



ICLG

The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2017

1st Edition

A practical cross-border insight into vertical agreements and dominant firms

Published by Global Legal Group, in association with CDR, with contributions from:

ALRUD Law Firm

Blake, Cassels & Graydon LLP

Cliffe Dekker Hofmeyr Inc

Darrois Villey Maillot Brochier A.A.R.P.I.

DDPV Studio Legale

Debarliev, Dameski & Kelesoska,
Attorneys at Law

Dickson Minto

ELIG, Attorneys-At-Law

Fourgoux-Djavadi&Associés

Johnson Winter & Slattery

KK Sharma Law Offices

Lee & Lee

Marval, O'Farrell & Mairal

Nagashima Ohno & Tsunematsu

Noerr LLP

Paul, Weiss, Rifkind, Wharton &
Garrison LLP

Pinheiro Neto Advogados

SRS Advogados

Tian Yuan Law Firm





global legal group

Contributing Editor
Charles F. (Rick) Rule,
Paul, Weiss, Rifkind,
Wharton & Garrison LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
June 2017

Copyright © 2017
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-57-4
ISSN 2399-9586

Strategic Partners



Country Question and Answer Chapters:

1	Argentina	Marval, O'Farrell & Mairal: Miguel del Pino & Santiago del Rio	1
2	Australia	Johnson Winter & Slattery: Sar Katdare & Maggie Hung	7
3	Brazil	Pinheiro Neto Advogados: Leonardo Rocha e Silva & Daniel Costa Rebello	14
4	Canada	Blake, Cassels & Graydon LLP: Randall Hofley & Evangelia Litsa Kriaris	21
5	China	Tian Yuan Law Firm: Wei Huang & Fan Zhu	28
6	European Union	Fourgoux-Djavadi&Associés: Jean-Louis Fourgoux & Leyla Djavadi	35
7	France	Darros Villey Maillot Brochier A.A.R.P.I.: Didier Théophile & Guillaume Aubron	41
8	Germany	Noerr LLP: Peter Stauber & Robert Pahlen	49
9	India	KK Sharma Law Offices: K K Sharma	60
10	Italy	DDPV Studio Legale: Luciano Vasques	68
11	Japan	Nagashima Ohno & Tsunematsu: Kaoru Hattori & Yusuke Kaeriyama	76
12	Macedonia	Debarliev, Dameski & Kelesoska, Attorneys at Law: Jasmina Ilieva Jovanovik & Dragan Dameski	84
13	Portugal	SRS Advogados: Gonçalo Anastácio & Luís Seifert Guincho	92
14	Russia	ALRUD Law Firm: German Zakharov & Alla Azmukhanova	99
15	Singapore	Lee & Lee: Tan Tee Jim, S.C.	106
16	South Africa	Cliffe Dekker Hofmeyr Inc: Andries le Grange & Albert Aukema	111
17	Turkey	ELIG, Attorneys-At-Law: Gönenç Gürkaynak & M. Hakan Özgökçen	118
18	United Kingdom	Dickson Minto: Ajal Notowicz & Maria Ziprani	125
19	USA	Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Andrew J. Forman	137

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Japan



Kaoru Hattori



Yusuke Kaeriyama

Nagashima Ohno & Tsunematsu

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Japan Fair Trade Commission (the “JFTC”) enforces the Antimonopoly Act (the “Act”), which governs vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The JFTC may (i) order persons concerned with a case or a witness to appear at a designated time and place to be interrogated or to produce documentary evidence or reports, (ii) order expert witnesses to appear to give expert opinions, (iii) order persons to produce accounting books or any other documents, and (iv) enter any business premises or any other places that the JFTC deems it necessary to enter with a view to investigating the conditions of the business operation, accounting books and any other material that the JFTC finds on the premises.

