Dominance
2019

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Getting The Deal Through

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Consulting editors
Patrick Bock, Kenneth Reinker and David R Little
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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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LEXOLOGY
Getting The Deal Through

London
March 2019

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Japan

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GENERAL FRAMEWORK

Legal framework

1 What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The behaviour of dominant firms is regulated under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947) (the Anti-Monopoly Act, hereafter referred to as the AMA). There are two key concepts under the AMA: 'private monopolisation' and 'unfair trade practice'.

Private monopolisation is prohibited in the first sentence of article 3 of the AMA, and this is the main legislation concerning behaviour of dominant firms. There are two types of private monopolisation: the 'exclusionary type of private monopolisation' and the 'control type of private monopolisation'. The exclusionary type of private monopolisation occurs when a dominant firm, alone or in cooperation with another firm, attempts to exclude competitors from the market or hinder new entrants. The control type of private monopolisation occurs when a firm tries to dominate the market by means of restraining the business activities of other firms through such means as acquiring shares in order to obtain control of competitor firms in collaboration with third parties or unilaterally. To constitute either type of private monopolisation, it is necessary to prove the effect of substantial restraint on competition was caused by controlling or excluding other companies.

With respect to the exclusionary type of private monopolisation, the Japan Fair Trade Commission (JFTC) published the Guidelines on Exclusionary Private Monopolisation (the Guidelines) on 28 October 2009. These Guidelines mainly deal with the application of the exclusionary type of private monopolisation but its contents are also useful when analysing the application of the control type of private monopolisation.

In addition to private monopolisation, unfair trade practices, which are prohibited under article 19 of the AMA, could be also applicable to the behaviour of dominant firms. The JFTC has provided the Designation of Unfair Trade Practices (the General Designation), which lists the categories of conduct that constitute an unfair trade practice.

The types of unfair trade practices cited in the General Designation include conducts such as refusal to trade, discriminatory treatment, tie-in sales, trading on exclusive terms, trading on restrictive terms, resale price maintenance and unjustly inducing customers. Further guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices. To constitute unfair trade practice, it is necessary to prove that the conduct specified by the JFTC's general designation has a tendency to impede fair competition.

There are also a variety of guidelines regarding the characteristics of specific business fields (logistics of the gasoline, electricity, home electric appliances, and other industries), dumping, intellectual property rights, franchising and other conduct, which explain what types of conduct are likely to raise concern as private monopolisation and unfair trade practices in these fields.

The behaviour of dominant firms is primarily regulated as private monopolisation, however, there is an overlap with certain types of unfair trade practices and, given that there is difference regarding the required anticompetitive effect, it is possible that in cases where an act does not amount to private monopolisation, this conduct could still be regulated as an unfair trade practice.

Definition of dominance

2 How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is not a defined word under the AMA. Theoretically, one is not required to establish a dominant position when establishing a violation of 'private monopolisation'. However, in order to constitute private monopolisation, it is necessary to prove the effect of substantial restraint on competition by controlling or excluding other companies. Therefore, in practice, it must be established that the firm has the market power necessary for controlling or excluding other companies. According to the Guidelines, when deciding whether to investigate a case as exclusionary private monopolisation, the JFTC will prioritise the case if the share of the product that the firm supplies exceeds approximately 50 per cent after the commencement of such conduct. Therefore, as a practical matter, market share is one of the important elements when analysing whether the conduct amounts to private monopolisation.

One item of note is that, in Japan, there is one category of unfair trade practices called 'abuse of superior bargaining position'. This refers to a situation where a party that has a superior bargaining position engages in the conduct of dealing in a way disadvantageous to a business partner unjustly, in light of normal business practices by making use of its superior bargaining position. However, this type of conduct does not require a dominant position in a market, but rather, it is generally understood that it is sufficient if an entity has a relatively superior position in relation to the counterparty in the transaction.

Purpose of the legislation

3 Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Article 1 of the AMA provides that the purpose of the legislation is 'to promote fair and free competition, stimulate the creative initiative of enterprise, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolisation, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc, and all other unjust restrictions on business activity through combinations, agreements, etc'. However, it is generally understood that the direct purpose of the AMA is 'to promote fair and free competition' and the ultimate purpose of the AMA is to promote the democratic and wholesome development of the national economy, as well as to secure the interests of general consumers.

