The Public Competition Enforcement Review

Eighth Edition

Editor
Aidan Synnott

Law Business Research

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The Cartels and Leniency Review
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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention.

Cartel enforcement remains robust, particularly by the European Union and the United States, although the number of new enforcement decisions adopted by the EU dropped significantly in 2015. Other jurisdictions, including Greece and France, also report a decrease in the magnitude of fines or numbers of decisions rendered in cartel actions. China, however, saw a slight increase. In 2015, Australia, Brazil, China, Cyprus, the European Union, Germany and the United States have opened, continued or settled enforcement actions against automotive parts cartelists. Brazil, China, Germany, Spain, and Switzerland have each seen enforcement activity related to the distribution of automobiles. Additionally, several jurisdictions investigated food-related cartels in 2015, including dairy products (France and Spain), chocolate (Canada), eggs (Australia), poultry (France), bakeries (Finland), and sugarcane (Colombia).

In the area of restrictive agreements, several European jurisdictions (France, Germany, Italy and Sweden) moved against an online travel booking platform for its use of 'most-favoured nation' clauses with respect to the rates offered by hotels to the platform. However, as we see in the chapters that follow, the German authority did not accept the commitments made by the platform to the other jurisdictions, and required a more stringent remedy. These actions follow on a similar enforcement action in the United Kingdom in 2014. In addition, Brazil, France, and Sweden have examined taxi services. We also continue to see several examples of actions against manufacturer-imposed restrictions on retailer behaviour, particularly against resale price maintenance, including actions in Argentina (bleach), Colombia (rice), Switzerland (musical instruments), and the United Kingdom (refrigerator and bathroom suppliers). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the dearth of public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

Merger review and enforcement activity remains robust, and the chapters that follow note activity in many sectors, including in the telecommunications area in the United

States, Spain, Greece, France, Croatia and Finland. We also see several reports of merger investigations in the healthcare area, including activity in Australia, Spain and the United States. Several of the reports, including the reports from the United States, Belgium and Germany, note enforcement activities arising out of merger process violations, such as the failure to properly report transactions.

Many jurisdictions continue to develop their approach to implementation of competition laws enacted in recent years. Of particular interest is the essay entitled 'The Damages Directive, in search of a balance between public and private enforcement of the competition rules in Europe,' which discusses the implementation of the 2014 European Commission Damages Directive.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2016

Chapter 19

JAPAN

Kaoru Hattori[1]

I OVERVIEW

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Act)[2] regulates four major categories of conduct, as follows:

a prohibition of private monopolisation (former clause of Article 3 and Article 2, Paragraph 5);

b prohibition of unreasonable restraint of trade (latter clause of Article 3 and Article 2, Paragraph 6);

c prohibition of unfair trade practices (Article 19 and Article 2, Paragraph 9); and

d regulations on business concentrations (e.g., mergers and acquisitions) (Chapter 4).

The regulation of private monopolisation does not extend to the dominant market condition itself, but rather any behaviours excluding and controlling[3] others that have the effect of substantially restraining competition. Unreasonable restraint of trade typically includes both hard-core and non-hard-core cartel behaviours. Unfair trade practices, defined in Article 2, Paragraph 9 of the Act, consist of 'concerted boycotts', 'discriminatory pricing', 'unjust low-price sales', 'resale price restriction', 'abuse of superior bargaining position' and other business activities that are designated by the Japan Fair Trade Commission (JFTC).[4] Under the regulation on business concentrations (merger control), the Act requires prior notification

1 Kaoru Hattori is a partner at Nagashima Ohno & Tsunematsu.

2 Act No. 54 of 14 April 1947. The latest amendment of the Act, which was enacted on 7 December 2013, came into effect on 1 April 2015.

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

4 The JFTC is the primary regulatory authority governing Japanese competition matters.

for certain types of concentration. In addition, regardless of the obligation of pre-notification, the Act regulates any concentrations that may raise anticompetitive concerns in the relevant market.

i Prioritisation and resource allocation of enforcement authorities

The JFTC places a priority on the enforcement of the following categories of conduct:[5]

a hard-core cartels, such as those involving price fixing and bid rigging that have a significant effect on consumers; and

b abuses of a superior bargaining position, unjust low price sales and discriminatory pricing that are unfair and prejudicial to small and medium-sized enterprises.

ii Enforcement agenda

Amendment of the Act

As previously mentioned, the amended Act came into force on 1 April 2015.

The main amendments to the Act are as follows:

a to abolish the JFTC's hearing procedure for administrative appeals, as well as eliminate the provision that provides that the Tokyo High Court is to be the court of first instance over any appeals pertaining to decisions of the JFTC;

b to introduce a system in which any appeals pertaining to cease and desist orders, etc., shall be subject to the exclusive jurisdiction of the Tokyo District Court, heard by a panel of three or five judges with a view to ensuring expertise in the Court's decisions; and

c to ensure procedural fairness, *inter alia*, by providing defendants with an explanation of the contents of cease and desist orders, etc., and allowing them to inspect and photocopy evidence cited by the JFTC during the hearing procedure prior to issuing a cease and desist order, etc.

