Competition Law in Asia Pacific

A Practical Guide

Edited by

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The authors would like to especially acknowledge the contribution of Kristel Harlow, former Senior Associate, and Eric White and Prayas Pradhan, lawyers in the Sydney competition law practice at Minter Ellison.

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He has been at the forefront of every major legal development in India and authored several publications on legal topics ranging from corporate law, capital markets, project finance to competition law. He is a member of the Advisory Board of the Centre for Study of the Legal Profession established by the Harvard Law School, a member of the Advisory Board of the National Institute of Securities Markets and on Board of IIM, Trichy. He is advisory member of the Finance Planning Standard Board of India and Macquarie. He is also a member of the Media Legal Defence Initiative International Advisory Board. Mr. Shroff is part of various committees of the Confederation of Indian Industry – the National Council on Corporate Governance, the National Committee on Capital Markets, Private Equity & Venture Capital, Commodities Markets, Financial Investors and Regulatory Affairs.

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Nisha contributes to evolving competition law jurisprudence in India, by way of various articles and chapters in books on Indian competition law. Her articles were also shortlisted for the 2013 and 2014 Antitrust Writing Award. She is a member of the Permanent Working Group on Non-Cartel Behavioural Issues of the IBA Antitrust Committee and a member of the Ad Hoc Working Group on Merger Control of the IBA Antitrust Committee.

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Farid Nasution is a senior associate of Hadiputranto, Hadinoto & Partners ("HHP"), the Jakarta member of Baker & McKenzie. Previous to working with HHP, he has had more than seven years' experience, first as an Investigator of the Business Competition Supervisory Commission (KPPU); the Indonesian competition Commission. His last position with KPPU was the Head of Substantive Review, the Directorate of Merger. Since, joining HHP, Farid has given advice on all types of anti-monopoly issues for many major multinational and national companies, including distribution agreements, horisontal agreements, abuse of dominant position, private and public tender and transactions. He has been involved in many high-profile anti-monopoly cases and numbers of merger and acquisition reviews.

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MALAYSIA

Lim Koon Huan graduated from the University of Melbourne with the degrees in Commerce and LLB (Hons). She was admitted to the Malaysian Bar in 1995 and commenced her legal practice with Skrine.

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She co-heads the Competition and Compliance Practice Groups and leads the Trade Remedies Practice Group in Skrine.

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Apart from his work in international trade law, Jason is a litigator and has conducted full trials and hearings in the Malaysian Sessions Court and High Court. He also regularly appears as junior counsel in the Malaysian Court of Appeal and Federal Court.

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The authors wish to thank Nicholas Lai for his valuable assistance in completing this chapter

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He was a partner at Rudd Watts and Stone (now Minter Ellison Rudd Watts) between 1989 and 1998, and in Minter Ellison (Sydney) from 1998 to 2007, where he headed Minter Ellison's Competition & Regulation practice. During his term of office as Telecommunications Commissioner he had responsibility for the implementation of the telecommunications reforms of 2006 and 2011, including the functional separation of the incumbent, Telecom New Zealand, in 2008, followed by structural separation in 2011. He also oversaw the introduction of local loop & bitstream access regulation, accounting separation, and mobile termination, roaming and co-location regulation.

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In 2012, Daren was named by *Global Competition Review* as one of the world's most talented competition lawyers under the age of forty in its *40 Under Forty* survey, and is the only South-east Asian lawyer recognised in the history of the list. *Who's Who Legal* (2013) cites Daren as being "very skilled", and "one of the finest lawyers in the region", and *Chambers Asia-Pacific* (2014), ranks him in Tier 1 as a "star performer".

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Japan

Yusuke Nakano and Taku Matsumoto
Anderson Mori & Tomotsune

PART 1: OVERVIEW – LEGISLATION AND REGULATORY AUTHORITIES

1.1 Japanese competition law regime

The key competition law legislation in Japan is the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (*Shiteki Dokusen no Kinshi oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu*) (Act No. 54 of 1947; the '**Antimonopoly Act**').

The Antimonopoly Act provides that its goals are, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, and by preventing excessive concentration of economic power, to promote fair and free competition, and thereby the democratic and sound development of the national economy, and to ensure the interest of general customers.

The Antimonopoly Act has an important part in competition policy, and establishes the Japan Fair Trade Commission (the '**JFTC'**), the main agency responsible for implementing the Antimonopoly Act.

The Antimonopoly Act is supplemented by the **Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontracto**rs (*Shitauke Daikin Shiharai Chien To Boshi Ho*) (Act No. 120 of 1956; the '**Subcontract Act**') and the Act against Unjustifiable Premiums and Misleading Representations (*Futo Keihin Rui oyobi Futo Hyoji Boshi Ho*) (Act No. 134 of 1962). Additionally, the JFTC periodically issues guidelines to clarify the interpretation of the Antimonopoly Act.

The Antimonopoly Act aims to achieve its goals by prohibiting:

(a) unreasonable restraint of trade;
(b) private monopolization;
(c) unfair trade practices; and

(d) business combinations the effect of which may be substantially to restrain competition, and by requesting that entrepreneurs (*jigyosha*) give prior notification of any business combination over a certain scale.

The prohibitions in the Antimonopoly Act may be classified into ex-ante regulation and ex-post facto regulation:

(a) Ex-ante regulation (business combination)
(b) Ex-post facto regulation
  – Concerted action
    • Horizontal restrictions (unreasonable restraint of trade, including cartel, joint research and development, etc.)
    • Vertical restrictions (private monopolization, certain unfair trade practices, including resale price restriction, trading on restrictive terms, abuse of superior bargaining position, etc.)
  – Unilateral action (private monopolization, certain unfair trade practices, including unjust low price sales)

There are also regulations related to trade associations (*jigyosha dantai*), which are not covered in this Japan chapter.

1.2 Scope of application – entities

Application to bodies corporate and non-corporate private entities

The Antimonopoly Act applies to 'entrepreneurs' and 'trade associations'. An 'entrepreneur' is broadly defined as 'a person who operates a commercial, industrial, financial or other business' (Article 2, paragraph 1 of the Antimonopoly Act). As such, any kind of business that involves commerciality, industrial or financial actions, irrespective of whether it is a corporate body, will be subject to the Antimonopoly Act. Therefore, qualified persons such as doctors, lawyers, accountants and notary publics, as well as individuals and national and local governments are within the meaning of entrepreneur as defined in the Antimonopoly Act.

Application to governments and their authorities

A national or local government can constitute an 'entrepreneur' and be subject to the Antimonopoly Act if it is engaged in business activities.

1.3 Scope of application – extraterritoriality

Application to foreign corporations

The JFTC has a imposed sanction against a foreign company for 'private monopolization', (the MDS Nordion Case – JFTC recommendation decision, 3 September 1998). Therefore, foreign companies (particularly those occupying a high market share) should be careful in this field.

'Unfair trade practices' is a unique regulation in Japan, and a foreign company conducting business which affects the Japanese market should sufficiently understand the details of these regulations. The JFTC has also imposed sanctions against foreign companies for 'unfair trade practices' (see paragraph 6.8).

With respect to 'business combination', it is important for a foreign company to examine if the contemplated combination contains any substantial problems from competition perspectives, or if it meets notification thresholds, from the early stages of its planning, regardless of whether a Japanese affiliate is involved.

Applying the Antimonopoly Act to foreign companies becomes troublesome if the foreign company has not established an entity in Japan. There are no court decisions or JFTC decisions that clearly support the 'effects doctrine' (i.e., 'the Antimonopoly Act has jurisdiction if there is influence over the Japanese market'). However, there have been JFTC decisions addressed to foreign companies, suggesting that the JFTC has also not yet adopted the principle of pure territoriality. In the Cathode Ray Tube Price Cartel Case (JFTC Cease and Desist Order and Payment Orders for Surcharge, 7 October 2009), turnover arising from sales from a foreign company to another foreign company was held to be the basis for the calculation of the surcharge. Though this issue is being challenged at the JFTC hearing, foreign companies should carefully consider the Antimonopoly Act on the assumption that the 'effects doctrine' may prevail.

Entrepreneurs conducting business in Japan should refer to Japanese laws, and judicial precedents, and also to the guidelines issued by the JFTC for further information on the application of the Antimonopoly Act. These guidelines are available on the JFTC's web site (http://www.jftc.go.jp/en/legislation_gls/index.html), and many of them are translated into English. The JFTC also conducts prior consultations to provide advice to entrepreneurs.

The jurisdiction of the Antimonopoly Act often becomes an issue in the service of documents. The MDS Nordion Case was settled on the assumption that documents could be served to a Japanese agent appointed by MDS Nordion. The procedure for serving documents to foreign companies has been clarified by amendments to the Antimonopoly Act made in 2002. Recently,

in the Marin Hose Case in 2008, a cease and desist order and payment order for surcharge were issued for the first time to a foreign company which did not have an agent in Japan, and the documents were served to the company outside of Japan. Since this case, there have been several others in which the JFTC's orders were served to foreign companies by 'service by publication'.

Amendments to the Antimonopoly Act in 2009 included provisions for exchanging information with foreign competition authorities, clearly stating that information can be provided to foreign authorities, and setting out the conditions for providing information. These amendments reflect the JFTC's principle of actively promoting international cooperation.

There have been no criminal antitrust cases on the extradition of a fugitive from Japan, or demanding extradition from other countries.

Application to foreign governments/sovereigns

There are no specific provisions in the Antimonopoly Act or precedence in case law regarding application of the Antimonopoly Act to foreign governments/sovereigns. However, if they fall under the definition of 'entrepreneur' and their conduct affects a Japanese market, we cannot exclude the possibility that the Antimonopoly Act may be applied to foreign governments/sovereigns.

1.4 Regulatory authorities

The JFTC is an independent administrative commission and is established under Chapter VIII of the Antimonopoly Act. The JFTC is the main agency responsible for administering and enforcing the Antimonopoly Act.

The JFTC investigates and may issue administrative orders to enforce the Antimonopoly Act, but does not bring enforcement actions by way of court proceedings.

Amendments to the Antimonopoly Act in 2005, and an increase in the number of JFTC personnel (number of members, officers for examination (*shinsa senmonkan*) and subcontracting transaction examiners (*shitauke torihiki kensakan*), etc.) have strengthened the JFTC's ability to enforce the Antimonopoly Act.

Although the JFTC is not directly involved in civil court proceedings, the process is designed to involve the JFTC, such as by permitting the court to seek the JFTC's opinions as to the amount of damages. Third parties that are affected by a violation of the Antimonopoly Act may seek damages and an injunction from the Court (injunctions are available only in unfair trade practices offences).

Similar to ordinary criminal litigation, criminal competition cases are instituted by the Public Prosecutors' Office, and trials are heard by the Court.

However, the Antimonopoly Act adopts the exclusive accusation system for major violations of the Antimonopoly Act. Accordingly, if no accusation is filed by the JFTC, the Public Prosecutors' Office will not bring charges.

For details of administrative, criminal, and civil proceedings, please refer to the paragraphs describing the enforcement actions by type of violation (Paragraphs 3.4, 4.4, 5.3, 6.4, 7.3, 8.5 and Part 9).

1.5 Key reference table of anti-competitive conduct prohibitions

The table overleaf provides an overview of the primary anti-competitive conduct prohibitions under the Antimonopoly Act, along with relevant penalties, exceptions and defences.

PART 2: OVERVIEW OF FUNDAMENTAL CONCEPTS

2.1 Introduction

This Part sets out how key concepts under the Antimonopoly Act are interpreted.

2.2 'Market'

Though the Antimonopoly Act uses the term 'any particular field of trade' rather than the term 'market', those two terms are exchangeable, and we use the term 'market' in this chapter.