It should be noted that there is no attorney-client privilege in Japan, so the JFTC has authority to seize, or order persons to produce, any documents that might be privileged in another jurisdiction.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

When the JFTC is aware of potential violation of the Act with regard to vertical agreements or dominant firm conduct, and decides to open an investigation, it may start the investigation by taking the measures mentioned in question 1.2 above or by asking the undertaking to voluntarily cooperate with the JFTC’s investigation. It is not unusual for the JFTC to open an investigation by conducting a dawn raid (the measure described at (iv) in question 1.2 above), even in the cases of vertical agreements and dominant firm conduct. When the JFTC has gathered sufficient evidence to find a violation of the Act, before issuing a formal order, the JFTC needs to issue a notice to the undertaking regarding the commencement of its opinion hearing process; allow the undertaking to review evidence that the JFTC has gathered to establish a violation of the Act; and hold an opinion hearing process, where the JFTC will hear the opinion of the undertaking. The opinion hearing process is not open

to the public. The JFTC will take account of the opinions presented at the opinion hearing process when it proceeds to issue a formal order, such as a surcharge payment order and cease and desist order.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The JFTC may issue a cease and desist order to the companies, which will require, among others, that the companies cease to engage in private monopolisation or unfair trade practices. On rare occasions where there is an urgent necessity, the JFTC may file a motion to the court to order the companies to temporarily cease to engage in conducts at issue.

In addition, the JFTC is required to issue a surcharge as an administrative penalty to companies that engaged in the following conducts on condition that such companies concerned repeat the same type of violation within 10 years: (i) concerted refusal to deal; (ii) discriminatory pricing; (iii) predatory pricing; and (iv) resale price restriction. The JFTC is also required to order the companies to pay administrative surcharges if they engaged in private monopolisation or abuses of a superior bargaining position.

Furthermore, in theory, an individual who committed, or attempted to commit, private monopolisation may be subject to imprisonment for not more than five years or a criminal fine of not more than JPY 5 million. As a matter of practice, however, criminal accusations have only been filed against horizontal agreements, such as cartels and bid riggings, and it is unlikely that those who committed private monopolisation will be criminally charged.

1.5 How are those remedies determined and/or calculated?

The JFTC has broad authority to order companies that have engaged in unfair trade practices or private monopolisation to cease and desist the prohibited acts or to take any other measures necessary to restore competition in the relevant market.

On the other hand, the JFTC does not have discretion regarding the amount of any surcharge payment order; such surcharge amount is calculated in accordance with the formula provided in the Act. Namely, the amount of surcharge is determined by multiplying the turnover from the relevant goods or services derived during the period of the prohibited acts (up to three years) by the relevant surcharge rates provided in the Act. The relevant rates basically range from 1% to 10%, differing based on the types of businesses (e.g., manufacturer, wholesaler, retailer, etc.) and the types of prohibited acts at issue.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Under the current law, there are no available forms of voluntary resolution such as negotiating commitments. The Act was recently amended to introduce a form of voluntary resolution, but such amendment will only be effective when the Trans-Pacific Partnership trade deal becomes effective in relation to Japan. It is not certain whether the Trans-Pacific Partnership trade deal will ever be effective.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The JFTC's formal orders will be subject to review by courts. There used to be a "substantial evidence rule", which means that the court is bound by the JFTC's findings of facts as long as they are supported by substantial evidence. Under the current law, however, there is no such rule. Accordingly, the JFTC's formal orders will be quashed if the court finds that such orders do not meet the requirements of the Act.

1.8 What is the appeals process?

When the JFTC's formal orders (i.e., cease and desist orders and/or surcharge orders) are issued, the addressees of such orders can file the action for judicial review against the JFTC to the Tokyo District Court. Such actions shall be brought within six months from the date when the addressees come to know such orders or within one year from the date when such orders are issued, whichever comes first. Such actions are subject to the exclusive jurisdiction of the Tokyo District Court.

If either of the addressees or the JFTC has any objection to the decision rendered by the Tokyo District Court, such parties can appeal to the Tokyo High Court.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Private rights of action are available to persons who allegedly suffered because of any violation of the Act. The persons may seek to quash all or part of a contract which arguably violates the Act to compensate its damages caused by the violation of the Act, and/or to suspend or prevent the conducts in violation of the Act (injunction). For the purpose of clarification, the injunction can only be available against unfair trade practices.

1.10 Describe any immunities, exemptions, or safe harbors that apply.

The Act shall be applied to the enterprise and the trade association. Under the Act, the enterprise is defined as "a person who operates a commercial, industrial, financial or other business". The meaning of "other business" has been widely interpreted and it can be satisfied if a person repeatedly receives certain economic interests as consideration in exchange for supplying certain economic interests (economic activities). Therefore, not only the conducts of a private company but also those of any public entities, such as the government body and states, can be subject to the Act as long as such public entities engage in any economic activities.

