

CPI's Asia Column Presents:

Competition Law in Japan: An Overview of Developments, 2016 to mid-2017

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Summary: This overview covers selected developments in Japanese competition law during 2016 and roughly the first half of 2017 (through the summer). One of the most important developments concerns the pending review of the fining system of the Japan Fair Trade Commission; this system is likely to be adjusted in order to give the JFTC discretion when imposing ‘surcharges’. In 2017 the JFTC also revised its Guidelines on Distribution Systems. In the areas of cartel enforcement and merger control, the level of the JFTC’s activity has remained relatively stable compared to previous years. In relation to alleged unfair trade practices, the JFTC now appears prepared to accept commitments (i.e., ‘voluntary measures’) in order to resolve certain cases early. This suggests an early implementation of a more formal reform scheduled to take effect when the Trans Pacific Partnership Agreement (without the U.S.) enters into force. The envisaged formal commitment procedure is a part of the Japanese law implementing the TPP (adopted on 9 December 2016), which is expected to take effect in Japan regardless of the TPP’s own fate. In the meantime, the JFTC’s provisional and informal use of a commitment procedure may signal the agency’s intention to become particularly active in cases concerning unfair trade practices (including abuse of dominance cases) in the IT/digital sector.

In order to cover a wide range of matters, the review merely scratches the surface and avoids lengthy discussions of particular issues and cases. The paper is divided into the following four sections:

- I. Reforms, soft law and policy initiatives, sector-specific regulation and international cooperation
- II. Public enforcement
- III. Private enforcement
- IV. Final remarks

I. REFORMS, SOFT LAW AND POLICY INITIATIVES, SECTOR SPECIFIC REGULATIONS AND INTERNATIONAL COOPERATION

Amendments to Distribution Systems Guidelines

On 16 June 2017, the JFTC amended its Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (originally adopted in 1992).¹ These amendments were prompted by rapidly changing distribution systems and business practices in Japan, a process of change relating to the increasing globalization of economic activities, technological innovation, shifts in business models and other dynamic factors.

The first part of the Guidelines provides guidance concerning the imposition of restrictions on the business activities of trading partners. Guidance is given from the perspective of regulating ‘unfair trade practices’: resale price maintenance; restrictions on dealings with competitors; sales territories, and sales methods; selective distribution; tie-in sales; and rebates. Due to the development and expansion of e-commerce, particular emphasis is given to internet transactions and related restrictions.

The second part of the amended Guidelines focuses on enterprises’ selection of their own business

¹ See JFTC Press Release of 16 June 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170616.html>.

partners. This part provides guidance concerning applicable principles in relation to concerted practices aiming at the prevention of new market entry or exclusion of existing competitors. Customer allocation, boycotts and refusal to deals are all analyzed in detail.

The last part of the document relates to the concept of sole distributorships in the domestic market. It provides guidance on restrictions imposed by one party upon another in the context of this distribution format, as well as guidance on the unreasonable obstruction of parallel imports.

Overall, the amended Guidelines shed further light on distribution practices that might create problems of compliance with the Antimonopoly Act. They are a major tool for the day-to-day assessment of distribution issues, and they clearly should be given close attention when distribution systems in Japan are envisaged and/or implemented.

‘Big Data’

On 6 June 2017, the JFTC published a Report by a Study Group on data and competition policy.² The report acknowledges that the collection, accumulation, and use of data (i.e., ‘big data’) lead to increased competitiveness in goods and services as well as enhanced innovation. Yet despite these benefits, restrictions of competition in the context of big data necessitate vigilance and prompt action under the Antimonopoly Act. The Report outlines a number of potential issues, including the following:

- First, business combinations, including transactions where data are accumulated, should be examined from the perspective of (i) whether they lead to reduced competition in artificial intelligence techniques or goods and services related to data, and (ii) whether there is a potential for reduced competition in the ‘data market’ where such data are traded.
- Second, interference with the accumulation and use of data is presented as a risk. This might occur, for instance, where an enterprise with a superior bargaining position obliges another enterprise to provide it with data. Another example is the unjustified hoarding of data, where an enterprise refuses to grant access to data that are essential to a competitor’s business.
- Third, the Report also cites concerns regarding the tying of data supply and data analysis as well as making the supply of data conditional on an obligation not to trade it with the supplier’s competitors.

The Report suggests that the JFTC will have to be wary of ‘digital cartels’ (i.e., algorithm-based collusion) as well as the monopolization or oligopolization of digital platforms. As the Report states at page 66, *‘product functionality improvements resulting from the collection of vast quantities of data and the use of AI-related technologies, the attraction of even more customers, and the expansion of network effects could lead to powerful economies of scale and economies of scope, which could make new entry more difficult. Furthermore, as deep learning technology improves, the scope of those effects will probably go beyond products sold on the Internet and reach to various products sold off-line.’*

² The Report and a summary thereof are available at <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.html>.

Revision of the JFTC's Surcharge System

On 25 April 2017, the JFTC published a Study Group report on the Antimonopoly Act which focuses on the possible revision of the current surcharge system.³ The Study Group identifies the flaws of the existing fining system in Japan and recommends revisions to improve it. The first issue relates to the JFTC's lack of discretion when imposing surcharges for violations of the Act. Due to the rigid, automatic rates that apply in various types of cases, the JFTC cannot tailor fines where necessary to ensure that adequate deterrence is achieved.