The measure for 'Market Definition' is not specified in the Antimonopoly Act; however, the 'Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination' (revised most recently on 14 June 2011; the '**Business Combination Guidelines**') state that the JFTC's fundamental attitude concerning 'Market Definition' for business combinations is that 'a particular field of trade denotes the scope for determining whether the effect of the business combination may be to restrain competition, and is determined, in principle, in terms of substitutability for users, such as the product range (including a service [omitted]) that is the subject of a particular trade and the range of trading areas'.

The Guidelines also state that 'when necessary, substitutability for suppliers is also considered' and that, when examining substitutability for users, the JFTC will suppose that a specific product is supplied by a monopolist in a specific region. Under this assumption, the JFTC considers the degree to which users can substitute an alternative product or region for the purchase of the product if a small but significant and non-transitory increase in price (e.g.,

Anti-competitive conduct prohibitions (extends over double-page spread)

Prohibition summary & classification	*Primary section references (Antimonopoly Act)*	*Criminal enforcement*
Horizontal arrangements between competitors (non-merger)		
Unreasonable restraint of trade *(Quasi-per se/ quasi-strict for conduct to which per se/strict applies in the United States)*. Any entrepreneur by contract, agreement or any other means, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties contrary to the public interest causing a substantial restraint of competition in any particular field of trade.	Second half of Article 3 (prohibits unreasonable restraint of trade) Article 2, paragraph 6 (defines unreasonable restraint of trade)	Yes Corporations A maximum criminal fine of YEN 500 million per violation Individuals Maximum imprisonment with work of 5 years and/or maximum criminal fine of YEN 5 million per violation
Vertical arrangements between suppliers and acquirers (non-merger)		
Unfair trade practices – DISCRIMINATORY CONSIDERATION	Article 19 (prohibition) Article 2, paragraph 9, item 2; and paragraph 3 of General Designations (definition)	No
Unfair trade practices – DISCRIMINATORY TREATMENT ON TRADE TERMS	Article 19 (prohibition) Paragraph 4 of General Designations (definition)	No
Unfair trade practices – DISCRIMINATORY TREATMENT IN A TRADE ASSOCIATION	Article 19 (prohibition) Paragraph 5 of General Designations (definition)	No
Unfair trade practices – UNJUST LOW PRICE SALES	Article 19 (prohibition) Article 2, paragraph 9, item 3; and paragraph 6 of General Designations (definition)	No
Unfair trade practices – UNJUST HIGH PRICE PURCHASING	Article 19 (prohibition) Paragraph 7 of General Designations (definition)	No
Unfair trade practices – TIE-IN SALES	Article 19 (prohibition) Paragraph 10 of General Designations (definition)	No

Administrative enforcement	*Primary exceptions/defences*	*Comp Law in the Asia-Pacific*
Yes – payment order for surcharge – generally 10% of volume of affected commerce (up to 3 years) Cease and desist order	Leniency System Related bodies corporate Domestic air carriers (Article 110, item 2, Civil Aeronautics Act) Shipping business operators (Article 28, Marine Transportation Act)	see Part 3
Yes Payment order for surcharge (where certain additional requirements are met) Generally 3% of volume of affected commerce (up to 3 years)	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Cease and desist order	Justifiable grounds	see paragraph 4.2
Yes Payment order for surcharge (where certain additional requirements are met) Generally 3% of volume of affected commerce (up to 3 years)	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2

Prohibition summary & classification	*Primary section references (Antimonopoly Act)*	*Criminal enforcement*
Unfair trade practices – TRADING ON EXCLUSIVE TERMS	Article 19 (prohibition) Paragraph 11 of General Designations (definition)	No
Unfair trade practices – TRADING ON RESTRICTIVE TERMS A transaction will be an illegal trading on restrictive terms if an entrepreneur conducts a transaction with another party on terms that unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party, other than on exclusive terms or resale price restriction.	Article 19 (prohibition) Paragraph 12 of General Designations (definition)	No
Unfair trade practices – RESALE PRICE MAINTENANCE The illegal act of one party making another party who purchases goods from the first party maintain its resale price, or otherwise restricting its free decision to set its own resale price, and maintaining further resale prices.	Article 19 (prohibition) Article 2, paragraph 9, item 4 (definition)	No
Anti-competitive arrangements		
Unfair Trade Practices – CONCERTED REFUSAL TO TRADE The act of refusing or restricting trade in concert with competitors, or causing other entrepreneurs to refuse or restrict their trade.	Article 19 (prohibition) Article 2, paragraph 9, item 1; and paragraph 1 of General Designations (definition)	No
Misuse of market power		
Unfair trade practices – ABUSE OF SUPERIOR BARGAINING POSITION An entrepreneur must not impose terms and conditions disadvantageous to other entrepreneurs by using their superior bargaining position.	Article 19 (prohibition) Article 2, paragraph 9, item 5 (definition)	No

Administrative enforcement	*Primary exceptions/defences*	*Comp Law in the Asia-Pacific*
Yes Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 4.2
Yes Payment order for surcharge Generally 3% of volume of affected commerce (up to 3 years) Cease and desist order	Certain copyrighted works Related bodies corporate (Distribution Guidelines) Justifiable grounds	see Part 7
Yes Payment order for surcharge (where certain additional requirements are met) Generally 3% of volume of commerce arising from sales to unaffected competitors of the refused	Justifiable grounds	see paragraph5.2
Yes Payment order for surcharge (where certain additional requirements are met) 1% of volume of commerce arising from sales to/purchases from affected counterparties (up to 3 years)	Justifiable grounds	see paragraph 6.2

Prohibition summary & classification	*Primary section references (Antimonopoly Act)*	*Criminal enforcement*
PRIVATE MONOPOLISATION Any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or otherwise 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 any particular field of trade.	The first half of Article 3 (prohibition) Article 2, paragraph 5 (definition)	Yes (theoretically) Corporations Maximum criminal fine of YEN 500 million per violation. Individuals Maximum imprisonment with work of 5 years and/or maximum criminal fine of YEN 5 million per violation.
Mergers/acquisitions		
DOMESTIC AND INTERNATIONAL (conditional) The Antimonopoly Act forbids business combinations the effect of which may be substantially to restrain competition in any particular field of trade, or which is conducted through unfair trade practices.	Article 10, paragraph 1; Article 13, paragraph 1; Article 14; Article 15, paragraph 1; Article 15-2, paragraph 1; Article 15-3, paragraph 1; and Article 16, paragraph 1	No

Administrative enforcement	*Primary exceptions/defences*	*Comp Law in the Asia-Pacific*
Yes Payment order for surcharge (where certain additional requirements are met) Exclusionary type – Generally 6% of volume of affected commerce (up to 3 years) Control type – Generally 10% of volume of affected commerce (up to 3 years) Cease and desist order	Related bodies corporate (Distribution Guidelines) Justifiable grounds	see paragraph 6.3

Yes Cease and desist order	Pressure on import New entries Competitive pressure from downstream/neighbouring markets Efficiency (unlikely successful) Failing firm	see Part 8

between 5% and 10% for about a year) is implemented by the monopolist to maximize its profit ('SSNIP Test'). When considering substitutability for suppliers, the JFTC considers the degree to which other suppliers can switch, within a relatively short period of time (generally, one year), without substantial cost or risk, from the manufacture and sale of a product or region to those of the product, if a small but significant and non-transitory increase in price is implemented for the product and region.

The JFTC regards the substitutability for users as a starting point of 'Market Definition' for business combinations, and as necessary, considers the substitutability for suppliers (however, the JFTC gives greater weight to the substitutability for suppliers compared with foreign countries).

Alternatively, in non-merger cases, the JFTC gives weight to the contents and scope of violations. For example, in a case involving rigging of public bids, the JFTC defines a segmentalized and specific market such as 'product "x" for the purpose of procurement by city "y"'.

The court, similar to the JFTC, has held that as to 'Market Definition' for unreasonable restraint of trade, 'it is suitable to define a market with defining extent, etc., that competitions are restricted in accordance with objectives, areas and situations, etc.' (Sticker Bid-Rigging Case, Tokyo High Court judgment, 14 December 1993).

2.3 'Competitors'/ in 'competition'

The Antimonopoly Act defines 'competition' as 'a state in which two or more entrepreneurs, within the normal scope of their business activities and without making any material change to the facilities for, or kinds of, such business activities, engage in, or are able to engage in, any act listed in the following items'.

Article 2, paragraph 4 of the Antimonopoly Act specifies that 'listed in the following items' means 'supplying the same or similar goods or services to the same user' and 'receiving supplies of the same or similar goods or services from the same supplier'.

In summary, 'competition' is interpreted:

(a) to mean that seller and buyer competition exists;
(a) to include existing and potential competition; and
(a) to include competition between distributors of the same brand.

2.4 'Substantial restraint of competition' and 'tendency to impede fair competition'

Under the Antimonopoly Act, in order for there to be an unreasonable restraint of trade or private monopolization, substantial restraint of competition is

required. In judicial precedents of unreasonable restraint of trade, substantial restraint of competition has been interpreted as the function of the relevant market is restrained, (the Tama Bid-Rigging (*Arai-gumi*) SurchargeCase) or due to a decrease of competition itself, it has emerged, or it is emerging that the specific entrepreneur or entrepreneur group may, to a certain extent, freely control the market by influencing conditions including price, quality or quantity (Toho Subaru Case, Tokyo High Court judgment, 19 September 1951). For further details of substantial restraint, see paragraph 3.3 below.

'Tendency to impede fair competition' (impediment to fair competition), which can be found where the extent of restriction of competition does not amount to 'substantial restraint of trade', is one of the requirements for a finding of unfair trade practices (Article 2, paragraph 9, item 6 of the Antimonopoly Act etc.). For details, see paragraph 4.2 below.

PART 3: CARTELS (AGREEMENTS BETWEEN COMPETITORS)

3.1 Overview

Under the Antimonopoly Act, cartels (including bid rigging) and other practices to avoid competition between competitors are prohibited as 'unreasonable restraints of trade'.

3.2 Prohibitions

The second half of Article 3 of the Antimonopoly Act prohibits the unreasonable restraint of trade. This provision prohibits entrepreneurs from substantially restricting competition by coordination among competing entrepreneurs, such as cartel conduct or bid-rigging.

Unreasonable restraint of trade is defined in Article 2, paragraph 6 of the Antimonopoly Act as business activities by which:

(i) 'any entrepreneur' (subject);
(ii) 'by contract, agreement or any other means, irrespective of its name (means)';
(iii) 'in concert with other entrepreneurs' (concerted activity with other entrepreneurs);
(iv) 'mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties' (mutual restriction of business activities, etc.);
(v) 'contrary to the public interest' (anti-public interest);

(vi) causing 'a substantial restraint of competition in any particular field of trade' (substantial restraint of competition).

3.3 Elements of the prohibition

Agreement between two or more competitors

The term (iii) 'in concert with other entrepreneurs' requires the involvement of more than one entrepreneur. Unilateral action cannot constitute an unreasonable restraint of trade (rather, unilateral action may amount to private monopolization or unfair trade practices). Although the text of the Antimonopoly Act does not expressly exclude the possibility that unreasonable restraint of trade may be committed in vertical relationships, there is judicial precedent which has held that it cannot (Newspaper Sales Channel Restriction Case, Tokyo High Court judgment, 9 March 1953).

An entrepreneur will not be considered as having concerted with other entrepreneurs if that entrepreneur simply conducts itself in the same way as other entrepreneurs (e.g., simultaneously increasing prices). Rather, there must be some sort of communication of intention between entrepreneurs (Plywood Bid-Rigging Case, JFTC hearing decision, 30 August 1949 and the Tama Bid-Rigging (*Arai-gumi*) Surcharge Case, Supreme Court judgment, 20 February 2012).

