# Japan

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## 1 General

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

The Japan Fair Trade Commission (JFTC) is the sole enforcement agency established under the Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (Act No. 54 of 14 April 1947, as amended) (AMA). It is an independent administrative commission. Its General Secretariat consists of the Secretariat, the Investigation Bureau and the Economic Affairs Bureau (including the Trade Practices Department). The Investigation Bureau is in charge of investigations and the issuance of orders. Criminal sanctions are imposed by a criminal court based on prosecution by the Public Prosecutor's Office, but the latter cannot prosecute antitrust violations and seek a criminal indictment without the JFTC's accusation.

### 1.2 What investigative powers do the responsible competition authorities have?

The JFTC has very broad investigative powers. Under the AMA, the JFTC may:

- order persons concerned with a case or witnesses to appear to be interrogated, or collect their opinions or reports;
- order expert witnesses to appear to give expert opinions;
- order persons keeping books and documents and other materials to hand over such materials, or keep these materials in its custody; and
- enter the business premises of the persons concerned with a case, or other relevant sites, and inspect conditions of business operation and property, books and documents, and other materials.

In a criminal investigation, in contrast with administrative investigations, the JFTC must obtain the court's permission to take the above steps (except for interviewing suspects and witnesses and requesting explanations), and a warrant is needed to conduct an on-site inspection. The AMA provides for criminal sanctions (imprisonment of up to one year or a fine of up to JPY3 million) for any individual who refuses, obstructs or evades and eludes inspection. Companies can also be fined up to JPY200 million.

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

Vertical agreements and dominant firm conduct can be challenged by third parties, either as part of a JFTC investigation or in private litigation. The JFTC can start investigations on its own initiative based on its own internal information. Third parties can report suspected violations to the JFTC under Article 45 of the AMA. The JFTC must consider the allegations and if the report is sufficiently detailed and in writing, the JFTC must let the third party know whether it will take action in response to the report.

When the JFTC becomes aware of suspected AMA violations, whether on its own initiative, after being tipped off by an employee or a whistleblower, or following a third-party complaint or notification as aforesaid, it first conducts a case review and analysis before deciding whether or not to open an investigation (and, if it so determines, whether to conduct an administrative investigation or a compulsory investigation of criminal offences, the latter being typically reserved for price-fixing and bid-rigging, and (potentially) private monopolisation).

The JFTC will issue a prior notice of a cease-and-desist order if it has identified AMA violations. Otherwise, the JFTC can decide to close the investigation or simply issue a warning or caution. If the conduct warrants a surcharge payment order, the JFTC also issues a prior notice of surcharge payment order. The recipient can present its views and submit evidence to challenge the upcoming issue, and the JFTC then decides whether to issue a formal order.

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

The JFTC has broad authority to order enterprises engaged in private monopolies or unfair trade practices to cease and desist such conduct, transfer part of their business or take other measures necessary to put an end to such conduct. The JFTC typically orders enterprises to cease and desist the conduct (or make sure it has been discontinued), not to engage in this conduct in the future and to take measures to restore competition in the relevant market and prevent the recurrence of violations. The JFTC has the authority to order other necessary measures to eliminate the conduct and its anti-competitive effects. Administrative and criminal fines can be imposed under the AMA (see question 1.5).

### 1.5 How are those remedies determined and/or calculated?

**Surcharges**. The JFTC is required to impose surcharges (administrative fines) if an enterprise is found to be engaged in a certain conduct. The amount of surcharge is calculated by applying certain rates to the sales of the relevant goods or services during the violation period (up to 10 years). The sales calculation methods and surcharge rates differ according to the type of conduct:

- Private monopolisation by controlling business activities, 10% of sales (increased by 50%, if the enterprise has been ordered to pay surcharges or subject to a similar order for private monopolisation or restraint of trade during the past 10 years), and private monopolisation by specified exclusionary conduct, 6%.
- Unfair trade practices (concerted refusal to deal, discriminatory treatment, predatory pricing and resale price maintenance (RPM)) corresponding to a repeated violation within 10 years, 3% of sales. A rate of 1% and a different calculation method apply to abuses of superior bargaining position (ASBP) for which a payment order can be imposed for the first violation.

**Fines**. Criminal sanctions are also available for private monopolisation under the AMA but have so far never been imposed. Enterprises face a maximum criminal fine of JPY500 million.