The Act provides a few exemptions. Especially, the provisions of the Act do not apply to acts found to constitute an exercise of rights under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act. However, the meaning of "exercise of rights" has been strictly interpreted and very few conducts can be exempted because of the exercise of IP rights.

In addition, in relation to unfair trade practice, Guidelines concerning Distribution Systems and Business Practice provide that the provisions of unfair trade practice under the Act may not be applied to a certain transaction between a parent company and its subsidiary.

1.11 Does enforcement vary between industries or businesses?

There is no substantial difference in the enforcement of the Act between industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Act shall be applied to the regulated industries as well, unless any specific exemptions are set forth in such laws that regulate the said industries. If there seem to be any conflicts between the industrial regulations and the Act, to what extent the Act should be applied is examined in each case. On the other hand, in some cases, the interests protected by the industrial regulations and by the Act are common and under such circumstance both laws are applied. To make clear the applications of laws, it is not unusual that the Guidelines, which show the kind of conduct which may be allowed and which is prohibited, are jointly prepared by the JFTC and the other regulatory agency.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

In Japan, the political environment may not affect antitrust enforcement.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Currently, the JFTC shows its strong interests in any possible foreclosure effects or unfair trade conducts by using its dominant or superior power in the area of IT/digital-related fields and has been monitoring the area. In addition, the JFTC would actively deal with any anticompetitive unilateral conducts to introduce and ensure the effective market mechanism in the regulated industries.

1.15 Describe any notable case law developments in the past year.

In JASRAC, the JFTC issued the cease and desist order against JASRAC, finding that JASRAC, a dominant copyright management organisation, excluded other copyright management entities from the market by entering into comprehensive contracts with broadcasting companies in February 2009. JASRAC requested the commencement of tribunal procedures to challenge the cease and desist order rendered by the JFTC, and the JFTC commenced the procedures in May 2009. The JFTC tribunal rescinded the original cease and desist order in 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. However, another copyright management organisation made a filing to object such JFTC's tribunal decision to the Tokyo High Court, requesting an order to rescind the JFTC's tribunal decision in July 2012. In November 2013, the Tokyo High Court granted that appeal, and in April 2015, the Supreme Court confirmed the Tokyo High Court decision.

According to the decision rendered by the Supreme Court, the JFTC resumed the tribunal procedures to review the original cease and desist order rendered by the JFTC in June 2015. The tribunal procedures ended with the withdrawal of the request for the commencement of a tribunal procedure by JASRAC in September 2016.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The JFTC's enforcement activities in the area of vertical agreements have been modest. According to the JFTC's annual report for the fiscal year 2015 (i.e., from April 2015 to March 2016), the JFTC issued eight formal orders in unfair trade practice cases during the past five years. Of these eight cases, one case concerned resale price restriction, two cases concerned interference with a competitor's transaction, and the remaining five cases concerned abuses of a superior bargaining position.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

An agreement is not a requirement in order to find a violation of the Act. For example, in cases of resale price restriction, if the undertaking restricts the other party's ability to determine its resale price, it would be sufficient to find a violation of the Act. In other words, the JFTC does not need to find an agreement to establish a violation of the Act. Therefore, there is no use discussing the analysis to determine whether there is an agreement. Likewise, there is no use discussing the analysis to determine whether the agreement is vertical.

2.3 What are the laws governing vertical agreements?

Vertical agreements are regulated by the prohibition of "private monopolisation" and prohibition of "unfair trade practices". Private monopolisation 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 speaking, this prohibition only applies to business entities with dominant market power in the market. On the other hand, "unfair trade practices" regulate concerted boycotts, discriminatory pricing, predatory pricing, resale price restriction, abuse of superior bargaining position and other business activities that are designated by the JFTC, which includes various types of vertical agreements such as tying, exclusive dealing, and trading on restrictive terms. The types of vertical agreements that are regulated by private monopolisation and unfair trade practices

substantially overlap. However, the JFTC has preferred to bring formal proceedings under the unfair trade practices regulations, which require a lower standard of anticompetitive effect than the one required under private monopolisation.

2.4 Are there any type of vertical agreements or restraints that are absolutely ("per se") protected?

No vertical agreements or restraints are protected *per se*. However, according to the Guidelines concerning Distribution Systems and Business Practice, with the exception of a few conducts such as territorial allocation, vertical agreements or restraints are generally allowed under the Act, if it is done by an undertaking with a market share of 20% or less.