Furthermore, the Study Group is concerned about the statutory leniency program, a problem that again arises due that the JFTC's lack of discretion and the automatic operation of leniency discounts. Because a leniency applicant is effectively guaranteed its benefit once the initial eligibility criteria are satisfied, the applicant's incentives to cooperate actively subsequently and throughout the investigation are weak. In short, the JFTC is unable to reward enterprises in a tailored way to encourage active cooperation.

To address these deficiencies, the Study Group calls for a system where—by means of a Cabinet Order—the JFTC would be allowed to take account of the specific circumstances of each case and to adjust surcharges or leniency benefits accordingly. However, the surcharge system should not become a moral-based form of liability (or a sanction for past conduct). Further, the principle of proportionality has to be respected, and proper safeguards should be in place to avoid administrative arbitrariness.

More concretely, some of the suggestions of the Study Group include:

- Authorizing the JFTC to deduct a certain amount of sales from the sales that would normally serve as the base for calculating surcharges (in effect enhancing the JFTC's ability to reward cooperation).
- Increasing the three-year upper limit for calculating the relevant period of infringement as a multiplier, which currently operates as an excessively rigid limitation on the amounts of surcharges.
- Raising the current level of surcharges as a whole, on the (correct) ground that they do not realistically represent the illegal gains that accrue to enterprises engaged in anticompetitive conduct, especially in the case of a cartel.
- Addressing a serious lacuna in the AMA by enabling the JFTC (through modalities to be determined) to calculate surcharges despite an absence of tangible sales in Japan, for example where a foreign enterprise refrains from selling into the territory as part of a market-sharing cartel or where a domestic enterprise (collusively) fails to secure a contract as part of a bid-rigging scheme.
- Maintaining lower surcharges for SMEs but improving the operation of these charges by precluding their application (by analogy with certain tax law distinctions) in the case of

³ See JFTC Press Release of 25 April 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425.html>.

enterprises which from a functional point of view do not really belong in the SME category such as, in particular, small subsidiaries of a large group.

- Authorizing the JFTC to reduce the applicable surcharge according to the value of proof provided by infringers in the context of the leniency program. Further, the Study Group recommends abandoning the current limit on the number of enterprises that can apply for leniency, extending the application deadline (which currently is 20 days after the initiation of the investigation) and establishing a legal obligation of ‘continuous cooperation’. In addition, penalties should apply to sanction any obstruction of investigation.
- Introducing a ‘direct settlement’ system analogous to the cartel settlement procedure in the EU.

Overall, the above reforms would strengthen the JFTC’s enforcement capacity and would address long-standing deficiencies in the surcharge system while at the same time avoiding the ill-conceived notion that high fines as such are a panacea that secures adequate compliance with the law.

It has taken rather too long for Japan to achieve a sufficiently nuanced and dissuasive surcharge system. Now that an improved approach is within sight, we hope and expect that this reform will be matched by more a serious commitment to due process, another subject addressed by the above-mentioned Study Group.

The Study Group’s Conclusions on Due Process and Procedural Rights

Due process issues have been discussed since the Advisory Panel meetings held in 2014. The focal points of these meetings were (i) the rights of defense, (ii) the JFTC’s fact-finding capacities, (iii) consistency with other administrative and criminal procedures in Japan, (iv) comparisons with overseas systems, and (v) the need to ensure the appropriateness and transparency of administrative investigation procedures. On 24 December 2014, the Advisory Panel published a report presenting its preliminary conclusions⁴ and a year later, on 25 December 2015, the JFTC adopted its Guidelines on Administrative Investigation Procedures under the Antimonopoly Act.⁵

In its 2017 Report, the Study Group echoes the cautious tones of the Advisory Panel as regards the links between due process and the effectiveness of enforcement. The main concern is that, if due process were strengthened too much, this would hinder the effectiveness of the JFTC. Any revision of procedural rights must therefore safeguard against the risk of abuse of the rights of defense.

Against that background, the Study Group finds that current procedures provide sufficient protection of due process. This finding is based on considerations that include: (i) a Supreme Court judgment that clarifies the applicable standards with regard to evaluating certain elements of proof and establishing a legally sufficient defense; (ii) safeguards provided by the Administrative Procedure Act; and (iii) the protections that apply under other laws.

Possible future approaches concerning due process and procedural rights are discussed in three different sections of the Report, namely: ‘pre-procedures’ under the current system, the attorney-

⁴ See report at: http://www.jftc.go.jp/houdou/pressrelease/h27/dec/151225_1.files/sankou.pdf (in Japanese).

⁵ See http://www.jftc.go.jp/houdou/pressrelease/h27/dec/151225_1.files/bessi1.pdf (in Japanese).

client privilege and the rights of defense in deposition procedures. The specific findings include the following:

- With regard to pre-order procedures (typically called 'preliminary procedures') under the current system, it is suggested that there is currently a sufficient protection of rights, and that no reform is needed. This position is based on the premise that the JFTC conducts hearings that allow targets of orders such as cease-and-desist orders to defend themselves and to obtain access to their file. A hearing consists of the disclosure of evidence relating to the alleged violation and to the basis of calculation of surcharges. The JFTC is not obliged to disclose all the evidence in its file.
- Concerning the (non-existent) attorney-client privilege (a.k.a. legal professional privilege), the Study Group did not find sufficient evidence that enterprises had actually suffered prejudice from their inability to claim such a privilege. Therefore, it finds no reason why the privilege must be protected. However, if the Study Group's recommendations were adopted with respect to improving the leniency program (see above), the Study Group recognizes that there would be greater need to consult with counsel when determining whether to apply for leniency. In those circumstances, it would be appropriate for the JFTC to 'take care' when handling communications between attorneys and their clients related to the use of the (future amended version of the) leniency program, provided that the fact-finding ability of the JFTC is not impeded. Measures should be in place to prevent undesired conduct such as the concealment of evidence.
- Finally, with regard to the rights of defense in deposition procedures (i.e., interviews of witnesses), despite criticism that access to counsel is too limited since there is no right to have an attorney present during questioning, the Study Group considers the current deposition procedures to be sufficient. The rationale for this position is that a person being questioned is permitted to consult with his attorney (and to take notes according to his memory) during breaks in the deposition. We do not find this argument to be very persuasive. However, we acknowledge that in certain circumstances there may be a risk that employee-witnesses may feel pressure that influences their testimony if they are attended by counsel retained by an employer under investigation.

