# DOMINANCE

## Japan

LEXOLOGY
Getting The Deal Through

Consulting editor
*Cleary Gottlieb Steen & Hamilton LLP*

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Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

Generated 23 March 2023

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## GENERAL FRAMEWORK

### Legal framework

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 (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. This is the main legislation concerning behaviour of dominant firms. There are two types of private monopolisation: the exclusionary-type private monopolisation and the control-type private monopolisation.

The exclusionary-type private monopolisation occurs when a dominant firm, alone or in conspiracy with another firm, attempts to exclude competitors from the market or hinder new entrants. The control-type 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 to obtain control of competitor firms in conspiracy 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 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 private monopolisation but its contents are also useful when analysing the application of the control-type private monopolisation.

In addition to private monopolisation, unfair trade practices, which are prohibited under article 19 of the AMA, may also be applicable to the behaviour of dominant firms. Article 2(9) of the AMA provides a list of types of conduct that constitute an unfair trade practice. In addition, the JFTC has further clarified in its General Designation specific types of conduct that constitute unfair trade practice. The types of unfair trade practices cited in the General Designation include conduct 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 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), below-cost pricing, intellectual property rights, franchising and other conduct that 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 practice and, given that there is a 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 unfair trade practice.

*Law stated - 17 January 2022*

## Definition of dominance

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

Private monopolisation requires a showing that competition was substantially restrained through the control or exclusion of other companies. In practice, substantial restraint on competition is established by showing that a firm has the market power necessary to control or exclude other companies, taking into consideration factors such as the company's market share and its ranking, the conditions of competition in the market, potential competitive pressure (entry barriers, degree of substitutability between products and customer's countervailing bargaining power), efficiency and any other extraordinary circumstances that may ensure the interests of consumers.

According to the Guidelines, when deciding whether to investigate a case as an exclusionary-type private monopolisation, the JFTC will prioritise the case if the share of the product supplied by the firm exceeds approximately 50 per cent after the commencement of the firm's conduct; therefore, as a practical matter, market share is an important element when analysing whether conduct amounts to private monopolisation.

In Japan, there is one category of unfair trade practice called 'abuse of superior bargaining position' (article 2(9)(v) of the AMA). This refers to a situation where a party that has a superior bargaining position engages in the conduct of dealing in a way that is disadvantageous to a business partner unjustly, in light of normal business practices, by making use of its superior bargaining position. This type of conduct does not require a dominant position in a market; rather, it is generally understood that it is sufficient if an entity has a relative superior position, namely a superior bargaining position in relation to the counterparty in the transaction.

*Law stated - 17 January 2022*

## Purpose of the legislation

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.

The main purpose of the AMA is to promote fair and free competition by regulating private monopolisation and unfair trade practices. The AMA itself has no intention to specifically protect other public interests or social purposes.

*Law stated - 17 January 2022*

## Sector-specific dominance rules

### 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 have been recently updated on 30 June 2022 and 23 December 2022.

The most recent amendment was made in order to reflect the report of the 'Issues of competition policy in the Mobile Phone Market (FY 2021 Survey)' prepared by the JFTC, and the 'Report on the Verification of Competition Rules 2022' prepared by the Telecommunications Market Verification Meeting 'Working Group on Verification of Competition Rules'.

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 31 March 2022, 16 September 2022 and 14 November 2022. The purpose of the update on 16 September 2022 was to provide guidance for the appropriate electric power transactions for distribution business operators and specified wholesale suppliers, and a designated area supply system.

Specifically regarding gas trading, the METI and the JFTC jointly developed the Guidelines for Proper Gas Trade. The most recent update of these guidelines was 25 February 2021. The purpose of the update was to clarify the types of problematic conduct based on recent studies conducted by the JFTC in the gas business (‘Regarding the fact-finding report in the city gas business field after the full liberalisation of retail sales’), and a recent JFTC investigation of a gas company concerning allegations of certain exclusionary conduct published in June 2020.

*Law stated - 17 January 2022*

## Exemptions from the dominance rules

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

There are no rules exempting certain entities from the rules concerning dominance. According to 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 entities that are subject to the AMA.

*Law stated - 17 January 2022*

### Transition from non-dominant to dominant

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.

*Law stated - 17 January 2022*

### Collective dominance

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 conspiracy is outside the scope of the AMA.

*Law stated - 17 January 2022*

### Dominant purchasers

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.

