

## How Unilateral Conducts Are Regulated In Japan

Takahiko Itoh<sup>1</sup>

Anderson Mori & Tomotsune, Tokyo

Email: takahiko.itoh@amt-law.com

### 1. Introduction

Unilateral conducts, which are prohibited under Japanese Anti-Monopoly Act (the “AMA”), can be categorised in two types: (i) Private Monopolisation (Articles 3 and 2-5 of the AMA); and (ii) Unfair Trade Practices (Articles 9 and 2-9 of the AMA).

Private Monopolisation took Section 2 of the Sherman Act of the United States as its mode, and has been prohibited under the AMA since its establishment in 1947.

Unfair Trade Practices were originally incorporated into the AMA by the amendment in 1953. The related provisions were further amended in 1982 and in 2009. Unfair Trade Practices are said to have its origin in Section 5 of the FTC Act of the United States (i.e. Unfair Method of Competition).

In addition to the AMA, the Sub-contract Law, which was established in 1956, prohibits certain business operators to conduct certain listed activities which are deemed to be an exercise of their superior bargaining power against its sub-contractors. The sub-contract law regulates specific aspects of abuse of superior bargaining power under the Unfair Trade Practices<sup>2</sup>.

#### 1.1 Private Monopolisation

Private Monopolisation is defined as “business activities, by which any enterprise, individually or by combination or conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade” (Article 2-5 of the AMA). As you see from the definition, Private Monopolisation is broadly defined. Please note, however, the Japan Fair Trade Commission (the “JFTC”) has issued “Exclusionary Private Monopolisation Guideline” under which four conducts (i.e. (i) below-cost pricing, (ii) exclusive dealing, (iii) tying and (iv) refusal to supply and discriminatory treatment) are indicated as typical exclusionary conducts.

#### 1.2 Unfair Trade Practices

---

<sup>1</sup> Disclaimer: The opinion contained in this report is the personal view of the author and nothing to do with the opinion of the firm or other organisation to which the author belongs.

<sup>2</sup> In addition to the Sub-contract Law, the statutes which regulate specific industry sectors, such as the Telecommunications Business Law, the Electricity Business Law and the Gas Business Law impose obligation to business operators e.g. to allow access to essential facilities. These statutes could be also categorised as one of the special rules to the AMA, but we do not go into detail in this report.

Unfair Trade Practices which are prohibited under the AMA are listed in Article 2-9 and General Designation<sup>3</sup>. The list covers various conducts including unilateral conducts: (i) joint refusal to supply (Article 2-9-1); (ii) price discrimination (Article 2-9-2); (iii) below-cost pricing (Article 2-9-3); (iv) resale price maintenance (Article 2-9-4); (v) abuse of superior bargaining power (Article 2-9-5); (vi) joint refusal to deal (General Designation 1); (vii) other refusal to deal (General Designation 2); (viii) price and other discrimination (General Designation 3, 4 and 5, excluding the conduct under Article 2-9-2); (ix) below-cost pricing (General Designation 6, excluding the conduct under Article 2-9-3); (x) purchase in excessive price (General Designation 7); (xi) solicitation by misrepresenting quality or benefit of goods/services (General Designation 8); (xii) solicitation by providing unjustifiable benefit (General Designation 9); (xiii) tying (General Designation 10); (xi) exclusive dealing (General Designation 11); (xi) trading on restrictive terms (General Designation 12, excluding conduct under Article 2-9-4 and General Designation 11); (xii) abuse of superior bargaining power on appointment of directors/officers (General Designation 13); (xiii) unfair interruption of the trade by a competitor (General Designation 14); and (xiv) unfair interference in connection with the internal matters of a competitor (General Designation 15). The list of Unfair Trade Practices is an exhaustive list. However, some of the conducts on the list are broadly defined to cover wide range of conducts as catch-all provisions.