2.5 What is the analytical framework for assessing vertical agreements?

The analytical framework for assessing vertical agreements varies depending on the types of conducts at issue. Under the Act, there are no vertical agreements that are illegal *per se* and, accordingly, the assessment of both the conduct itself and its competitive effect is generally required.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

According to the JFTC's Exclusionary Private Monopolization Guidelines, its basic approach is to identify the relevant exclusionary practice at issue and define the product/geographic range affected by such practice as a relevant market. According to the guidelines, the JFTC also adopts, as necessary, an approach that is more widely used in other jurisdictions. Namely, the JFTC also considers a demand-side substitutability and supply-side substitutability.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so called "dual distribution")? Are these treated as vertical or horizontal agreements?

When one of the parties to a vertical agreement is vertically integrated at the same level as the other party, such agreement can be analysed both as a vertical and horizontal agreement. Generally speaking, the JFTC's enforcement activities are more active in the area of a horizontal agreement and, if the JFTC finds that the agreement could relate to the overlapping markets, the JFTC tends to first try to scrutinise such an agreement as a horizontal one.

2.8 What is the role of market share in reviewing a vertical agreement?

The market share is an element that the JFTC will consider when analysing the anticompetitive effect. A high market share is not a prerequisite to find a vertical agreement to be in violation of the Act. That being said, according to the Exclusionary Private Monopolization Guidelines, the JFTC's enforcement priority is on cases where the market share of the undertaking exceeds approximately 50% after the commencement of the conduct at issue and where the conduct is deemed to have serious impact on the lives of citizens in Japan.

2.9 What is the role of economic analysis in assessing vertical agreements?

The JFTC may use some economic analysis to support its findings. However, it appears that economic analysis has not played a key role in assessing vertical agreements so far.

2.10 What is the role of efficiencies in analysing vertical agreements?

The JFTC considers efficiencies in analysing vertical agreements. According to the Exclusionary Private Monopolization Guidelines, the JFTC will consider efficiencies in analysing the anticompetitive effects only where (i) the efficiencies are specific to the conduct at issue and cannot be achieved by less anticompetitive means, and (ii) the efficiency gains will be passed on to consumers and enhance the consumer welfare in the form of price reduction, improvement of product quality, introduction of innovative products, etc.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Article 21 of the Act provides that any conducts that are recognised as exercise of intellectual property rights are exempted from the Act. However, “exercise of intellectual property rights” has been interpreted quite narrowly, and thus this provision does not appear to give a great safe-harbour in practice. Actually, an abuse of intellectual property rights in an anticompetitive way continues to be subject to scrutiny under the Act and does not qualify as exercise of intellectual property rights that are exempted from the Act. The JFTC has issued Guidelines for the Use of Intellectual Property under the Antimonopoly Act.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes. Substantial restraint of competition is a prerequisite for a finding of private monopolisation. In light of the court precedents, it is generally understood that substantial restraint of competition means establishing, maintaining or strengthening the state in which a certain undertaking or a certain group of undertakings can control the market at will by being able to influence price, quality, quantity and other conditions to some extent due to the lessening of competition. On the other hand, likeliness of impeding fair competition is a prerequisite for a finding of unfair trade practices. It is generally understood that establishing likeliness of impeding fair competition is easier than establishing substantial restraint of competition.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The JFTC and courts will consider potential benefits or efficiencies in analysing vertical agreements. For example, when a vertical agreement promotes an inter-brand competition by solving a free-rider problem, that would be a fact that can be considered in analysing the vertical agreement.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

It is generally understood that a vertical agreement may be justified if (i) it has a legitimate purpose, (ii) it is necessary to achieve such purpose, and (iii) there is no less anticompetitive alternative to achieve such purpose. Examples of such legitimate purposes include product safety and promotion of public welfare.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The JFTC issued the following Guidelines: (i) the Exclusionary Private Monopolisation Guidelines; and (ii) the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act. In addition, there are other Guidelines that refer to vertical agreements, such as the Guidelines for the Use of Intellectual Property under the Antimonopoly Act and Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is generally presumed to be illegal. In theory, an undertaking can rebut the presumption by demonstrating a justifiable reason such as the fact that the resale price maintenance is procompetitive by promoting inter-brand competition. In practice, however, an undertaking is hardly able to convince the JFTC or courts that the resale price maintenance is procompetitive.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing may fall foul of the Act when it has a strong foreclosure effect, i.e., when it makes it difficult for new entrants or competitors to find alternative sources of supply or distribution channels. The relevant Guidelines state that if the market share of the undertaking engaging in an exclusive dealing does not exceed 20%, there would not be such foreclosure effect. Key factors to analyse the foreclosure effect include the duration of the exclusive dealing and the percentage of the market that is foreclosed. However, no clear safe-harbour has been set with regard to the duration of the exclusive dealing. In light of the precedents, a sufficient foreclosure effect is likely to be found when more than 50% of the market is foreclosed by exclusive dealings.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