However, an express agreement between entrepreneurs is not necessary to prove a 'communication of intention', and an implied agreement shall suffice (Toshiba Chemical Case, Tokyo High Court judgment, 25 September 1995.). In many cases, there is no direct evidence of a communication of intention, and the JFTC may prove 'communication of intention' by cumulative circumstantial evidence (Kyowa Exeo Surcharge Case, Tokyo High Court judgment, 29 March 1996). The Toshiba Chemical Case indicates that if entrepreneurs conduct themselves in the same way as other competitive entrepreneurs after exchanging information on an increase in price between them, the existence of a 'communication of intention' shall be inferred unless exceptional circumstances indicate that an act was performed based on independent judgment.

Mutual restriction of business activities

Item (iv) requires mutual restriction of business activities and the like. The concerted activity must have some binding force. A sanction against a breach of the agreement is not necessary to constitute 'mutual restriction', and a conclusion of some type of agreement shall suffice (the Tama Bid-Rigging (*Arai-gumi*) Surcharge Case etc.). In addition to the 'restriction of business activities', item (iv) also lists 'conduct of business activities' as prohibited activities. However, the distinction between the two is not important in practice.

Contrary to the public interest

The term (v) 'contrary to the public interest' is also one of the requirements for unreasonable restraint of trade. However, there is no judicial precedent in which the action in question has not constituted an unreasonable restraint of trade on the basis that it was not contrary to the public interest, suggesting that this term does not have any practical meaning when considering unreasonable restraint of trade.

Substantial restraint of competition

Item (vi) 'a substantial restraint of competition in any particular field of trade' refers to circumstances in which:

- the function of the relevant market is restrained (the Tama Bid-Rigging (*Arai-gumi*) Surcharge Case); or
- due to a decrease of competition itself, it has emerged, or it is emerging that the specific entrepreneur or entrepreneur group may, to a certain extent, freely control the market by influencing conditions including price, quality or quantity (Toho Subaru Case).

In practice, this requirement considers price cartels and bid-rigging separately. With respect to price cartels, whether the parties' total share of the market exceeds 50% is important when determining the impact on the market, though it is not the only criteria for consideration.

For example, in the Takamatsu Tofu Price Cartel Case (JFTC recommendation decision, 29 November 1968) seven entrepreneurs, including an entrepreneur who held a share of approximately 30%, (the total share of those seven entrepreneurs was approximately 50%) committed a price cartel. The JFTC determined that competition was substantially restricted because the combined market share of the relevant entrepreneurs was 'approximately 50%' in the market and it was difficult for other entrepreneurs (outsiders) to increase output.

With respect to bid-rigging, though there is not yet settled precedent on the treatment of a 'cooperator' or 'outsider', courts have determined whether competition is substantially restricted by considering many factors, including whether:

- cooperation from other entrepreneurs is generally expected (the Tama Bid-Rigging (*Arai-gumi*) Surcharge Case);
- price competitiveness of other entrepreneurs is inferior to that of a certain entrepreneur because of their small business size (the Tama

Bid-rigging (*Nishimatsu Construction*) Surcharge Case, Tokyo High Court j udgment, 29 May 2009); or
- a certain entrepreneur could have controlled other entrepreneurs by requesting their cooperation (Stoker Type Incinerator Bid-Rigging Case, Tokyo High Court judgment, 26 September 2008).

With respect to the problems of joint development research, see paragraphs 3.9 and 4.9.

3.4 Remedies and sanctions

The method of sanction against unreasonable restraint of trade varies widely as follows.

Administrative disposition

The primary and most common methods of sanction against unreasonable restraints of trade are a cease and desist order, and payment order for surcharge (*kachokin*). Both are administrative dispositions.

a) Cease and desist order
A cease and desist order means 'the measures necessary to eliminate the violation or to ensure that the violation is eliminated'. Such orders may be made by the JFTC pursuant to Article 49, paragraph 1 of the Antimonopoly Act.

Though the specifics of a cease and desist order vary, the typical contents include:

(a) to confirm that the violation has ceased;
(b) to notify consumers that it will perform business based on their own voluntary judgment, after taking corrective measures;
(c) to prohibit repeated violations; and
(d) to report to the JFTC after taking corrective measures.

The JFTC has in the past also included more tailored requirements in a cease and desist order, for example:

- that a code of conduct for compliance with the Antimonopoly Act be prepared, that regular training of sales staff regarding compliance with the Antimonopoly Act be conducted, that an audit be regularly conducted by the legal department (Okayama City Junior High Schools, School Excursion Price Cartel Case, JFTC cease and desist order, 10 July 2009), and

– that certain employees be transferred to a different position and should not be returned to sales work for at least 5 years (Bridge Bid-Rigging Case, JFTC recommendation decision, 18 November 2005).

Criminal penalties are available for violations of final and binding cease and desist orders. The penalties are imprisonment with work for not more than two years, a fine of not more than three million yen, or both for individuals, and a fine of not more than three hundred million yen for corporations. Violation of a cease and desist order before it becomes final and binding is subject to an administrative fine.

If a cease and desist order against an entrepreneur becomes final and binding, an infringement is presumed (with the possibility of rebuttal by the recipient of the order) in the private action for compensation for damage filed for the relevant violation of the Antimonopoly Act (Oil Price Fixing Case, Supreme Court judgment, 4 April 1978 and Tsuruoka Oil Case, Supreme Court judgment, 8 December 1989).

Amendments to the Antimonopoly Act in 2009 provide that the JFTC may issue a cease and desist order to the entrepreneur who committed the violation *and* to the entrepreneur who obtains the business related to the violation, and also extended the period for the statute of limitation for cease and desist orders from three years to five years.

b) Payment order for surcharge

If an unreasonable restraint of trade occurs and it pertains to consideration of goods or services or substantially restrains supply or purchase volume, market share or transaction counterparties with respect to goods or services and thereby affects the consideration, the JFTC must order a payment of surcharge.

In practice, as the unreasonable restraints of trade the JFTC normally pursues pertain to consideration, a payment order for surcharge comes with a finding of unreasonable restraint of trade.

The amount of the surcharge is calculated by multiplying the amount of sales of the object products or services during the period in which the unreasonable restraint of trade was implemented (the maximum period is three years) by the surcharge calculation rate of the type of relevant business as described in Table 1 (Calculation Rate of Surcharge) below.

In bid rigging cases, the object products or services whose amount of sales will become the basis for calculation of the surcharge are those products or services, among all the products and services subject to the basic or underlying agreement, which caused actual restrictions on competition by coordination of acceptance of orders etc. based on the underlying agreement (Stoker Type Incinerator Bid-Rigging (*JFE Engineering*) Surcharge Case, Tokyo High Court judgment, 28 October 2011 (this case is different from the above

Stoker Type Incinerator Bid-Rigging Case, Tokyo High Court judgment, 26 September 2008) and the Tama Bid-Rigging (*Arai-gumi*) Surcharge Case). However, in price cartel cases, all of the object products or services subject to the basic or underlying agreement will become the basis for the calculation of the surcharge, unless there are extraordinary circumstances showing that they are excluded from the object products or services by express or implied agreements between the relevant entrepreneurs (Polypropylene (*Idemitsu*) Surcharge Case, Tokyo High Court judgment, 26 November 2010).

If the entrepreneur has been subject to a payment order for surcharge due to unreasonable restraint of trade or private monopolization within the past 10 years, the calculation rate of surcharge is weighted by 1.5. In addition, the calculation rate of the surcharge imposed against entrepreneurs who play a major role in an unreasonable restraint of trade is weighted by 1.5 (only as to amount of sales on or after the effective date of amendments in 2009). If an entrepreneur satisfies both weighted requirements (i.e., by committing repeated violations and playing a major role), the calculation rate of surcharge is weighted by 2.

The calculation rate of surcharge is reduced by 20% if:

(a) an entrepreneur ceases violation one month prior to the 'Investigation Start Date' (which in most cases means the date of on-site inspection (or 'dawn raid') conducted by the JFTC);
(b) the entrepreneur does not fall under the event that requires weighting of the surcharge; and
(c) the implementation term of violation is less than two years. Such weight or mitigation of the calculation rate of surcharge is determined in accordance with the rate described in Table 2 (Conditions of Reduced Calculation Rate of Surcharge). If certain requirements are satisfied, an entrepreneur who has not committed any violation, but who obtains a business related to a violation by merger, corporate split or business transfer, can still be the addressee of a payment order for surcharge.

Table 1: Calculation Rate of Surcharge

	General	*Mitigated*	*Weighted*	*If several weighted requirements are satisfied*
General	10% (4%)	8% (3.2%)	15% (6%)	20% (8%)
Retailers	3% (1.2%)	2.4% (1%)	4.5% (1.8%)	6% (2.4%)
Wholesalers	2% (1%)	1.6% (0.8%)	3% (1.5%)	4% (2%)

Table 2: Conditions of Reduced Calculation Rate of Surcharge

Type of Business	*Conditions*
Manufacturing business, Construction business, Transportation business or any other business (excluding those mentioned below)	Any corporation whose amount of capital or total amount of contribution is not more than three hundred million yen or any corporation or individual whose number of regular employees is not more than three hundred.
Wholesale business	Any corporation whose amount of capital or total amount of contribution is not more than one hundred million yen or any corporation or individual whose number of regular employees is not more than one hundred.
Service business	Any corporation whose amount of capital or total amount of contribution is not more than fifty million yen or any corporation or individual whose number of regular employees is not more than one hundred.
Retail business	Any corporation whose amount of capital or total amount of contribution is not more than fifty million yen or any corporation or individual whose number of regular employees is not more than fifty.
Other business	Standard set forth by the cabinet order.

If a corporation satisfies the following conditions of the relevant type of business, the figures in the brackets in Table 1 above will apply.

The statute of limitation for payment order for surcharge is five years. The highest amount of a total surcharge in a single case (including those pending) is approximately 27 billion yen and the highest amount of a surcharge imposed on a single company in a case is approximately 13.1 billion yen (as of 1 November 2014).

Criminal sanctions

An unreasonable restraint of trade may be subject to criminal punishment: an individual who commits an unreasonable restraint of trade shall be punished by imprisonment with work for not more than five years, by a fine of not more than five million yen, or both. Any corporation whose employee or officer commits an unreasonable restraint of trade shall be punished by a fine of not more than five hundred million yen.

If several violations are identified, the crimes are consolidated and weighted, and the maximum period of imprisonment with work will be extended to not more than seven years and six months, and the maximum amount of the fine to be imposed on the individual and the corporation will be increased to the upper limit set by the laws and regulations multiplied by the number of violations.

In practice, for individuals, all punishment by imprisonment with work has been imposed with a suspension sentence and actual imprisonment with work has never been executed. If a court sentences imprisonment for over

three years, a suspension sentence is not available. The amendment in 2009 increased the upper limit of imprisonment period from three years to five years, indicating that 'even if certain violations do not constitute a consolidated punishment, it is possible that actual imprisonment with work may be imposed'.

Any criminal violation of the Antimonopoly Act may only be found if the JFTC files an accusation (Article 96, paragraph 1 of the Antimonopoly Act). In practice, the JFTC determines whether to file the accusation after consulting with the Public Prosecutors' Office at the Accusation Council.

There are 17 cases in total (as of 1 November 2014) in which the JFTC has filed criminal accusations of unreasonable restraint of trade in the Antimonopoly Act since the Illegal Oil Cartel Case (including the Nagoya Municipal Metro Engineering Work Bid-Rigging Case, Japan Green Resources Agency Bid-Rigging Case, Zincic Coated Steel Plate Cartel Case). As the employees of an entrepreneur may be arrested if the JFTC files an accusation, criminal punishment serves as an important deterrence.

Civil suits

a) Claim for damage

Entrepreneurs and consumers who have incurred damage may file a claim for civil damages against entrepreneurs who committed the unreasonable restraint of trade, and may claim for damages based on joint tort theory (Articles 709 and 719 of the Civil Code and Article 25 of the Antimonopoly Act) or claim for unjust enrichment (Article 703 of the Civil Code).

To claim damages based on joint tort theory, the plaintiff is required to establish:

(a) an infringement of rights;
(b) damage;
(c) causation; and
(d) intention or negligence.

