Chapter 12

JAPAN

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I INTRODUCTION

i Laws and enforcement

With regard to the regulations on dominance, the Japanese Anti-Monopoly Law ('AML') has two concepts, which are private monopolisation[2] and unfair trade practices.[3]

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 cartel activities, the first half of Article 3, which prohibits private monopolisation, covers primarily unilateral conduct by dominant firm(s). Article 2, paragraph 5 of the AML provides the definition of '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.

Article 19 of the AML prohibits unfair trade practices, which are defined by Article 2, paragraph 9 of the AML and mainly cover unilateral conduct similar to private monopolisation. Such conduct includes, for example, predatory pricing, exclusionary dealing, tying, refusal to deal, discriminatory treatment, and abuse of superior bargaining

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2 Article 3 of the AML.

3 Article 19 of the AML. In addition to the definition of unfair trade practice in Article 2, paragraph 9 of the AML, the Japan Fair Trade Commission has separately provided the Designation of Unfair Trade Practices, which lists the conducts that it designates as unfair trade practice.

position. Unfair trade practices apply not only to dominant firms but also to non-dominant firms; however, the Japan Fair Trade Commission ('JFTC') has been more successful in establishing cases against dominant firms, considering the impact of their conduct on the relevant market.

The types of conduct covered by private monopolisation and unfair trade practice substantially overlap. Private monopolisation is, however, subject to more serious sanctions, including criminal charges[4] and administrative sanctions (surcharge payment orders and cease-and-desist orders), compared to unfair trade practices, which are subject to administrative sanctions[5] but not criminal charges. The JFTC therefore tends to apply private monopolisation to prohibited conduct with a more serious adverse impact on competition, typically the conduct of a firm with a larger market share.

ii Guidelines

In relation to the regulation on dominant firms, the JFTC publishes two guidelines: the Guidelines on Exclusionary Private Monopolisation[6] ('the Exclusionary Private Monopolisation Guidelines') and the Guidelines on Abuse of Superior Bargaining Position.[7] These two 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.

iii The JFTC's enforcement policy

Although the JFTC is willing to take enforcement action against dominant firms based on private monopolisation, in practice, the number of actual cases of private monopolisation is very limited. This is because it is not easy to prove that the business conduct of a single firm has actually restrained competition in a certain market, while the JFTC is more active in enforcing horizontal cartel activities by and among two or more firms.[8] On the

4 Please see Section V.i, *infra*. Although private monopolisation is subject to criminal sanctions under the AML, they have not been implemented to date. In practice, it is unlikely that a party conducting private monopolisation is actually penalised for such conduct.

5 With regard to unfair trade practices, the administrative surcharge, which is imposed only for certain types of conduct, was introduced by an amendment to the AML that became effective in January 2010. Please see Section V.i, *infra*.

6 The Guidelines for Exclusionary Private Monopolisation under the AML as of 28 October 2009.

7 The Guidelines concerning Abuse of Superior Bargaining Position under the AML as of 30 November 2010.

8 Another reason why the enforcement against private monopolisation has not been so active in Japan would be because the degree of market concentration is generally low in the Japanese market. In other words, the number of firms with dominant power is relatively limited in Japan.

other hand, the JFTC has recently indicated, in particular, its proactive stance[9] of taking enforcement action against firms abusing their superior bargaining position, in view of protecting small and medium-sized businesses.

iv Sector-specific rules

Sector-specific competition rules exist for the telecommunications and energy sectors. In addition to the laws governing these sectors, there are competition guidelines designed for the telecommunications and energy sectors.[10]

II YEAR IN REVIEW

As noted above, the cases actually enforcing the law against private monopolisation conduct are very limited. In 2012, there was no enforcement against private monopolisation. In the past five years, there has only been one case in which the JFTC has taken enforcement action against 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 pricing policy for copyright licensing fees, for which JASRAC was alleged to have taken advantage of its dominant position in the market.[11] 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. This indicates that it is still very difficult to prove private monopolisation conduct.[12]

In the past 10 years, there have been only four enforcement proceedings against private monopolisation. One high-profile private monopolisation case was the case against Intel KK, a wholly-owned subsidiary of Intel Corporation, which was admonished by the JFTC in March 2005 to cease certain restrictive actions against domestic original equipment manufacturers of personal computers.[13] Another high-profile case was the case against NTT East, in which the JFTC admonished NTT East in December 2003[14] for its exclusionary conduct in optical-fibre internet communication services, by providing its services effectively at a lower price than its access charges so as to price squeeze its

9 The JFTC established a special team called the 'Taskforce for Cases of Abuse of Superior Bargaining Position' in November 2009.