## **2. No definition of “Abuse”**

### **2.1 Private Monopolisation**

Unlike the regulation in the EU, prohibition of unilateral conducts in Japan does not take the form of “abuse of a dominant position”. Therefore, there is no definition of “abuse” in such context either in legislation, guidelines of the JFTC or case law.

### **2.2 Unfair Trade Practices**

As explained in 1.2 above, Unfair Trade Practices have a category of activities called abuse of superior bargaining power (Article 2-9-5 of the AMA and General Designation 13). These are unique regulation in Japan which prohibits a party to “unfairly impose disadvantages to the counter party by taking advantage of its own position” (“Abuse of Superior Bargaining Power Guideline” issued by the JFTC). Whether or not a party is in superior position is determined relative to the position of the counterparty.

However, there is no definition of “abuse” in the legislation, guidelines of the JFTC or case law. This is because the conducts prohibited are specifically identified. For example, Article 2-9-5 of the AMA prohibits a party to unfairly conduct the following activities by taking advantage of its superior bargaining position: (i) force the counterparty in continuing relationship to purchase goods/services which are not subject of the trade; (ii) force the counter party in continuing relationship to supply cash, service or other economic benefit to the party with which it has a continuous trade; or (iii) reject or return the goods, delay the payment, reduce the payment amount, or set or change the trade terms or implement the trade in a manner disadvantageous to the counterparty.

## **3. Exploitative and Exclusionary Conducts**

Both exploitative and exclusionary conducts are covered by Private Monopolisation and Unfair Trade Practices.

### **3.1 Private Monopolisation**

---

<sup>3</sup> Article 2-9-6 delegates the power to the JFTC to issue a list of prohibited conducts as General Designation.

Article 2-5 which defines Private Monopolisation requires “exclusion” or “control” by the business operator. “Exclusion” corresponds to exclusionary conduct and “control” basically corresponds to exploitative conduct.

Whether or not a certain activity is regarded as “exclusion” is determined by whether or not such activity has an artificial character which exceeds the normal competition measures in the sense that it could create, maintain and strengthen its own market power, and such activity has an effect to make it extremely difficult for a competitor to enter into (or continue competition in) the relevant market (*JASRAC case*, Supreme Court of Japan, 28 April 2015; *NTT East case*, Supreme Court of Japan, 17 December 2010).

On the other hand, “control” means, in principle, to restrict the counterparty in some way and to deprive it of the freedom to make its own decision (*Noda Soy Sauce case*, Tokyo High Court, 25 December 1957).

As explained above in 1.1, the JFTC has issued Exclusionary Private Monopolisation Guideline. According to the JFTC, these guidelines were established to keep the transparency of the enforcement of the law and to increase the predictability by the business operators, because it tends to be difficult to distinguish whether a competitor is excluded as a result of fair competition or by illegal activity. Four conducts (i.e. (i) below-cost pricing, (ii) exclusive dealing, (iii) tying and (iv) refusal to supply and discriminatory treatment) are indicated as typical exclusionary conducts by the Exclusionary Private Monopolisation Guideline.

Because the base rates used to calculate administrative surcharge are different between exclusionary conduct (6%) and exploitative conduct (10%), it is practically necessary to distinguish between two types of conducts. If a conduct has both the exploitative and exclusive nature at the same time, the rate for exploitative conduct (10%) will be applied.

In addition to “exclusion” or “control”, “substantial restraint of trade” is required for Private Monopolisation. “Substantial restraint of trade” is defined as creation, maintenance or strengthening the circumstance to dominate the relevant market (*NTT East case*, Supreme Court of Japan, 17 December 2010)<sup>4</sup>.

### **3.2 Unfair Trade Practices**

List of Unfair Trade Practices under Article 2-9 of the AMA and General Designation includes both exclusionary and exploitative conducts.