To establish damage, the consumer who has incurred damage due to the unreasonable restraint of trade is required to establish the difference between the product price increased due to the unreasonable restraint of trade and the price to be set without the unreasonable restraint of trade (assumed price or 'but for' price). A Supreme Court precedent concerning price fixing held that the retail price immediately before the implementation of the price fixing may be regarded as the assumed price, provided that there is no significant change to economic factors during the period from implementation of the price fixing up to the purchase of the products by the consumers. It also indicated that

consumers shall bear the burden of proving that 'there is no significant change to economic factors and so forth' (Tsuruoka Oil Case, Supreme Court judgment, 8 December 1989, etc.). The plaintiff consumer lost that case because the court decided that the condition for the presumption was not satisfied on the ground that there had been significant changes to economic factors after implementation of the price fixing. The plaintiff of this case was an indirect victim and therefore proof of damage was difficult. If a plaintiff is a direct victim, proof of damage is easier to establish. Increasingly, the Court determines the amount of damages by reference to Article 248 of the Code of Civil Procedure, which came into force in 1998. Article 248 empowers the court to determine a reasonable amount of damages if it is proved that damage has occurred but it is difficult to establish due to the nature of damage.

b) Liquidated damages

In light of the difficulty in proving damage, if a local public agency or independent administrative institution is involved in a bidding procedure, the agreement often provides that the bidder shall pay a certain amount of money if any bid-rigging or other misconduct is found with respect to the relevant agreement (liquidated damages). This special provision is common in local prefectural governments, ordinance-designated cities, and cities with populations of three hundred thousand or more. Though the amount of the liquidated damages varies on a case by case basis, it is common to set the amount to 10% of the contract amount.

To strengthen the penalty against violating entrepreneurs, there has been a proposal to take strict measures, including increasing the amount to 20% or more of the amount of the contract (e.g., 'Policy on Prefectural Public Procurement Reform (Immediate Report)' as of 18 December 2006 prepared by the Project Team regarding the Public Procurement of the National Governors' Association).

c) Derivative action

If a director of a company allows an unreasonable restraint of trade, or overlooks it because he/she did not pay reasonable attention, the shareholders may file a derivative action against the director for damages incurred by the company. That derivative action can be brought for violation of the Antimonopoly Act was confirmed by the Stock-Loss Compensation Case by Nomura Securities, Supreme Court judgment (7 July 2000). Wilful misconduct or negligence of the director must be proved to establish the director's responsibility.

An example of a recent significant case which triggered a shareholders' derivative suit associated with an unreasonable restraint of trade is the derivative action against Sumitomo Electric Industries, Ltd. ('**SEI**'). In this case, SEI had received JFTC payment orders for surcharges totalling approximately 8.9

billion yen for two cartel cases involving optical fibre cables and automotive wiring harnesses. SEI paid the amounts charged and certain SEI shareholders filed a derivative action against SEI's management for failing to seek leniency, claiming that the management should pay damages in the same amount to SEI. The case was settled on 7 May 2014 on terms including:

(a) payment by the management to SEI of 520 million yen as a settlement amount; and
(b) investigation into the cause of, and development of measures to prevent a recurrence of the contraventions by an external investigative committee, as per the shareholders' demand.

This is considered to be the highest settlement amount for a derivative action in Japan. This case is particularly significant as it suggests that shareholders may pursue management for its decision as to whether to apply for leniency, and also raises the issue as to the need for companies to build a framework for appropriate use of leniency programs where necessary or desirable.

Others: nomination suspension

The 'Central Public Works Contract System Operational Liaison Council Model for the Outline of Nomination Suspension Measures for Construction Contracts' (the '**Nomination Suspension Model'**) stipulates that measures to suspend participation in nomination / bidding procedures should be taken against any person who commits a violation of the Antimonopoly Act involving bids for certain public works ('**Nomination Suspension Measures**').

Though the Nomination Suspension Model is not law, it is of great practical influence and many public work outsourcers have established a similar outline of nomination suspension measures. The maximum nomination suspension period under the Nomination Suspension Model is three years.

Under the Nomination Suspension Model, an entrepreneur will be subject to the nomination suspension measures upon the receipt of a cease and desist order, and even if the entrepreneur contends against the cease and desist order, the nomination suspension measures will not be suspended. If leniency is applied for and the application of leniency is published by the JFTC (after the JFTC confirming the applicant's intention to make the application publicly known), the term of the Nomination Suspension Measures is mitigated by half.

3.5 Leniency/immunity programs

The Leniency System

The Leniency System was introduced by amendments to the Antimonopoly Act in 2005, together with the reform of the surcharge system, to increase the deterrent effect of the surcharge system. Prior to the amendment, the surcharge was calculated based on the amount of sale of products and services that were the subject of the unreasonable restraint of trade, and as such did not have sufficient weight to deter violations for entrepreneurs who provided many products or services. Additionally, entrepreneurs did not previously have any incentive to report violations to the JFTC.

Under the Antimonopoly Act, the JFTC could issue a payment order for surcharge separately from fines as criminal punishment. This was criticized as 'Double Punishment' and the nature of the surcharge has therefore been discussed. Previously, the surcharge was explained to be an 'administrative measure' aimed at removing unreasonable economic benefits and ensuring social justice and deterring violations, and as such differed from criminal punishment. However, after the amendment in 2005, the nature of the surcharge became closer to a 'sanction' because it was weighted for repeat offences and mitigated for voluntary surrenders. Therefore, the amendment aimed to balance the criticism of 'Double Punishment' by deducting half of the amount of a criminal fine (imposed by a final and binding decision) from the amount of any surcharge.

The number of leniency applications had increased steadily since the introduction of Leniency System until Fiscal Year 2011 (from 1 April 2011 to 31 March 2012). Since then, the number has been on the decline. The number of leniency applications in Fiscal Years 2011 through 2013 are 143 (record high), 102 and 50, respectively. There have been 725 applications since the introduction of Leniency System (for approximately seven years and three months). There have been 98 published cases where the Leniency System has been used, and those cases identify 235 instances of individual entrepreneurs using the system.

Operation of the Leniency System

If an entrepreneur satisfies certain conditions, the surcharge will be exempted as follows:

(a) for the first applicant who submits reports and materials before the Investigation Start Date, the surcharge will be totally exempted;

(b) for the second applicant who submits reports and materials before the Investigation Start Date, 50% of the surcharge will be reduced;
(c) for the third applicant who submits reports and materials before the Investigation Start Date, 30% of the surcharge will be reduced;
(d) for the fourth or fifth applicant who submits reports and materials which the JFTC is unaware of before the Investigation Start Date, 30% of the surcharge will be reduced; and
(e) for the applicant who submits a report or submits materials after the Investigation Start Date, 30% of the surcharge will be reduced.

If five entrepreneurs have already made an application before the Investigation Start Date, other companies who make an application before or after the Investigation Start Date will not receive a reduction of the surcharge. If no entrepreneur makes an application before the Investigation Start Date, each of the first three entrepreneurs who claim the violation after the Investigation Start Date can obtain a 30% reduction of the surcharge.

If an entrepreneur satisfies certain requirements, several entrepreneurs within the same business group may jointly apply for exemption or reduction from the surcharge and will be allotted the same rankings.

Under the Leniency System, only the surcharge can be exempted or reduced. Cease and desist orders and responsibilities in civil actions are not exempted. Recently, however, the JFTC valued the fact that the surcharge was exempted due to leniency applied for before the Investigation Start Date and did not issue a cease and desist order for a number of cases. Further, considering that the incentive to apply for leniency is reduced if criminal punishment is still applied even if the surcharge is exempted, the JFTC has adopted a policy not to file criminal accusations against the first entrepreneur who submits reports and materials regarding the exemption of surcharge before the Investigation Start Date ('The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations'). Officers and employees of the relevant entrepreneur will be similarly exempt from accusation if, under the circumstances, they should be treated the same as the relevant entrepreneur (i.e., if they cooperate with the internal investigation of the applicant and the JFTC's investigation).

Practical points to consider

Under the Leniency System, whether the surcharge is reduced or exempted, or whether the criminal accusation is also exempted or reduced will largely depend on whether the entrepreneurs voluntarily surrender and are the first to submit reports and materials before the Investigation Start Date.

If entrepreneurs consider themselves to be committing violations, it is highly advisable to promptly decide and act to secure the position as the first one to submit reports and materials, because the timing of applying for leniency by sending a report by facsimile is extremely important under the Japanese Leniency System. If Company A sends a report by facsimile (which may be called 'marker') to the JFTC after learning only 'suspicious events' and Company B sends a report by facsimile three business days later after carefully confirming facts, Company A will beat Company B in terms of the queue for leniency (provided that Company A submits detailed reports and materials as a follow-up).

3.6 Extraterritorial application

Please see paragraph 1.3.

3.7 Application to state/government entities

Please see paragraph 1.2 above.

3.8 Treatment of related bodies corporate

Though traditional theories suggest there can be no unreasonable restraint of trade between affiliated companies connected via 'control' relationship (which are normally found where there one company holds a majority of voting rights in another), the JFTC has in the past issued a cease and desist order and a payment order for surcharge to entrepreneurs for bid rigging among four wholly-owned subsidiaries of a certain company (Eco-station Rigging Case (*Kanto Koshinetsu* Region), cease and desist order, 11 May 2007). However, the circumstances of that case involved:

(a) a government-subsidized project (for construction of eco-stations) for which public funds were to be used, therefore requiring an appropriate bidding process; and
(b) the JFTC's traditional belief that due process of bidding must be observed.

Thus, while the JFTC may adopt a similar judgment in future bid rigging cases, it is less likely that the JFTC would rule as illegal any price agreement between affiliated companies other than bid rigging.

3.9 Treatment of joint ventures

Whether an entrepreneur is a joint venture is not determined under the Antimonopoly Act. Rather, unreasonable restraint of trade may occur, according to the 'Guidelines Concerning Joint Research and Development under the Antimonopoly Act' (most recently revised on 1 January 2010; '**Joint Research and Development Guidelines**') in the following circumstances:

(a) 'if by undertaking R&D jointly, its activities are restricted among the participants, and which, in turn, may substantially restrict competition in the technology or product market'; or
(b) 'in implementing a joint R&D project by "competing" firms in the product market, if business activities are mutually restricted in terms of price and volume, etc. of a product'. As such, joint R&D may amount to an unreasonable restraint of trade, and the Antimonopoly Act will apply.

Though the JFTC has not issued a cease and desist order in regard to joint sales practices and the like, there are cases involving consultation with the JFTC. The JFTC has ordinarily handled cases in accordance with the 'rule of reason'. For example, if there is a joint creation of a product between an entrepreneur with a large market share in a region and another entrepreneur with a large market share in another region, there is no issue if there is an emergency need for the creation, such as need for mutual accommodation of products in a time of disaster. However, in the absence of such emergency need, the JFTC may rule that such practice constitutes an unreasonable restraint of trade.

If an unincorporated partnership created under the Civil Code engages in bid rigging, each partner or member of the partnership would likely be subject to a cease and desist order and a payment order for surcharge (Kanto Landscaping and Constructing Cooperative Case, hearing decision, 8 September 2003).

3.10 Other exceptions

Exercise of rights under intellectual property laws

Article 21 of the Antimonopoly Act provides that the provisions of the Antimonopoly Act do not apply to acts recognisable as the exercise of rights under Japanese intellectual property law – specifically, the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act.

Acts by a partnership

Article 22 of the Antimonopoly Act provides that the provisions of the Antimonopoly Act do not apply to acts by a partnership which conforms to the requirements listed in each of the following items and which has been formed pursuant to the provisions of the Act:

(a) The purpose of the partnership is to provide mutual support to small-scale entrepreneurs or consumers;
(b) The partnership is voluntarily formed, and the partners may voluntarily participate in and withdraw from it;
(c) Each partner possesses equal voting rights; and
(d) If a distribution of profits among partners is contemplated, the limits of the distributions are prescribed by laws and regulations or in the articles of partnership.