The JFTC's Commitment Procedure and the TPP Agreement

Despite the withdrawal of the U.S. in January 2107, the TPP process continues. Article 16.2(5) of the TPP Agreement as it stands today provides that '*each Party shall authorise its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action.*' This is a significant step for Japan since, under the AMA, there was previously no legal basis for a commitment procedure. The legislator in Japan has in fact responded by passing a bill that partially amends the AMA to give effect to Article 16.2(5) TPP. As mentioned earlier, the amendment to the AMA will take effect when, as expected, the TPP Agreement itself enters into force.⁶

⁶ Subject to possible changes, if the eleven TPP signatories ratify the agreement by 3 February 2018, the Agreement will enter

In December 2016, the JFTC solicited public comments on draft rules for a commitment procedure. Under the proposed rules, where the JFTC suspects a violation of the AMA, it can notify the party concerned and invite it to apply for clearance on the basis of voluntary alterations of its conduct. Cartels are naturally excluded. In January 2017, Chairman Sugimoto expressed his support for the introduction of such a procedure. And while his term will expire in the Spring of 2018, we anticipate that the initiative will move forward along the same general lines, considering that: first, the EU commitment procedure is perceived to work reasonably well; and second, no strong objection from the business community has been heard. In the meantime, as noted above in the introduction, the Amazon e-books case was terminated in accordance with a *de facto* process analogous to the EU commitment procedure, and other cases may follow.

Revised Guidelines for the Use of Intellectual Property

On 21 January 2016, the JFTC partially amended its Guidelines for the Use of Intellectual Property under the Antimonopoly Act.⁷ This revision responds to the need for clarification as to the proper application of the AMA in situations involving standard essential patents. In that context, the Guidelines now indicate that an SEP holder who has given a FRAND commitment may trigger the prohibition against private monopolization if he refuses to license the relevant technology or if he files an action for an injunction against a willing licensee.⁸

Guidelines on Administrative Investigation Procedures

On 4 January 2016, the Guidelines on Administrative Investigation Procedures under the Antimonopoly Act entered into force.⁹ The Guidelines clarify the standard steps and key issues arising in the JFTC's administrative investigations. Aimed partly at strengthening procedural rights, the Guidelines outlined the JFTC's policies in relation to, among others: (i) its case investigations system and the responsibilities of supervisors; (ii) on-the-spot investigations; (iii) depositions; and (iv) the JFTC's orders requiring companies to submit reports and other information.

Developments Concerning Particular Sectors (Energy, Telecoms, Petrol)

A number of developments arising between the beginning of 2016 and the summer of 2017 may be noted here briefly:

- On 28 June 2017, the JFTC published its report on LNG markets, a report prepared amid Japanese customers' concerns about destination restrictions that can potentially prevent them from reselling excess LNG inside or outside Japan. The position put forth in the report is that LNG sellers should avoid providing for destination restrictions and similar restraints when they conclude or renew contracts. By limiting the possibility of resale by Japanese customers,

into force at the time of the eleventh ratification. Failing that condition (and again, subject to change), it will enter into force after ratification by at least six states whose collective GDP exceeds 85% of the GDP of the entire group.

⁷ See JFTC Press Release of 21 January 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160121.html>.

⁸ On FRAND-encumbered SEPs, see also JFTC Press Release of 18 November 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/November/161118.html> (announcing the closure of an investigation into the One-Blue patent pool that licenses Blu-ray technology due to the cessation of suspected 'interference with a competitor's transactions', a category of unfair trade practice).

⁹ The Guidelines are available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/151225.pdf.

destination restrictions lead to the exclusion of new entrants in the fixed-Asian contract market or worldwide spot contract market, resulting in foreclosure effects. Profit-share clauses have similar effects. According to the JFTC, such clauses and practices are, in principle, contrary to the AMA.

- On 6 February 2017, the Ministry of Economy, Trade and Industry (METI) and the JFTC jointly revised the Guidelines for Proper Electric Power Trade.¹⁰ The amendments concern the provision of guidance on the trade of ‘Negawatt power’, which is a theoretical reference to the amount of electricity saved by consumers.
- On the same day, 6 February 2017, METI and the JFTC jointly revised the Guidelines for Proper Gas Power Trade¹¹ in order to take account of the full liberalization of new entry into the gas retail market.
- In telecoms, the JFTC on 2 August 2016 published a report outlining competition issues relating to the entry of new mobile virtual network operators in terminal, communications services, and applications markets.¹²
- On 20 May 2016, the JFTC amended the Guidelines for Promotion of Competition in the Telecommunications Business Field,¹³ a revision that follows the legislator’s amendments of the Telecommunications Business Act. In the amended Guidelines the JFTC sheds further light on unjust treatment relating to the interconnection of telecom facilities, bundled services and wholesale services.
- On 28 April 2016, the JFTC published a short ‘Follow-up Survey Report’ on gasoline transactions in light of changes in the competitive environment of the gasoline distribution market.¹⁴ With a note of disappointment the report discusses changed methods for determining wholesale prices charged by primary oil distributors to retailers since the initial report was published in July 2013.¹⁵ It is suggested that primary oil distributors still need to improve their pricing policies through more open negotiation of their wholesale price formulas and greater transparency. Among other findings, the 2016 report expresses the JFTC’s view that the AMA is breached (i.e., because it constitutes ‘trading on restrictive terms’, which is a category of unfair trade practices) when a primary oil distributor restricts an energy trading company from selling to a dealership affiliated with the primary oil distributor the gasoline provided by that primary oil distributor without the distributor’s trademark, when the conduct unfairly restricts business activities.