10 The JFTC and the Ministry of Internal Affairs and Communication jointly published the latest version of the Guidelines Concerning the Promotion of Competition in the Telecommunications Sector in April 2012, and the JFTC and the Ministry of Economy, Trade and Industry jointly published the latest version of the Guidelines Concerning Appropriate Electricity Dealings and the Guidelines Concerning Appropriate Gas Dealings in September 2011.

11 The JFTC Cease and Desist Order as of 27 February 2009.

12 In the *JASRAC* case, the JFTC's decision did not discuss fundamental legal issues, such as how to define exclusionary conduct. The JFTC tribunal determined to rescind its order by simply denying the facts that were originally found by the investigator.

13 The JFTC Admonishment as of 8 March 2005.

14 The JFTC Admonishment as of 4 December 2003.

competitors. Despite the party's appeals, the Supreme Court finally upheld the JFTC's decision in December 2011.[15]

With regard to unfair trade practices, the JFTC is particularly active in pursuing cases involving abuse of superior bargaining position. During the five-year period from 2007 to 2011, the JFTC issued 10 orders in cases involving abuse of superior bargaining position among the 59 cases it investigated.[16] 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 against Toys"R"Us-Japan, Ltd, a large toy retailer, in December 2011,[17] and again, a surcharge payment order and a cease-and-desist order against Edion, a home electronics retailer in February 2012.[18]

Further, the JFTC issued a cease-and-desist order against Qualcomm Inc in September 2009 for certain restrictive clauses included in its licensing agreements with mobile phone handset makers, alleging that such clauses violate the prohibition against unfair trade practices.[19] This case, although it did not fall under private monopolisation, also involved issues regarding dominant firms. This order was appealed by Qualcomm at the JFTC tribunal, but the tribunal has not yet issued a decision.

It is difficult to predict the JFTC's policy direction, in particular with regard to private monopolisation due to the small number of precedents in this area. On the other hand, the JFTC repeatedly expresses its active stance to take action against abuse of superior bargaining position. Although this prohibition does not apply only to dominant firms, it should be important for dominant firms to pay attention to their day-to-day business activities with smaller counterparts.

III MARKET DEFINITION AND MARKET POWER

i Definition of dominance

First, in theory, a party is not required to have a dominant position in the relevant market to be an infringer of the AML either due to private monopolisation or unfair trade practice. 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 practice is the more generally applicable type of conduct, regardless of dominance in the relevant market.

As such, there is no clear definition of dominance under the AML. For example, there is no market share threshold above which a company will be presumed to be dominant. Market share is only one of the various factors considered when determining whether private monopolisation or unfair trade practice has occurred.

15 Judgment of the Supreme Court as of 17 December 2011.

16 The JFTC 2011 Annual Report.

17 The JFTC Cease and Desist Order and Surcharge Payment Order as of 13 December 2011.

18 The JFTC Cease and Desist Order and Surcharge Payment Order as of 16 February 2012.

19 The JFTC Cease and Desist Order as of 30 September 2009.

On the other hand, a majority (i.e., over 50 per cent) market share is generally considered by the JFTC in setting its enforcement priorities. The Exclusionary Private Monopolisation Guidelines provide a criterion of 50 per cent market share as an indication of the JFTC's enforcement policy, by saying 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.*[20]

Under the AML, there is no concept of 'collective dominance' or 'relative dominance'. In the past, the AML 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.

As for unfair trade practice, in terms of abuse of superior bargaining position under Article 2, paragraph 9, item 5 of the AML, the JFTC provides a guideline for the meaning of 'superior bargaining position' as follows:

> *In order for Party A to have superior bargaining position over the other party (Party B), Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position equivalent thereto, but only needs to have a relatively superior bargaining position as compared to the other transacting party. When Party A has superior bargaining position over Party B, who is a transaction counterpart, it means such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.*[21]

As shown above, 'superior bargaining position' is different from 'dominant position' as recognised in Europe or in the United States. This concept does not require an absolutely dominant bargaining position, but only needs a relatively superior position in terms of the relationship between the relevant parties.

ii Defining the market

With regard to market definition, the Exclusionary Private Monopolisation Guidelines provide the method of defining the relevant market. The basic approach of the test is broadly the same as for merger control, consisting of product or service definition (considering purpose of the good or service, price trends and supply volume, and perception and reactions of customers) and geographical definition (considering geographical coverage of supplier's business operation as well as customers' purchasing habits, characteristics of the good or service, and transportation method and cost). In

20 Part 2, paragraph 1 of the Exclusionary Private Monopolisation Guidelines.

21 Section II, part 1 of the Guidelines Concerning Abuse of Superior Bargaining Position under the AML.

the case of private monopolisation, however, the JFTC in practice tends to identify exclusionary or exploitive conduct first and then define the scope of market to be affected by such conduct as the relevant market.