Because types of conducts listed in the Exclusionary Private Monopolisation Guidelines also overlap with types of conducts listed as Unfair Trade Practices, the guidelines are useful to understand the positions taken by the JFTC with respect to (i) below-cost pricing, (ii) exclusive dealing, (iii) tying and (iv) refusal to supply and discriminatory treatment. In addition, Distribution Guidelines issued by the JFTC covers various vertical restraints included in the list of Unfair Trade Practices.

Distinction between exclusionary and exploitative conducts is less important for Unfair Trade Practices than Private Monopolisation, but the JFTC has to specify the provision(s) which it applies to certain conduct.

---

<sup>4</sup> Please also note that the Supreme Court of Japan recently defined that “substantial restraint of trade” means that **the market loses the competitive function**, although it was in a bid-rigging case (*Tama Bid-rigging case*, Supreme Court of Japan, 20 February 2012).

Conducts listed as Unfair Trade Practices become illegal if they have “tendency to impede competition”. It is a prevailing view in Japan that “tendency to impede competition” requires a lower degree of restriction on competition compared to “substantial restraint of trade” which is required for Private Monopolisation.

#### **4. Price Based and Non-Price-Based Conducts**

Distinction between price-based and non-price-based conducts is less important for Private Monopolisation and Unfair Trade Practices for the reasons explained below.

##### **4.1 Private Monopolisation**

Although not distinguished in the provision of the AMA, Private Monopolisation covers both price-based and non-price based conducts. For example, the Exclusionary Private Monopolisation Guidelines lists below-cost pricing as one of the examples of price-based conduct. On the other hand, tying is basically a non-price-based conduct. Exclusive dealing and refusal to supply/discriminatory treatment can be either price-based or non-price-based or both.

Unlike the distinction between exploitative and exclusionary conducts, it is not necessary for the JFTC to distinguish between price-based and non-price-based conducts in practice, so far as other requirements for Private Monopolisation are met.

There is no distinction between price-based or non-price-based conduct with respect to the consequences/sanctions, and we do not have a case law which decided with respect to such distinction.

##### **4.2 Unfair Trade Practices**

Some of the conducts listed as Unfair Trade Practice under Article 2-9 of the AMA or the General Designation are clearly tied with price.

The JFTC has to specify the provision(s) which it applies to certain conduct, and as a result, price-based and non-price-based conducts are distinguished.

There is no case law which distinguishes price-based and non-price-based conducts beyond what is provided in the statute.

#### **5. Enforcement**

##### **5.1 Decision-Making Practice**

###### **5.1.1 Cease and Desist Order by the JFTC**

Please see Table 1 for the numbers of Cease and Desist Order issued by the JFTC in the past five years. As you see, the number of orders issued in connection with Unfair Trade Practices is far less than that of Cartel/Bid-rigging. The JFTC has not issued any cease and desist order on Private Monopolisation case in recent years.

**Table 1: Cease and Desist Order by the JFTC (FY2009-FY2013)**

Types of conducts		FY2009	FY2010	FY2011	FY2012	FY2013	Total
<b>Private Monopolisation</b>		0	0	0	0	0	0
<b>Unfair Trade Practices</b>	<b>Resale Price Maintenance</b>	0	0	1	0	0	1
	<b>Restrictive/Excusive Dealing</b>	2	1	0	0	0	3
	<b>Interference of trade</b>	0	0	1	0	0	1
	<b>Abuse of Superior Bargaining Power</b>	2	1	3	0	1	7
<b>Unilateral Conduct Total</b>		4	2	5	0	1	12
<b>Cartel/Bid-rigging</b>		22	10	17	20	17	98

Source: JFTC Annual Report (FY2013)

### 5.1.2 Court Decisions

There is no official statistics regarding the number of antitrust cases decided by the court and it is difficult to calculate a precise number of cases decided by the court in the past five years. However, the JFTC Annual Report (FY2013) provides for the number of antitrust administrative cases pending at the courts. According to the JFTC Annual Report (FY2013), 21 antitrust administrative cases were pending during FY2013, and most of them (20 cases) were Cartel/Bid-rigging cases. The remaining one case was Private Monopolisation case (*JASRAC case*).