*Law stated - 17 January 2022*

### Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds 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') is 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 market: 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, 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 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.

*Law stated - 17 January 2022*

## ABUSE OF DOMINANCE

### Definition of abuse of dominance

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 Anti-Monopoly Act (AMA); however, certain types of conduct by dominant firms may be regulated by the Japan Fair Trade Commission (JFTC) as private monopolisation or unfair trade practice. Those included types of conduct are somewhat similar to the concept of abuse.

With respect to private monopolisation, the AMA and the Guidelines on Exclusionary Private Monopolisation (the Guidelines) provide a non-exhaustive 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.

Private monopolisation is therefore 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 types of conduct in the JFTC's General Designation) and effect-based conditions (tendency to impede fair competition). 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.

*Law stated - 17 January 2022*

## Exploitative and exclusionary practices

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

Exclusionary practices fall within the scope of the Guidelines explicitly.

Regarding 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 so long as the conduct includes the exclusion or control of other firms; 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.

*Law stated - 17 January 2022*

## Link between dominance and abuse

### 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.

Regarding 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.

*Law stated - 17 January 2022*

### Defences

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 (eg, potential competitive pressure and customer bargaining power), efficiency (efficiency of business activities that are caused by 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 interests 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 interests, 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 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, although the Guidelines state that such an intent is an important factor 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.

*Law stated - 17 January 2022*

## SPECIFIC FORMS OF ABUSE

### Types of conduct

Rebate schemes

Rebate schemes 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 be regulated as an unfair trade practice.

With respect to private monopolisation, the Guidelines on Exclusionary Private Monopolisation (the Guidelines) state that various factors would be considered to assess whether rebate-giving has an effect on restraining the dealings of competitors' products and has the same effect as exclusive dealing, including the progressiveness 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.

Regarding 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.

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

*Law stated - 17 January 2022*

## 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 be regulated as an unfair trade practice.

Regarding 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 Japan Fair Trade Commission (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.

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

*Law stated - 17 January 2022*

## 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 be regulated as an unfair trade practice.

Regarding 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.

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

*Law stated - 17 January 2022*

## 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 be regulated as an unfair trade practice.

Regarding 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 the 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. Setting a price below the cost of

supplying the product (ie, below-cost pricing) could therefore be regarded as exclusive conduct or abuse.

As a benchmark of whether the cost constitutes below-cost pricing, the Guidelines adopt the concept 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 firm ceases to supply the additional amount; however, from a practical perspective, the Guidelines replace ACC with the cost that would have been generated had the product not been supplied.

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 AMA.

*Law stated - 17 January 2022*

## Price or margin squeezes

Price or margin squeezes 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 be regulated as an unfair trade practice.

The Guidelines state that the issue of whether a margin squeeze-like situation would be deemed exclusionary will be analysed from the same viewpoint as refusal to supply or discriminatory treatment; in other words, refusing to supply products necessary for a supplier to conduct business activities in the downstream market beyond a reasonable degree could constitute exclusionary conduct and thus amount to private monopolisation (exclusionary type). Margin squeeze-like situation refers to 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 the 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.

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

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 fibre-to-the-home (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 conduct that has both aspects of a 'unilateral and one-sided refusal to deal' or 'low price sales' and amounts to exclusionary conduct.

*Law stated - 17 January 2022*

## 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, thereby causing a substantial restraint on competition. If those types of conduct do not amount to private monopolisation, they may 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 a reasonable degree'.

The Guidelines further state that whether 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 the product is an unsubstitutable and indispensable product for the other party to carry out business activities in the downstream market and whether it is impossible in reality for the other party to produce the product through its own effort, such as investment and technological development.

Neither the AMA nor the Guidelines provide a definition of essential facilities; however, if an essential facility were to be defined as an indispensable facility, a facility for conducting certain business activities that are considered economically or technically impossible or a facility that is extremely difficult to establish (typical examples being telecommunications, electricity, gas and transportation, which require huge initial capital investment), such facility is likely to be considered as a product necessary for the other party to conduct business activities in the market (downstream).

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

*Law stated - 17 January 2022*

## 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, thereby causing a substantial restraint on competition. If those types of conduct do not amount to private monopolisation, they may 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.

*Law stated - 17 January 2022*

## Price discrimination

Price discrimination may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the 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.

*Law stated - 17 January 2022*

## 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.

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. They claim that establishing remarkably high or low consideration with a counterparty while in a superior position could amount to the act of abusing a superior position.