When analysing the tying claims, the JFTC and courts will first analyse if there are two distinct products/services. If two distinct products/services are tied, it may fall foul of the Act when an anticompetitive effect is found in the tied product/service market. In some precedents, the JFTC or courts have easily found an anticompetitive effect, stating that the tying deprived the buyer of the freedom to choose a supplier and therefore harms competition on the merit in the tied product/service market without analysing in detail the effect perceived in the tied product/service market.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination will not have an anticompetitive effect if the price difference results from a fair difference in cost (e.g., the cost saving effect due to production in large quantities) or reflects the supply-demand balance in the market. However, price discrimination may fall foul of the Act if it has an anticompetitive effect in the market where the undertaking is active or in the downstream market. When the JFTC or courts scrutinise an anticompetitive effect in the market where the undertaking is active, a key factor is whether the price is below a certain measure of cost, which makes it impossible for an equally efficient competitor to survive the market. On the other hand, when the JFTC or courts scrutinise an anticompetitive effect in the downstream market, they will analyse, among others, whether the products at issue are indispensable for the business activities in the downstream market and whether such price discrimination has an exclusionary effect in the downstream market. In addition, if an undertaking engages in price discrimination in order to achieve otherwise illegal purpose, it would also fall foul of the Act.

2.20 How do enforcers and courts examine loyalty discount claims?

The JFTC and courts may regard loyalty discount as having the exclusionary effect similar to exclusive dealings under certain circumstances. In analysing the exclusionary effect, the JFTC and courts will take account of, among others, the level of rebate percentage, including whether it is progressively set in accordance with the volume of trade, the thresholds for granting rebates, and whether the rebates are granted on all purchases in a particular period once a certain threshold is exceeded (or granted only on the incremental purchases above the threshold).

In 2005, the JFTC found that the rebate system of Intel Japan constituted a private monopolisation. According to the findings of the JFTC, Intel Japan granted rebates to its customers, which were Japanese manufacturers of personal computers, on condition that (i) the customers purchase CPUs only from Intel Japan, (ii) 90% of the CPUs that the customers use are purchased from Intel Japan, or (iii) the customers do not use Intel Japan's competitors' CPUs for major personal computer brands. The level of rebate percentage was not made public by the JFTC. The customers to which Intel Japan granted rebates represented approximately 77% of the total procurement volume of CPUs in Japan.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

The JFTC's Guidelines state that if sufficient customers will choose bundled products as a result of the bundled discount, the JFTC will analyse the bundled discount in a similar way that the JFTC analyses a tying. The JFTC's guidelines also mention that if the undertaking's competitors can readily offer the bundled products and compete with the undertaking in the market of bundled products, the JFTC will analyse the bundled discount in a similar way that it would analyse predatory pricing.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Given that the list of vertical restraints that are prohibited by the

Act is not exhaustive, the Act can be read to cover any type of vertical restraints that has an anticompetitive effect. In fact, the list of unfair trade practices includes "trading on restrictive terms" and "interference with a competitor's transaction", and they can serve as a catch-all provision to make illegal an anticompetitive vertical agreement.

2.23 How are MFNs treated under the law?

There are no precedents of the JFTC or courts that have analysed MFN clauses under the Act. In addition, the JFTC's guidelines do not set out how it analyses MFN clauses. Accordingly, it is yet to be seen how MFNs are treated under the Act by the JFTC or courts. Generally speaking, the JFTC and courts will probably take account of the number of undertakings subject to the MFN clauses and their market shares to assess an anticompetitive effect. The media reported in August 2016 that the JFTC conducted a dawn raid against Amazon Japan, alleging that Amazon Japan procured the MFN clauses in its agreements with E-book publishers.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The level of enforcement activities conducted by the JFTC in relation to private monopolisation is not particularly high. However, the JFTC has great continuous interests in prohibiting any foreclosure conducts and controlling conducts by using the dominant or superior position in a certain field. Therefore, although the JFTC's enforcement activities in the area of unfair trade practices are still modest, such conducts have been regulated by various types of unfair trade practices. As explained in question 3.2 below, the conducts made by any entrepreneur with a dominant or superior power can be regulated by private monopolisation and unfair trade practices. However, the JFTC is inclined to apply the provisions of unfair trade practices to such conducts rather than private monopolisation.

