

Abuse of Superior Bargaining Position in Japan - Its Development and Current Position

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Introduction

Abuse of Superior Bargaining Position (“ASBP”) is drawing increased attention in Japan. While this concept can also be seen in some jurisdictions outside of Japan, such as Korea and Taiwan, many significant jurisdictions including the US and the EU do not have such a concept ingrained within their competition laws and legislation.² The use of the term “abuse” together with the term “superior position”, may at a first glance, give an impression that ASBP might be similar to the concept of abuse of dominance seen in some major jurisdictions. However, for ASBP to come into play one does not require to have a dominant position in the market, and the concept of ASBP may rather be better understood in comparison with the concept of abuse of economic dependence seen in jurisdictions such as France and Germany.³ Indeed, even in Japan there has been a controversy as to how to understand this concept in its competition law regime. As such, it may be better to distinguish this from abuse of dominance, at least at the outset.

In this regard, there are some scholars in Japan who suggest ASBP is actually similar to exploitative abuse of dominance.⁴ However, such reading does not seem to have gained the support of the legal community at large, nor the Japan Fair Trade Commission (“JFTC”), or the judicial courts, and this shows that there are still some controversy and lack of clarity even in Japan about the concept of ASBP. With such a lack of clarity in mind, a sensible approach to understanding the concept of ASBP may be through the structure of the statute and the focus

on the actual enforcement history and recent activities of the JFTC to curb ASBP. In the latter regard, as discussed in detail below, we have recently witnessed an increased use of the law on curbing ASBP both on the enforcement side and on the advocacy side. At the same time, given that ASBP is coming more and more to the forefront despite the vague nature of the provision of the law and the concept, we should also bear in mind that such increased use may lead to an abuse of the use of ASBP and strangulation of healthy competition by the agency.

ASBP in Japan

In Japan, ASBP is provided as a type of Unfair Trade Practice (Article 19) by the Anti-Monopoly Act (“AMA”).⁵ The unique feature of the AMA is that besides the two categories of competition law concepts that respectively capture horizontal collusion (Unreasonable Restraint on Trade) and unilateral conduct by an entity with market power (Private Monopolization), both imposing a substantial restraint on competition, the AMA provides for a third category called Unfair Trade Practices. Unlike what the name suggests, Unfair Trade Practices cover various conducts that harm competition, some of which overlap with private monopolization. However, for the required level of harm on competition, Unfair Trade Practices only require a lower threshold, namely all those conducts that have a “tendency to impede competition.”⁶

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² See *ICN Special Program for Kyoto Annual Conference Report on Abuse of Superior Bargaining Position*, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_ASBP2008.pdf.

³ See *Vassili Moussis, Atsushi Yamada, Abuse of Economic Dependence, Global Dictionary of Competition Law, Concurrences, Art. N° 86372* available at: <https://www.concurrences.com/en/dictionary/abuse-of-economic-dependance>.

⁴ See Tadashi Shiraishi, *The Exploitative Abuse Prohibition: Activated by Modern Issues*, *Antitrust Bulletin* Vol. 62(4) p737 (2017)

⁵ Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) . English translation available here: https://www.jftc.go.jp/en/legislation_gls/AMA.pdf.

⁶ This comes from the language in Article 2(9)(vi), which functions as a catch-all provision for Unfair Trade Practices in the AMA, which provides as follows: “any act falling under any of the following items, which tends to impede fair competition.”

Although the definition of Unfair Trade Practices is provided for in Article 2(9) of the AMA, and the provision sets out several types of conduct in Items (i) to (v), there are also some types of conduct provided separately under the JFTC rules. Pursuant to the rule-making authority granted by Article 2(9)(vi) of the AMA, the JFTC has framed a detailed list that expands Unfair Trade Practice to a further 15 types of conduct under its rules called the Designation of Unfair Trade Practices (“General Designations”).⁷ This framework is a bit complex as compared to before 2009, where a list of all types of conduct that fell under Unfair Trade Practices was provided solely under General Designations framed by the JFTC. Upon the introduction of administrative fines targeting certain types of Unfair Trade Practices in 2009, changes were introduced to the AMA to specifically bring certain types of conduct subject to administrative fines. ASBP is one such type of conduct that was previously provided as an Unfair Trade Practice under the General Designations but since the 2009 amendment, it is now being defined under the AMA itself (Article 2(9)(v)).