Although the Exclusionary Private Monopolisation Guidelines do not include a description of market definition (such as the 'small but significant and non-transitory increase in price' (SSNIP) test) that is 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 the past cases of private monopolisation, the market definition was not substantially argued through the application of economic analysis.

IV ABUSE

i Overview

The concept of abuse under the AML is different from that in Europe or in the United States because there is no general rule prohibiting 'abuse of dominant position' in Japan. As noted above, the AML provides for two concepts in regulating dominant firms: private monopolisation and unfair trade practice.

With regard to private monopolisation, there are two types of prohibited conduct: exclusionary conduct in exclusionary private monopolisation and exploitative conduct in private monopolisation by control. Exclusion is interpreted as making it difficult for other firms to continue their business activities or preventing them from entering the market. Control means to deprive other firms of their freedom to make decisions concerning their business activities and to force them to obey the controller.

Exclusionary conduct may include the 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.[22] Regarding a case where the negative impact on the market is not large enough to amount to private monopolisation, unfair trade practice may also be applied to the exclusionary conduct.

In addition to assessment of the conduct itself, the JFTC also evaluates the actual impact of conduct on the relevant market. In private monopolisation, Article 3 of the AML explicitly requires the realisation of the substantial restraint of competition as a prerequisite. In this regard, this is not 'illegal *per se*' type of conduct. The Exclusionary Private Monopolisation Guidelines set out how to assess the impact of the conduct at issue on the competition.

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 realisation of the substantial restraint of competition, the likeliness of impeding fair competition is sufficient for unfair trade practice. Another difference between private monopolisation and unfair trade practices is that only certain types of conduct are listed as unfair trade practices under the AML. On the other hand,

22 The Exclusionary Private Monopolisation Guidelines provides the list of such prohibited conduct.

private monopolisation can cover various types of exclusionary or exploitative conducts. Although the relevant guidelines provide for several types of conduct that may constitute private monopolisation (see Section IV.ii, *infra*), the lists are not exhaustive, but merely provide for typical problematic conducts.

In theory, subjective intent is not required either in private monopolisation or unfair trade practice. In practice, subjective intent could be one of the factors that are considered in evaluating whether certain conduct is deemed to be anti-competitive conduct.

ii Exclusionary abuses

Predatory pricing

Predatory pricing may constitute exclusionary private monopolisation or an unfair trade practice.[23,24] If an undertaking, without justifiable grounds, supplies goods or services continuously for a consideration that is lower than the average variable costs, thereby tending to cause difficulties to the business activities of other undertakings, such sales may constitute predatory pricing. Even where the price is over 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 to be predatory pricing.[25,26]

While margin squeeze is not specifically covered by the private monopolisation or unfair trade practice, it could constitute private monopolisation. As mentioned above, in the *NTT East* case, the JFTC found that NTT East was conducting a price squeeze and ordered it to cease and desist from this conduct.

Exclusionary dealing

Exclusionary dealing is covered by both exclusionary private monopolisation and unfair trade practice.[27] 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 said trade partner, such conduct may constitute private monopolisation or unfair trade practice.

Giving rebates can be seen as such exclusionary dealing in certain circumstances. If an undertaking gives rebates to trade partners on the condition that the amount or volume of purchases from the undertaking or the proportion of amount (volume) of

23 Article 2(9)(iii) and 19 of the AML and Clause 6 of the Designation of Unfair Trade Practices.

24 Unjust high price purchasing (e.g., purchasing raw materials from particular suppliers at high prices and making it difficult for other undertakings to purchase such raw materials) is also banned as an unfair trade practice if it causes difficulties to the business activities of other undertakings. Such act may also constitute a private monopolisation depending on the market situation. However, unjust high purchasing has not been applied to date.

25 The JFTC will examine the characteristics of the price-cut goods, the intention or purpose of the price cutter, the effects of the price cutting, the status of the entire market, and other factors.