To regulate private monopolisation and to regulate unfair trade practices are some ways to achieve the purpose of the AMA. The AMA itself has no intention to specifically protect other public interests or social purposes.

Sector-specific dominance rules

4 Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are some sector-specific regulations and rules, including for the telecommunications sector and the energy sectors.

A firm operating in the telecommunications sector is subject to the Telecommunications Business Act (TBA). The TBA is under the jurisdiction of the Ministry of Internal Affairs and Communication (MIC).

Although the MIC does not focus on monopoly regulation, the Guidelines for Promotion of Competition in the Telecommunications Business Field were jointly created by the MIC and the JFTC, and provide guidance on monopolisation issues in this sector. These guidelines were updated on 28 May 2016.

The major amendment to these guidelines was the addition of the following topics:

- the connection and sharing of telecommunications facilities;
- the provision of telecommunications services;
- provision of content services; and
- the manufacture and sale of telecommunications facilities.

In relation to the energy sector, the Ministry of Economy, Trade and Industry (METI) and the JFTC jointly developed the Guidelines for Proper Electric Power Trade. These guidelines were recently updated on 6 February 2017. The purpose of this update was to add guidance for the trade of 'negawatt power' (negawatt power being a theoretical unit of power representing an amount of electrical power saved).

Specifically as regards trade of gas, the METI and the JFTC jointly developed the Guidelines for Proper Gas Trade. These guidelines were updated on 6 February 2017. The purpose of this update was to add guidance for new proper trade in the gas market after the full retail liberalisation of the gas market.

The key aspects of the amendment added guidance on the following topics:

- appropriate gas trading in the retail field;
- appropriate gas trading in the wholesale field; and
- appropriate gas trading regarding the transportation service.

Exemptions from the dominance rules

5 To whom do the dominance rules apply? Are any entities exempt?

There are no rules exempting certain undertakings from the rules concerning dominance. Under case law, entities that are subject to the AMA include any entity, regardless of its legal form, that operates a commercial, industrial, financial or any other business but is not a consumer. Therefore, foundations, unions, nations and local governments may be an undertaking that is subject to the AMA.

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

The AMA covers the conduct of non-dominant firms attempting to become dominant, as well as the conduct of dominant firms maintaining or strengthening their dominant position by way of excluding or controlling other firms in their business activities.

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

The AMA covers both single firm dominance and dominance of multiple parties connected by way of mutual agreement or arrangement. However, collective dominance without any coordinated conduct is outside the scope of the AMA.

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The AMA does not have a specific provision that precludes the regulation of a dominant purchaser. Consequently, conduct by which a dominant purchaser excludes or controls other companies, as well as similar conduct of monopolistic suppliers, may be subject to the AMA as constituting private monopolisation or unfair trade practices.

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

The basic framework provided by the Guidelines (section 3: 'Substantial Restraint of Competition') are as follows: a particular field of trade (the definition of market) means the scope where the exclusionary conduct causes a substantial restraint of competition. There are two types of markets, the product market and the geographic market. The product market is determined based on factors such as usage, changes in price, quantity, etc, and recognition and behaviour of users. The geographic market is determined based on factors such as the business area of suppliers and the area in which the users purchase, the characteristics of the products, and the means and cost of transport. This approach is similar to the analysis used in the context of merger control. The method of analysis with respect to merger control is provided in detail by the Guidelines to Application of the Antimonopoly Act concerning the Review of Business Combination.

According to the Guidelines (Guidelines on Exclusionary Private Monopolisation), when deciding whether to investigate a case as constituting exclusionary private monopolisation, the JFTC will prioritise the case if: the share of the product that the firm supplies exceeds approximately 50 per cent after the commencement of the conduct; and the conduct is deemed to have a serious impact on the lives of the citizenry after comprehensively considering relevant factors such as market size, the scope of the business activities of the said firm and the characteristics of the product. As this is not a safe harbour, there remains a possibility that in a case where the share of the products a firm supplies is less than 50 per cent the firm may still be subject to investigation as constituting exclusionary private monopolisation depending on the type of conduct, market conditions, positions of the competitors, and other factors.