3.11 Sector/ industry-specific regulation/ exceptions

Japanese law includes provisions that exempt the application of the Antimonopoly Act, similar to other countries' laws (Article 110 of the Civil Aeronautics Act and Article 28 of the Marine Transportation Act).

Article 110, item 2 of the Civil Aeronautics Act stipulates that, with regard to a route between a point in the country (Japan) and another point in a foreign country, 'in the case where any domestic air carrier concludes an agreement on joint carriage, fare agreement and other agreements relating to transportation with another air carrier', the provisions of the Antimonopoly Act shall not apply, provided that the domestic air carrier obtains an authorization from the Minister of Land, Infrastructure, Transport and Tourism ('**MLIT**').

Similarly, Article 28, item 4 of the Marine Transportation Act stipulates that 'in the case where any shipping business operator concludes an agreement on terms and conditions of shipping, routes, placement of vessels, and loading with another shipping business operator' the provisions of the Antimonopoly Act shall not apply, provided that prior notification be filed with the MLIT.

3.12 Enforcement action

An example of a recent significant case involving an unreasonable restraint of trade is the Tama Bid-rigging (*Arai-gumi*) Surcharge Case (Supreme Court judgment, 20 February 2012). This case is most significant as the Court offered an exhaustive interpretation of the requirements for bid rigging to constitute an unreasonable restraint of trade as set out in Article 2, paragraph 6 of the Antimonopoly Act.

3.13 Key recent developments and proposals for reform

The JFTC primarily sanctions cases of 'unreasonable restraint of trade', and in particular, has recently been sanctioning an increasing number of price cartels (rather than bid rigging, which has generally been more prevalent in the past) (see Figure 1).

Since the Leniency System was introduced in 2006, there has been a decrease in the number of entrepreneurs contending cease and desist orders. However, the number of entrepreneurs challenging payment orders for surcharges has not decreased significantly.

Recent amendments (yet to take effect) to the Antimonopoly Act will abolish the hearing procedures under the Antimonopoly Act, and cease and desist orders, etc. will be reviewed in appeal litigation by the Tokyo District Court. The amendments will also strengthen due process for entrepreneurs by implementing hearings by officers appointed by the JFTC, and establishing entrepreneurs' right to inspect and copy evidence prior to the cease and desist orders, etc. The amendments will come into effect within one and a half years from the date of promulgation (i.e., no later than 13 June 2015).

PART 4: RESTRAINTS IN VERTICAL AGREEMENTS

4.1 Overview

The Antimonopoly Act prohibits entrepreneurs from engaging in unfair trade practices (Article 19 of the Antimonopoly Act). There are 16 types of 'unfair trade practices', of which several may occur in vertical relationships.

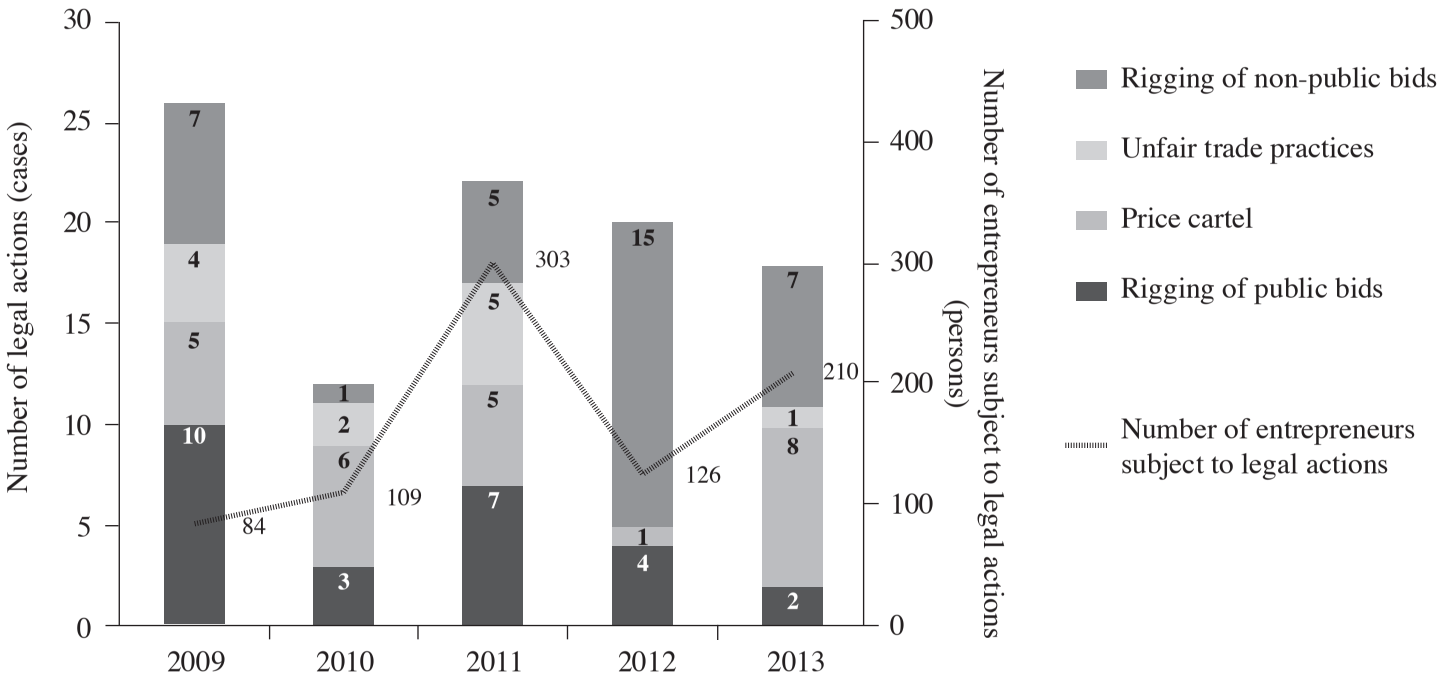
There are five types of actions that are subject to surcharge as 'unfair trade practices' (as set out in Article 2, paragraph 9, items 1 through 5 of the Antimonopoly Act) and 11 types of actions which are never subject to surcharge (as set out in item 6 of the same paragraph and the JFTC Public Notice No. 15 of 1982, the '**General Designations**'). There are other unfair trade practices that may be committed only in a specific industry.

4.2 Prohibitions

The following are the types of unfair trade practices listed in Article 2, paragraph 9 and the General Designations, and prohibited under Article 19 of the Antimonopoly Act:

(1) Concerted refusal to trade;
(2) Other refusal to trade;

Figure 1: Trends of Number of Legal Actions and Entrepreneurs Subject to Legal Actions



Source: Prepared by authors based on the press release issued by JFTC as of May 29, 2013

(3) Discriminatory consideration;
(4) Discriminatory treatment on trade terms;
(5) Discriminatory treatment in a trade association;
(6) Unjust low price sales;
(7) Unjust high price purchasing;
(8) Deceptive customer inducement;
(9) Customer inducement by unjust benefits;
(10) Tie-in sales;
(11) Trading on exclusive terms;
(12) Resale price restriction;
(13) Trading on restrictive terms;
(14) Abuse of superior bargaining position;
(15) Interference with a competitor's transactions; and
(16) Interference with the internal operation of a competing company.

The prohibition on unfair trade practices largely regulates the legality of vertical restraints; however, the prohibition is not restricted to vertical relationships. This chapter focuses on action (13), which is a type of unfair trade practice potentially applicable to any vertical relationship.

Actions (1), (6), and (12) are common in foreign competition laws. Action (14) (abuse of superior bargaining position) is a peculiar type of regulation in Japanese law and is dealt with at paragraph 6.2. Concerted refusal to trade (action 2) is dealt with in Part 5, and the prohibition on resale price restriction (action (12)) is dealt with in Part 7.

Actions (1), (3), (6), (12), and (14) will be subject to surcharge if they satisfy certain additional requirements.

Prohibition: trading on restrictive terms

If an entrepreneur conducts a transaction with another party on terms that unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party, other than on exclusive terms or resale price restriction, the transaction will be an illegal trading on restrictive terms.

One of the typical types of trading on restrictive terms is a 'territorial restriction'. The Guidelines Concerning Distribution Systems and Business Practices (most recently revised June 23, 2011; '**Distribution Guidelines**') classify territorial restrictions as:

(1) area of responsibility system (compelling active sales in the area of primary responsibility);
(2) location system (restricting or designating the place of sales);

(3) exclusive territory (restricting the distributor from selling outside each assigned area); and,
(4) restriction of sales to outside customers (restricting sales to a customer located outside an area from within an assigned area even if there is a request from such customer).

Although territory restriction types (1) and (2) are not, in principle, recognized as illegal, types (3) (if conducted by an 'influential entrepreneur', which has a market share of 10% or more or is within the top three) and (4) may be illegal if there is a possibility of causing price maintenance of a product. The JFTC is widely criticized for its strict view of type (3). However, in the Sankogan Honten Case (Tokyo District Court judgment, 15 April 2004), it was held that to prove that the exclusive territory restriction has an anticompetitive nature, it must be proven that:

(a) the entrepreneur is an influential entrepreneur in the market;
(b) the restriction unjustly restricts business activities; and
(c) it has the effect of maintaining price (which differs from the JFTC's Distribution Guidelines, which require the 'possibility of causing' price maintenance).

4.3 Elements of the prohibitions

Terms such as 'unjustly' or 'without justifiable grounds' are used in the provisions for each of the types of action of unfair trade practices under Article 2, paragraph 9 of the Antimonopoly Act and the General Designations. These terms are interpreted to describe the tendency to impede fair competition. Tendency to impede fair competition involves:

(a) a reduction in competition;
(b) competition by unjust means; and
(c) infringement of the basis of free competition.

Each of the above types of actions has one or two elements of (a) through (c).

With regard to the tendency to impede fair competition of each of the types of action, Article 2, paragraph 9 of the Antimonopoly Act and the General Designations refer to 'unjustly' and 'without justifiable grounds'. 'Without justifiable grounds' is used for certain types of actions which will be considered as illegal unfair trade practices, unless there are justifiable grounds. However, recently there has been strong criticism against heavily relying on the use of one of these terms.

The JFTC often pursues entrepreneurs for unfair trade practices if it is difficult to determine if the case was one of private monopolization, which requires 'substantial restraint of competition'.

4.4 Remedies and sanctions

The following types of unfair trade practice actions are subject to a payment order for surcharge and the same method of enforcement as for unreasonable restraint of trade if certain additional requirements are met:

(a) concerted refusal to trade (action (1));
(b) discriminatory consideration (action (3));
(c) unjust low price sales (action (6));
(d) resale price restriction (action (12)); and
(e) abuse of superior bargaining position (action (14)).

However, there is no criminal punishment available for breaches of the prohibitions on unfair trade practices.

There is also a system to seek injunctive relief from the civil court so that a victim can avoid damage to be incurred in the future. However, since 'material damages' need to be proved, there has been only one case in which injunctive relief has actually been granted.

4.5 Leniency/immunity programs

The Leniency System is not available for a breach of the prohibition on unfair trade practices.

4.6 Extraterritorial application

Please see paragraph 1.3 above.

4.7 Application to state/government entities

As mentioned in paragraph 1.2 above, a State or a local government constitutes an 'entrepreneur' and is subject to the Antimonopoly Act if it is engaged in business activities.

Notable cases in which the entrepreneurial nature of the State or a local government was recognized with unfair trade practices include:

– the New Year's Lottery Postcards Case (Supreme Court judgment, 18 December 1998), which recognized the entrepreneurial nature of the

State (the former Ministry of Posts and Telecommunications) for the issuance and sale of postcards, and
- the Tokyo Metropolitan Shibaura Slaughterhouse Case (Supreme Court judgment, December 14, 1989) which affirmed the entrepreneurial nature of the Tokyo Metropolitan Government in its engagement in the slaughtering business.