Even though ASBP now has a separate provision within the AMA, the provision itself remains far from clear. In an effort to provide clarity upon making ASBP subject to administrative fines in 2010, the JFTC issued “Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act” (“ASBP Guidelines”). However, even with such an effort, there is still a lack of clarity in understanding ASBP. Further, in 2019, with the rising concern of digital platform operators collecting and making use of

consumers’ data, the JFTC has decided to address this from an ASBP perspective, and issued a new guideline, Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (“Consumer ASBP Guidelines”), to address such concerns.⁸ However, rather than clarifying the concept of ASBP, the focus here was more on stating that data transactions with consumers would fall within the scope of the ASBP scrutiny and therefore the vagueness of ASBP provision itself was left untouched.

The ASBP provision and the ASBP Guidelines

I. Elements of the ASBP provision

Article 2(9)(v) of the AMA provides that if a party who has a superior bargaining position over the counterparty makes use of such superior bargaining position and unjustly, in light of normal business practices, engages in certain types of conduct that is disadvantageous to the counterparty, such conduct would constitute an unfair trade practice.⁹ This category of conduct is defined as ASBP, and is prohibited under Article 19 of the AMA.

The elements of ASBP could be broken down as follows:

1. **Superior bargaining position;**
2. Conduct that **imposes a disadvantage on the counterparty (or abusive conduct);** and

⁷ Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982). English translation is available here: https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html. The General Designations is provided pursuant to the rule making power granted to the JFTC to specify conduct that fall in as Unfair Trade Practices pursuant to Article 2(9) Item (vi) of the AMA. There are two types of designation, one which is applicable to a specific industry/sector and another which is generally applicable across all industries/sectors. The General Designations is the latter type.

⁸ Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. English translation available at: https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217DPconsumerGL.pdf.

⁹ Article 2(9)(v) provides as follows:

(9) *The term "unfair trade practices" as used in this Act means an act falling under any of the following items:*

(v) *engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices:*

(a) *causing the counterparty in continuous transactions (including a party with whom one newly intends to engage in continuous transactions; the same applies in (b) below) to purchase goods or services other than those to which the relevant transactions pertain*

(b) *causing the counterparty in continuous transactions to provide money, services or other economic benefits*

(c) *refusing to receive goods in transactions with the counterparty, causing the counterparty to take back such goods after receiving them from the counterparty, delaying payment to the counterparty or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty*

3. The conduct is **unjust in light of normal business practices**.

The ASBP Guidelines further expand on these three elements and also provide some examples:

1. **Superior bargaining position:**

- Finding of a superior bargaining position is done on a case-by-case basis, and therefore what matters is whether Party A has a superior bargaining position vis-à-vis the counterparty (Party B) in the context of the transaction between the Parties. In other words, Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position, and having a relatively superior bargaining position over Party B in its transactions with Party B would be sufficient. Further, the scope is not limited to transactions between large enterprises and small or medium-sized entities (“SMEs”) (i.e. depending on the facts of the case, ASBP may be applicable in transactions between large enterprises, or transactions between SMEs)
- When determining whether Party A has a superior bargaining position over Party B, the following factors would be considered:
 - Party B’s **degree of dependence** on the transactions with Party A, typically measured by looking at the ratio of Party B’s number of sales with A to Party’s B’s total amount of sales
 - Party A’s **position in the market**, typically considering its market share and ranking within the market
 - Party B’s **possibility of changing its business counterpart** from Party A, typically considering the possibility of Party B starting or increasing its transactions with parties other than Party A, and the investments made by Party B in relation to its transactions with Party A
 - Any **other facts indicating the need to carry out transactions with Party A** on Party B’s side, including factors such as the number of sales with Party A, the future growth potential of Party A, the importance for Party B to handle

the goods or services subject to the transactions with Party A, the possibility of Party B increasing its credibility through transactions with Party A, and the difference in business sizes between Party A and Party B

2. **Disadvantageous conduct (abusive conduct):**

- The AMA provides examples of disadvantageous conduct (Article 2(9)(v) Items (a)–(c)) and the AMA Guidelines further elaborate on this. However, the latter portion of Item (c) functions as a catch-all provision providing as follows: “otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty.” As such, the key indicator for abusive conduct would be whether the conduct is **“disadvantageous to the counterparty”**.
- The examples provided by the AMA and the ASBP Guidelines include:
 - (1) Causing Party B, with which Party A has regular transactions, to purchase goods or services other than the one pertaining to the said transaction (Item (a) of Article 2(9)(v)) (**forced purchase/use**)
 - (2) Causing Party B, with which Party A has regular transactions, to provide for Party A money, services, or other economic benefits (Item (b) of Article 2(9)(v)) (**Request for economic benefits**)
 - The term “economic benefits” in these provisions refers to the provision of money as a monetary contribution, financial assistance, or under any other title, the provision of labor services, and the like.
 - (3) Establishing or changing trade terms or executing transactions in a way that is disadvantageous to the counterparty (Item (c) of Article 2(9)(v)), such as:

- **Refusing to receive goods** pertaining to transactions from the said party
 - Causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party (**Return of goods**)
 - **Delaying the payment** for the transactions to the said party
 - Reducing the amount of the said payment (**Price reduction**)
 - **Unilateral decision on a consideration for transactions**
 - **Request for recalling and resending of goods or services even though there is no defect or default**
- Based on these examples, commentators consider the following as the core aspects of disadvantageous conduct: (i) whether the disadvantage imposed is such that the counterparty could not calculate in advance; and (ii) whether the disadvantage places a burden on the counterparty in excess of what is deemed reasonable considering the direct benefit. While these help in identifying abusive conduct, given that there is a catch-all provision, the boundaries of abusive conduct remain unclear, especially for conduct that does not squarely fit into the examples provided above.
3. **Unjust conduct (in light of normal business practices)**
- This last element is abstract and does not add clarity by itself, but it is generally understood that this element provides for the abusive aspect of the conduct, in other words, the lack of justifiable grounds for such conduct.
 - The ASBP Guidelines simply provide that "normal business practices" means business practices that are endorsed from the viewpoint of the maintenance and promotion of fair competition (fair

competition here means business operators competing to provide better quality or lower price) and thus simply complying with currently existing business practices in place would not immediately rule out ASBP from the conduct.

- While the ASBP Guidelines do not explicitly provide guidance for the vague term "unjust", they do state that

if a party, who has a superior bargaining position against its counterparty, makes use of such position to impose a disadvantage on the counterparty, unjustly in light of normal business practices, such act would impede transactions based on the free and independent choice of the counterparty, and put the counterparty in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors.

This is generally understood as the JFTC's view on the theory of harm of ASBP, and the courts seem to agree with the JFTC's point of view.¹⁰ With this in mind, if there is disadvantageous conduct that impedes the free and independent choice of the counterparty, in the absence of justification, the conduct is likely to be considered unjust, but the lack of clarity continues to exist.

II. Consequences of the finding of a violation of ASBP

1. **Cease-and-desist order:** The JFTC may order the party to cease and desist from engaging in the relevant act, delete the relevant clauses from the contract, or take any other measure necessary to eliminate ASBP conduct which may include not engaging in similar conduct in the future, and establish systems to ensure compliance (Article 20(1) of the AMA).
2. **Surcharge payment order:** If the party is deemed to have engaged in abusive conduct

¹⁰ A recent example is the March 3, 2019, Tokyo High Court decision in the *Raise* retail store case

on a “continuous basis”, the JFTC must order payment of a surcharge (administrative fine). The surcharge will be calculated as an amount equivalent to one percent of the party's sales to the counterparty to the act in violation (Article 20(6) of the AMA).

3. **Injunction:** A person whose interests are infringed upon or likely to be infringed upon by an act of Unfair Trade Practice (including ASBP) and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements with the judicial court (Article 24).
4. **Civil litigation:** A party may claim for damages based on the general torts provision of the Civil Code (Article 709), or claim that a certain agreement should be deemed against the principles of public policy and declared void based on the public policy provision of the Civil Code (Article 90). In either case, violation of ASBP would be considered as one factor in deciding whether the relevant conduct is unlawful or against public policy.

III. Relevant Regulations

1. The Subcontract Act

While ASPB is provided for in the AMA, which is the main competition law legislation in Japan, a separate law, so-called the Subcontract Act,¹¹ also covers the same types of conduct that are listed as examples in the ASBP Guidelines. Enacted in 1956, the Subcontract Act aims to ensure that transactions between large procuring business operators and their subcontractors are fair and aims to protect the interests of the subcontractors. The Act seeks to achieve these by requiring the documentation of key items of the subcontract agreement and prohibiting specific types of conduct that harm the interests of the subcontractors such as delay in payment of subcontract fees. In contrast to the ASBP provision which is ambiguous in many respects