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

As the regulation in Japan does not take the form of abuse of dominance, abuse is not directly defined under the AMA. However, certain types of conduct by dominant firms may be regulated by the JFTC as private monopolisation or unfair trade practice, and those types of conduct are somewhat similar to the concept of abuse.

With respect to private monopolisation, the AMA and the Guidelines provide an illustrative list of problematic conduct. In particular, the Guidelines refer to past cases and describe the following four typical types of exclusionary conduct:

- below-cost pricing (setting a product price below the cost);
- exclusive dealing;
- tying; and
- refusal to supply, and discriminatory treatment.

For each type of conduct, the Guidelines provide factors to be considered when assessing whether the alleged conduct constitutes exclusionary conduct. The Guidelines also note that the type of exclusionary conduct that constitutes exclusionary private monopolisation is not limited to the types of conduct that fall under these four typical types of exclusionary conduct.

Additionally, based on an effects-based approach, the AMA further requires that a substantial restraint of competition caused by the exclusionary conduct should be proven in order for the conduct to be prohibited as private monopolisation.

Therefore, private monopolisation is defined by both form-based conditions and effect-based conditions, so both are required.

With respect to unfair trade practices, it is also defined by both form-based conditions (certain type of conducts in the JFTC's General Designation) and effect-based conditions (tendency to impede fair competition), and the difference with private monopolisation is that the threshold for the effect-based conditions is somewhat lower.

For both private monopolisation and unfair trade practices, there is no conduct that is per se illegal under the AMA.

Exploitative and exclusionary practices

11 Does the concept of abuse cover both exploitative and exclusionary practices?

With respect to exclusionary practices, the Guideline explicitly covers these (see question 1).

With respect to exploitative practices, unlike exclusionary practices, the AMA is silent on this. Because the concept of private monopolisation is defined by general terms, theoretically any conduct may constitute private monopolisation. However, there has not been any such case to date.

Further, exploitative practices may be regulated as 'abuse of superior bargaining position', which is a type of unfair trade practice.

Link between dominance and abuse

12 What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

With respect to both private monopolisation and unfair trade practices, the JFTC needs to prove a linkage between the conduct and the result of substantial restraint of competition (for private monopolisation) or prove that the conduct has the tendency to impede fair competition (for unfair trade practice) in the relevant market.

With respect to an adjacent market, conduct by a dominant firm could be regarded as private monopolisation or an unfair trade practice in cases where the effect on competition occurs on a market adjacent to a dominant market. One such example would be a case of tying or bundling sales.

Defences

13 What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In general, if the conduct is somehow justified, allegations of private monopolisation or unfair trade practice cannot be established. The assessment of private monopolisation and unfair trade practice is carried out by considering the actual impact on competition.

The Guidelines state that, in addition to other standard market analysis components (ie, potential competitive pressure, customer's bargaining power, etc), efficiency (efficiency of business activities that are caused by the economics of scale, integration of production facilities, specialisation of facilities, reduction of transportation costs, and improvement of the efficiency of research and development systems) or special circumstances in relation to the protection of consumer benefits may be considered in determining whether the conduct causes a 'substantial restraint of competition' or has the tendency to impede fair competition in the relevant market. This means various business justifications are available as defences.

As for special circumstances in relation to the protection of consumer benefits, the Guidelines give the following example: a case where a gas equipment sales company with approximately 50 per cent market share in a region sells gas equipment with a device that prevents imperfect combustion to those who still use gas equipment without such a device at a price lower than the cost required for its supply in order to stimulate replacement demands for gas equipment with such devices and prevent serious accidents caused by carbon monoxide poisoning. Under those circumstances, the conduct could be considered to be for the purpose of preventing serious accidents before they happen. Further, the conduct is considered to serve the interests of general consumers and more likely to have limited influence on competition. Therefore, the JFTC will consider such circumstances to assess whether or not competition is substantially restrained.

To constitute private monopolisation or unfair trade practice, there is no requirement that there be an intent to exclude a third party, though the Guidelines state that such an intent is one of the important factors that could lead to infer that the alleged conduct constitutes exclusionary conduct (abuse). Therefore defences can be shown even where there is intent, but the threshold would be higher.