¹⁰ See METI web announcement of 6 February 2017 (14 February 2017 for the English version), http://www.meti.go.jp/english/press/2017/0206_001.html.

¹¹ See METI News Release of 6 February 2017 (14 February 2017 for the English version), http://www.meti.go.jp/english/press/2017/0206_002.html.

¹² See JFTC Press Release of 2 August 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/August/160802.html>.

¹³ See JFTC Press Release of 27 May 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/May/160527.html>.

¹⁴ See JFTC Press Release of 28 April 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/April/160628.html>.

¹⁵ See JFTC Press Release of 23 July 2013, <http://www.jftc.go.jp/en/pressreleases/yearly-2013/july/130723.html>.

Developments Concerning International Cooperation

- On 6 July 2017, bilateral negotiators adopted a tentative ‘Agreement in Principle’ in connection with the pending EU-Japan Economic Partnership Agreement.¹⁶ The EPA will cover a wide range of trade-related fields including corporate governance, procurement, IPRs and sustainable development. The Competition Chapter of the EPA will include provisions on antitrust, subsidies and SOEs. As regards *antitrust and mergers*, the provisions are standard 21st century cooperation arrangements (although the JFTC is also preparing for negotiations that will likely upgrade the 2003 Cooperation Agreement to a ‘second generation’ agreement¹⁷), and the dispute settlement mechanism that applies to the EPA as a whole is excluded in antitrust and merger matters. The Parties reaffirm their adherence to the 2003 Agreement,¹⁸ which spells out their mutual commitments in further detail. In the specific field of *subsidies* (where dispute settlement generally *will* apply¹⁹), the EPA will include enhanced cooperation measures.²⁰ Japan agrees to provide details regarding subsidies granted for goods and services (thus going beyond the goods-only scope of the WTO-level SCM Agreement) at all levels of government. Both sides agree to ‘explore possible solutions’ if concerns raised by the one of the parties are confirmed. Further, both sides agree to prohibit (subject to an important exception for sub-central levels of government²¹) two types of harmful subsidies: unlimited guarantees as to debts or liabilities; and restructuring aid for ailing or insolvent enterprises where there is no credible restructuring plan.²²
- On 22 June 2017, the JFTC and the Competition Commission of Singapore concluded a Memorandum of Cooperation, which establishes a framework for notifications in relation to

¹⁶ See European Commission Press Release of 6 July 2017, http://europa.eu/rapid/press-release_IP-17-1902_en.htm?locale=en.

¹⁷ The possibility of exchanging confidential information between the two sides is being discussed separately. That process is expected to produce amendments to the original 2003 Agreement signed by Japan and the European Community (cited in the next footnote). See Press Release of the JFTC and the Ministry of Foreign Affairs dated 15 March 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160315.html>. See also ‘Interview with the JFTC’, *CPI Asia Column* (11 October 2017), page 4 (expressing certainty that the expected future arrangements will provide for the exchange of confidential information). Japan already has ‘second generation’ agreements with Australia and—as noted below in the main text—with Canada.

¹⁸ See Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, 2003 OJ 183/12. As noted in the previous footnote, preparations are underway for negotiations that will likely result in amendments to the 2003 Agreement.

¹⁹ However, the EPA’s dispute settlement mechanism is excluded in the context of consultations. In the consultation procedure, which can be triggered where one Party considers that a subsidy could have a significantly negative effect on its trade or investment interests, the other Party ‘*shall accord sympathetic consideration to the concerns of the requesting Party*’, and any solution ‘*must be considered feasible and acceptable by the requested Party*’. (Current language of Article 6(5) of the Chapter on Subsidies.)

²⁰ The current version of Article 3 of the Chapter on Subsidies excludes the audio-visual sector from its scope.

²¹ The exclusion for sub-central levels of government is however moderated as follows: ‘*In fulfilling its obligations under [the Subsidies Chapter], each Party shall take such reasonable measures as may be available to it to ensure observance by sub-central levels of government within its [Area].*’

²² This prohibition of particularly harmful forms of aid currently appears in Article 7 of the Chapter on Subsidies.

enforcement activities, exchange of information (consistent with national law), confidentiality, coordination of enforcement activities, communication and so on.²³

- On 11 May 2017, the JFTC and the Canadian Competition Bureau concluded a Cooperation Agreement, based on the 2005 Agreement between two countries' governments (a 'second generation' agreement).²⁴ The focus of the Cooperation Agreement is the exchange of confidential information (consistent with national law and applicable policies).
- On 15 March 2017, the JFTC and Mongolia's Authority for Fair Competition and Consumer Protection (AFCCP) concluded a Cooperation Arrangement in accordance with the existing Implementation Agreement under the two countries' Economic Partnership Agreement.²⁵
- On 9 June 2016, the JFTC and the Competition Authority of Kenya concluded a Memorandum on Cooperation.²⁶
- On 11 April 2016, the JFTC and the Ministry of Commerce of the People's Republic of China (MOFCOM) concluded a Memorandum on Antimonopoly Cooperation.²⁷ According to Article 1, the purpose of the Memorandum is to establish a sound mechanism for the communication and cooperation in the fields of competition law and policy as well as enforcement. The memorandum provides for the scope of cooperation (e.g. exchange of information on legislative developments, enforcement and policies), regular meetings (at least once yearly), technical cooperation, information sharing and confidentiality.