*Law stated - 17 January 2022*

## Abuse of administrative or government process

An abuse of administrative or government process by a firm may constitute private monopolisation when used to exclude the business activities of other businesses, thereby causing a substantial restraint on competition. If the 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, while having no intention of using the trademark, and also set a discounted price for advertisements 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 that series of conduct 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. 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.

*Law stated - 17 January 2022*

## 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 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 exclusionary type); therefore, technically, mergers and acquisitions themselves may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition.

However, there have been no cases in which mergers and acquisitions have directly been deemed to constitute private monopolisation or unfair trade practices.

*Law stated - 17 January 2022*

## Other abuses

The concept of private monopolisation is defined in 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 the categories are not exhaustive, and theoretically any conduct can constitute private monopolisation (control type or exclusionary type).

Moreover, the JFTC responds to each case on a case-by-case basis, so new kinds of conduct may be considered abusive acts.

*Law stated - 17 January 2022*

## ENFORCEMENT PROCEEDINGS

### Enforcement authorities

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

The Japan Fair Trade Commission (JFTC) is responsible for the enforcement of the Anti-Monopoly Act (AMA). Under the AMA, it has the power to:

- order persons concerned with a case or a witness to appear to be interrogated, 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 those objects or maintain those 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.

*Law stated - 17 January 2022*

### Sanctions and remedies

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

With regard to private monopolisation, the JFTC can issue a cease-and-desist order. Furthermore, it can impose a surcharge (administrative fine). The amount of surcharge is calculated by multiplying the amount of sales of the relevant products or services during the period in which private monopolisation was implemented (for a maximum period of 10 years (or more in certain circumstances)) by the surcharge calculation rate in the following table. Administrative fines on private monopolisation were introduced in January 2006 for the control-type private monopolisation, and in January 2010 for the exclusionary-type private monopolisation.

| Type of private monopolisation | Surcharge calculation rate |
|---|---|
| Exclusionary-type | 6 per cent |
| Control-type | 10 per cent |

Theoretically, a firm that engages in private monopolisation would be subject to a criminal penalty under the AMA; however, the JFTC has never issued criminalised charges based on private monopolisation.

With regard to unfair trade practices, the JFTC can issue a cease-and-desist order. Furthermore, for certain types of unfair trade practices, the JFTC can impose a surcharge (an administrative fine), depending on the applicable category, as follows.

| Unfair trade practice | Surcharge |
|---|---|

| | |
|---|---|
| Joint refusal of trade<br>Predatory pricing<br>Price discrimination (*1) | 3 per cent |
| Abuse of superior bargaining position | 1 per cent |

Other than abuse of superior bargaining position, a firm that engages in the unfair trade practices described above may be subject to the imposition of a surcharge (ie, an administrative fine) if:

- it conducts the same type of unfair trade practice for a second time within a 10-year period; or
- it is a wholly-owned subsidiary of another firm that has also engaged in an unfair trade practice, and it conducts the same type of unfair trade practice within the most recent 10-year period.

A firm that engages in unfair trade practices is not subject to a criminal penalty.

## Reform of the surcharge system

The 2019 amendment of the AMA regarding the surcharge system became effective on 25 December 2020. The major amendments related to private monopolisation or unfair trade practices are as follows.

### Extension of the calculation period and statute of limitations

The maximum surcharge calculation period was extended from a three-year period to a period starting from as early as 10 years prior to the start date of the relevant investigation, such as an on-site inspection, up until the date that the violation ceased. In addition, the amendments extended the time during which the JFTC can impose a surcharge from five years to seven years from the date upon which the party under investigation ceases its unlawful act.

### Additional types of unjust gains to calculate surcharges

The following types of unjust gains derived from infringements have been included in the basis of calculating surcharges:

- a financial gain as a reward for not supplying goods or services in connection with an unlawful act;
- the amount of sales of a business related to goods or services provided in connection with an unlawful act (eg, subcontract); and
- the sales of certain firms that are associated with violators or firms that receive instructions or information from violators.

### Abolition of different calculation rates by the type of business

The basic calculation rate has been unified among all types of businesses.

### Firms that have succeeded the business of violators

The calculation rate, which will be increased by an extra 50 per cent, will be applicable to infringements by a firm that

has succeeded the business of another firm that has violated the AMA within the past 10 years. This means, for example, that if a firm, which has succeeded the business of another firm that has violated the AMA within the past 10 years, commits an exclusionary-type private monopolisation act, the surcharge rate will be 9 per cent.