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

The AMA does not provide for any formal settlement procedure with the JFTC. In practice, it is possible to voluntarily offer remedies to the JFTC when it is considering issuing a cease-and-desist order. A commitment procedure has been introduced in the AMA, and the JFTC has adopted commitment procedure rules before publishing related guidelines in 2018. Under this procedure, an alleged violator can voluntarily resolve AMA violations by entering into an agreement with the JFTC as an alternative to the standard procedure under which the JFTC issues a cease-and-desist order. Remedies are identified and documented in a plan to be approved by the JFTC aiming at eliminating violations and competition concerns.

The Code of Criminal Procedure (Act No. 131 of 1948) provides for a plea-bargaining scheme: an enterprise or individual accused of AMA violations can enter into an agreement with the prosecutor under which the accused agrees to cooperate through the provision of evidence or testimonies that can help convict a third party (an enterprise or individual) and in exchange the prosecutor agrees to drop or reduce the criminal charges against the accused.

### 1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

In fiscal year 2022 (1 April 2022 to 31 March 2023), commitment plans were accepted with three companies. One of these cases concerned trading on restrictive terms (parity/most-favoured nation clauses (MFNs)), one related to interference with a competitor's transactions (urging municipalities to include in their orders specifications making it difficult for certain competitors to tender) and one concerning RPM. In 2022, the JFTC closed one case after accepting voluntary measures proposed by the alleged violator rather than accepting a commitment plan under the commitment procedure.

In fiscal year 2023 (1 April 2023 to 31 March 2024), commitment plans were accepted with five companies in relation to alleged practices involving trading on exclusive terms or restrictive terms and ASBP. In April 2023, a drugstore chain settled an ASBP probe by the JFTC under the commitment procedures, agreeing to repay JPY750 million to its suppliers to compensate them for forcing them to dispatch employees to its stores being shut down or on the occasion of a new store opening without compensating for the use of the dispatched workers and for forcibly returning products to their supplier due to the COVID-19 pandemic without any prior agreement on return conditions or compensating the suppliers for their losses. In January 2024, the JFTC approved a commitment plan submitted by a furniture and interior products retailer for the following conduct over six years: at the time of opening new stores or refurbishing existing ones, forcing suppliers to dispatch employees to the stores to perform work, including in relation to goods other than those delivered by them. The retailer had no dispatch agreement with those suppliers and did not bear related expenses. At the time of opening a new store, suppliers had to pay a "store opening contribution", without advance disclosure of the calculation basis, the use of the money, etc. Following earthquakes, the suppliers had to compensate the retailer for its own losses due to discounts or the disposal of the goods delivered by them that would have been damaged by the earthquakes. Investigations by the Task Force Against ASBP, etc. have led to the issuance of warnings and cautions to enterprises, including retailers and accommodation operators, whose practices may violate the law or lead to violations of the law (one warning and three cautions were issued during the period 1 April 2023 to 31 March 2024). In contrast, no cease-and-desist order was issued for private monopolisation during the same period. A caution was issued in April 2023 to an investment banking and securities firm for suspicion of ASBP, as the initial public offering lead manager, towards its clients to be listed, which restricted their ability to switch the lead manager; a warning and a caution were issued in May 2023 to several petroleum products retailers operating gas stations for unjust low prices, which were likely to cause difficulties to the business activities of other petroleum products retailers in surrounding areas; and a caution was issued in December 2023 to a software manufacturer and distributor suspected of interference with a competitor's transactions.

In 2023, an investigation was suspended against a large-scale retailer who had put an end to its suspected ASBP (the retailer was requesting suppliers to bear the price difference between its original price and the discounted price corresponding to its competitors' pricing in price negotiations with suppliers in case of price alignment).

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

The recipient of a cease-and-desist order may initiate proceedings to get the order rescinded. The JFTC would have to defend its claims in front of a court (see question 1.9). The burden of proof of the facts underlying the order lies on the JFTC. However, the Administrative Case Litigation Act (No. 139 of 16 May 1962, governing actions for the judicial review of administrative dispositions, etc.) and the Code of Civil Procedure apply to lawsuits for the revocation of orders and, for the order to be revoked, the plaintiff must demonstrate that there was an abuse of discretion in the order, and the court may refuse to entertain such a claim.