II. PUBLIC ENFORCEMENT

The public enforcement categories mentioned briefly below fall under four headings: unreasonable restraints of trade; unfair trade practices; abuse of dominance; and merger control.

Unreasonable Restraints of Trade

(i) On 15 March 2017, the JFTC issued a warning to Deutsche Securities Inc. for a suspected violation of Section 3 AMA (unreasonable restraint of trade).²⁸ The JFTC's concerns related to: the exchange of information on pricing and customer inquiries with regard to European government bond transactions taking place on electronic trading platforms; and the suspected rigging of bids related to such transactions.

(ii) On 13 March 2017, the JFTC issued surcharge payment orders amounting to 24.61 million yen as well as cease-and-desist orders to distributors selling wallpaper.²⁹ The JFTC found that competition

²³ See JFTC Press Release of 22 June 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170622.html>.

²⁴ See JFTC Press Release of 12 May 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/May/170512.html>.

²⁵ See JFTC Press Release of 15 March 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170315.html>.

²⁶ See JFTC Press Release of 9 June 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160609.html>.

²⁷ See JFTC Press Release of 11 April 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/April/160411.html>.

²⁸ See JFTC Press Release of 15 March 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170315-1.html>.

²⁹ See JFTC Press Release of 13 March 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170313-1.html>.

was substantially restrained due to agreements aimed at raising sale prices.

(iii) On 10 March 2017, the JFTC issued surcharge payment orders amounting to 223 million yen and cease-and-desist orders for bid-rigging in connection with a bid for textile products made of vinylon and fire-resistant vinylon ordered by the Acquisition Technology & Logistics Agency (ATLA).³⁰

(iv) On 16 February 2017, the JFTC issued surcharge payment orders amounting to 592.53 million yen and cease-and-desist order to bidders for the construction of greenhouses in Miyagi and Fukushima ordered by the local municipality.³¹ As part of this bid-rigging scheme, the JFTC found that the public employees in charge of the bidding process had induced or facilitated the violations by providing sensitive information to some of the bidders. The JFTC thus also warned the Miyagi Agriculture Development Public Corporation to take the necessary measures to prevent the recurrence of such conduct.

(v) On 15 February 2017, the JFTC issued surcharge payment orders amounting to 319.21 million yen and cease-and-desist orders in another bid-rigging case involving manufacturers of inputs ('apparatuses') used in hybrid optical communication and transmission path in the context of a bidding process organized by Chubu Electric Power Company Holdings, Inc (CEPCO).³²

(vi) On 2 February 2017, the JFTC in another bid-rigging case issued surcharge payment orders amounting to 6.3449 billion yen and cease-and-desist orders to enterprises selling equipment for fire rescue digital radio (i.e., equipment of wireless radio communication systems used by firefighters in emergency services).³³

(vii) On 21 September 2016, the JFTC issued surcharge payment orders amounting to 480.29 million yen and cease-and-desist orders to bidders for disaster restoration paving works contracts related to the Great East Japan Earthquake in the context of a bid organized by the Kanto Branch of East Nippon Expressway Company Ltd.³⁴

(viii) Relatedly, on 29 February 2016, the JFTC found that the AMA's criminal provisions were violated in the bid-rigging investigation concerning restoration paving works ordered by the Tohoku Branch of East Nippon Expressway Company Ltd.³⁵ In this case, the JFTC filed criminal accusations with the public prosecutor against 11 individuals from 10 companies in accordance with Article 74(1) AMA.

(ix) On 12 July 2016, the JFTC issued surcharge payment orders amounting to 402.91 million yen and cease-and-desist orders to enterprises selling equipment for electric power security communication who bid on contracts put out to tender by Tokyo Electric Power Company Holdings, Inc. (TEPCO).³⁶

³⁰ See JFTC Press Release of 10 March 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170310.html>.

³¹ See JFTC Press Release of 16 February 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/February/170216.html>.

³² See JFTC Press Release of 15 February 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/February/170215.html>.

³³ See JFTC Press Release of 2 February 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/February/160202.html>.

³⁴ See JFTC Press Release of 21 September 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/September/160921.html>.

³⁵ See JFTC Press Release of 29 February 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160303.html>.

³⁶ See JFTC Press Release of 12 July 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160712.html>.

(x) On 29 March 2016, the JFTC imposed surcharge payments amounting to more than 6.5 billion yen on aluminum electrolytic capacitor manufacturers and tantalum electrolytic capacitor manufacturers.³⁷ These products are used in various electronic equipment, such as PCs and smart phones. The JFTC found that the parties had colluded, either through agreements or by signaling, to raise product prices.

(xi) On 10 February 2016, the JFTC issued surcharge payment orders and cease-and-desist orders to enterprises that had rigged bids for contracts concerning the manufacturing and installation of country elevators put out to tender by agricultural cooperatives in Hokkaido.³⁸ The JFTC found that the companies concerned had pre-designated the successful bidders.