**Repeated infringement within the same company group**

The increased calculation rate will be applicable to infringements by firms whose fully-owned subsidiaries have been subject to the imposition of a surcharge within the past 10 years. This is only applicable to private monopolisation.

**Expansion of the concept of second time of conducting unfair trade practices**

Prior to the enforcement of the amendment, a surcharge (ie, an administrative fine) could be imposed only when a firm conducted an unfair trade practice for a second time. Following the amendment, a surcharge (ie, an administrative fine) may also be imposed on a firm that is a wholly owned subsidiary of another firm that has also conducted an unfair trade practice within the most recent 10 years. This is only applicable to unfair trade practices.

*Law stated - 17 January 2022*

## Enforcement process

### 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 and issue a surcharge payment order without the involvement of any other authority; however, if it seeks to issue a cease-and-desist order, it must conduct a hearing with the would-be addressee of the cease-and-desist order.

### Commitment Procedures

The Commitment Procedures, which were introduced to the AMA on 30 December 2018, are applicable to a suspected violation of the AMA, including private monopolisation and unfair trade practices, except in the following cases:

- suspected violations perpetrated by a hardcore cartel, such as bid rigging or price-fixing;
- cases in which a firm has violated the same provisions of the AMA within 10 years; and
- cases recognised as constituting suspected violations that are vicious and serious in nature, in respect of which criminal prosecution is considered as appropriate.

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 allow for a firm subject to a JFTC investigation to submit to the JFTC voluntary measures to address the competition concerns the JFTC has, and enable the JFTC to close the case without acknowledging illegal conduct, provided the JFTC confirms that those measures are sufficient for eliminating the suspected conduct and it is confident that the same will be reliably undertaken by the firm.

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. For example, the JFTC launched an investigation against Nihon Medi-Physics on the suspicion that Nihon Medi-Physics had unjustly excluded a potential competitor that tried to enter the fludeoxyglucose (FDG) market by:

- informing a dominant reseller that Nihon Medi-Physics intended to stop selling FDG that was manufactured and sold by Nihon Medi-Physics if the reseller began trading FDG with the potential competitor at regional prices;
- explaining to certain customers (hospitals) without any clear basis that automatic injection devices developed by a potential competitor may not be used for FDG manufactured and sold by Nihon Medi-Physics; and
- refusing same-day delivery requests for FDG from certain customers (hospitals) that purchased FDG manufactured and sold by the potential competitor.

The JFTC initially suspected that those acts amounted to private monopolisation or unfair trade practices (ie, interference with a competitor's business); however, it subsequently recognised that the commitment plan suggested by Nihon Medi-Physics provided sufficient measures to eliminate the suspected concerns. It approved the plan on 11 March 2020 without acknowledging any illegal conduct by Nihon Medi-Physics.

## Investigations closed after voluntary commitments

In addition to the Commitment Procedure, there have been cases in which the JFTC has closed its investigation without taking any measures in consideration of the fact that the subject of the JFTC's investigation had voluntarily offered reasonable measures to remove its competition concern.

### Osaka Gas

The JFTC launched its investigation against Osaka Gas suspecting that Osaka Gas had unjustly excluded competitors in the gas retail market for certain large customers by offering discounts to customers that concluded multiple contracts, but obliging those customers to pay a certain fee if they wanted to terminate a portion of those contracts. On 2 June 2020, the JFTC decided to close its investigation against Osaka Gas because Osaka Gas had voluntarily offered to revise the multipoint contract and the gas supply contract that were the subject of the JFTC's investigation.

### Apple

The JFTC investigated the business practice of Apple Inc (Apple) in relation to its operation of the App Store for suspicion of restricting business activities of app developers under articles 3 and 19 of the AMA. Apple required app developers to use only the means of payment that Apple specified, referred to as in-app purchases (IAP), for selling digital content and prohibited including external links or buttons within the app that led users to non-IAP. It further collected fees of 15 to 30 per cent when sales were made through the IAP under its App Store Review Guidelines.

The JFTC investigated this conduct on the suspicion that the prohibition may interfere with the functioning of the developers' sales channels that use means of payment other than IAP or that the restrictions imposed by Apple may cause the app developers to abandon sales channels that use means of payment other than IAP, when the existence of a sales channel using payment other than IAP may otherwise effectively contribute towards a price-reduction effect and consequently benefit consumers.