Important tasks for the JFTC in 2015

One of the JFTC's main tasks in 2015 is to ensure the smooth and proper implementation of the 'pass-on' in relation to the increase in consumption tax. In particular, small and medium-sized businesses may face difficulties with consumption tax pass-on. The Act Concerning Special Measures for Pass-on of Consumption Tax is a special legal framework designed to swiftly and effectively correct rejecting consumption tax pass-on and other practices by specific enterprises. The JFTC has announced that it will carry out a questionnaire survey on a wide scale to find any conducts that impede smooth and proper consumption tax pass-on.

II CARTELS

i Overview

Unreasonable restraints of trade are defined under Article 2, Paragraph 6 as follows:

5 JFTC press release, 28 May 2014, http://www.jftc.go.jp/houdou/pressrelease/h27/may/150527_1.html.

> *[…] such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.*

Therefore, any agreements[6] between competitors designed to eliminate or restrict competition, such as bid rigging, price fixing, limits on production and territory, market or customer allocation are considered unreasonable restraints of trade.

Once such an agreement is found, the agreement itself will constitute a prohibited unreasonable restraint of trade,[7] even without specific conduct following the agreement. On the other hand, in practice, such agreements between competitors are usually proven by an accumulation of indirect evidence, most typically by a showing of certain contacts or communications between competitors, and subsequent conducts that run parallel to such contacts or communication. Moreover, although the Act clearly stipulates that competition must be substantially restrained and contrary to the public interest for the collusion to be considered illegal, in reality and practically, the JFTC is usually able to establish this requirement fairly easily in the case of hard-core cartels, and it is seldom possible to rebut such finding.

ii Sanctions

Under the Act, two possible sanctions are stipulated: administrative sanctions and criminal sanctions. To date, the JFTC has usually chosen administrative sanctions; only limited cases are subject to criminal sanctions, as described below. In addition, a company participating in a cartel may also be subject to civil liabilities as a result of private lawsuits filed by its customers.[8] Moreover, in bid-rigging cases, the company is usually suspended from participating in public procurement procedures for a certain period.

Administrative sanctions: cease and desist orders and surcharges

The JFTC has broad authority to order companies allegedly conducting a cartel to cease and desist the prohibited acts, transfer a part of their business to a third party or take any other measures necessary to restore competition in the relevant market (Article 7). In cease and desist orders, the JFTC has been inclined to require addressees to conduct various types of activities, including:

a passing a board resolution confirming the termination of the cartel activities;

b notifying its competitors in Japan of the termination of all cartel activities;

c notifying customers in Japan of the termination of all cartel activities and of its decision not to participate in such cartel activities in the future;

d promoting the compliance of its officers and employees, including those of its subsidiaries; and

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

7 *Petroleum Cartel* case, Supreme Court, 24 February 1984.

8 In Japan, there is no legal system for class actions and punitive or multiple damages.

e excluding employees involved in the cartel activities from divisions in which contacts with competitors are necessary.

The JFTC also has the authority to issue surcharge payment orders that require companies allegedly conducting a cartel to pay a surcharge as a penalty for breaching the Act. Such orders must be issued if the JFTC finds cartel conducts where sales of goods or services in Japan are affected by such conducts. The JFTC does not have any discretion on whether it should impose a surcharge or how much it shall order to be paid as a surcharge.[9] The surcharge amount is determined using a formula provided in the Act. The companies sanctioned must pay a certain percentage (generally 10 per cent)[10] of the affected sales in Japan during the period in which the cartel is determined to have been active, which period shall not exceed three years (Article 7-2, Paragraph 1). If the company sanctioned is subject to a further surcharge within 10 years, the applicable surcharge will be increased by 50 per cent (Article 7-2, Paragraph 7). In addition, if the company sanctioned is a leader,[11] then the surcharges shall be increased by 50 per cent (Article 7-2, Paragraph 8).

The statute of limitations for these two administrative sanctions is five years from the end of the illegal conduct (Article 7, Paragraph 2 and Article 7-2, Paragraph 27).

Criminal penalties

The JFTC has exclusive power to decide whether to present an accusation of the alleged conduct to the Public Prosecutor's Office. The JFTC's policy on criminal accusation is as follows.[12]

The JFTC will actively seek criminal penalties in the following cases:

a serious cases that are considered to have widespread influence on people's livelihoods, including those violations that substantially restrain competition in certain areas of trade, such as price-fixing cartels, supply restraint cartels, market allocations, bid rigging, group boycotts, private monopolisation; and

b violation cases involving firms or industries that are repeat offenders or that do not abide by the imposed measures, and those cases for which the administrative measures of the JFTC are not considered to fulfil the purpose of the Act.