26 The Guidelines Concerning Predatory pricing under the AML as of 18 December 2009 (revised as of 23 June 2011) and Part II-2 of the Exclusionary Private Monopolisation Guidelines.

27 Clause 11 or 12 of the Designation of Unfair Trade Practices.

purchases from the undertaking to the total amount (volume) of its 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 fall under private monopolisation or unfair trade practice as exclusionary dealing.[28]

Tying (or leveraging)

Tying (or leveraging) may constitute exclusionary private monopolisation or unfair trade practice[29] 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 of the tied product, judging from:

a conditions of the entire market of the tying and the tied products;
b position of the said undertaking in the market of the tying product;
c positions of the said undertaking and its competitors in the market of the tied product;
d period of the conduct, number of trade partners, and quantity of products to be traded; and
e other conditions of the conduct.[30]

Refusal to deal

An undertaking basically has the discretion to select to whom and on what conditions it supplies products. However, if an undertaking carries out, beyond a reasonable degree, a refusal 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,[31] such refusals or imposition of restrictions may fall under exclusionary private monopolisation or unfair trade practice.[32]

Refusal to license patents, know-how or other types of intellectual property does not usually constitute private monopolisation or unfair trade practice, although if a holder of intellectual property abuses its right and unreasonably harms competition, such an abuse will be a violation of the AML. For example, if members of a patent pool

28 The JFTC will determine whether rebate-giving has such 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. (Part II-3 of the Exclusionary Private Monopolisation Guidelines).

29 Clause 10 of the Designation of Unfair Trade Practices.

30 Part II-4 of the Exclusionary Private Monopolisation Guidelines.

31 Whether or not a product in the upstream market can be considered to be a 'product necessary for the trading customers to carry out business activities in the downstream market' will be assessed from the viewpoint of whether or not a) the product is an unsubstitutable and indispensable product for the trading customers to carry out business activities in the downstream market and b) it is impossible in reality for the trading customers to produce the product through the trading customers' own effort, such as investment and technological development (Part II-5 of the Exclusionary Private Monopolisation Guidelines).

32 Clause 1 or 2 of the Designation of Unfair Trade Practices.

regarding intellectual property essential for manufacturing certain products refuses to license to particular parties without justifiable reasons, such refusal may be considered a private monopolisation or unfair trade practice.[33]

iii Discrimination

Discriminatory pricing

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 costs, such as the 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 a consideration that discriminates between regions or between parties without justifiable reasons, thereby tending to cause difficulties to the business activities of other undertakings, it may fall under exclusionary private monopolisation or unfair trade practice[34] as discriminatory pricing.[35]

Discriminatory treatment

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 applies discriminatory treatment, beyond a reasonable degree, to certain customers concerning a product necessary for the trading customers to carry out business activities in the downstream market, such discriminatory treatment may fall under exclusionary private monopolisation or unfair trade practice.[36]

iv Exploitative abuses

Abuse of superior bargaining position

If an undertaking makes use of its superior bargaining position over the other party, unjustly in light of normal business practices, thereby (1) causing such other party to purchase goods or services irrelevant to the transactions regarding which the undertaking has a superior bargaining position; (2) causing the other party to provide money, services or other economic benefits; or (3) refusing to receive goods pertaining to transactions from the said party, causing the party to take back the goods pertaining to the transactions after receiving the goods from the party, delaying the payment of 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 position[37] and may constitute private monopolisation as well.

33 The Guidelines for the Use of Intellectual Property under the AML as of 28 September 2007 (revised as of 1 January 2009).

34 Article 2(9)(ii) and 19 of the AML and Clause 3 of the Designation of Unfair Trade Practices.

35 Part II-5 of the Exclusionary Private Monopolisation Guidelines.

36 Clause 4 of the Designation of Unfair Trade Practices.

37 Article 2(9)(v) and 19 of the AML.

Excessive pricing

Under the AML, the setting of a high price by a dominant firm does not usually constitute private monopolisation or an unfair trade practice because the existence of dominant power itself does not violate the AML. However, if a dominant firm engages in any unreasonable act such as announcing its 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 to be 'controlling the activity of competitors' and constitute private monopolisation.[38]

V REMEDIES AND SANCTIONS

i Sanctions

Administrative sanctions

The JFTC shall order an undertaking conducting any of the following acts to pay surcharges:

a Private monopolisation:
- private monopolisation by control if the relevant activity is (1) pertaining to the consideration; or (2) substantially restraining (a) supply volume, (b) market share, or (c) transaction counterparties and thereby affecting the consideration; and
- exclusionary private monopolisation.

b Unfair trade practices:[39]
- concerted refusal to trade;
- discriminatory pricing;
- predatory pricing;
- resale price restriction; and
- abuse of superior bargaining position.