The JFTC investigation was concluded in September 2021 after Apple voluntarily offered to implement measures to allow developers of reader apps of music streaming services, e-books and video streaming services for smartphones to post links to external websites to make purchases of the digital content available and to revise its App Store Review Guidelines. The JFTC confirmed that those measures were sufficient to resolve its concerns.

*Law stated - 17 January 2022*

## Enforcement record

### What is the recent enforcement record in your jurisdiction?

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

The most recent case against Mainami Aviation Service Co, Ltd published on 7 July 2020 involved exclusionary-type private monopolisation. The JFTC issued a cease-and-desist order on 7 July 2020 and issued a surcharge payment order on 19 February 2021 for the same offence as that found in the cease-and-desist order. While the surcharge amount imposed was not particularly high (¥6.12 million), the case is noteworthy because it is the first case in which a surcharge payment order had been imposed owing to acts of exclusionary-type private monopolisation since the introduction of the surcharge payment order for exclusionary-type private monopolisation in January 2010 under the AMA. Mainami Aviation Service Co, Ltd filed lawsuits for both the revocation of the cease-and-desist order and the revocation of the surcharge payment order. The Tokyo District Court dismissed the claims of Mainami Aviation Service Co, Ltd in both cases on 10 February 2022. According to the press release of Mainami Aviation Service Co, Ltd, they will appeal against the decisions to the High Court after carefully reviewing the judgements of the Tokyo District Court. The most recent case of control-type private monopolisation involved the Fukui Economic Federation of Agricultural Cooperatives Associations on 16 January 2015.

*Law stated - 17 January 2022*

## Contractual consequences

### 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.

*Law stated - 17 January 2022*

## Private enforcement

### 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 those cases, the JFTC is obliged to conduct at least a preliminary investigation. Only selected cases trigger a formal full-fledged investigation.

Regarding unfair trade practices, it is also 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.

*Law stated - 17 January 2022*

### Damages

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, which can be claimed when the defendant is subject to a final and binding cease-and-desist order or a payment order for surcharge (an administrative fine), the element of intention or negligence is not required.

*Law stated - 17 January 2022*

### Appeals

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

A firm 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 (article 14 of the Administrative Litigation Act).

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 with the Tokyo District Court.

*Law stated - 17 January 2022*

## UNILATERAL CONDUCT

**Non-dominant firms**

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

Unfair trade practice may be applicable.

*Law stated - 17 January 2022*

## UPDATE AND TRENDS

**Forthcoming changes**

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?

There are currently no planned amendments to the Anti-Monopoly Act.

*Law stated - 17 January 2022*

# Jurisdictions

| | |
|---|---|
| **Australia** | Gilbert + Tobin |
| **Austria** | Schima Mayer Starlinger |
| **Belgium** | Cleary Gottlieb Steen & Hamilton LLP |
| **Bulgaria** | Wolf Theiss |
| **Canada** | Baker McKenzie |
| **China** | DeHeng Law Offices |
| **Denmark** | Bruun & Hjejle |
| **Ecuador** | Robalino |
| **European Union** | Cleary Gottlieb Steen & Hamilton LLP |
| **France** | UGGC Avocats |
| **Germany** | Cleary Gottlieb Steen & Hamilton LLP |
| **Greece** | Nikolinakos & Partners Law Firm |
| **Hong Kong** | Eversheds Sutherland (International) LLP |
| **India** | Shardul Amarchand Mangaldas & Co |
| **Indonesia** | ABNR |
| **Ireland** | Matheson LLP |
| **Italy** | Rucellai & Raffaelli |
| **Japan** | Anderson Mōri & Tomotsune |
| **Morocco** | UGGC Avocats |
| **Norway** | Advokatfirmaet Thommessen AS |
| **Portugal** | Gomez-Acebo & Pombo Abogados |
| **Saudi Arabia** | Al Tamimi & Company |
| **Singapore** | Drew & Napier LLC |
| **Slovenia** | Odvetniska druzba Zdolsek |
| **South Korea** | Yoon & Yang LLC |

| | |
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| **Switzerland** | CORE Attorneys Ltd |
| **Turkey** | ELIG Gurkaynak Attorneys-at-Law |
| **United Kingdom** | Cleary Gottlieb Steen & Hamilton LLP |
| **USA** | Cleary Gottlieb Steen & Hamilton LLP |