In both of these cases, the Supreme Court acknowledged the entrepreneurial nature of the State or the local government without providing any detailed reasons.

4.8 Treatment of related bodies corporate

The JFTC's position on unfair trade between related bodies corporate is set out in the Distribution Guidelines. According to the Distribution Guidelines, 'a trade between a parent company and its wholly-owned subsidiary is, in general, substantively equivalent to intra-company trade and thus is not regulated as unfair trade practices'.

However, the Distribution Guidelines also state that 'when a trade between a parent company and its subsidiary is substantively equivalent to intra-company trade and the parent company restricts the business activities of third parties that is a business partner of the subsidiary, for example, the subsidiary restricts the selling price of its business partner based on the instructions of the parent company, such action of the parent company would be regulated as an unfair trade practice'.

4.9 Treatment of joint ventures

In so far as the parties to a joint venture continue to conduct their own business activities even after the commencement of operations of the joint venture, it is possible that unfair trade practices will be found.

For example, the Joint Research and Development Guidelines drafted by the JFTC state that 'if an arrangement unjustly restricts the business activities of a participant under an arrangement, and may thereby impede fair competition, the arrangement will constitute unfair trade practices' and list a number of typical joint venture conducts that are unlikely to, may, or are likely to, constitute unfair trade practices. The Joint Research and Development Guidelines go further to state that restrictions on the sales prices to a third party of the products based on the fruits of joint research and development would likely be regarded as trading on restrictive terms.

4.10 Other exceptions

There are no other general exceptions for the unfair trade practices provisions, except for those mentioned in paragraph 3.10 above.

4.11 Sector/industry-specific regulation/exceptions

There are 3 industry-specific unfair trade practices (as set out in the JFTC Public Notice No. 9 of 1999, the 'Special Designations in the Newspaper Business', the JFTC Public Notice No. 1 of 2004, the 'Special Designations in the Logistics Business' and the JFTC Public Notice No. 11 of 2005, the 'Special Designations in the Large-Scale Retail Business').

For example, the Special Designations in the Newspaper Business prohibits newspaper publishers from selling newspapers by setting different prices or discounting the set price differently depending on the area or target person. The Special Designations in the Logistics Business and the Special Designations in the Large-Scale Retail Business prohibit certain consignors and large-scale retailers from abusing superior bargaining position against logistics service providers and suppliers (respectively).

4.12 Enforcement action

The Supreme Court has considered whether restricting sales methods amounted to trading on restrictive terms in two cases: the Shiseido Tokyo Sales Case (Supreme Court judgment, 18 December 1998) and the Kao Cosmetics Sales Case (Supreme Court judgment, 18 December 1998) considered whether restricting sales methods amounted to trading on restrictive terms. The issue in these cases was whether manufacturers requiring face-to-face selling of cosmetics to sales stores amounted to trading on restrictive terms. The Supreme Court held that the restriction on the sales method would not be considered 'unjust' as:

(i) 'there are some reasonable grounds' for the restriction of its sales method; and
(ii) manufacturers are imposing the 'same restrictions against other business partners.'

Additionally, acts that prohibit prices from being shown on the advertisement upon selling of the products would be considered as trading on restrictive terms and a cease and desist order could be issued (Johnson & Johnson Case, JFTC cease and desist order, 1 December 2010).

PART 5: OTHER ANTI-COMPETITIVE AGREEMENTS

5.1 Overview

There is no general prohibition on anti-competitive agreements.

Under the Antimonopoly Act, horizontal concerted actions may constitute unreasonable restraints of trade described in Part 3 and vertical concerted actions or restrictions may constitute, unfair trade practices described in Part 4, or private monopolization described in Part 6.

In this Part, we outline the prohibition on unfair trade practices which relates to concerted refusal to trade.

5.2 Prohibition: concerted refusal to trade

The Antimonopoly Act prohibits entrepreneurs from employing unfair trade practices (Article 2, paragraph 9, item 1, item 6 of the same paragraph, paragraph 1 of the General Designations, and Article 19 of the Antimonopoly Act). The act of refusing or restricting trade in concert with competitors, or causing other entrepreneurs to refuse or restrict their trade, is one type of unfair trade practices.

This conduct will amount to illegal concerted refusal to trade except where there are 'justifiable grounds' (see paragraph 4.3). For example, establishing standards regarding product safety between entrepreneurs and reaching an agreement not to purchase any products failing to fulfil those standards will not be regarded as 'illegal', provided that the standards and practices of the product safety are reasonable. If a concerted refusal to trade occurs in transactions related to supply (Article 2, paragraph 9, item 1, Antimonopoly Act), and certain requirements are satisfied, entrepreneurs who commit this violation more than once shall be subject to surcharge.

5.3 Remedies and sanctions

Concerted refusal to trade is punishable by surcharge. Please see paragraph 4.4 for further detail.

5.4 Leniency/immunity programs

Please see paragraph 4.5.

5.5 Extraterritorial application

Please see paragraph 1.3.

5.6 Application to state/government entities

As mentioned in paragraph 1.2 above, a State or a local government constitutes an 'entrepreneur' and is subject to the Antimonopoly Act if it is engaged in business activities.

5.7 Treatment of related bodies corporate

Please see the discussion at paragraph 4.8 above.

5.8 Treatment of joint ventures

Please see the discussion at paragraph 4.9 above.

5.9 Sector/industry-specific regulation/exceptions

There are no other general exceptions in relation to concerted refusal to trade except for those mentioned in paragraph 3.10 above. Also, it is unlikely that the exception under Article 21 will completely alleviate concern regarding concerted refusal to trade (see paragraph 6.5).

5.10 Enforcement action

One case involving a concerted refusal to trade is the Rockman Construction Method Case (JFTC recommendation decision, 31 October 2000). This case concerned the rockman machines necessary for the advanced method of constructing sewers called the 'rockman method'. The constructors (members of the Rockman Association) and machine manufacturer made it impossible for nonmembers to conduct construction using the rockman method by refusing to lend or resell the machines to nonmembers, and refusing to sell or lend the machines to nonmembers. The act of the constructors amounted to a concerted refusal to trade, and, as it was not a joint action with competitors, the act of the machine manufacturers amounted to 'other refusal to trade').

PART 6: ABUSE OF DOMINANCE/MARKET POWER

6.1 Overview

Under the Antimonopoly Act, there is no concept of abuse of dominance or misuse of market power which is substantially similar to that in other jurisdictions. Instead, an abuse of superior bargaining position generally amounts to

unfair trade practices, and market control (including by way of exclusionary act) amounts to private monopolization.

Part 4 provided a general outline of the unfair trade practices regime. This Part provides further detail about the specific unfair trade practice of abuse of superior bargaining position, and sets out the prohibition on private monopolization. It also identifies industry-specific regulation designed to protect the interests of firms in inferior bargaining positions.

6.2 Prohibition: unfair trade practices – abuse of superior bargaining position

Abuse of superior bargaining position is a peculiar type of regulation in Japanese law. To the best of our knowledge, only South Korea and Taiwan have similar regulations.

Entrepreneurs that impose terms and conditions disadvantageous to other entrepreneurs by using their superior bargaining position will be engaging in illegal abuse of superior bargaining position.

Superior bargaining position

The JFTC issued 'Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act' on 30 November 2010. The Guidelines clarify the scope of the prohibition and provide examples of conduct which is likely to breach it. The JFTC has also published a number of other Guidelines concerning abuse of superior bargaining position in relation to particular types of entities or in particular industries.

The Guidelines indicate that whether one party is in a superior bargaining position in relation to the other party is a question of fact which will be determined on a case-by-case basis. Determining whether Party A is in a superior bargaining position is a relative question which takes into account the parties' comparative positions, rather than their size or dominance. The Guidelines indicate that the JFTC will consider:

- the degree of dependence by Party B on transactions with Party A;
- the position of Party A in the market;
- the possibility of Party B changing its business counterpart; and
- other concrete facts indicating the need for Party B to carry out transactions with Party A.

In relationships between a bank and a borrower, a franchiser and a franchisee, and a major retailer and a supplier, the former entrepreneur may have superior bargaining positions over the latter entrepreneur.

Acts which may breach the prohibition

Article 2, paragraph 9, item 5 of the Act specifies types of acts which, when engaged in unjustly in light of normal business practices, will constitute illegal abuse of superior bargaining position:

- causing the party to purchase goods or services other than the one pertaining to the transactions in question;
- causing the party in regular transactions to provide money, services or other economic benefits;
- refusing to receive goods or causing the party to take back the goods;
- delaying payment or reducing the amount of the payment; or
- otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the party.

The Guidelines indicate that whether the conduct is unjust in light of normal business practices is also a question of fact to be determined case by case from the viewpoint of maintaining and promoting fair competition. An act is not justified merely because it is in line with current business practices.

An entrepreneur that continues to abuse its superior bargaining position over a period of time shall be subject to a surcharge, even if the entrepreneur has not received a cease and desist order for the same action in the past. As of 1 November 2014, there are 5 pending cases where the recipient of a payment order for surcharge is challenging the order.

In the Mitsukoshi Case (JFTC consent decision, 17 June 1982), Mitsukoshi held a very strong position in the relevant market (it had the largest market share in the department stores industry and the second largest share in the retail industry). It conducted coercive sales to suppliers by forcing them to purchase products and/or services, among other things.

In the Seven-Eleven Japan Case (JFTC cease and desist order, 22 June 2009), the acts of the franchiser against franchisees amounted to an abuse of superior bargaining position. Seven-Eleven Japan, a franchiser of convenience stores, was operating a system in which the franchisees were responsible for the cost of the products even if the products were disposed of (typically, boxed lunch after the sell-by dates). Under this system, Seven-Eleven Japan forced its franchisees who sold boxed lunches or other products with close expiry dates at reduced prices to stop discounted sales, resulting in the franchisees losing the opportunity to minimize the burden arising from the cost allocation method mentioned above.

6.3 Prohibition: private monopolisation

The first half of Article 3 prohibits entrepreneurs from effecting private monopolisation. Private monopolization is defined in Article 2, paragraph 5 as business activities by which:

(i) 'any entrepreneur';
(ii) 'individually, by combination or conspiracy with other entrepreneurs, or otherwise by any other manner';
(iii) 'excludes or controls the business activities of other entrepreneurs, thereby causing';
(iv) 'contrary to the public interest';
(v) 'a substantial restraint of competition in any particular field of trade.'

The regulation applies to foreign companies, as shown in the MDS Nordion Case.

Unilateral action may suffice

Communications of intention with other entrepreneurs are not necessarily required for 'private monopolization', and unilateral action taken by an entrepreneur may be subject to the prohibition of private monopolization. As the regulations of private monopolization differ from those of unreasonable restraint of trade, it is possible that a case which was initially considered to be an unreasonable restraint of trade may be recognized as private monopolization if communication of intention cannot be proved.

Excluding or controlling the business activities of other entrepreneurs

There are two types of private monopolization regarding the requirements of actions as referred to in item (iii): exclusionary type and control type. The exclusionary type 'excludes' the business activities of other entrepreneurs and the control type 'controls' the business activities of other entrepreneurs.

As exclusion of other entrepreneurs' business activities may occur naturally by fair business activities, the simple fact that some entrepreneurs are being excluded is insufficient to be considered as 'exclusionary'. Rather, the activity must have some element of blame which distinguishes it from justifiable business activities. The 'Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act' set the standards for determining whether a case is exclusionary. The MDS Nordion Case is an example of the exclusionary type. MDS Nordion dominated the majority of the worldwide manufacturing quantity of Molybdenum 99 and also had a large part of the

sales quantity. Under the agreement with two entrepreneurs who purchased Molybdenum 99 in Japan, MDS Nordion imposed obligations on those entrepreneurs to exclusively purchase the total amount of Molybdenum 99 from MDS Nordion to the exclusion of the business activities of its competitors.