3.2 What are the laws governing dominant firms?

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.

In addition, the Act prohibits unfair trade practices such as exclusionary conducts, bundling, and abuse of superior bargaining power. In the case where dominant firms engage in such conducts, such conducts are likely to be found to be made "without justifiable grounds" and thus to be unfair trade practices.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The relevant market shall be defined based on the various factors, including but not limited to the relevant product, area, and manner, etc. of the specific conducts. Generally, by examining the conducts

and the effects of such, the JFTC will define the relevant market where the competition shall be substantially restrained. To define the relevant market, the substitutability of products on the demand side gives a great influence on the analysis, but the substitutability on the supply side is also considered. Please also refer to question 2.6 above.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no clear threshold of the market share to consider a firm as dominant or a monopolist. However, a market share over 50% is generally considered as a certain benchmark by the JFTC in setting its enforcement priorities. The Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) provide that: “[T]he JFTC, when deciding whether to investigate a case as Exclusionary Private Monopolization, will prioritize the case where the share of the product that the said undertaking supplies exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry.”

3.5 In general, what are the consequences of being adjudged “dominant” or a “monopolist”? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Under the Act, dominance or monopoly itself is not *per se* illegal. Any conducts excluding the business activities of other entrepreneurs (hereinafter referred to as exclusionary conduct) can be considered illegal as private monopolisation to the extent that, contrary to public interest, such exclusionary conducts cause a substantial restraint of competition in any particular field of trade. For example, below-cost pricing, exclusive dealing, tying and refusal to supply, and discriminatory treatment thereby causing a substantial restraint of competition in any particular field of trade are the typical examples for private monopolisation.

3.6 What is the role of economic analysis in assessing market dominance?

In general, economic analysis has not played a great role. Although the number of cases where the JFTC found the violation of private monopolisation is very few, so far, it is much harder to identify a specific case where economic analysis was considered for its finding. However, for the purpose of the merger review, the number of cases where economic analysis has been considered seems to have increased recently, and there is a possibility that economic analysis will play a certain role in assessing market dominance in the future. However, economic analysis may be considered as supportive only when such analysis coincides with presumed facts based on qualitative evidence.

3.7 What is the role of market share in assessing market dominance?

Please refer to question 3.4 above.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

For private monopolisation, only if the conducts substantially

restrain the competition in the relevant market, such conducts shall be deemed illegal. Therefore, the entrepreneur allegedly engaging in private monopolisation may defend the case by showing that such conducts will not substantially restrain the competition in the relevant market.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are one of several factors to be considered when assessing whether there is any substantial restraint of competition. However, as a practical matter, in cases where the exclusionary conducts lead to a dominant or strong market power, it is unlikely to prove that there is no substantial restraint of the competition by only showing the efficiencies.

3.10 Do the governing laws apply to “collective” dominance?

Yes. As set forth in the Act, exclusionary conducts can be made individually or combined with other entrepreneurs.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

There are no substantial differences between the purchase and the sale, and thus the same as described above will be applied to dominant purchasers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

A type of conduct similar to the unfair trade practices listed in Article 2 (9) of the Act can be found as exclusionary conduct. Therefore, a part of unfair trade practices may fall under exclusionary conduct as well. On the other hand, exclusionary conduct has not necessarily been limited to those similar to unfair trade practices, and a lot of types of conducts other than these have been also regarded as exclusionary conduct. There is a wide variety of conducts deemed as exclusionary conduct, and thus it is difficult to characterise all of them. The Exclusionary Private Monopolisation Guidelines (as of 28 October 2009), however, provide for five typical exclusionary conducts: below-cost pricing; exclusive dealing; tying and refusal to supply; and discriminatory treatment.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The scope and effect by intellectual property may be considered to assess dominance or market power.