Unfair Trade Practices

On 1 June 2017, the Amazon e-books case mentioned earlier was closed informally when the JFTC accepted commitments proposed by the company.³⁹ The investigation related to price parity clauses and selection parity clauses, which according to the JFTC had been imposed by Amazon upon retailers in sales contracts. The JFTC raided Amazon's local unit in the summer of 2016, and suspected that the parity provisions unjustly restricted trade contrary to Article 19 AMA (unfair trade practices). As provided for by the voluntary measures, Amazon will exclude such clauses from seller contracts and will annually report on the implementation of its commitments.

On 29 March 2017, the JFTC issued a cease-and-desist order to JA Tosa-Aki Agricultural Cooperative due to restrictions imposed on trading terms by its members.⁴⁰ The cooperative had refused to accept sales of eggplants by former members who were expelled for shipping the product to non-members; the cooperative had also imposed fines and collected fees from its members who sold to parties other than the cooperative.

On 15 June 2016, the JFTC issued a cease-and-desist order to Coleman Japan Co., Ltd. for resale price restrictions contrary to Article 19 AMA.⁴¹ Coleman had been imposing price restrictions on retail dealers of camping equipment since 2010.

Abuse of Dominance (private monopolization)

No case involving private monopolization was decided by the JFTC in the period of 2016 to mid-2017 but it is worth mentioning this category of conduct in light of a possible future trend toward (relatively) more frequent investigations of such behavior.

A significant nuance here is that, in Japan, conduct or agreements that could be categorized as abuse of dominance may potentially fall within the scope of two quite different AMA provisions: either those that concern 'private monopolization' and/or, more frequently, those concerning 'unfair trade

³⁷ See JFTC Press Release of 29 March 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160329.html>.

³⁸ See JFTC Press Release of 10 February 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160210.html>.

³⁹ See JFTC Press Release of 1 June 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html>. An implementation report was received from Amazon Services International in August 2017. See JFTC Press Release of 15 August 2017.

⁴⁰ See JFTC Press Release of 29 March 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170329.html>.

⁴¹ See JFTC Press Release of 15 June 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160615.html>.

practices’.

Historically, the JFTC has not been particularly active enforcing the prohibition of private monopolization, which requires a demonstration of a substantial restraint of trade. It has instead tended to privilege the prohibition of unfair trade practices, which entails a less stringent standard, the ‘tendency’ to impede fair competition. However, this state of affairs may be evolving due to the increasing importance of the digital economy. Going forward, the JFTC can be expected to investigate more cases applying a private monopolization framework. Such a shift would be consistent with indications given by Chairman Sugimoto in his 2017 New Year’s message in relation to IT/digital-related fields.⁴² It is also conceivable that the JFTC may could launch investigations in the field of mobile telecoms operations, with an eye toward facilitating the entry of new mobile virtual network operators (MVNOs), now that it has sifted through data culled from a sector inquiry carried out in 2016.⁴³

Merger Control

A review of Japan’s merger control system

We review recent merger developments in the next sub-section. As a preliminary matter we review here Japan’s basic merger control framework, as established in Chapter IV of the Antimonopoly Act and the relevant provisions of the Cabinet Ordinance and Regulations for the Law.⁴⁴ Together, these texts set forth the relevant thresholds and detailed filing requirements.

The criteria applied to evaluate whether a business combination would substantially restrain competition in a particular field of trade are set out in the 2004 Guidelines on the Application of the Antimonopoly Act for Reviewing Business Combinations, last amended in 2011 (the ‘2004 Merger Guidelines’).⁴⁵

The main types of mergers that are prohibited if they substantially restrain competition are: share acquisitions, statutory mergers and demergers, significant business transfers and the appointment of interlocking managers and officers. The type of merger that is being examined also affects which threshold will apply for purposes of the obligation to file with the JFTC. For instance, in the case of share acquisitions, the acquiring company should file when: (i) the ratio of voting rights held in the issuing company exceeds either of two thresholds, one set at 20% and the other set at 50%; (ii) it has, as a group, Japanese turnover of more than 20 billion yen; and (iii) the target, as a group, has Japanese turnover of more than 5 billion yen.

With regard to joint ventures, the JFTC analyzes not only the potential unilateral anticompetitive effects created by the joint venture but also any coordinated anticompetitive effects on the competitive relationship between the parties to the joint venture, except where each party transfers the entire business of a certain section or department to the joint venture, thereby putting in place a

⁴² See Message from the Chairman (January 2017), http://www.jftc.go.jp/en/about_jftc/MessagefromChairma/170115.html.

⁴³ See JFTC Press Release of 2 August 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/August/160802.html>.

⁴⁴ A flowchart of the merger review process is provided at page 11 of the JFTC’s Policies Concerning Procedures of Review of Business Combination (2011), http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/pcbr.pdf.

⁴⁵ The Guidelines are available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/110713.2.pdf.

ring fence between the joint venture and the parents.

Even a transaction not caught by the relevant thresholds may be reviewed by the JFTC to determine whether it substantially restrains competition. In this respect, the above-mentioned 2004 Merger Guidelines provide detailed rules, indicative criteria, and factors to assess such as the market positions of the parties, the status of competitors, opportunities for market entry, etc.

With regard to the filing and review procedure, notification to the JFTC should be made prior to the closing of a transaction. This is followed by a 30-day waiting period ('Phase I'). If the JFTC determines that a more detailed review ('Phase II') is required, it will request more information and materials. The time limit for a Phase II review is 90 days from the date on which the JFTC is satisfied that it has received all requested information and materials.