An example of the control type is the Noda Shoyu Case (Tokyo High Court judgment, 25 December 1957), in which Noda Shoyu conducted resale price maintenance. Since Noda Shoyu held the largest market share among the four major soy sauce companies, other competing companies had no options other than to maintain the price established by Noda Shoyu to maintain the 'prestige' of their brand and the act was considered as a 'control' type of private monopolization.

6.4 Remedies and sanctions

The JFTC may impose a surcharge on an entrepreneur which illegally abuses its superior bargaining position. For more information about surcharges, please see paragraph 6.2.

The JFTC often pursues entrepreneurs for unfair trade practices if it is difficult to determine if the case was one of private monopolization, which requires 'substantial restraint of competition'.

The following are brief comparisons between the enforcement methods used for private monopolization and unreasonable restraint of trade.

First, as an administrative measure, cease and desist orders and payment orders for surcharge are possible for both of private monopolization and unreasonable restraint of trade. However, the Leniency System is not applicable to private monopolization.

Secondly, criminal sanctions are available to both, i.e., an individual person shall be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or a combination thereof and a company shall be punished by a fine of not more than five hundred million yen. However, there is no private monopolization case in which these penalties were actually applied.

Thirdly, for both private monopolization and unreasonable restraint of trade, there is possibility of a civil action including:

(1) a claim by an entrepreneur or consumers for damages incurred by them; and
(2) derivative actions (see paragraph 3.4).

From a practical viewpoint, it is important to note that:

(i) there has been no payment order for surcharge as to private monopolization since surcharges have been available for exclusionary type (in 2010) and for control type (in 2006); and
(ii) there has been no criminal case as to private monopolization in the history of the Antimonopoly Act.

6.5 Collective dominance

Private monopolization may be committed 'by combination or conspiracy with other entrepreneurs'. In one case, which may be characterized as the Japanese equivalent of a 'collective dominance' case, 10 manufacturers of pachinko pinball game machines established a patent pool and had that entity refuse to grant licenses to outsiders. It was found that this act resulted in substantial restraint of competition and amounted to exclusionary type of private monopolization (*Pachinko* Patent Pool Case, JFTC recommendation decision, 6 August 1997).

6.6 Price discrimination

Discriminatory consideration and discriminatory treatment on trade terms are both expressly prohibited as types of unfair trade practices under Article 2, paragraph 9, item 2 of the Antimonopoly Act and paragraphs 4 and 5 of the General Designations. It is not necessary that a party be in a dominant position to demonstrate a breach of those prohibitions.

6.7 Private monopolization and access to natural monopoly infrastructure/facilities

There is no specific regime in the Antimonopoly Act providing for third-party access to natural monopoly infrastructure or facilities. However, refusal to provide services may amount to private monopolization.

In the NTT East Japan Case (Supreme Court judgment, 17 December 2010), the entrepreneur was legally obliged to allow other telecommunications carriers to use its optical fibre facilities for users established by the entrepreneur. However, the entrepreneur effectively set the fees for users of its own retail service cheaper than the lowest available fees which other telecommunications carriers could set for their retail services, which reflected the wholesale fees the entrepreneur charged to those telecommunications carriers.. The court held that the action amounted to the exclusionary type of private monopolization as the entrepreneur used its position as the only provider in the optic fibre facilities market to set higher wholesale prices for competitors, who had no option but to accept given the need for access. The

action therefore had the effect of complicating competitors' entry to the market. This case may be seen as the Japanese version of a 'squeeze out' case.

6.8 Unfair trade practices and intellectual property rights

Non-assertion of patents clauses (or '**NAP clauses**') are one of the most typical issues of unfair trade practices involving intellectual property. The Intellectual Property Guidelines provide that a NAP clause has a tendency to impede fair competition if it would result in an enhancement of the relevant party's influential position in the product or technology market, or undermine the incentives for the licensees to conduct research and development, thereby impeding the development of new technologies (Microsoft Case, JFTC hearing decision, 16 September 2008; Qualcomm Case, JFTC cease and desist order, 28 September 2009 (under hearing)).

6.9 Other relevant legislation

A key additional regulation relevant to this area is the Subcontract Act. The Subcontract Act has two key purposes:

- to prevent delays in payment of subcontract proceeds, and thus to ensure that transactions between main subcontracting entrepreneurs and subcontractors are fair; and
- to protect the interests of the subcontractors, thereby contributing to the sound development of the national economy.

Although the Act has not yet been enforced against companies located overseas, foreign companies must still be aware of the regulations particularly if they have a subsidiary in Japan.

The Subcontract Act specifies that, with respect to manufacturing contracts, repairing contracts, information-based product creation contracts and service contracts, if the main subcontracting entrepreneur's scale of business exceeds a certain size, and the subcontractor is less than a certain size (e.g., when a main subcontracting entrepreneur with capital exceeding JPY 300 million concludes a manufacturing contract with a subcontractor with a capital of not more than JPY 300 million), a document must be delivered to the subcontractor stating the details of work, the amount of the subcontract proceeds, the date of payment, the method of payment, and other items (Article 3, paragraph 1 of the Subcontract Act). The Act also specifies the matters that should be complied with by main subcontracting entrepreneurs (Article 4 of the Subcontract Act) and sets a penalty interest rate for a delay of payment

by main subcontracting entrepreneurs at 14.6% per year (Article 4-2 of the Subcontract Act).

Recommendations are the primary method of enforcing the Subcontract Act (Article 7 of the Subcontract Act). These are documents which urge violators to take remedial action concerning the violation. If there is a breach of the document delivery obligation under Article 3 of the Subcontract Act, the representatives of the main subcontracting entrepreneur would be subject to a criminal fine of up to JPY 500,000 and the same would be charged for the main subcontracting entrepreneur itself. The risk for breach is not high however, as there has not been a case to date in which a penalty has been imposed. However, a breach of the Subcontract Act carries a relatively high reputational risk as it is possible that the names of entrepreneurs who have received a recommendation and the summary of violations will be published.

6.10 Industry-specific or other exceptions

There are no other general or industry-specific exceptions for a breach of the prohibitions on abuse of superior bargaining position or private monopolization, except for those mentioned in paragraph 3.10 above.

6.11 Enforcement action

In the JASRAC Case (Tokyo High Court judgment, 1 November 2013, pending at the Supreme Court), an entrepreneur was entrusted with the management of music copyrights from owners of copyrights. The entrepreneur allowed broadcasters to use the music, collected royalties from the broadcasters and distributed them to the owners of copyrights. The entrepreneur calculated the royalties without reflecting the ratio of music managed by the entrepreneur to the number of all of the music the broadcaster used.

The only meaningful competitor of the entrepreneur argued that 'if the broadcasters use music managed by other management companies, the total amount of payment of royalties by broadcasters would be increased because the broadcasters should pay royalties to both the entrepreneur and other management companies, so the broadcasters will not use the music managed by other management companies and it is difficult for management companies to do business concerning management of music for broadcasters', and claimed for rescinding the JFTC's decision that held that the business of the entrepreneur did not amount to exclusionary type of private monopolization.

The court held that the competitor had standing to commence litigation rescinding the JFTC's decision and that the entrepreneur's business had an exclusionary effect. The court rescinded the JFTC's decision.

PART 7: OTHER PROHIBITIONS ON UNILATERAL CONDUCT

7.1 Overview

This Part explains the prohibition on resale price restriction, which is a form of 'unfair trade practices' under Article 2, paragraph 9, item 4 and Article 19 of the Antimonopoly Act.

7.2 Prohibition: unfair trade practices – resale price restriction

Resale price restriction is the illegal act of one party making another party who purchases goods from the first party maintain its resale price, or otherwise restricting its free decision to set its own resale price, and maintaining further resale prices.

Though a simple recommendation of a resale price is not illegal, the JFTC determines whether entrepreneurs are simply recommending resale prices or rather are engaging in illegal resale price restriction strictly.

7.3 Remedies and sanctions

Entrepreneurs who repetitively restrict resale prices (and who satisfy certain additional requirements) shall be subject to surcharge.

For general commentary regarding remedies for breaching the prohibition on unfair trade practices, please see paragraph 4.4.

7.4 Leniency/immunity programs

Please see paragraph 4.5.

7.5 Extraterritorial application

Please see paragraph 1.3.

7.6 Application to state/government entities

As mentioned in Paragraph 1.2 above, a State or a local government constitutes an 'entrepreneur' and is subject to the Antimonopoly Act if it is engaged in business activities.

7.7 Treatment of related bodies corporate

Please see paragraph 4.8.

7.8 Treatment of joint ventures

Please see paragraph 4.9.

7.9 Other exceptions

There are no other general exceptions to the prohibition on resale price restriction.

7.10 Sector/industry-specific regulation/exceptions

There is an exemption system for resale price restrictions for certain types of copyrighted works under the Antimonopoly Act. While resale price restrictions constitute an unfair trade practice, the Antimonopoly Act shall not apply to legitimate acts performed to fix and maintain the resale prices of six items: books, magazines, newspapers, music records, music tapes and music compact disks (II-2 of Chapter 12 (Resale Price Maintenance Contracts) of JFTC Annual Report for FY1992). There is no exemption for DVDs and other products not within six categories. The exemptions do not apply if the acts would unreasonably harm the interests of general consumers, or if the seller maintains the resale price of any copyrighted work against the will of the publisher.

7.11 Enforcement action

In the Baby Formula Resale Price Case (Supreme Court judgment, 10 July 1975), the relevant entrepreneur argued that the act of maintaining the resale price promoted inter-brand competition and therefore had a 'justifiable reason'. The Supreme Court rejected the claim by stating that 'though such act may lead to strengthen the competition between the actor and competitors, since such act will not necessarily bring the same economic effects as when free price competition has been conducted between the distributors of such products, existence of anti-competitiveness cannot be denied'.

PART 8: MERGERS

8.1 Overview

The Antimonopoly Act provides two types of regulations for business combinations (stockholdings, interlocking directors, amalgamations, splits, joint share transfer and acquisitions of business, etc.):

(a) substantial regulation which forbids a business combination if it is determined as having the effect of substantially restraining competition in any particular field of trade or conducted through unfair trade practices; and
(b) formalistic regulation which requires a prior notification for business combinations of a certain size.

8.2 Application to offshore acquisitions

Mergers outside Japan will be subject to the Antimonopoly Act where they have an impact on competition in a relevant market in Japan. Mergers between foreign companies are also subject to the same notification thresholds as Japanese companies, even where they do not have any subsidiaries in Japan. Please see paragraph 8.4 for an explanation of the thresholds.

8.3 Competition assessment

Chapter IV of the Antimonopoly Act forbids business combinations the effect of which may be substantially to restrain competition in any particular field of trade, or which is conducted through unfair trade practices (Article 10, paragraph 1 (stockholdings), Article 13, paragraph 1 (interlocking directors), Article 14 (stockholdings by individuals), Article 15, paragraph 1 (amalgamations), Article 15-2, paragraph 1 (splits), Article 15-3, paragraph 1 (joint share transfers) and Article 16, paragraph 1 (acquisitions of business, etc.) of the Antimonopoly Act).

These provisions focus on how business combinations substantially affect competition, and determine the effect of business combinations on the markets, regardless of whether they meet the threshold for prior notification mentioned in 8.4 below, or whether the notification has actually been submitted.

The JFTC issued 'Business Combination Guidelines' on 31 May 2004. The Guidelines set out the standard for judging whether the effect of a business combination may be substantially to restrain competition, explain the JFTC's ideas for the regulation of business combinations, and clarify the standard for regulating business combinations by setting a safe harbour rule to provide predictability for entrepreneurs.

The Business Combination Guidelines divide business combinations into three types: horizontal business combination, vertical business combination and conglomerate business combination.