as mentioned above, the Subcontract Act defines contractors and subcontractors that are subject to the Act based on an objective criterion (i.e., the size of capital), so a finding of a superior bargaining position is not required. Further, the Act also specifically lists the types of conduct that constitute a violation and does not require a finding of harm to competition (unjustness). As such, finding a violation under the Subcontract Act is more straightforward. Therefore, for ASBP type conducts between procuring business operators and their subcontractors where the Subcontract Act is applicable, the JFTC's enforcement is mostly conducted through the issuance of administrative guidance pursuant to the Subcontract Act. In the beginning, the focus of the Subcontract Act was on the manufacturing sector, but in 2003, the scope was expanded to procurement of information-based products (e.g., software, audio/video content, designs, etc.) and procurement of services, with the current number of cases handled under the Subcontract Act being around 8,000 every year. Among these, in a handful of cases (about 5-10 cases every year), the JFTC issues a formal administrative recommendation (“*Kankoku*”). The JFTC does not have the authority to issue fines, but for the formal administrative recommendations it would make the case public, and may instruct restitution as part of the recommendation. However, the majority of the cases are handled more informally, by way of providing guidance (“*Shidou*”) to urge voluntary compliance. Such enforcement has been indirectly supporting the curbing of ASBP by the JFTC.

2. Special Designations

There are some JFTC rules addressing certain ASBP-type conduct for specific industries. Currently, there are three such special designations: (i) the newspaper business;¹² (ii) transactions between large scale retailers and its suppliers;¹³ and (iii) transactions where certain shippers assign transport and storage of goods.¹⁴

¹¹ Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of June 1, 1956). English translation available here: https://www.jftc.go.jp/en/legislation_gls/subcontract.html.

¹² Designation of Specific Unfair Trade Practices in the Newspaper Business. English translation available at: https://www.jftc.go.jp/en/legislation_gls/index_files/spaper.pdf.

¹³ Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers: English translation available at: https://www.jftc.go.jp/en/legislation_gls/index_files/dsutp.pdf.

¹⁴ Designation of Specific Unfair Trade Practices when Specified Shippers Assign the Transport and Custody of Articles. English translation available at: <https://warp.ndl.go.jp/info:ndljp/pid/286894/www.jftc.go.jp/e-page/legislation/ama/specifiedshippers.pdf>.

What these three have in common is that they specifically define the target and the type of conduct, which enables easier interpretation and thus easier enforcement. Of these, the special designation for large scale retailers, which was originally introduced in 1954 targeting department stores and supermarket chains was expanded in 2005 to include other types of large scale retailers that have emerged over time (such as do-it-yourself (“DIY”) stores, clothing and home appliance store chains, drug store chains and convenience store franchises), and has played a significant role in terms of enforcement against ASBP type conduct.

ASBP in Practice and Enforcement Trends

I. Early days of ASBP (1953-1982)

ASBP finds its origin in the AMA when it was introduced by way of an amendment in 1953 to strengthen enforcement against Unfair Methods of Competition. One key feature of the amendment was to add a novel category of conduct to address situations where large scale business operators took advantage of their superior position to unjustly place pressure on SMEs. When this new category of conduct was introduced, what was previously called Unfair Methods of Competition in the AMA was renamed to Unfair Trade Practices, and this novel category was added as one type of Unfair Trade Practice in the amended law.¹⁵ This AMA provision authorized the JFTC to enact rules and define what would constitute an Unfair Trade Practice. The JFTC then under Item 10 of the then General Designation provided for “Abuse of Economic Power”, which formed the origin of the current ASBP.¹⁶ This provision was intended to address cases such as delay of payment to its

subcontractors by large companies, unjust return of goods to its suppliers by department stores, and use of compulsory deposit for loans and/or discounting bills by financial institutions.

Some early cases were directed toward intervention in management of other companies by financial institutions and control of distribution channels by manufacturers. However, enforcement, especially enforcement by way of issuing a formal order, was not necessarily active. This was presumably due to the difficulty of implementation of the vague provision and the controversy over the interpretation that entailed. Further, for transactions between large business operators and their subcontractors, after a new law (Subcontract Act) was introduced in 1956 to specifically address bullying of subcontractors, the use of the Subcontract act gradually increased. Against such a background, the enforcement of ASBP gradually shifted to focus on abusive conduct by large scale retailers against their suppliers. Indeed, the first formal measure taken by the JFTC solely based on the grounds of violation of ASBP was the *Mitsukoshi* case in 1982, where the largest department store in Japan then (Mitsukoshi) pressured its suppliers to purchase certain goods and show tickets from Mitsukoshi and also urged its suppliers to bear the cost of renovation and promotion activities of the department store.