The number of cases that the JFTC has made subject to criminal accusations has been relatively low to date.

Criminal prosecutions can only be brought by the Public Prosecutor against companies and individuals that allegedly conduct a cartel on referral from the JFTC.

9 Recently, the JFTC seems to study to introduce any systems which allow the JFTC to decide how much it shall order to pay as a surcharge.

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

11 Those who originate an illegal scheme and request that other firms participate in it or not cease to infringe, or continuously set prices or allocate trade partners in response to the conspirator's request, shall be deemed as a leader (Article 7-2, Paragraph 8).

12 www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf.

A company allegedly conducting a cartel may face criminal fines of not more than ¥500 million for a single violation (Article 95, Paragraph 1, item 1).[13] If both a surcharge and a criminal fine are levied on a company, half of the amount of the fine is, in principle, deducted from the administrative surcharge (Article 7-2, Paragraph 19). Regarding criminal sanctions, individuals who are actually involved in cartel conducts, such as corporate executives and employees of the company, may also face criminal penalties of up to five years' imprisonment, fines totalling not more than ¥5 million (Article 89, Paragraph 1), or both. A representative of a company who, despite knowing of the planned or actual illegal activity, fails to take necessary measures to prevent it or rectify it is subject to the same penalties as the violator (individual) (Article 95-2).

iii Japan's leniency programme

Under Japan's leniency programme, companies that may be in violation of the Act are encouraged to apply for leniency, and thereby potentially are subject to an exemption from or a reduction in the penalties they may face. Under the Act, the total number of companies that may apply for the leniency programme is five; however, once an investigation has been initiated, no more than three companies may apply after such an investigation. When companies file a leniency application before the official initiation of a JFTC investigation, the first applicant is eligible to receive 100 per cent immunity from any subsequent surcharge payment order, the second applicant is eligible to receive a 50 per cent reduction and the other applicants can receive a 30 per cent reduction. As indicated above, leniency may also be applied for after the initiation of a JFTC investigation. In that case, each applicant is only eligible to obtain a 30 per cent reduction in any subsequent surcharge payment order. The cap on the total number of companies that can apply for leniency includes all companies that apply, whether before an investigation or after its initiation.

The JFTC has no discretion in determining whether immunity from surcharge is granted or how much of a reduction in the surcharge payment is granted. If the application for leniency is completed,[14] then the award granted to the applicant is automatically determined based on when such application is submitted (i.e., pre-investigation or post-investigation), and what its chronological order of submission is.[15] If the JFTC deems it appropriate (in particular with respect to international cartel cases), the applicant may substitute an oral statement for certain entries in the application form, but it must still file the written application without inserting those entries by telefax to the designated number and submit certain materials separately. The JFTC generally will not issue cease and desist

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

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

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

orders to those applicants that file for leniency voluntarily before the JFTC initiates the investigation; however, if an applicant is not the first-in applicant, a surcharge payment order will be issued to such applicant. Moreover, the JFTC has announced that it will not refer the first-qualified leniency applicant (including its cooperative executives and employees) to the Public Prosecutor, and the Ministry of Justice has declared that it will give full regard to the JFTC's decisions. This means that the first-in leniency applicant (who filed an application prior to the initiation of a JFTC investigation) is exempted not only from administrative sanctions but also from any criminal penalties.

iv Significant cases

In addition to recent cases, we discuss the defining cases in the development of the enforcement of the Act by the JFTC, especially in relation to international aspects, below.

Marine Hose[16]

The *Marine Hose* case involved alleged territorial allocation (a concept of home country priority), including the designation of the recipient of orders, the predetermination of the shares of companies to be received for each order, and price cooperation among Japanese, British, Italian and French companies regarding the supply of marine hose. In this case, the JFTC, for the first time in its history, issued cease and desist orders against foreign companies located outside Japan. However, as such foreign companies did not have any sales in Japan according to the agreement, there was no basis to impose surcharge payment orders on such foreign companies, and no surcharge payment orders were issued. In its press release, the JFTC stated that investigations in the marine hose sector were commenced simultaneously in May 2007 by competition authorities including the US Department of Justice and the European Commission.

Cathode ray tubes for televisions[17]

The *Cathode ray tubes for televisions* case involved alleged price fixing among Japanese, Korean and Taiwanese companies and their subsidiaries in South East Asia regarding the supply of cathode ray tubes to production subsidiaries of Japanese television manufacturers located in South East Asia. In this case, the JFTC issued cease and desist orders and, for the first time in its history, surcharge payment orders to foreign companies located outside Japan. On 29 March 2010, the JFTC announced that it took necessary steps to serve orders on foreign companies located outside Japan.