Horizontal business combinations are the most likely business combination to become an issue in practice. In reviewing a horizontal business combination, the Business Combination Guidelines consider:

(i) the position of the company groups involved and the competitive situation;
(ii) the pressure on import;
(iii) barriers to entry;
(iv) competitive pressure from neighbouring markets;
(v) competitive pressure from users;
(vi) overall business capability;
(vii) efficiency; and
(viii) the financial conditions of the company groups.

If the parties' corporate groups involved meet any of the following, the horizontal business combination is generally not considered to be a restraint on competition in a particular field of trade. The factors above do not need to be considered if:

(1) the Herfindahl-Hirschman Index ('**HHI**') after the business combination is not more than 1,500;
(2) the HHI after the business combination is more than 1,500 but not more than 2,500 while the increment of HHI is not more than 250; or
(3) the HHI after the business combination is more than 2,500 while the increment of HHI is not more than 150.

The HHI referred to above is the sum of the square value of the market share for each entrepreneur in the particular field of trade.

The Business Combination Guidelines also provide a quasi safe harbor if the HHI is not more than 2,500 and the market share of the parties' corporate group after the business combination is not more than 35%, considering the past experiences of the JFTC.

8.4 Filing requirements and thresholds

The Antimonopoly Act also requires prior notification for business combinations meeting a particular threshold. Acquisitions of shares, amalgamations, splits, joint share transfers and acquisitions of business, etc. are subject to this requirement.

If a business combination is subject to prior notification, it is prohibited to close the transactions subject to the notification for a period of 30 days after submitting the notification. The JFTC may, however, shorten this period if deemed necessary where it is satisfied that the effect of the transaction may not be to substantially lessen competition, and there is a rational reason for shortening the period.

The threshold for prior notification can be briefly described as follows, by taking acquisition of shares as an example: prior notification would be required if:

- the 'total domestic sales' of the acquiring company side exceeds JPY 20 billion;
- the total amount of domestic sales of the acquired company and all of its subsidiaries exceeds JPY 5 billion; and
- the ratio of voting rights of the acquiring company in the acquired company after acquisition newly exceeds 20% or 50%.

'Total domestic sales' means the amount combining the domestic sales of the companies belonging to the same business combination group as the company acquiring the shares within the most recent fiscal year. 'Business combination group' means the group consisting of the 'ultimate parent company' (among the company's parent companies, the company that is not a subsidiary of other companies) and the subsidiaries of the ultimate parent company.

There is no obligation to notify a business combination within the same business combination group.

Although there are detailed provisions for the thresholds applicable to amalgamations, splits, joint share transfers and acquisitions of business, etc., in many situations the standard of JPY 20 billion and JPY 5 billion with respect to the total domestic sales is used. Accordingly, if Company A acquires a certain business from Company B, and Company B contemplates another transaction, the domestic sales arising from the business acquired under the first transaction must be counted for the purpose of calculation of the domestic sales of Company B when analysing whether the second transaction is notifiable.

8.5 Remedies

Under Article 17-2 of the Antimonopoly Act, where an act in breach of the substantive regulations on business combinations has been committed, the JFTC may order the entrepreneur concerned to dispose of all or some of its shares, transfer a part of its business or take any other measures it considers necessary.

Article 18 enables the JFTC to bring a lawsuit to have amalgamations, splits and joint share transfers in breach of formalistic regulations declared invalid. Although the Antimonopoly Act does not impose any statutory limitation on the time within it must bring such an action, it is generally interpreted that Article 828 of the Companies Act (Act No. 86 of 2005) is applicable to

a lawsuit and the statutory limitation for the lawsuit is 6 months from the effective date of the amalgamations, etc.

The Business Combination Guidelines indicate that entrepreneurs can offer remedies at any stage of the JFTC's review, based on facts in individual cases. The JFTC prefers structural measures such as the transfer of business in order to restore competition lost as a result of the combination; however, it acknowledges that in some cases behavioural measures may be appropriate. Normally, the JFTC requires remedies to be implemented prior to the transaction closing.

8.6 Appeals

See paragraph 9.3.

8.7 Use of expert economic evidence

The Business Combination Guidelines do not explain the value and role of expert economic evidence. Though it is widely recognized that the JFTC has staff that have a background in economics, and that use of this type of evidence is a common practice in 'mega deals', it is not clear to what extent the JFTC relies on this evidence as the JFTC's announcement of any Phase II review (or mega deal that is worth public announcement of the review results) is not as detailed as those of other competition authorities.

8.8 Enforcement action

Since 1953, there have been only three decisions claiming a business combination as a breach of the Antimonopoly Act. The primary reason for such a small number of decisions is that many of the parties involved have reduced the risk of legal actions being taken by the JFTC by consulting with the JFTC in advance ('prior consultation system'; see paragraph 8.9).

One case that involved a breach of amalgamation regulations (Article 15 of the Antimonopoly Act) is the Yahata Steel and Fuji Steel Case (the JFTC consent decision, 30 October 1969). Although the production volume of crude steel after the merger was 35.4% of the production in Japan, it was held that, if the business combination was conducted, 'the competition would be substantially restricted' in some markets such as railway rails. As a result, various measures were ordered in the consent decision to resolve the issues.

8.9 Key recent developments and proposals for reform

Prior consultation system

From July 1, 2011, the JFTC abolished the prior consultation system, and will now review business combination plans requiring a notification under the Antimonopoly Act only in the course of the formal procedure after the notification. However, according to the JFTC's 'Policies Concerning Procedures of Review of Business Combination' dated 14 June 2011, a company planning to file a notification may consult with the JFTC on how to make entries on the notification form.

PART 9: ENFORCEMENT

9.1 Regulator's enforcement powers and tools

If the JFTC has doubts as to whether the actions of an entrepreneur violate the Antimonopoly Act, the JFTC may carry out administrative investigations (Article 47 of the Antimonopoly Act) and criminal investigations (Article 101 of the Antimonopoly Act). As criminal investigations are rarely conducted, only administrative investigations will be detailed in this Part.

The Antimonopoly Act specifies that administrative investigations may include:

(a) orders to appear, be interrogated and report;
(b) orders to appraise;
(c) orders to submit documents and keep them; and
(d) on-site inspections.

Administrative actions have legal force (as indirect compulsory execution) and a person who disturbs, or does not obey, investigations may be subject to criminal penalties.

Requests to appear

The JFTC may request persons concerned to voluntarily appear to the JFTC office for questioning. As a request to appear is not an indirect compulsory execution, the requested person has the discretion as to whether to attend. However, most persons that are requested for questioning comply with the request. Attorneys are not permitted to attend the voluntary questioning.

On-site inspections

On-site inspection is a particularly important method of administrative investigations. Inspections are conducted by investigators designated by the JFTC, who may visit business offices and other sites. The investigators may investigate business circumstances and properties, and the books and records of entrepreneurs. The investigations are carried out without prior notice or warrants, and as 'privilege' does not exist under Japanese law, it is not possible to refuse to submit documents, and it is difficult to delay the inspection until an attorney arrives.

The media will often report the facts after an on-site inspection has been conducted, representing a significant potential for reputational damage.

9.2 Remedies and sanctions

If a violation of the Antimonopoly Act is found, the following actions are available:

(a) cease and desist orders, and payment order for surcharge issued by the JFTC (administrative penalty);
(b) criminal penalties issued by the Court with accusations by the JFTC;
(c) claims for damage by third parties that incurred damage from the violation (including derivative lawsuits), and injunctions by the Court; and
(d) nomination suspensions.

For more detail on the remedies available for each type of prohibition see paragraphs 3.4, 4.4, 5.3, 6.4, 7.3 and 8.5.

9.3 Relevant courts/tribunals

Any person dissatisfied with a cease and desist order or payment order for surcharge may request that the JFTC initiates a hearing regarding such order (administrative hearing) within 60 days of the service of the order.

If that person is dissatisfied with the decision of the hearing, the person may appeal to the Tokyo High Court within 30 days of the service of the hearing decision, and subsequently to the Supreme Court if necessary, for cancellation of the order. Once amendments made in December 2013 come into effect, the hearing procedure will be abolished, and cease and desist orders and payment orders for surcharge will be reviewed in appeal litigation by the Tokyo District Court.

9.4 Litigation – matters of procedure

Litigation under the Antimonopoly Act includes actions for:

(a) claims for damage by third parties that incurred damage from the violation; and
(b) injunctions by third parties (however injunctions are only available for unfair trade practices. See paragraph 4.4).

Though competition litigation proceeds in a way substantially similar to standard civil litigation, there are procedures applicable only to litigation under the Antimonopoly Act.

Claims for damage

Third parties damaged by unreasonable restraint of trade, unfair trade practices, or private monopolization have the right to claim for damage in tort. The period of the statute of limitation is 3 years from the time when the victim knows the damage and the tortfeasor, or 20 years from the time of the tort, whichever is earlier (Article 724 of the Civil Code).

A competent court is decided based upon the general rule under the Code of Civil Procedure. In accordance with the same general rule, the lawsuit is subject to the 'three-level and three-instance' system, starting with one of the District Courts, followed by one of the High Courts and the Supreme Court. See also paragraph 3.4.

Generally, claims by third parties for damages require intention or negligence by the entrepreneur. However, the Antimonopoly Act stipulates that 'no entrepreneur … may be exempted from the liability … by proving the non-existence of intention or negligence on its part'. As such, the Antimonopoly Act imposes on entrepreneurs no-fault liability to protect third parties (Article 25, paragraph 2 of the Antimonopoly Act). However, third parties may only claim no-fault liability after cease and desist order (or, in a certain case, payment order for surcharge) has become final and binding on the entrepreneur (Article 26, paragraph 1 of the Antimonopoly Act).

The right to make a no-fault claim for damage expires by prescription after three years from the date on which the cease and desist order or the payment order became final and binding on the entrepreneur (Article 26, paragraph 2 of the Antimonopoly Act). If the hearing procedure and appeal litigation take a significant amount of time, this statute of limitation may be advantageous to victims. A no-fault claim is currently heard by the Tokyo High Court under the special 'two-level and two-instance' system, but will be heard by the Tokyo District Court (Article 85-2 of the Antimonopoly Act)

under the 'three-level and three-instance' system, after an amendment passed by the Diet on 7 December 2013 takes effect, which should be no later than June 2015.

Irrespective of whether or not a cease and desist order has become final and binding on the entrepreneur, third parties may claim for damages under Article 709 of the Civil Code. The right to claim under the Civil Code will expire by prescription after three years from the time when the claimant comes to know of the damages and the identity of the perpetrator. The court with jurisdiction to hear a claim under the Civil Code is the same as under ordinary civil procedures.

Injunctions

Injunctions are only available for unfair trade practices. If an injunction is necessary 'in order to avoid any substantial detriment or imminent danger' a third party may seek an order of provisional disposition (Article 23, paragraph 2 of the Civil Provisional Remedies Act). Given the nature of relief sought, the statute of limitation is irrelevant. The competent court and the numbers of levels and instances are pursuant to the general rule under the Code of Civil Procedure. However, there are certain special provisions that add a few courts as competent court which may apply. See also paragraph 3.4.

However, since introduction of injunctions against unfair trade practices in 2001, an injunction has only been issued in one case. One of the reasons for this seems to be the requirement of 'extreme damage' to have been suffered or likely to be suffered. Where the likelihood of success is not high, one possible option is to report an alleged violation to the JFTC hoping that the JFTC launches its own investigation.

Class actions

There is no specific provision under Japanese law for class actions. Under the Japanese Code of Civil Procedure, a number of persons who share common interests may appoint a representative to make a claim on their behalf. However, any judgment will only apply to the representative and any persons who made the appointment. Though a legal action similar to a class action (only to seek injunctions, not compensation for damages) has been newly introduced to certain 'consumer contracts' as a result of recent legal reform, it is unlikely that it will be used effectively by victims of violations of the Antimonopoly Act.