The amount of surcharge shall be 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

38 *Noda Shoyu, etc. v. the JFTC* (Tokyo High Court, 25 December 1957).

39 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. (Please see footnote 40, *infra*.)

rates are different for each type of conduct falling under private monopolisation or unfair trade practice. The basic surcharge rate for each type of conduct is as follows:[40,41]

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

Criminal sanctions

An individual who has committed private monopolisation or attempted to commit a private monopolisation may be subject to imprisonment for not more than five years or a criminal fine of not more than ¥5 million.[42] Also, a corporation that has committed private monopolisation may be subject to a fine of ¥500 million or less.[43] However, 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 to penalise such parties.[44]

ii Behavioural remedies

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

40 With respect to private monopolisation (limited to controlling the business activities of other undertakings), the surcharge rates will be increased by 50 per cent if the undertaking has been ordered to pay surcharges or subject to a similar order due to private monopolisation or unfair trade restrictions (i.e., cartel activities) during the past 10 years. On the other hand, with respect to unfair trade practices (except abuse of superior bargaining position), the JFTC may order the payment of surcharges only when an undertaking has been investigated regarding or charged with the same type of unfair trade practice during the past 10 years. (In other words, a surcharge payment order will not be issued if the undertaking conducted the relevant unfair trade practice for the first time.)

41 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.

42 Article 89, paragraph 1 of the AML.

43 Article 95, item 1 of the AML.

44 Please see Section VI.i, *infra*.

such act.[45] The JFTC typically orders undertakings (1) to cease and desist from such act (or to make sure that such act has been discontinued); (2) not to conduct the same or a similar act in the future; and (3) to take measures to prevent recurrence of such act such as holding antitrust seminars or implementation of antitrust compliance programmes. The JFTC has authority to order other necessary measures as well to eliminate such acts as well as the anti-competitive effects caused by them.[46,47]

iii 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 disposition of shares of the relevant company controlled by the person conducting private monopolisation by control (*Toyo Seikan* case[48]) or dissolution of a trade association (*Acetic ether association*[49]).

VI PROCEDURE

i Investigation

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

There are two types of investigations: administrative investigation 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. The JFTC has the authority to enter and inspect the relevant business office and other necessary sites. The JFTC regularly orders (1) persons concerned with a case or witnesses to appear for an interrogation, or to prepare and submit reports regarding the underlying facts; (2) expert witnesses to appear and provide expert opinions; and (3) persons holding books, documents and other materials to submit such materials. In practice, it should be

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

46 For example, the JFTC in the past has ordered renegotiation of price with customers, relocation of salespersons, and amendment of particular clauses of the relevant agreement.

47 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 anti-competitive effects thereof has been eliminated.

48 The JFTC Cease and Desist Order, 18 September 1972.

49 The JFTC Cease and Desist Order, 18 October 1973.

noted that the JFTC does not allow attorneys to be present at the interrogation by the JFTC. It is also important to note that there is neither attorney–client privilege nor the doctrine of attorney work product under Japanese law. Although the JFTC has authority to conduct a criminal investigation, unlike cases relating to cartels and bid rigging, there have been no such criminal investigations to date for private monopolisation.

The JFTC cooperates regularly with competition authorities in other jurisdictions, such as the United States, Canada, the European Commission and South Korea.[50] In a case involving several jurisdictions, if the JFTC finds it appropriate, it may ask the relevant parties to give waivers so as to provide other authorities with confidential information obtained through the JFTC's investigation.

ii Issuance of orders and hearing by the JFTC

If the JFTC finds a violation of the AML, it will issue a cease-and-desist order or a surcharge payment order, or both, after giving the addressee of such order an opportunity to express its opinions and to submit evidence.

The addressees of such orders can request that the hearing procedure of the JFTC tribunal be commenced.[51] In the hearing procedure, the JFTC will designate an investigator, who shall prove underlying facts and make arguments to maintain the cease-and-desist order or a surcharge payment order, as the case may be, while the undertaking requesting a hearing ('respondent') can counter-argue such facts and arguments. The procedures are presided over by a hearing examiner, who will be designated by the JFTC. Settlement with the JFTC is not available under Japanese law.