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 Rebate schemes

Rebate schemes may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

With respect to private monopolisation, the Guidelines state that various factors would be considered to assess whether or not rebate-giving has an effect on restraining the dealings of competitors' products and has the same effect as exclusive dealing, including progressiveness of rebates and retroactivity of rebates. For example, with respect to the progressiveness of rebates, the Guidelines state that when the level of the rebate is progressively set in accordance with the quantity of trade in a specified period, the rebate more effectively causes customers to deal with the dominant firm with greater preference than the dominant firm's competitors, and, therefore, customers would be more likely to purchase more products from the dominant firm than from competitors. This type of rebate is more likely to restrain the business of competitors.

With respect to the retroactivity of rebates, the Guidelines state that if rebates are given for the entire quantity of trade made thus far in a case where the quantity of trade has exceeded a certain threshold, the rebates more effectively cause the customers to deal with the dominant firm with greater preference than the competitors. Additionally, customers are more likely to purchase more products from the dominant firm than when rebates that exceed the threshold required for rebates are given only for a portion of the quantity of trade. Such a rebate is highly effective in restraining the business of competitors.

With respect to unfair trade practices, similar guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices.

15 | Tying and bundling

Tying and bundling may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

With respect to private monopolisation, the Guidelines state that where tying causes difficulties in the business activities of competitors who are unable to easily find alternative customers in the market of the tied product, this conduct could be regarded as exclusionary conduct or abuse. The JFTC comprehensively considers the following factors when assessing whether the conduct would cause these difficulties for competitors:

- conditions of the entire market where the tying occurs;
- position of the tying firm in the market of the tied product (market share, ranking, brand power, excess supply capacity and business size);
- positions of the tying firm's competitors in the market of the tied product (market share, ranking, brand power, excess supply capacity and business size);
- duration of the conduct, number of customers and trading volume; and
- nature of the conduct.

With respect to unfair trade practices, similar guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices.

16 | Exclusive dealing

Exclusive dealing may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

With respect to private monopolisation, the Guidelines state that where a firm deals with its trade partners on the condition that transactions with the firm's competitors are prohibited or restrained, and the competitors cannot easily find an alternative supply destination, such exclusive dealing may cause difficulties to the business activities of the competitors and undermine competition. Thus, dealing with the trade partners on the condition that transactions with the competitors be prohibited or restrained could be regarded as exclusive conduct or abuse.

The JFTC will comprehensively consider the following factors when assessing whether the conduct would cause any difficulties for competitors:

- conditions of the entire market of the product;
- position of the firm requiring exclusivity from trade partners in the market (market share, ranking, brand power, excess supply capacity and business size);
- positions of the competitors in the market (market share, ranking, brand power, excess supply capacity and business size);
- duration of the conduct, number of customers and shares; and
- nature of the conduct.

With respect to unfair trade practices, similar guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices.

17 | Predatory pricing

Predatory pricing may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

With respect to private monopolisation, the Guidelines state that when a firm sets a very low price that does not even allow the recovery of the cost of the products, where such cost would not be generated unless the product was supplied, and where the amount of loss to the firm grows larger as it increases the supply of the product, the conduct lacks economic rationality except in extraordinary circumstances. Therefore, depriving competitors of customers by setting such a low price would not reflect normal business efforts or normal competitive behaviour and makes it difficult for an equally (or more) efficient competitor to compete, thereby possibly undermining competition. Thus, setting a price below the cost of supplying the product (ie, 'below-cost pricing') could be regarded as exclusive conduct or abuse.

As a benchmark of whether or not the cost constitutes below-cost pricing, the Guidelines adopt the formula of the average avoidable cost (AAC). AAC is the expense per unit of product, calculated by dividing the additional supply amount by the sum total of fixed costs and variable expenses that will not occur if the undertaking ceases to supply the additional amount

There is no requirement of recoupment to constitute private monopolisation under the AMA when setting a predatory price.

With respect to unfair trade practices, similar guidance is provided by the Guidelines Concerning Unjust Low Price Sales Under The Antimonopoly Act.

18 | Price or margin squeezes

Price or margin squeezes may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that the issue of whether a 'margin squeeze'-like situation (ie, a situation where a firm in the upstream market who supplies products that are necessary for carrying out business activities in the downstream market also carries out business activities in the downstream market, and such firm engages in the conduct of setting a price of its product in the upstream market at a level higher than that in the downstream market or setting a price that is so close as to interfere with its trading customers from countering by economically reasonable business activities) would be deemed exclusionary will be analysed from the same viewpoint as 'refusal to supply or discriminatory treatment'. That is, refusing to supply products necessary for a supplier to conduct business activities in the downstream market beyond a reasonable range could constitute exclusionary conduct, and thus amount to private monopolisation (exclusionary type) (see question 19).