Wire Harnesses[18]

The *Wire Harnesses* case involved an alleged price-fixing cartel. On 19 January 2012, the JFTC ordered the companies allegedly conducting such cartel to pay a surcharge payment amounting to approximately ¥12.9 billion in total. In its press release, the JFTC stated that it had started its investigation of the case at approximately the same time as the US Department of Justice and the European Commission.

16 Cease and desist order and surcharge payment order, 22 February 2008.

17 Cease and desist order and surcharge payment order, 7 October 2009 and 29 March 2010.

18 Cease and desist order and surcharge payment order, 19 January 2012.

With respect to other automotive parts, on 22 November 2012, the JFTC ordered the companies allegedly conducting cartels in relation to the supply of alternators, starters and windshield wiper systems for automobile and radiators and electric fan motors for automobiles to pay a surcharge payment amounting to approximately ¥3.4 billion in total. On 22 March 2013, the JFTC also ordered the companies allegedly conducting cartels in relation to the supply of headlights and rear combination lamps for automobiles to pay a surcharge payment amounting to approximately ¥4.7 billion in total.

Engineering works for overhead transmissions[19]

In the bid-rigging cartel involving engineering works for overhead transmissions, which were ordered by Tokyo Electric Power Co, Inc, on 20 December 2013, the JFTC ordered the alleged violators to pay a surcharge payment amounting to approximately ¥746 million in total. In this case, one alleged violator was named as a ringleader of the cartel, and the JFTC increased the surcharge for that company by 50 per cent because the violator had played an important role in facilitating the alleged cartel. Another alleged violator was also named as a ringleader of the cartel, because such violator solicited the other violators to participate in the cartel. In addition to this, said violator received a surcharge payment order that was enforced within 10 years counting retroactively from the investigation start date; thus, the JFTC increased the surcharge for said violator by 100 per cent. For the other companies involved (the exact number was not published), the JFTC increased the surcharge by 50 per cent because those companies had received a surcharge payment order that was enforced within 10 years counting retroactively from the investigation start date.

Bearings[20]

In relation to the price-fixing cartel among manufacturers of bearings (excluding miniature and small-sized bearings), in addition to a criminal sanction,[21] on 29 March 2013, the JFTC ordered the alleged violators to pay a surcharge payment amounting to approximately ¥13.4 billion in total.

International Ocean Shipping Companies[22]

The JFTC issued cease and desist orders and surcharge payment orders against international ocean shipping companies. The surcharge payment amounted to approximately ¥22.7 billion in total.

Snow-melting Equipment Engineering Works for Hokuriku Shinkansen[23]

The JFTC filed a criminal accusation of bid rigging concerning snow-melting equipment engineering works for Hokuriku Shinkansen ordered by the Japan Railway construction,

19 Cease and desist order and surcharge payment order, 20 December 2013.

20 Cease and desist order and surcharge payment order, 29 March 2013.

21 To date, while two of the manufacturers were found guilty by the Tokyo District Court and ordered to pay criminal fines of ¥380 million and ¥180 million respectively, one other manufacture is still arguing the case at the Tokyo High court.

22 Cease and desist order and surcharge payment order, 18 March 2014.

23 The filing was made by the JFTC on 4 March 2014.

Transport and Technology Agency. In addition, the JFTC issued cease and desist orders and surcharge payment orders against such engineering companies. The surcharge payment amounted to approximately ¥1 billion in total.

v Trends, developments and strategies

Japan's leniency system has been widely used[24] by major Japanese companies as well as foreign-based companies. In a briefing on 19 February 2014, the Secretary General of the JFTC announced that, among a total of 106 cases where the JFTC has formally initiated investigations into alleged cartels, there have been 86 cases where the JFTC has granted immunity or a reduction of the surcharge based on leniency applications. In addition, the Secretary General pointed to a trend whereby a company against which the JFTC has made a dawn raid initiates an intensive internal investigation to find not only whether it truly was involved in the alleged conduct, but also whether it was or has been involved in similar conducts in relation to different goods or services. Should the company find any suspicious conducts, it submitted leniency applications for such different goods or services. There is no corresponding or similar system to the United States' amnesty-plus in Japan.

In addition, 102, 50 and 61 leniency applications were filed in the financial years 2012, 2013 and 2014 respectively; however, the number of investigations conducted by the JFTC was around 20 per year at most. There may be several reasons for this discrepancy in numbers; however, the vagueness of the conducts confessed as cartels by such leniency applications and the JFTC's policy may be part of the reason for this situation. In balancing its monetary and personal resources and effective enforcement to deter illegal cartels, the JFTC may have selected to concentrate on certain high-profile cases.