II. Increased enforcement of ASBP-type conduct

In the same year (1982), the General Designations was amended to provide clarity and reflect changes in the economy. With respect to ASBP, Item 10 of the General Designations was clarified by adding specific examples of abusive conduct and was renumbered to Item 14.¹⁷ After

¹⁵ Item (v) was added to the provision providing for definition of Unfair Trade Practice (then Article 2(7), later renumbered to Article 2(9)) as follows:

“The term “unfair trade practices” as used in this Act means any act falling under any of following items, which tends to impede fair competition and which is designated by the Fair Trade Commission:

[(i)-(vi) omitted]

(v) Dealing with another party by unjust use of one’s bargaining position”

¹⁶ Item 10 provided as follows:

“Engaging in transactions with terms unjustly disadvantageous to the counterparty in light of the normal business practices by making use of one’s superior bargaining position over the other party”.

In contrast to the current provision, Item 10 did not provide any examples of conduct that would fall in as “transactions with terms unjustly disadvantageous to the counterparty.”

¹⁷ Item 14 provided as follows:

“(Abuse of Superior Bargaining Position)

the introduction of the new General Designations, the enforcement of ASBP picked up, however, with a focused target. The vast majority of the cases (19 out of 22 cases where the JFTC issued formal orders during the period from 1982 until 2010) were directed toward large scale retailers (such as supermarket chains, convenience store franchises, home appliance store chains) and hotel operators for their conduct against suppliers. In parallel, the Special Designation for large scale retailers was frequently utilized as well (9 out of the 19 cases above were solely based on the Special Designations.)

III. Introduction of administrative fines in 2009

The 2009 amendment to the AMA introduced surcharges (administrative fines) as a sanction for ASBP. Prior to 2005, the AMA did not provide for any fines for categories other than Unreasonable Restraint on Trade which covered cartel/bid-rigging type of conduct. In contrast, for violation of Private Monopolization and Unfair Trade Practices, the only sanction under the AMA by the JFTC was a cease-and-desist order. However, voices calling for stronger enforcement of competition law led to the introduction of administrative fines for conducts other than cartels/bid-rigging that have substantial impact on competition. First, in 2005, administrative fines were introduced for control-type Private Monopolization, and subsequently, in 2009, administrative fines were further expanded to exclusionary-type Private Monopolization and certain types of Unfair Trade Practices that could be regarded as an early sign of Private Monopolization (e.g., Joint Refusal to Trade, Discriminatory Pricing, Predatory Pricing, and Resale Price Maintenance). These types of conduct were selected on the basis that their unlawfulness was rather explicit, and only a repeated violation was subject to fines in order to

avoid imposing a stifling effect on business activities. However, although the government did not consider ASBP an early form of Private Monopolization, the government nevertheless saw a necessity to impose administrative fines given the significant harm SMEs suffer, and thus included it within the scope for imposition of administrative fines. As such, the administrative fines for ASBP fines were treated differently and were provided as an administrative fine that could be imposed for even a first-time violation.

IV. Cases after the introduction of administrative fine in 2009

During the first five years after the introduction of administrative fines (the amendment came into effect in 2010), the JFTC brought five cases, all of which concerned large scale retailers. In all five cases, the parties challenged the JFTC's decision. This was partly because under the AMA, once the JFTC finds a violation, there is no discretion on the JFTC's side to adjust the amount of fines, so from the party's perspective it had to choose whether to accept or challenge the decision. In addition, the provision for the calculation of fines lacked clarity and left room for interpretation as to what the basis should be, and this also led the parties to challenge the JFTC's formal orders.

The parties challenging the JFTC's decision placed a significant burden on the JFTC, especially given that each of these ASBP cases involved a significant number of suppliers and there were numerous transactions with each supplier. As a result, the JFTC appears to have become careful if not hesitant to bring up ASBP cases by way of issuing a formal order. Indeed, the JFTC has not issued any formal orders for ASBP cases after 2014.