### 1.9 What is the appeals process?

Once a cease-and-desist order or surcharge payment order is issued, the recipient can challenge the JFTC's decision before the Tokyo District Court by filing a lawsuit for rescission against the JFTC within six months of becoming aware of the order or within one year of the date of the order. The District Court decides on the facts and the law and can rule differently from the JFTC. Any further appeal lies to the Tokyo High Court and, ultimately, to the Supreme Court.

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

Parties found by the JFTC to be engaged in private monopolisation, unreasonable restraint of trade or unfair trade practices are liable to indemnify those they have injured (Article 25 of the AMA). A cease-and-desist order or a surcharge payment order must be finalised before the claimant can take action under Article 25. Although the claimant can alternatively file a damage action under Article 709 of the Civil Code before the JFTC order becomes final, in an Article 25 action the claimant does not have to prove the defendant's intent or negligence (strict liability). The court will instead rely on the JFTC's findings from the order or hearing decision. The JFTC's decision creates a rebuttable presumption of AMA violation but, in practice, it is difficult for the defendant to rebut it. Claimants in an Article 25 action still need to prove the amount of damage and reasonable causation between the defendant's illegal conduct and the damage. However, the AMA allows the court to request an opinion from the JFTC on the amount of damage in an Article 25 action and this can reduce the burden of proof. An Article 25 action by a private claimant must be brought before the Tokyo High Court. The downside of such action is that it must be based on violations established by the JFTC's orders and claimants cannot add other claims, only recipients of the JFTC's order can be sued and orders do not bind the courts in a civil action (they can be quashed) and claimants must prove the violation.

Under Article 24 of the AMA, plaintiffs may seek a provisional or permanent injunction against certain unfair trade practices (e.g., RPM, predatory pricing). Article 24 actions must be brought before the district courts.

### 1.11 Describe any immunities, exemptions, or safe harbours that apply.

The AMA does not provide for any minimum thresholds. However, the JFTC's Guidelines Concerning Distribution Systems and Business Practices of 11 July 1991 (Distribution Guidelines, last amended on 16 June 2017) define a safety zone for certain vertical non-price restraints that may otherwise be illegal as unfair trade practices, if such restraints were imposed by an "influential enterprise in a market". As a rule of thumb, under the Distribution Guidelines, to determine whether a manufacturer meets the "influential manufacturer" test, one must consider whether a manufacturer has a market share above 20% (meaning a product market that consists of a group of products with the same or similar functions and utility as the product covered by a particular conduct, and competing with each other based on certain criteria, and which is defined, in principle, in terms of substitutability). Even if an enterprise meets the test, a restriction is not systematically unlawful. It is only illegal if it has foreclosure or price maintenance effects. Within the 20% market share safe harbour, enterprises do not usually tend to distort fair and effective competition.

A substantial restraint of competition is a prerequisite to private monopolisation and the Exclusionary Private Monopolisation Guidelines of 28 October 2009 (last amended in 2020) provide guidance on how to assess the impact of a particular conduct on competition. In case law, a "substantial restraint of competition" means "establishing, maintaining, or strengthening the state in which a certain entrepreneur or group of entrepreneurs can control the market at will by being, to some extent, free to influence prices, quality, quantity, and various other terms and conditions after competition has decreased". The JFTC, when deciding whether to investigate a case as exclusionary private monopolisation prioritises cases where the share of the product supplied by the entrepreneur exceeds approximately 50% after the commencement of the conduct, and the conduct is deemed to have a serious social impact. Even if these criteria are not met, a case may still be subject to investigation depending on the type of conduct, market conditions, position of competitors, and other factors.

With respect to unfair trade practices and the "likeliness of impeding fair competition" (see question 2.12), the courts and the JFTC assess such likeliness according to the circumstances, but the test is typically subject to a lower standard of anti-competitive effect than that required for private monopolisation.

The AMA does not apply to acts constituting the exercise of a right under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act (Article 21 of the AMA), but the JFTC's Guidelines for the Use of Intellectual Property lay down limits to curb abuses. RPM of certain copyrighted literary and musical works between competitors is exempt (Article 23-4 of the AMA). According to the JFTC's interpretation, "copyrighted works" for the purposes of this provision only include newspapers, books, magazines, music records and music CDs.