In this context, when a suspicious conduct is found, it is advisable to consider making a leniency application, provided that there are no substantial downsides. The following information may be helpful to make such decision:

a any potential applicant can make a prior consultation with the JFTC anonymously (although the relevant goods and services shall be identified) to understand whether it can obtain a first-in position, or what position it can obtain;

b if an applicant provides all relevant information that is required in the forms designated by the JFTC, such applicant can be granted 100 per cent immunity, or a 50 per cent or 30 per cent reduction of surcharges, according to the order in which the submission is made, which is strictly stamped on the facsimile records;

c the JFTC may, in some cases, allow an oral application, which enables an applicant, or its lawyer on behalf of the applicant, to report a part of the information required in the forms orally. However, even when allowed to use an oral application, some information still must be filled in the written forms, including the relevant goods or services, the time period during which an alleged cartel was conducted and the type of alleged cartel, such as price fixing or bid rigging;

24 From the time that the leniency programme was introduced in January 2006 until the end of March 2015, 836 leniency filings have been made. See JFTC press release, 27 May 2015.

d the applicant is required to cooperate with the JFTC, including responding[25] to all questions posed by JFTC officials, and having its executives and employees, and sometimes its former executives and employees, participate in lengthy interviews; and

e under the JFTC's current policy and practice, it is clear that the JFTC will not disclose any information and materials that are in its possession, regardless of whether they have been seized in a dawn raid or through the submission by leniency applicants to a third party (e.g., the US courts).[26]

vi Outlook

The JFTC has declared its intention to aggressively enforce the act against cartels. Although the rate of JFTC accusations that trigger criminal procedures against companies and individuals for alleged cartels have been relatively moderate to date,[27] and its announced policy[28] has not changed, such criminal investigations may be carried out at short intervals and the number of criminal investigations may increase. The JFTC made a criminal accusation in relation to the alleged *Bearings* cartel in June 2012, and less than two years later it made a criminal accusation in relation to alleged bid rigging for engineering works for the Shinkansen in March 2014.

The JFTC will also continue to deal with international cartel cases vigorously in cooperation with competition authorities such as the US Department of Justice and the European Commission.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Private monopolisation

Overview

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

The JFTC has issued a very limited number of cease and desist orders with regard to the regulations concerning private monopolisation since the Act was first introduced in

25 As attorney–client privilege is not recognised in Japan, an applicant cannot refuse any JFTC requests because of attorney–client privilege.

26 The Secretary General of the JFTC announced the JFTC's current position in his weekly briefing on 19 February 2014, and presented one case where the JFTC rejected a US court's discovery request in cooperation with the EC.

27 The JFTC conducted criminal investigations regarding the *Bearings* cartel case in July 2011, three-and-a-half years after it initiated a criminal investigation against the price-fixing cartel among manufacturers and distributors of galvanised steel sheets in January 2008. An interval of three to four years between criminal investigations is not rare.

28 www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf.

1947.[29] The reason for this limited number was mainly because, since differences in the outcomes[30] were negligible, the JFTC preferred to bring formal proceedings under the unfair trade practices regulations, which require a lower standard of anticompetitive effect than those required under private monopolisation. Around the time of the amendment of the Act in 2005, which introduced surcharge payment orders against companies involved in 'control' type private monopolisation activities pertaining to or affecting prices,[31] there seemed to be a trend in which the JFTC tried to actively enforce private monopolisation regulations. However, the 2009 amendment of the Act introduced surcharge payment orders against companies involved in certain types of unfair practices such as an abuse of superior bargaining power.[32] Although the basic surcharge rate against companies involved in private monopolisation activities is higher than those against companies involved in unfair trade practices, and thus this may provide the JFTC with more incentive to make use of the private monopolisation regulations, in reality, since 1 January 2010, while there have been five cases where cease and desist orders and surcharge payment orders were issued regarding a breach of an abuse of superior bargaining power, there have been a single cases where cease and desist orders have been issued against a private monopolisation breach. In such a private monopolisation case, however, surcharge payment order was not issued.

Significant cases

In *JASRAC*, the JFTC found that JASRAC, a dominant copyright management organisation, excluded other copyright management entities from the market by entering into comprehensive contracts with broadcasting companies. JASRAC requested the commencement of tribunal procedures to challenge the cease and desist order levied by the JFTC, and the JFTC commenced the procedures in May 2009. The JFTC tribunal rescinded the original cease and desist order in 14 June 2012, because there was no evidence that JASRAC's royalty collection method had the effect of damaging the business activities of other copyright management organisations.[33] However, the JFTC appealed to the Tokyo High Court requesting an order to rescind the JFTC's tribunal order. The Tokyo High Court granted that appeal.