### 5.1.3 Private Monopolisation Cases

There have been only eleven Private Monopolization cases since 1996 in Japan (Table 2). Among those, eight cases are exclusionary conducts and three cases are exploitative conducts.

**Table 2: Private Monopolisation case in Japan (since 1996)**

<b>Case Name</b>	<b>Date of decisions</b>	<b>Types of Conduct</b>
<i>Japan Medical Food Association case</i>	JFTC Decision, 8 May 1996	Exclusionary and exploitative
<i>Pachinko Patent Pool case</i>	JFTC Decision, 6 August 1997	Exclusionary (Refusal to supply and discriminatory treatment)
<i>Paramount Bed case</i>	JFTC Decision, 31 March 1998	Exploitative
<i>Nordion case</i>	JFTC Decision, 3 September 1998	Exclusionary (Exclusive Dealing)
<i>Hokkaido News Paper case</i>	JFTC Decision, 28 February 2000	Exclusionary
<i>Usen Broad Networks case</i>	JFTC Decision, 13 October 2004	Exclusionary
<i>Intel case</i>	JFTC Decision, 13 April 2005	Exclusionary (Exclusive Dealing)
<i>Nipro case</i>	JFTC Decision, 5 June 2006	Exclusionary (Exclusive Dealing)
<i>NTT East case</i>	JFTC Decision, 26 March 2007 Tokyo High Court Judgment, 29 May 2009 (Dismissal of appeal) Supreme Court Judgment, 17 December 2010 (Dismissal of appeal)	Exclusionary (Refusal to supply and discriminatory treatment)
<i>JASRAC Case</i>	JFTC Cease and Desist Order, 27 February 2009 JFTC Decision, 12 June 2012 (Revocation of JFTC Cease and Desist Order) Tokyo High Court Judgement, 1 November 2013 (Revocation of JFTC Decision) Supreme Court Judgment, 28 April 2015 (Dismissal of Appeal)	Exclusionary (Exclusive Dealing)
<i>Fukui-ken Keizairen Case</i>	JFTC Cease and Desist Order, 16 January 2015	Exploitative

#### 5.1.4 Unfair Trade Practices Cases

Some of the Unfair Trade Practices cases listed in Table 3 could have been able to be characterised as Private Monopolisation, but the JFTC did not do so. In my personal view, this is partly attributable to a prevailing view in Japan that “tendency to impede competition” requires a lower degree of restriction on competition compared to “substantial restraint of trade” which is required for Private Monopolisation. In addition, before Private Monopolisation become subject to the administrative surcharges order (in 2006 with respect to “control” and in 2010 with respect to “exclusion”), it was not possible to impose administrative surcharges order on Private Monopolisation and there was no difference in sanctions between Private Monopolisation and Unfair Trade Practices. If conducts can be categorised as one of the conducts listed as Unfair Trade Practices, then it is easier for the JFTC to first consider the application of Unfair Trade Practices than Private Monopolisation.

**Table 3: Unfair Trade Practices cases close to Private Monopolisation case**

<b>Case Name</b>	<b>Date of decisions</b>	<b>Types of Conduct</b>
<i>Chaku-Uta case</i>	JFTC Decision, 24 July 2008	Joint refusal to deal
<i>Microsoft NAP case</i>	JFTC Decision, 16 September 2008	Trading on restrictive terms

<i>Daiichikosho case</i>	JFTC Decision, 16 February 2009	Unfair interruption of a trade by a competitor
<i>Qualcomm case</i>	JFTC Cease and Desist Order, 28 September 2009 (JFTC Hearing still pending)	Trading on restrictive terms
<i>DeNA case</i>	JFTC Cease and Desist Order, 9 June 2011	Unfair interruption of a trade by a competitor

## 5.2 Competent Courts and Authorities

In Japan, the JFTC is the only regulatory body that can enforce the AMA<sup>5</sup>. In relation to the unilateral conducts, the JFTC has issued “Exclusionary Private Monopolization Guidelines” and “Distribution Guidelines” to keep the transparency of the enforcement of the law and to increase the predictability by the business operators.