### 1.12 Does enforcement vary between industries or businesses?

The AMA does not discriminate between industries or businesses, and it applies equally to all economic sectors, except for those excluded from its scope of application. The JFTC's policy is to actively deal with those sectors in which the preservation of competition is problematic or will become more problematic in the near future. Currently, the focus of its enforcement activities is on the IT and digital sectors, as illustrated by the latest JFTC guidelines, case investigations and study group reports (e.g., B2C e-commerce, digital platforms and marketplaces, and consumer protection).

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

Express exemptions from the AMA (usually for cartels and not for unilateral conduct) are entrenched in more than a dozen laws. Certain industries are specifically regulated but not necessarily exempt from the application of the AMA and, depending on the purpose of the regulation, a special law may supersede the AMA in case of conflict, or an alleged violation of the AMA may be justified.

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

The JFTC is an independent agency that is enforcing the AMA more vigorously than ever before and, in principle, it should not

be affected by the political environment. The JFTC and other ministries and agencies it is cooperating with often share the same concerns (e.g., big data, digital platforms, and consumer protection).

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

See question 1.12. Also, the explosive growth in companies' exploitation of big data is drawing intense scrutiny from the JFTC. The regulator has raised exclusionary concerns and fears that big data can create barriers to entry and market power, especially where companies hold unique customer datasets that cannot be replicated by competitors. The perception is that limited access to big data may create barriers to entry and stifle the growth of the digital economy in Japan. The JFTC had launched investigations into Rakuten, Amazon and other major technology companies to assess whether the data-holders have a dominant position and engage in abusive conduct. For example, Apple had been suspected of restricting business activities of enterprises that sell digital content and distribute applications (developers) based on the App Store Review Guidelines in force in Apple's App Store, where the developers distribute these apps for iPhones. During the JFTC's investigation, Apple proposed to take measures that were accepted by the JFTC, which closed its investigation in September 2021. Similarly, the commitment procedure was used for Booking.com BV and Expedia Lodging Partner Services Sarl in 2022, in both cases for suspicion of trading on restrictive terms through the use of narrow parity clauses.

The JFTC monitors certain industries, including digital markets, to sanction ASBP (see question 2.22). In 2022, it conducted a survey in 22 industries to see how current circumstances (increasing oil prices and yen depreciation) were affecting business relations and in particular pricing terms between small- and medium-sized enterprises (SMEs) and companies in a superior bargaining position. The JFTC sent warning letters to several thousand companies involved in problematic conduct and published a list of key companies involved in conduct that may be deemed an ASBP in December 2022. In October 2023, the JFTC announced it had launched a probe into suspected AMA violations by Google LLC (exclusionary practices and trading on restrictive terms) and decided to seek information from third parties. This was the first time the JFTC was seeking information from third parties in the early stages of the investigation, following the policy statement "Towards the Active Promotion of Competition Policy in response to Socioeconomic Changes as represented by Digitalization – Coordination and Strengthening of Advocacy and Enforcement" published in June 2022.

Japan aims to achieve carbon neutrality by 2050. In this context, the market for electric vehicle (EV) charging services is expected to grow rapidly, and the market environment is also expected to change significantly in the near future. Accordingly, to promote fair competition in the development of charging infrastructure and to promote the realisation of a green society from the viewpoint of competition policy by stimulating new entrants and promoting innovation, the JFTC has conducted a market study on EV charging services on expressways (published in July 2023).

### 1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

See questions 1.6 and 1.7 on the commitment procedure, the fairly recent introduction of which has led to an increase in enforcement activity by the regulator.

## 2 Vertical Agreements

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

The JFTC will investigate and may pursue vertical agreements that are prohibited by the AMA, whether as unfair trade practices or private monopolisation. The main focus is on unfair trade practices. See question 1.7.

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

The AMA's focus is not on the existence of a vertical agreement but on the existence of a vertical restraint and whether it is prohibited under the AMA. There is no definition of agreement for the purpose of vertical restraints (which can include unilateral conduct) and there is no need for a formal agreement. An agreement can be found where a party compels another party to comply with a certain obligation. For example, for RPM, it is sufficient to show that the supplier has successfully coerced its distributor into following its pricing instructions.