Guidelines for 'exclusion' type private monopolisation[34]

Because of the difficulty in distinguishing excluding conduct by normal business activities that lead to the exclusion of other companies, which is subject to a surcharge, it has been pointed

29 Between 2009 and 2013, only one cease and desist order has been issued (in February 2009).

30 Under the previous Act, the JFTC could only issue a cease and desist order against an alleged private monopolisation and could not issue a surcharge payment order. In addition, the JFTC could only issue a cease and desist order against an alleged unfair trade practice, and could not also issue a surcharge payment order.

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

32 This amendment came into force on 1 January 2010. It also introduce surcharge payment orders against companies involved in 'exclusion' type private monopolisation activities.

33 See Shinketsu, 14 June 2012.

34 The full text of the guidelines is available at www.jftc.go.jp/e-page/press releases/20101/January/100107.pdf. A summary of the guidelines is available at www.jftc.go,jp/e-page/

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

ii Unfair trade practices

As previously mentioned, the Act prohibits unfair trade practices, including certain types of concerted boycotts, discriminatory pricing, unjust low-price sales,[35] resale price restrictions and abuse of superior bargaining position, and other business activities that are designated by the JFTC.[36] They cover a wide range of anticompetitive conducts, including a vertical relationship; it is believed that the requirements under the regulations governing unfair trade practices (i.e., a tendency to impede fair competition[37]) can be established more easily than those under the regulations governing unreasonable restraints of trade or private monopolisation (i.e., a substantial restraint of trade or competition).

The 2009 amendment of the Act introduced a surcharge against unfair trade practices, which are stipulated in the Act. Regarding certain types of concerted boycotts, discriminatory pricing, unjust low-price sales and resale price restrictions, a surcharge of 3 per cent (2 per cent for retailers and 1 per cent for wholesalers) of the sales of goods or services concerned is imposed against companies that are determined to have committed a second offence of the same type of infringement within a 10-year period. Regarding certain types of abuses of

pressreleases/2009/October/091028-1.pdf and www.jftc.go.jp/e-page/pressreleases/2009/Ocrober/091028-2.pdf.

35 Predatory price setting can be included in this category. In addition, if goods or services are continuously supplied for a consideration that is excessively below the cost incurred in supplying such goods or services, such conduct may constitute unjust low price sales. Under the guidelines relating to unjust low price sales issued by the JFTC, 'the cost incurred in the said supply' consists of variable costs (i.e., costs that would not be incurred if the goods or services were not supplied) and costs other than variable costs, and, if the price of the goods or services is set below the variable costs, the JFTC assumes that such price is 'excessively below the cost incurred in the said supply'. The full text of the guideline (in Japanese) is available at www.jftc.go.jp/dk/guideline/unyoukijun/futorenbai.html.

36 The JFTC public notice containing the 15 categories of unfair trade practices can be found at www.jftc.go.jp/e-page/legislation/ama/unfairtradepractices.pdf.

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

superior bargaining position, a surcharge of 1 per cent of the sales earned by the transaction with the trade partners that suffered the abuse is imposed against a company that commits a continuous offence.

The regulation of an 'abuse of a superior bargaining position' is unique to Japan. Sometimes, this has been translated into English as an 'abuse of a dominant position', which might give rise to considerable confusion; as such, it is important to note that a dominant market position is not required for such regulation in Japan. The purpose of such regulation is to protect small and medium-sized companies from pressure being exerted by business entities that have a superior bargaining position.

Significant cases

The JFTC has investigated and issued a number of cease and desist orders in connection with very recent cases involving abuses of a superior bargaining position, unjust low price sales and resale price restrictions.

Edion[38]

Edion is one of the largest electronic retailers in Japan. In Edion, the JFTC found that Edion coerced its suppliers, which were in an inferior bargaining position, into dispatching employees to assist with Edion's ordinary operations, such as carrying and displaying goods, without prior agreement and without incurring the cost for such works. The JFTC issued a cease and desist order for an alleged abuse of superior bargaining power, and a surcharge payment order that ordered payment of a surcharge of approximately ¥4 billion.

Edion requested the commencement of tribunal procedures in order to challenge both of the cease and desist order and the surcharge payment order imposed by the JFTC, and the JFTC commenced the procedures in April 2012.

Ralse[39]

Ralse operates a regional supermarket in Hokkaido. In *Ralse*, the JFTC found that Ralse coerced its suppliers, which were in an inferior bargaining position, into dispatching employees to assist with Ralse's ordinary operations, such as carrying and displaying goods, without prior agreement and without incurring the cost for such works; and that Ralse further coerced its suppliers into providing Ralse with money it termed support money for several types of sales, such as grand opening, renovation and anniversary sales. The JFTC issued a cease and desist order for an alleged abuse of superior bargaining power, and a surcharge payment order that ordered the payment of a surcharge of approximately ¥1.3 billion.

Ralse requested the commencement of tribunal procedures in order to challenge both the cease and desist order and the surcharge payment order imposed by the JFTC, and the JFTC commenced the procedures in October 2013.