In particular, the following two factors are key in the analysis: whether the product to be supplied is a 'necessary product' in order to conduct business activities in the downstream market, and whether the refusal to supply is 'beyond reasonable range'.

In order to assess whether the product is a 'necessary product', the Guidelines indicate that the following factors should be considered: whether the product is an unsubstitutable and indispensable product for trading customers to carry out business activities in the downstream market; and whether it is realistically impossible for trading customers to produce the product through the trading customer's own effort, such as investment and technological development.

One representative case is the *NTT East* case. In this case, NTT East Japan (Japan's largest landline telecommunications company and essentially the only company providing connection to optical fibre facilities) entered the FTTH service market in eastern Japan (a communication service using optical fibre for detached houses), while requiring existing competitors to pay NTT East Japan a business fee for starting a new FTTH service connecting to optical fibre. The allegation was that by excluding the business activities of other telecommunications carriers in the FTTH service market by setting a low user-specific fee, NTT East Japan restrained competition in the market in eastern Japan, amounting to private monopolisation. The court held, among other things, that such conduct could be regarded as a conduct having both aspects of a 'unilateral and one-sided refusal to deal' or 'low price sales', and amount to exclusionary conduct.

19 | Refusals to deal and denied access to essential facilities

Refusals to deal and denied access to essential facilities could constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If such types of conduct do not amount to private monopolisation, they may instead be regulated as unfair trade practices.

With respect to private monopolisation, the following two factors would be key in the analysis: whether the product to be supplied is to be regarded as a product necessary for the other party to conduct business activities in the market (downstream); and whether the refusal to supply is 'beyond reasonable range'. The Guidelines further state that whether or not a product in the upstream market can be considered to be a product necessary for the other party to carry out business activities in the downstream market will be assessed from the viewpoint of whether or not the product is an unsubstitutable and indispensable product for the other party to carry out business activities in the downstream market, and it is impossible in reality for the other party to produce the product through the its own effort, such as investment and technological development. The AMA nor the Guidelines provide a definition of essential facilities. However, if an essential facility were to be defined as an indispensable facility or facility for conducting certain business activities that is considered economically or technically impossible or extremely difficult to establish such facility (typical examples being telecommunications, electricity, gas and transportation, which require huge initial capital investment), such facilities are likely to be considered as a product necessary for the other party in order to conduct business activities in the market (downstream) described above.

With respect to unfair trade practices, similar guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices.

20 | Predatory product design or a failure to disclose new technology

Predatory product design or a failure to disclose new technology may constitute private monopolisation when used to exclude business activities of other firms, and thereby cause a substantial restraint on competition. If such types of conduct do not amount to private monopolisation, they may instead be regulated as unfair trade practices.

There have been no cases in which predatory product design or a failure to disclose new technology has been deemed to constitute either private monopolisation or unfair trade practices.

21 | Price discrimination

Price discrimination may constitute private monopolisation when used to exclude business activities of other firms, and it thereby causes a substantial restraint on competition. If such acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

There are no particular price discrimination laws that apply other than those governing monopolisation and unfair trade practices.

22 | Exploitative prices or terms of supply

Exploitative prices or terms of supply may technically constitute private monopolisation when they cause a substantial restraint on competition contrary to the public interest. However there has never been a case in practice. If these acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

Under the AMA, there is no concrete stance on how to regulate exploitative prices. Some commentators say that it might be possible to consider exploitative prices to be regulated as an 'abuse of superior bargaining position', which is a type of unfair trade practice. Establishing remarkably high or low consideration with a counterparty while in a superior position could amount to the act of 'abusing a superior position'.