3.14 Do enforcers and/or legal tribunals consider “direct effects” evidence of market power?

The exclusionary effect is not necessarily recognised as direct on the market where the alleged violator is active. However, if any indirect effects on the different markets can be found, it could be sufficient to establish the illegal exclusionary conducts with the effect of the restraint of the competition.

3.15 How is “platform dominance” assessed in your jurisdiction?

The effect on a certain market by big data or platform dominance is one of the hot topics which the JFTC has recently been actively studying. It has been said that the legacy analysis methods may not be appropriate for the competitive analysis in such cases, but the discussion on how to analyse it is currently in progress.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

If it is highly likely for a supplier in the upstream market to cause difficulties in continuing the business activities in that market or in commencing the business activities in that market as a new market entrant due to the refusals to deal, such refusals could be exclusionary conducts. To assess whether it is highly likely that the supplier’s refusal may cause difficulties in continuing the business activities or commencing the business activities, the degree of concentration, the nature of products, the degree of the economies of scale, and distribution systems in the upstream market and the downstream market shall be considered. To constitute exclusionary conduct, it is not necessary to result in the actual elimination of business activities of other entrepreneurs from the market or to completely block business activities to enter into new market due to such exclusionary conduct.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

The conducts that fall under private monopolisation can also be subject to unfair trade practices, and the JFTC is inclined to deal with such conducts by the regulation on unfair trade practices. Under the current Act, the conducts which are listed in the Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) as typical exclusionary conducts may be subject to not only the cease and desist order but also the surcharge order, even if they are found to violate unfair trade practices, and the JFTC may achieve a similar result within the framework of unfair trade practices.

Under the Act, the JFTC may, in order to ensure the proper operation of the Act, make any necessary matters public except for the secrets of enterprises. Recently, the JFTC seems to utilise this power to disclose the warning against the conducts which do not violate the Act but could lead to the violation of the Act by requesting cessation of such conducts and taking any measures to prevent any recurrence. As the warning is not a formal disposition, the addressee of such warning has no right to object to any factual findings by the JFTC while the fact that the addressee engaged in the suspected conducts which could lead to the violation of the Act is disclosed to the public. The substance of the warning or its substantial effect is very similar to the cease and desist order.

**Kaoru Hattori**

Nagashima Ohno & Tsunematsu
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan

Tel: +81 3 6889 7192
Email: kaoru_hattori@noandt.com
URL: www.noandt.com/en

Kaoru Hattori is a partner at Nagashima Ohno & Tsunematsu. She began 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 LL.B. from the University of Tokyo (1995) and an LL.M. from the University of San Diego School of Law (2002).

**Yusuke Kaeriyama**

Nagashima Ohno & Tsunematsu
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan

Tel: +81 3 6889 7332
Email: yusuke_kaeriyama@noandt.com
URL: www.noandt.com/en

Yusuke Kaeriyama is a partner at Nagashima Ohno & Tsunematsu. He is a competition law specialist and represents clients before the Japan Fair Trade Commission and competition authorities in various jurisdictions. He has been involved in a large number of high-profile merger cases. He has also advised on cartel cases and other behavioural cases in various industries. He holds an LL.B. from the University of Tokyo (2003) and an LL.M. with merit in competition law from King's College London (2009). He previously spent time working in the competition group of Slaughter and May in London (2009–2010) as a visiting attorney and for the Japan Fair Trade Commission (2012–2014), where he was a chief investigator handling cartel cases and other behavioural cases.

NAGASHIMA OHNO & TSUNEMATSU

Nagashima Ohno & Tsunematsu, having offices in Tokyo, New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, is widely known as a leading law firm and one of the foremost providers of international and commercial legal services in Japan. The firm represents domestic and foreign companies and organisations involved in every major industry sector and in every legal service area in Japan. The firm has structured and negotiated many of Japan's largest and most significant corporate and finance transactions, and has extensive litigation strength spanning key commercial areas, including intellectual property and taxation. The firm comprises around 400 lawyers (including 21 foreign attorneys) capable of providing its clients with practical solutions to meet their business needs.

With one of the largest legal teams in the country, the firm brings a wealth of practical knowledge focused on the singular purpose of providing high-quality legal expertise for developing optimum solutions for any business problem or goal that its clients may have. The firm, with its knowledge and experience across a full range of practice areas, is always prepared to meet the legal needs of its clients in any industry.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com