Direx[40]

Direx operates discount stores in Kyushu and others. In *Direx*, the JFTC found that Direx coerced its suppliers, which were in an inferior bargaining position, into dispatching

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

39 JFTC cease and desist order and surcharge payment order, 3 July 2013.

40 JFTC cease and desist order and surcharge payment order, 5 June 2014.

employees to assist with opening and renewal sales, such as carrying and displaying goods, without prior agreement and without incurring the cost for such works; and that Direx further coerced its suppliers into providing Direx with money it termed support money for several types of sales, such as closing sales. The JFTC issued a cease and desist order for an alleged abuse of superior bargaining power, and a surcharge payment order that ordered the payment of a surcharge of approximately ¥1.3 billion.

Unjust low price sales

Regarding unjust low price sales, the JFTC issued administrative warnings in several cases. In August 2012, the JFTC issued administrative warnings against alcohol wholesalers for unjust low price sales of alcoholic beverages. In January 2013, the JFTC issued an administrative warning against a retailer operating many of the gas stations in four cities across the Fukui prefecture regarding unjust low price sales of regular gasoline.

Adidas Japan KK[41]

In Adidas, the JFTC found that Adidas had caused retailers to sell its toning shoes at a designated fixed retail price, and that this conduct fell under the category of resale price restriction.

iii Outlook

There have been no clear signs to date that the JFTC may take an aggressive approach in enforcing the private monopolisation regulations; rather, it seems to continue to be inclined to use the unfair trade practice regulations framework. That said, in view of the amendment to the surcharges system and the JFTC's willingness to cooperate with the competition authorities of other jurisdictions, it would be prudent to wait and see whether the JFTC may take an aggressive approach in enforcing the private monopolisation regulations in the future.

Regarding abuses of superior bargaining positions, the recent trend of strengthening the regulations and enforcement will continue. In addition, protecting small and medium-sized enterprise is an important area for the JFTC; especially in regard to the increase of the rate of consumption tax, the regulations and enforcement relating to small and medium-sized enterprises has been strengthened.

IV MERGER REVIEW

i Abolition of the prior consultation system and introduction of pre-notification consultation

The prior consultation system concerning business combinations was in effect in Japan until the end of June 2011. This system allowed a company to obtain the official view of the JFTC prior to implementing a combination. A company with concerns that a contemplated combination might raise anticompetitive concerns was able, by applying in writing, to consult with the JFTC, substantially undergo the JFTC's review of the business combination and obtain, in advance, the JFTC's endorsement that there were no antitrust issues, prior to making the combination public. In fact, as long as the company was able to obtain the

41 JFTC cease and desist order, 2 March 2012.

JFTC's determination, through such prior consultation, that the contemplated combination had no antitrust issues, the company was able to announce the combination with absolute confidence, and was able to implement it smoothly. On the other hand, if, as a result of the prior consultation it became clear that obtaining the JFTC's approval would be difficult, the company could abandon the contemplated combination, and be able to avoid possible damages caused by abandoning a combination because no public announcement had yet been made.

However, even with this prior consultation system, criticism from businesses increased, as the JFTC repeatedly requested various materials and information, and the trend for a lengthy prior consultation period became more and more pronounced. Moreover, the number of cases that could barely benefit from the merit of the prior consultation system (i.e., that of being able to obtain JFTC's approval without publicly announcing the case) increased. Furthermore, in consideration of consistency with the processes of other countries, the JFTC made a change to its policy to provide JFTC official views only through the formal review of the pre-notification after its formal submission to the JFTC; therefore, the prior consultation system was basically abolished in June 2011.[42]

The system established in place of the prior consultation system is the pre-notification consultation. In a notice issued by the JFTC, it is indicated that a company or companies planning a combination can consult with the JFTC, in a pre-notification consultation, regarding how to fill out the notification form and other matters, prior to the formal submission of the notification. It is entirely up to companies planning a combination whether to utilise the pre-notification consultation, and it will not suffer an immediate disadvantage by not utilising the process.[43] Currently, it is also more or less up to those companies planning a combination to decide what will be asked or discussed with the JFTC at the pre-notification consultation. However, the JFTC seems to hold that the best way to promptly reach an appropriate judgment is for companies planning a combination, which are therefore most knowledgeable regarding such business, to actively explain the aspects of the business, including but not limited to the market situation and competitors. The JFTC also seems confident that an appropriate decision can be ensured through mutual, close communications, sufficient discussion and the verification of issues between the parties and the JFTC in a timely manner. The JFTC expects companies planning a combination to actively take such steps in those cases that may raise anticompetitive issues or that are complex due to the large scale of the business.