23 | Abuse of administrative or government process

An abuse of administrative or government process by an undertaking may constitute private monopolisation when used to exclude the business activities of other businesses, and cause a substantial restraint on competition. If such acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

One reference case is the *Hokkaido Newspaper* case. In this case, a newspaper company filed a trademark that a competitor was likely to use, but they had no intension of using such trademark, and also set a discounted price for advertisement while well aware that advertisement revenue is important for the newspaper business. With regard to these consecutive measures taken by the newspaper company, the JFTC concluded that these series of conducts constituted an exclusionary type private monopolisation by the newspaper company as new competitors were precluded from entering the market by the trademark and a significantly discounted advertising rate.

Another reference case is the *Japan Medical Food Association* case. Here, a manufacturer of medical food with a dominant position had asked the Japan Medical Food Association to establish a very complicated registration system that did not easily allow competitors to register for medical food sales. As a result, rival companies and their affiliates had difficulty registering sales of medical foods and were practically excluded from the market. The JFTC concluded that the establishment of a system that did not easily allow competitors to register for medical food sales by such dominant company through the Japan Medical Food Association constituted a private monopolisation as the competitors were precluded from entering the medical food market by the abuse of the registration system for the medical sales market.

24 | Mergers and acquisitions as exclusionary practices

Abuse in the context of mergers and acquisitions is principally controlled through the merger-filing procedures or prohibitions under the AMA. Under the merger control system in Japan, in cases where pre-merger notifications are required the JFTC will review a transaction from the viewpoint of whether it creates a business combination that may substantially restrain competition in any particular field of trade, or where a business combination is created through an unfair trade practice. This approach is basically in line with the analysis of private monopolisation except that the likelihood of restraint in the future would be examined.

As the concept of private monopolisation is defined by general terms, theoretically, any conduct can constitute private monopolisation (control type or exclusion type). Therefore, technically, mergers and acquisitions themselves may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. However, there have been no cases in which mergers and acquisitions directly have been deemed to constitute private monopolisation or unfair trade practices.

25 | Other abuses

The concept of private monopolisation is defined by general terms, and while the Guidelines clarify the meaning of monopolistic acts by setting out some typical categories of conduct, the Guidelines also note that such categories are not exhaustive, and theoretically, any conduct can constitute private monopolisation (control or exclusion). Moreover, the JFTC responds to each case on a case-by-case basis, so new kinds of conduct may be considered as abusive acts.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The JFTC is responsible for the enforcement of the AMA.

Under the AMA the JFTC has the power to do the following:

- order persons concerned with a case or a witness to appear to be interrogated, or to collect their opinions or provide a report;
- order expert witnesses to appear to give expert opinions;
- order persons holding books and documents and other objects to submit such objects, or maintain such submitted objects at the JFTC; and
- enter any business office of the persons concerned with a case or other necessary sites, and inspect the conditions of the business operation and property, books and documents, and other materials.

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

As for private monopolisation, the JFTC can issue a cease-and-desist order. Furthermore, the JFTC can impose a surcharge (administrative fine). The amount of surcharge is calculated by mutiplying the amount of sales of the relevant products or services during the period in which private monopolisation was implemented (the maximum is three years) by the surcharge calculation rate in the following table. Administrative fines on private monopolisation were introduced in January 2006 for the controlling type of private monopolisation, and in January 2010 for the exclusionary type of private monopolisation. To date, there has been no case in which an administrative fine was imposed.

	Manufacturer	Retailers	Wholesalers
Exclusionary type of private monopolisation	6%	2%	1%
Controlling type of private monopolisation	10%	3%	2%

Theoretically, an undertaking who engages in private monopolisation would be subject to a criminal penalty under the AMA. However, until now, the JFTC has never issued criminalised charges based on private monopolisation.

As for unfair trade practices, the JFTC can issue a cease-and-desist order. Furthermore, for certain types of unfair trade practices, the JFTC can impose an administrative fine as follows, depending on the applicable category:

	Manufacturer	Retailers	Wholesalers
Joint refusal of trade Predatory pricing Price discrimination	3%	2%	1%
Abuse of superior bargaining position	1%	1%	1%

An undertaking that engages in unfair trade practices is not subject to a criminal penalty.

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

28 Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The JFTC can issue a cease-and-desist order without the involvement of any other authority. However, if the JFTC seeks to issue a cease-and-desist order, it must conduct a hearing with the would-be addressee of the cease-and-desist order.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

In recent years, there have not been many cases concerning private monopolisation. Regarding that point, it might be the case that the introduction of a non-discretionary surcharge (administrative fine) system may have made the JFTC hesitant to move forward as the firm is likely to fight to the end in the event a surcharge is imposed.