The JFTC has power to investigate the competition issues and issue a cease and desist order and/or an administrative surcharges order, if it finds the breach of the AMA. As for the criminal sanction, the JFTC must first make an accusation to the Public Prosecutors’ Office and the Public Prosecutors’ Office can initiate the criminal proceedings against the accused.

A business operator who are not happy with the cease and desist order and/or the administrative surcharges order can challenge the order(s). Effective as of 1 April 2015, administrative hearing procedure at the JFTC was abolished and all the business operators who want to challenge the cease and desist order/the administrative surcharges order issued thereafter must bring an action for revocation to the Tokyo District Court. The parties can further appeal the case to Tokyo High Court and the Supreme Court of Japan depending on the outcome in the lower courts.

## 6. Consideration

### 6.1 Harmonisation with global approach

Unlike the EU regulation, the AMA does not use the concept of “Abuse of Dominant Position” to regulate unilateral conducts. Instead, it regulates the unilateral conducts by Private Monopolisation and Unfair Trade Practices as already explained above.

However, it seems that both the EU and Japan shares the common concern to distinguish whether a competitor is excluded as a result of fair competition or by illegal activity. Otherwise, the business activities may be over regulated and have a chilling effect which may result in diminish of fair competition and innovation. This way of thinking can be seen in the court decisions regarding “abuse” in the EU and “exclusion” in Japan.

“Abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened, and that, *through recourse to methods different from those that condition normal competition in products or services on the basis of the transactions of commercial operations*, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.” (ECJ, case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR, emphasis added)

---

<sup>5</sup> Public prosecutors can bring criminal proceedings to the court subject to the JFTC’s accusation.

“Whether or not a certain activity is regarded as “exclusion” is determined by whether or not *such activity has an artificial character which exceeds the normal competition measures in the sense that it could create, maintain and strengthen its own market power*, and such activity has an effect to make it extremely difficult for a competitor to enter into the relevant market.” (*JSARAC case*, Supreme Court of Japan, 28 April 2015, emphasis added)

Both the ECJ and the Supreme Court of Japan are trying to narrow down the concept of “abuse” and “exclusion”, respectively, by reviewing whether methods used by the party exceeds those to be used in the normal competition. This similarity is not just a coincidence but is one evidence that Japanese antitrust practice has developed in a way that has harmonisation with the global approach, regardless of the terms in the statute that does not use the concept of “abuse”<sup>6</sup>.

## **6.2 Over regulated or under regulated?**

Given the small number of Private Monopolisation and Unfair Trade Practices cases in Japan, it is probably correct to say in general that unilateral conducts are not overly regulated in Japan.

It should be noted, however, that the JFTC seems to apply provisions of Unfair Trade Practices (which requires lower degree of restriction than Private Monopolisation) to cases which could have to be brought as Private Monopolisation case, absent regulation under Unfair Trade Practices.

If that is the case, some of the unilateral conducts in Japan may have been overly regulated. In particular, if the issue is whether exercise of IP rights is regarded as exclusionary conduct (e.g. *Microsoft NAP case* and *Qualcomm case*), it casts a difficult question whether a holder of IP rights are overly restricted from seeking its own business opportunities using IP rights it has developed.

The factors to be considered to answer such question are probably very similar to the factors to be considered when application of “Abuse of Dominant Position” to huge IT companies is argued in EU.

\* \* \*

---

<sup>6</sup> Nevertheless, “abuse” probably has broader meaning than “exclusion” or “control” in nature.