Recently, it has been common practice for the parties to a contemplated combination to use the new consultation system prior to formally filing the pre-notification, including holding several meetings between JFTC officers and the parties (plus their lawyers) in which they discuss the circumstances of the relevant industry and market, and the scope of horizontal or vertical overlapping products, and verify the issues to be examined further. In contrast to the prior consultation system, since the parties may file the pre-notification

42 With regard to a combination that does not satisfy the requirements for pre-notification, a company or companies planning to carry out a combination are allowed to request a prior consultation to obtain the JFTC's approval indicating that there are no antitrust issues.

43 For cases in which no substantial anticompetitive concerns is found, it is often the case that a company planning a combination asks the JFTC officer to check the draft notification prior to formally filing the notification.

and commence the official review period[44] at any time, prolongation of the examination may be avoided, despite substantially similar questions and requests for materials, etc., to be responded to or submitted being made at the pre-notification consultation. Moreover, it is not uncommon for communications between the parties and JFTC officers to continue after the commencement of the official examination triggered by the filing of the pre-notification by the parties concerned.

As stated above, the current practical trend for the examination of combinations in Japan has been advanced with the use of active communications between the JFTC officers and the parties planning a combination, regardless of whether such communications are conducted before or after the notification. Through conducting these communications, since the parties may confirm the questions and concerns of the JFTC officers in charge in a timely manner and submit various kinds of materials to dispel these, it seems to be possible for the JFTC to arrive at a judgment in a more prompt and appropriate manner, and avoid arriving at a judgment that is surprising for the parties.

V CONCLUSIONS

i Pending cases and legislation

As previously mentioned, the amended Act came into force on 1 April 2014.

The amendment changes the system of appeals against cease and desist orders and surcharge payment orders. Previously, in order to challenge a cease and desist order or surcharge payment order issued by the JFTC, the alleged addressee of such order must first file its complaint with the JFTC tribunal. The alleged addressee can only bring the case to court if it decides to challenge the order issued by the JFTC tribunal in the matter. Further the court's review of the case is limited only to legal issues (substantive evidence rules), because it is bound by the factual findings of the JFTC; the court, therefore, can only examine whether the findings by the JFTC are supported by substantive evidence, and whether there is any illegality in the JFTC's decision. Since the decision-maker and its reviewers are ultimately the same five commissioners of the JFTC, the JFTC's review process continues to be strongly criticised.

After the enforcement of the amendment to the Act, the JFTC's tribunal review system is due to be abolished. The alleged addressee of cease and desist orders and surcharge payment must file its complaint with the Tokyo District Court and three or five judges at the Tokyo District Court will review the complaint including the factual findings of the JFTC.

44 If the notification is filed, it will be received and accepted unless a defect is found in the formal description, and the first phase, 30-day examination will commence. In addition, if the JFTC cannot come to a judgment during the 30-day period of the first phase examination, it shall issue a request for reports during such 30-day period and proceed to the second phase examination. The second phase examination period runs until 120 days from the date of the acceptance of the notification, or until 90 days from the date of the acceptance of all responses to requests for reports, whichever is later; however, a request for reports requires the submission of multiple answers to questions, materials and data and, since normally no less than one month is necessary to provide all the appropriate responses, the time frame for supplying these is generally considered to be 90 days from the date of the completion of responses to the request for reports.

In relation to the abolition of the tribunal system, the amendments to the Act require the preparation of necessary and sufficient procedures to ensure the rights of alleged addressees prior to the issuance of cease and desist orders or surcharge payment orders, and to balance the introduction of the courts' substantial review and the maintenance of the JFTC's expertise of competition analysis.

ii Analysis

The JFTC continues to express its willingness to rigorously enforce the Act, and recently it has not hesitated to issue cease and desist orders and surcharge payment orders against foreign companies. In this regard, the JFTC is cooperating more actively with foreign authorities. Further, there are some unique regulations to protect small and medium-sized businesses, such as prohibition of abuse of a superior bargaining position, under the Act that will enable the JFTC to strengthen its enforcement activities. As a result, foreign companies may now have to pay much greater attention to the Act when they conduct business that may affect a Japanese market, and to the development of the JFTC's procedures to ensure such business is conducted in compliance with the Act and will not be exposed to a JFTC investigation.

Appendix 1

ABOUT THE AUTHORS

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Kaoru Hattori is a partner at Nagashima Ohno & Tsunematsu. She started her practice in 1997 after the completion of a two-year legal traineeship, and has since focused on competition issues. She is a specialist on competition law and covers every area within that field.

She has wide-ranging experience in high-profile mergers and acquisitions that require multiple filings and are subject to substantial investigations, as well as international cartels investigated by multiple jurisdictions.

She holds an LLB from the University of Tokyo (1995) and an LLM from University of San Diego School of Law (2002).

In addition, Ms Hattori was a part-time lecturer at the University of Tokyo in 2006 and 2008–2009.

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