Recent developments in merger control

Statistically speaking, the JFTC's practice was stable in 2016 compared to previous years. 289 filings were accepted by the JFTC in 2016, down just six from the 295 filings in 2015. In 2016, five cases advanced to a Phase II review; three of these were ultimately cleared unconditionally, while the other two were cleared subject to remedies.

On 30 June 2016, the JFTC raised 'gun-jumping' concerns with regard to the proposed acquisition of shares of Toshiba Medical Systems Corporation by Canon Inc. A preliminary phase of the transaction related to the creation of different types of shares in Toshiba Medical's equity and a special purpose vehicle (SPV). A two-step structure for the transaction was then supposed to be implemented. First of all, immediately upon the signing of the transaction agreements, the SPV was to acquire voting share class while Canon was to acquire non-voting shares and warranties. Canon was then to transfer the purchase amount without gaining control over the target, Toshiba Medical, since it was only the SPV which acquired voting shares. However, once the necessary antitrust approvals were secured, Canon would then later exercise its warranty and receive common voting shares of the acquired company.

In June 2016, the JFTC approved the transaction. However, the JFTC also raised concerns that Article 10(2) AMA may have been breached by the structure of the transaction, given the three-way relationship between Canon, Toshiba Medical and the SPV and the transfer of consideration prior to the issuance of the necessary antitrust approvals. However, rather than aggressively objecting, the JFTC issued a warning. As the agency said, it '*cautioned Canon not to conduct such actions in the future and has also urged Toshiba, who engaged in the implementation of the above structure, not to engage in activity in the future that may be inconsistent with the purport of the prior notification system [...].*'

Other significant merger and acquisition cases from 2016 to mid-2017 are summarized below:

- On 19 July 2017, the JFTC received a notification from Daishi Bank, Ltd. and Hokuetsu Bank, Ltd. concerning a proposed joint share transfer.⁴⁶ The case has moved to Phase II, with the JFTC requesting that the parties submit further reports, information and materials. Third

⁴⁶ See JFTC Press Release of 19 July 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/July/170719.html>.

parties were asked to provide comments regarding the possible competitive effects of the transaction.

- On 30 January 2017, after a Phase II review, the JFTC cleared an acquisition of shares of Nisshin Steel Co., Ltd. by Nippon Steel & Sumitomo Metal Corporation after having obtained remedies that alleviated concerns that competition in any field of trade would be substantially restrained.⁴⁷
- On 19 December 2016, the JFTC cleared an acquisition of shares of Showa Shell Sekiyu K.K. by Idemitsu Kosan Co., Ltd and an acquisition of shares of TonenGeneral Sekiyu by JX Holdings, Inc.⁴⁸ According to the notification, Idemitsu planned to acquire more than 20 percent of Showa Shell's voting rights, while JXHD planned to acquire more than 50 percent of TonenGeneral's voting rights. The JFTC found that the remedies proposed by the parties removed its competition concerns.
- On 7 October 2016, a notification to the JFTC was withdrawn due to foreclosure concerns.⁴⁹ In this case, Lam Research Corporation and KLA-Tencor Corporation (KT) had planned to merge their businesses but the JFTC (having exchanged information with the U.S. DOJ) considered that their proposed business integration would substantially restrain competition for the production and sale of semiconductor fabrication equipment, in particular because the transaction would make it possible for Lam to exclude competitors by reducing their timely access to KT's metrology and inspection equipment, and related services. When the parties abandoned their deal, the JFTC terminated its review.
- On 18 March 2016, following a Phase II review, the JFTC cleared the establishment of a joint venture for containerboards by Nippon Paper Industries Co., Ltd. and Tokushu Tokai Paper Co., Ltd.⁵⁰ In effect, the transaction created an SPV enabling the companies to combine their containerboard sales departments.
- On 28 January 2016, in another Phase II case, the JFTC cleared the acquisition of shares of Tokyo Kohtetsu co., Ltd. by Osaka Steel Co., Ltd.⁵¹

III. PRIVATE ENFORCEMENT

Background: legal bases for private litigation and jurisdiction of the courts

Article 25 AMA provides that parties who have engaged in monopolization, cartel conduct or unfair trade practices are liable to indemnify those injured by such practices. This legal basis in the AMA is however limited to follow-on actions, as Article 26 AMA provides that the right to claim damages under Article 25 cannot be asserted in court until the JFTC's cease-and-desist order becomes final

⁴⁷ See JFTC Press Release of 30 January 2017, <http://www.jftc.go.jp/en/pressreleases/yearly-2017/January/170130.html>.

⁴⁸ See JFTC Press Release of 19 December 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/December/161219.html>.

⁴⁹ See JFTC Press Release of 7 October 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/October/161007.html>.

⁵⁰ See JFTC Press Release of 18 March 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160318.html>.

⁵¹ See JFTC Press Release of 28 January 2016, <http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160128.html>.

and binding.

On the other hand, Article 709 of Japan's Civil Code sets forth general principles for liability arising from the violation of rights and the corresponding duty to compensate. This means that there are two possible ways to bring an action seeking monetary compensation following losses suffered from anticompetitive conduct—the distinction between them being the burden of proof. In the context of a follow-on suit under Article 25 AMA, an order of the JFTC finding an infringement necessarily already exists. Therefore, the plaintiff in private litigation need not prove intent or negligence on the part of the defendant. By contrast, a suit based on Article 709 of the Civil Code—an instrument of general tort law—can only succeed where the plaintiff substantiates culpability, i.e., fault.