If the respondent is dissatisfied with the decision made by the JFTC, it is entitled to file a lawsuit with the Tokyo High Court within 30 days requesting rescission of the decision.[52]

iii Consultation procedures

Prior consultation by the JFTC is available, although the applicant for the consultation has to agree that their name and the details of consultation and response will be published. Under these procedures, the JFTC will give its responses, in principle, within 30 days.[53] It should be noted, however, that as the 30-day period starts to run only after the JFTC

50 The JFTC has entered into bilateral agreements with the United States, the European Commission and Canada concerning cooperation on anti-competitive activities.

51 Once such orders are issued, the orders are binding upon the undertaking whether or not it requests the hearing procedures. Therefore, the undertaking subject to a surcharge payment order has to pay the surcharges even if it challenges the order at the JFTC tribunal. If the order is cancelled after the hearing or court procedures as mentioned below, the money paid will then be paid back.

52 It should be noted that findings of fact made by the JFTC at the hearing procedures shall, if established by substantial evidence, be binding upon the court.

53 In practice, unofficial prior consultation with the JFTC is used as well. However, there is no standard period for response for such unofficial consultation and it should be noted the response in such unofficial consultation is not legally binding upon the JFTC.

is satisfied that it has received sufficient information, it is difficult in practice to estimate how long it would actually take for the applicant to receive responses from the JFTC.

VII PRIVATE ENFORCEMENT

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 where private parties have taken actions in relation to private monopolisation, such as *Naigai v. Nipro*[54] and *AMD v. Intel*.[55]

Private parties may seek 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 (1) the intent or negligent acts of the defendant; (2) the amount of damages; and (3) the reasonable causation between the defendant's conduct and the damages. On the other hand, in an Article 25 action, the plaintiff need not prove the defendant's intent or negligence although the plaintiff can commence an Article 25 action only after a cease-and-desist order or a surcharge payment order by the JFTC is finalised. Under Japanese law, class actions are not available. There is no fixed calculation method for damages to be awarded or punitive or treble damages, either.

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

With respect to attorneys' fees, each party generally must pay its own attorneys' fees. However, in both Article 709 actions or Article 25 actions, courts may include some portion of the attorney's fees in the damages to be awarded.

VIII FUTURE DEVELOPMENTS

As the JFTC is strengthening execution of the AML concerning not just domestic cases but also international cases, this may have an impact on future developments of the regulations on dominance. For example, global companies such as Intel and Qualcomm have been subject to investigation on private monopolisation and abuse of dominant

54 The *Naigai v. Nipro* case, relating to Nipro's private monopolisation, was argued in the Tokyo High Court in December 2007. The Tokyo High Court rendered a judgment ordering Nipro to pay approximately ¥100 million. It is reported that Naigai, the plaintiff, is dissatisfied with this judgment and made a petition for acceptance of appeal by the Supreme Court.

55 The *AMD v. Intel* case, relating to Intel's private monopolisation, was argued in the Tokyo High Court in June 2005. This case was settled in November 2009.

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.

In addition, the procedure to request revocation of the JFTC's order may be changed in the future. As described above, an undertaking dissatisfied with a cease-and-desist order or surcharge payment order currently must first request a hearing at the JFTC tribunal before filing an action with a court. However, there has been criticism that the procedure at the JFTC tribunal is biased. Therefore, the JFTC once decided to abolish the hearing procedure at the JFTC tribunal so that an undertaking dissatisfied with an order by the JFTC can directly file an action with the Tokyo District Court. The bill calling for such amendment to the AML was submitted in March 2010, but it had been pending for more than two years before it was scrapped due to the dissolution of the House of Representatives in December 2012. However, this amendment to the AML is still expected to be enacted in the future.

Appendix 1

ABOUT THE AUTHORS

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

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Takahiro Azuma is an associate at Nishimura & Asahi. He joined the firm in 2003, and has been involved in a broad range of matters pertaining to Japanese competition law since then. He represents Japanese and foreign clients before the JFTC in connection with private monopolisation and cartel cases. He also provides clients with advice relating to Japanese competition law, such as pre-merger notifications in M&A transactions and antitrust compliance matters. Mr Azuma graduated from the University of Tokyo (LLB) in 2002 and earned a Master of Laws degree from New York University School of Law in 2009. He worked at the New York office of Dewey & LeBoeuf LLP from 2009 to 2010.

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