That said, in terms of overall enforcement against ASBP, JFTC remains active, mainly through its

(14) *Engaging in any act specified in one of the following items, unjustly in light of the normal business practices, by making use of one's superior bargaining position over the counterparty unjustly:*

- (i) *Causing the counterparty in continuous transactions to purchase goods or services other than those to which the relevant transactions pertain;*
- (ii) *Causing the counterparty in continuous transactions to provide money, services or other economic benefits*
- (iii) *Establishing or changing trade terms in a way disadvantageous to the counterparty;*
- (iv) *Imposing a disadvantage on the counterparty regarding trade terms or execution of transactions other than the acts falling under any of the preceding items; or*
- (v) *Causing a corporation which is one's counterparty to a transacting to follow one's instruction in advance, or to get one's approval, regarding the appointment of officers of the said corporation (meaning those as defined by paragraph 3 of Article 2 of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade....)."*

ASBP Task Force established in 2009. The ASBP Task Force focuses on handling ASBP cases, which allows for the efficient gathering of information and building experience, and strives to intervene at an early stage by way of issuing informal warnings, leading to early detection and resolution. The ASBP Task Force has been handling around 50 cases every year, and the average period required for intervention and issuing an informal warning has significantly improved from the average of 122 days prior to the introduction of the Task Force to roughly 40 to 50 days after the introduction. As such, the JFTC has been quite successful in implementing this approach to dealing with ASBP.

V. Recent developments and the potential shift in enforcement

Besides the success of the ASBP Task Force, there have been several notable developments.

1. **Introduction of the Commitment Procedure:** In 2017, the AMA was amended to introduce the Commitment Procedure. Under the Commitment Procedure, the party under the JFTC's investigation may engage in discussions with the JFTC and request approval of voluntary commitments to address the JFTC's concerns, and if approved, the case will be closed without the finding of a violation and thus no formal orders such as a cease-and-desist order and/or a surcharge payment order (administrative fine order) would be issued.

The Commitment Procedure provides leeway for the JFTC and the party to reach a negotiated resolution, without going all the way to the final order and any challenges at judicial courts. This could allow the JFTC to proceed with its investigation without being too concerned about the party challenging the JFTC's decision and fighting it to the end.

Indeed, shortly after the introduction, the Commitment Procedure was used in three recent ASBP cases.¹⁸ In addition, in two other recent cases, while the Commitment Procedure was not utilized, the JFTC closed

the case without any finding of violation when the party under investigation made commitments to change its business practice that addressed the JFTC concerns adequately, achieving a similar result as the Commitment Procedure.

Such development suggests that with the introduction of the Commitment Procedure which brought about flexibility in enforcement, the JFTC has become more willing to open ASBP investigations.

2. Increased use of advocacy through market studies:

Traditional targets of market studies: The JFTC conducts market studies to gain a better understanding of a certain market and identify potential competition law issues. In the past, with respect to ASBP, market studies in areas such as transactions between large scale retailers and suppliers, franchisors and franchisees, hotels and suppliers, shippers and logistic companies, and financial institutions and companies were quite common and frequent.

New areas of focus: However, in the past 5 years, the JFTC has suggested placing greater emphasis on advocacy through market studies as a means to enhance competition policy and facilitate enforcement. The JFTC has increased the frequency of launching such market studies and also expanded the sectors within its radar. Just to name a few novel sectors, areas such as the following were addressed by the JFTC's recent market studies: liquid natural gas ("LNG") trade, human resources industry, e-commerce, credit cards, various digital platforms (online shopping malls, mobile app stores, digital ads, cloud services, and distribution of news contents), restaurant ranking sites using algorithms, financial services utilizing fintech (household accounting services and cashless payment services using QR codes and barcodes), working conditions for freelancers and

¹⁸ Approval of the Commitment Plan submitted by Genky Stores, Inc., August 5, 2020, Japan Fair Trade Commission. See: <https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/200805.html>; Approval of the Commitment Plan submitted by Amazon Japan G.K., September 10, 2020, Japan Fair Trade Commission. See: <https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html>; Approval of the Commitment Plan submitted by BMW Japan Corp., March 12, 2021, Japan Fair Trade Commission. See: <https://www.jftc.go.jp/en/pressreleases/yearly-2021/March/210312.html>.

transactions with startups (transactions with business partners and with brokerage firms).

New types of conduct: Further, together with the expansion of target sectors, the JFTC appears to suggest that certain types of conduct that it had not focused on much in the past could come into the scope of ASBP. To give some notable examples, first of all, there is frequent reference to unilateral changing of contract terms by the superior party, such as raising of price or service fees. The second type of conduct that is frequently referred to is unilaterally obligating the other party to bear certain costs and/or losses, take certain actions such as providing data/technology/IP, use certain services, and even develop new customers. Third, there are cases where the JFTC focuses on instances where the superior party imposes unfavorable obligations (e.g., non-compete, exclusive dealing, and restriction on the use of output) to the counterparty. Finally, in relation to algorithms, the JFTC suggested that changing an algorithm arbitrarily and using that as leverage to have the counterparty enter into an agreement more favorable to the superior party could be in violation of ASBP.