Putting damages actions aside, the AMA, as a result of amendments made in 2001, also enables private plaintiffs to seek an injunction to stop certain unfair trade practices. Specifically, Article 24 AMA provides that if a person's interests are infringed or likely to be infringed by an act that constitutes an unfair trade practice under Article 8(v) or Article 19 AMA, he may be entitled to obtain an injunction from the court. It is worth underlining that Article 24 does not apply in cases involving hard core cartel conduct, as behavior of this kind would constitute an unreasonable restraint of trade, and not an unfair trade practice.

The jurisdiction of the Japanese courts to hear private antitrust litigation has been modified as a result of amendments which were adopted in December 2013 and which entered into force in April 2015. Due to these amendments, follow-on actions under Article 25 AMA are no longer filed originally with the Tokyo High Court; the trial court now is the Tokyo District Court.⁵² Decisions of the Tokyo District Court may be appealed to the Tokyo High Court, and a final appeal may be made to the Supreme Court of Japan. In contrast to actions under Article 25 AMA, if a plaintiff files a case under Article 709 of the Civil Code, the litigation can proceed in other District Courts in Japan where tort jurisdiction is established: she is not limited to filing only with the District Court in Tokyo. Appeals may then be made to the High Court that is competent to review decisions of the court in question.

Pursuant to Article 26 AMA, private actions based on the AMA must be brought within three years of the day that the JFTC's order becomes final. By contrast, actions brought under Article 709 of the Civil Code are subject to a limitation of either within three years from the date on which the victim or plaintiff became aware of the conspiracy or act that caused the damage, or within 20 years of the date of the conspiracy or damaging act, whichever is earlier.

Recent developments and non-developments

Perhaps the most remarkable development in the context of private antitrust litigation in recent years has been the emergence of shareholder derivative suits filed to hold key persons responsible for improper action or inaction. In these cases, the executives of large corporations have been sued for failing to prevent cartel engagements or for failing to timely apply for leniency in order to mitigate or avoid surcharges. Often, such suits have led to payouts by the defendant executives, with damages—including by way of settlement—being paid to the relevant corporations. Payouts have amounted to sums of 88 million yen, 230 million yen, 160 million yen, and 140 million yen in various cases in 2010, and 520 million yen in a case in 2014. Such litigation is a sign that shareholders are putting

⁵² By way of exception, a plaintiff must still bring private actions pursuant to Articles 25 and 26 of the Antimonopoly Act before the Tokyo High Court when the action is based on a JFTC order that became final and binding on or before 31 March 2015.

increased pressure on the managers of public corporations, especially in the sphere of cartel conduct.

By contrast, it is rare to see successful private actions being brought by small private victims of anticompetitive conduct, in particular because Japan has not established legal mechanisms (especially class actions or a variant thereof) that secure sufficient incentives to motivate litigation of this kind.⁵³ Business-to-business litigation arises occasionally, but not necessarily for the primary purpose of resolving competition law claims. However, there are examples of cases where an antitrust claim is indeed the main focus of the case, as illustrated by the *Nipro* judgment of the Tokyo High Court in 2012.⁵⁴ By way of background, on 7 December 2007, Naigai Co., Ltd. and Naigai Glass Kogyo Co., Ltd. filed a follow-on claim for damages under Article 25 AMA before the Tokyo High Court (at that time the competent trial court for such claims) against Nipro Corporation. Consistent with the JFTC's findings, the plaintiffs alleged that Nipro had violated the prohibition against private monopolization by refusing to supply Nagai with material glass tubes for ampoules. On 21 December 2012, the Tokyo High Court found Nipro to be liable and ordered the latter to pay the plaintiffs 133 million yen in damages (which that time amounted to about USD 1.3 million) plus interest.

In contrast to lawsuits involving private plaintiffs, where successful recoveries remain rare, it is not uncommon for local governments and other public entities in Japan to seek damages, with a good deal of success, before the courts. As Vande Walle found in 2013, 96 percent of the sixty billion yen that had been recovered through either final damages awards or settlements was recovered by public entity plaintiffs.⁵⁵

In the future, Japan will likely amend the AMA to formally introduce a procedure to resolve administrative investigations by means of commitments (see above). That suggests that many future cases may well be resolved with no cease-and-desist or surcharge order on the part of the JFTC. To that extent, one may expect even less scope for bringing claims on the basis of Article 25 AMA which, as already noted, can only be invoked where the JFTC has adopted an order.

IV. FINAL REMARKS

The JFTC has long been, and remains, one of the most active competition law enforcers worldwide. The year 2016, and the first part of 2017, are no exception. In addition to the full case load described above, the JFTC continues to pursue policy initiatives, revisiting a number of its soft law guidance documents and bringing them up to date. The most noteworthy development, as noted earlier, is the momentum toward yet another round of amendments to the AMA. These amendments could potentially transform the surcharge system—which has suffered from various flaws for 40 years—into a much more effective enforcement tool. While the expected financial consequences of infringements are only part of a larger picture that determines corporate and individual behavior, the move toward a more nuanced and potent surcharge system is a necessary step on Japan's path toward a better-designed and better-functioning competition law framework.

⁵³ See generally Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Maklu, 2014).

⁵⁴ See Judgment of the Tokyo High Court of 21 December 2012, Heisei19 (wa) No. 10 (in Japanese).

⁵⁵ See Vande Walle, above note 53, at page 141 (pie chart).