In addition, after the introduction of an administrative fine for both types of private monopolisation, there has been no case to date in which an administrative fine was imposed.

The most recent case was against Fukui Economic Federation of Agricultural Cooperatives Associations published on 27 January 2015, which amounted to the control type of private monopolisation. In this case, the JFTC did not impose an administrative fine due to the fact that the association had no sales revenue. The most recent case of exclusionary type of private monopolisation is the JASRAC case, where the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), a copyright management company, was deemed to exclude other copyright management companies from the market by engaging in the business practice of concluding 'comprehensive contracts' with almost all broadcasting companies.

Contractual consequences

30 Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

A violation of the AMA does not automatically render the clause (or the entire contract) void (and thus unenforceable), however, if the clause is in violation of public policy (article 90 of the Civil Code), the provision (or the entire contract) will be invalid.

Private enforcement

31 To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The operation of the AMA is exclusively within the purview of the JFTC. However, any person who believes that there has been an infringement of the AMA can report the relevant facts to the JFTC and request that appropriate measures be taken. In such cases, the JFTC is obliged to conduct at least a preliminary investigation. Only selected cases trigger a formal full-fledged investigation.

With regard to unfair trade practices, it also is possible to file a lawsuit in court seeking an injunction against the other party. These special injunctions are not available in cases of private monopolisation.

Damages

32 Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

In cases where a third party has suffered damages and is requesting damages owing to an act in violation of the AMA, a claim based on article 709 of the Civil Code and a claim under article 25 of the AMA may be considered.

To claim damages based on the Civil Code, the plaintiff is required to establish:

- an infringement of rights;
- damage;
- causation; and
- intention or negligence.

However, in case of a claim under article 25 of the AMA Act, which can be claimed when the defendant is subject to a final and binding cease and desist order or a payment order for surcharge (administrative fine), the element of intention or negligence is not required.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

An undertaking that is the subject of a cease-and-desist order or an administrative fine order can file a suit for revocation of those orders (administrative disposition) with the court within six months from the date of the order (Administrative Case Litigation Act article 14).

Unlike ordinary administrative lawsuits, a violation of the AMA is targeted for complex economic matters. Because of the high level of expertise required, all actions for revocation of an administrative disposition shall be filed in the Tokyo District Court.

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UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

Unfair trade practice may be applicable. See question 2.

UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

Introduction of the Commitment Procedures to the Anti-Monopoly Act (AMA)

Commitment procedures (the Commitment Procedures) were introduced to the AMA on 30 December 2018. For the introduction of the Commitment Procedures, the JFTC published 'the Rules on Commitment Procedures by the Fair Trade Commission' and 'Policies Concerning Commitment Procedures' to ensure the transparency of the application, as well as predictability for businesses, of the law related to Commitment Procedures. The Commitment Procedures allow for a company subject to a JFTC investigation to submit to the JFTC proposed measures to address the competition concerns and enable the JFTC to close the case without acknowledging illegal conduct, provided the JFTC confirms that those measures are sufficient for excluding the suspected conduct and it is confident they will be reliably undertaken by the company. The Commitment Procedures are initiated at the full discretion of the JFTC, and where the JFTC recognises that it is necessary for the promotion of free and fair competition.

The Commitment Procedures are applicable to a suspected violation of the AMA, including private monopolisation and unfair trade practices, except in the following cases:

- suspected violations of a hard-core cartel such as bid-rigging or price- fixing;
- cases in which a company has violated the same provisions within 10 years; and
- cases recognised as constituting vicious and serious suspected violations that are considered to deserve a criminal accusation.

The Commitment Procedures are beneficial to a company that is the subject of a JFTC investigation in the following aspects: (i) to avoid receiving a cease-and-desist order and a surcharge payment order from the JFTC; (ii) to avoid reputational risk through the acknowledgement of illegal conduct; and (iii) to lower the risk of civil liability with respect to a claim for compensation for damages. In order for the company to obtain these benefits, a company that is subject to the JFTC's investigation regarding private monopolisation and unfair trade practices may choose to negotiate with the JFTC officers after the launch of the JFTC's investigation, and throughout the investigation procedure, as to whether the Commitment Procedures will be applied.

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