Things to note moving forward: However, it is important to note that these suggestions are made in the context of a market study. Whether a conduct described in these market reports would indeed be deemed as a violation would also depend on various other factors such as whether the conduct was taken without any justifiable reason and whether the counterparty was unfairly disadvantaged in light of normal business practices. The JFTC acknowledges this, usually noting that the conduct it identified has “potential concerns of violating the AMA,” carefully choosing words so as not to give a definitive impression and leave room for interpretation based on the specific facts of a case. As such, it is fair to say that JFTC does bear in mind that there is tension between ASBP and the parties’ freedom of contract to some extent, and a case-by-case analysis would be important. Therefore, whether the JFTC will indeed pursue ASBP enforcement for the conducts it has identified is yet to be seen and would depend on the circumstances

of each case. That said, we should expect that the JFTC is now more open to looking into ASBP in areas other than the classic examples where large scale retailers are bullying their suppliers.

3. **Application of ASBP vis-a-vis consumers:** While the language of the ASBP provision does not limit its application to transactions between business operators, ever since its introduction in 1953, the JFTC had only applied ASBP to transactions between business operators. However, the JFTC changed its position in 2019 when it newly introduced the Consumer ASBP Guidelines as part of its efforts to regulate digital platform operators. In the Consumer ASBP Guidelines, the JFTC suggested that acquiring or using personal information could also fall under ASBP, and ASBP is applicable in transactions between a digital platform operator and consumers concerning personal data. We have not yet seen a case where the Consumer ASBP Guideline was applied, and what kind of interplay with existing personal data privacy laws would take place is yet to be seen, but with the increased focus on digital platform operators, this is an area to keep an eye on.
4. **Utilization of ASBP as a tool to address competition law issues concerning digital platforms:** In line with other competition authorities around the globe, the JFTC has been focusing on how to address potential competition concerns in relation to digital platforms that are gaining power in various markets. As part of such efforts, the JFTC has conducted various market studies into the digital sector, and has identified potentially problematic conduct in its final reports. The potential competition harm and potentially applicable AMA provision identified in these final reports vary depending on the type of conduct identified, but the types of conduct where ASBP is considered as a potential concern is increasing.

Further, there have been several cases where the JFTC has indeed opened ASBP cases against digital platform operators (the

Amazon case and the *Rakuten* case¹⁹), and one of these cases (*Rakuten*) was a novel one in terms of the type of ASBP conduct. In contrast to the typical ASBP cases that the JFTC had been pursuing for the last 20-30 years, the issue in question was whether introducing a change to the terms and conditions would be deemed as an ASBP.

This is a novel issue, and is directly related with the freedom of contract and the underlying principle of private autonomy, which forms the basis of competition in the private sector. In this case, Rakuten, an operator of a major online shopping mall Rakuten Ichiba, planned to introduce a new rule requiring that merchants offer free shipping to customers placing orders above a certain price threshold. The JFTC alleged that such change would leave the merchants to shoulder the shipping costs themselves, and thus introduction of such a uniform free shipping threshold constituted ASBP. When Rakuten showed moves to go ahead with the change even though the JFTC had commenced its investigation, the JFTC chose to file a petition for an emergency injunction²⁰ with the Tokyo District Court.²¹ Rakuten gave in before the court held hearings and changed its plan to allow for merchants to opt out of the proposed plan, and the petition was withdrawn. The JFTC continued with the investigation to confirm that the merchants indeed had the freedom to choose, and thereafter the investigation was closed without any finding of violation taking into consideration the fact that *Rakuten* had changed its plan. This case is unique given that the JFTC has chosen to utilize its power to file for an emergency injunction which had rarely been used in the past.²²

It is notable that the JFTC has taken quite an aggressive approach, going as far as to file a

petition for an emergency injunction. It should also be noted that the type of conduct that was concerned in this case was a unilateral change of contract terms, which as mentioned above appears to be a new area where the JFTC intends to curb ASBP violations. While we have yet to see whether the JFTC would continue to make use of the emergency injunction and whether the court would indeed grant injunction in similar cases, given its success in the *Rakuten* case, we should expect that at least for now, filing for an emergency injunction has become part of the JFTC's tool kit for enforcement of competition law.

