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55 Cease-and-desist order, 2 March 2012.

56 The JFTC launched the ‘Programme for Promoting Fair Trade with Small- and Medium-sized Enterprises’ in November 2009 and established the ‘abuse of superior bargaining position taskforce’ in its investigation bureau in order to exercise its power over abuse of superior bargaining position cases more swiftly and effectively.

57 See Subsection I, iii, Amendment of the Act.

**ii Analysis**

Since the amendments to the Act enacted in 2005 went into effect in 2006, Japanese competition law has been rigorously enforced not only in Japan but also overseas, in line with the enforcement efforts of foreign authorities. The Amendments will further the JFTC's effort in this regard. As a result, foreign companies that have heretofore paid little attention to Japan's rapidly evolving competition law will now need to monitor its development in order to avoid finding themselves the subject of a JFTC investigation.



## Appendix 1

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# ABOUT THE AUTHORS

### **KOZO KAWAI**

*Nishimura & Asahi*

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

### **FUTABA HIRANO**

*Nishimura & Asahi*

Ms Hirano is a counsel at Nishimura & Asahi and handles a broad range of matters pertaining to Japanese competition law, including making leniency filings, representing clients before the JFTC and the courts, and providing clients with competition law advice, including those governing M&A transactions. Ms Hirano graduated from the University of Tokyo (LLB) in 1995 and earned a Master of Law from Harvard Law School in 2006. She also worked at Hunton & Williams LLP, Washington DC, 2006 to 2007. Before joining Nishimura & Asahi, she worked as an assistant judge of the Kyoto District Court, 1997 to 1998, at the Ministry of Economy, Trade and Industry, Tokyo, 2000 to 2002 and at the Ministry of Foreign Affairs, Tokyo, 2003 to 2004.

**TOMOYUKI NUMATA**

*Nishimura & Asahi*

Mr Numata is an associate at Nishimura & Asahi and handles a broad range of significant domestic and international cartel cases, including a recent international cartel case in connection with high voltage power cables and a unilateral conduct violation case. Mr Numata also advises clients extensively on merger regulations and other various competition law issues. Mr Numata graduated from the University of Tokyo Law School (JD) in 2006.

**NISHIMURA & ASAHI**

Ark Mori Building  
1-12-32 Akasaka, Minato-ku  
Tokyo 107-6029  
Japan  
Tel: +81 3 5562 8500  
Fax: +81 3 5561 9711 / 14  
info@jurists.co.jp  
www.jurists.co.jp/en