Conclusion

As examined above, the ASBP provision itself is vague, and even though efforts have been made through amendments and the JFTC's ASBP Guidelines, there still remains a lot of room for interpretation, and it is still far from a crystal-clear provision that allows for enforcement with a reasonable degree of predictability. While in some aspects the JFTC has addressed this lack of clarity by way of introducing a clear-cut provision targeting specific types of entities and conduct (e.g. the Subcontract Act and the special designations), more clarifications and simplifications need to be made. While we have seen active enforcement by the JFTC in those areas, for areas not covered, the JFTC's ASBP enforcement was not necessarily active. This shows the difficulty of enforcement of ASBP, and also explains the trend in the past where a large ratio of cases pertained to transactions between large scale retailers and its suppliers. This trend became more evident, especially after the introduction of administrative fines and the burdensome experience of fending off the parties' challenges at court that followed.

¹⁹ See: id.; Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Rakuten Group, Inc., December 6, 2021, Japan Fair Trade Commission. See: <https://www.jftc.go.jp/en/pressreleases/yearly-2021/December/211206.html>.

²⁰ The JFTC may file a petition with the Tokyo District Court for an emergency injunction to prohibit a company from violating the AMA. The JFTC needs to show (i) the existence of such alleged violation of the AMA; and (ii) the urgent necessity of the injunction order (Article 70-4 of the AMA).

²¹ The JFTC has Filed a petition for an Urgent Injunction against Rakuten, Inc., February 28, 2020, Japan Fair Trade Commission. See: <https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html>.

²² There have been only eight cases in total where the JFTC filed a petition for emergency injunction since the procedure was introduced in 1947, and after 2000, there have been only two cases (in 2004 and 2020). In both cases the JFTC withdrew its filing after the party voluntarily changed its conduct. The latter 2020 case concerns the ASBP case against Rakuten.

As one alternative to tackle this, the JFTC shifted towards a more informal and soft approach in the name of early intervention. Given its success, this route of ASBP enforcement is likely to continue. As another route, with the newly introduced Commitment Procedure, now the JFTC seems to have become less hesitant to formally push forward ASBP cases. At the same time, the scope of types of conduct and sectors that the JFTC intends to cover with ASBP seems to have broadened. During the course of launching market studies in a wide range of sectors, the JFTC has shown its eagerness to put various new types of conduct under its ASBP radar. Although the JFTC seems to be taking a cautious approach by not giving definitive answers as to what types of conduct would be a violation absent specific facts of a case, the lack of clarity poses a problem. We should bear in mind that the enforcement history of ASBP has shown the difficulty of applying ASBP without clear guidance. If the JFTC were to push forward aggressively in the absence of such guidance, it would inevitably come into odds with the concept of freedom of contract which is the keystone of a market-based economy, which in turn may pose a stifling effect on business operators. To avoid such a situation, it would be prudent to introduce a clearer and more concrete guidance before moving ahead with enforcement. However, in the *Rakuten* case, the JFTC chose to take the

aggressive approach of filing for an emergency injunction before any clarification or guidance. Fortunately for the JFTC, in the *Rakuten* case, the move worked, and the party had changed its practice. However, as a result, neither the JFTC nor the judicial court had the chance to put forward their interpretation, and thus the lack of clarity remains. In fact, some commentators suggest that it might have been difficult to find a violation of ASBP. If the JFTC were to continue with similar moves without any clear guidance (i.e. utilizing filing of an emergency injunction as a means to impose pressure, essential), the lack of predictability would have a detrimental effect on business activities and competition. Therefore, efforts to provide clarification is warranted here. We have yet to see what the JFTC's next move will be after so many market study reports frequently referring to ASBP as a potential issue, but exercising due care around the negotiation process to mitigate ASBP risks would be the sensible approach. At the end of the day, for the purpose of preserving the basis of the market-based economy and enhancing business activities, the JFTC should give weight to providing predictability to business operators, and make efforts to provide more clarity in advance regarding its ASBP enforcement.²³ Otherwise, the enforcement efforts could end up as an overuse of ASBP by the authorities.

²³ Further, while not addressed in this article, we should also keep our eyes on developments of use of ASBP in private litigation. Though it has not yet become mainstream, ASBP can be used as a basis of claims in private litigation, and indeed in a recent Tokyo district court decision, manipulation of an algorithm was considered as ASBP (case pending on appeal at the Tokyo High Court). See: Atsushi Yamada, "The Rise of Antitrust Private Enforcement in Japan: The *Tablelog* Case" available at: <https://chambers.com/legal-trends/antitrust-private-enforcement-in-japan>.