### 2.3 What are the laws governing vertical agreements?

The main piece of legislation is the AMA. The AMA distinguishes between horizontal and vertical agreements and practices and provides, in its Article 3, that "an enterprise must not engage in private monopolisation or unreasonable restraint of trade". Restraints of trade (mainly cartels and bid-rigging) are caught by Articles 2 to 6 of the AMA, which prohibit anti-competitive agreements and concerted practices, and are typically horizontal in nature. Restrictive agreements and practices that are vertical in nature are generally classified as unfair trade practices referred to in Articles 19 and 2(9) of the AMA and described in the JFTC's Designation of Unfair Trade Practices.

Private monopolisation (Articles 3 and 2(5) of the AMA), defined as business activities that exclude or control the business activities of other enterprises thereby causing a substantial restraint of trade in a particular field of trade contrary to the public interest, covers unilateral exclusionary or controlling conduct by dominant firms. It covers both horizontal and vertical restrictive practices, as there is some overlap between the types of conduct covered by private monopolisation and unfair trade practices, such as boycotting and exclusive dealing.

The Distribution Guidelines also affect vertical agreements and provide important guidance. The JFTC's Exclusionary Private Monopolisation Guidelines of 28 October 2009 (last amended in 2020) provide guidance on how to assess the impact of a particular conduct on competition. Other JFTC guidelines detailing the types of conduct that can be characterised as unfair trade practices include (*inter alia*) the Guidelines Concerning Joint Research and Development of 20 April 1993 (Development Guidelines), the Guidelines on Abuses of Superior Bargaining Position of 30 November 2010, last amended on 16 June 2017, the Guidelines on Unjust Low Price Sales, last amended on 23 June 2011, the Guidelines for the Use of Intellectual Property of 2007, last amended on 21 January 2016, and the Guidelines for the Promotion of Competition in the Telecommunications Sector, last amended on 25 December 2002. Recently, several

laws and regulations relevant to distribution have been adopted or revamped, including data protection and privacy laws and the AMA itself. For example, on 17 December 2019, the JFTC published Guidelines Concerning Abuses of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information.

On 31 March 2023, the JFTC published Guidelines Concerning the Activities of Enterprises, etc. toward the Realization of a Green Society under the Antimonopoly Act (the Green Guidelines) to harness the efforts of enterprises and trade associations seeking to achieve carbon neutrality. Following its compilation of the Green Guidelines, the JFTC has been consulted about the contents of the Green Guidelines, including on concrete efforts. As a result, the JFTC is currently revising the Green Guidelines to further clarify the application of the AMA to joint activities, joint procurement, etc.

The Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Act No. 120 of 1 June 1956, as amended) aims to ensure the fairness of subcontracting transactions and protect the interests of subcontractors. This Subcontract Act prohibits large companies with capital exceeding a certain amount from coercing SMEs into unfair transactions and from engaging in certain trade practices in relation to manufacturing contracts, repair contracts, information-based product creation contracts, and contracts for services. The JFTC's Guidelines for the Subcontract Act provide detailed guidance with respect to prohibited trade practices. The JFTC clamps down on violations, including by conducting regular written investigations with subcontractors and their employers to collect more information on dealings and practices that may put SME operators at a disadvantage through breaches of the Subcontract Act or ASBP.

In addition to these laws, regulations and guidelines, legal sources dealing with vertical restraints include court precedents and JFTC precedents (recommendations and orders).

### 2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected? Are there any types of vertical agreements or restraints that are *per se* unlawful?

See question 1.11. The Distribution Guidelines define a safety zone for certain vertical non-price restraints that may otherwise be illegal as unfair trade practices (restrictions on dealing with competitors, strict territorial restrictions and tie-in sales), if such restraints were imposed by an "influential enterprise in a market" and have foreclosure or price maintenance effects. Within the 20% market share safe harbour, enterprises do not usually tend to distort fair and effective competition.

By contrast, given that the justifiable grounds exception can only exceptionally be relied upon, RPM could be treated as illegal *per se*.

### 2.5 What is the analytical framework for assessing vertical agreements?

The analytical framework depends on the nature of the vertical restraint (see questions 2.2–2.16 *et seq*.). Vertical agreements are classified as unfair trade practices or exclusionary private monopolisation. The regulator will consider if the restraint substantially lessens or prevents competition and has foreclosure effects (in cases where the conduct is not illegal *per se*).

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

The market definition is not drastically different from that used for horizontal restraints. A market has a product and a geographic dimension. The definition used in the Distribution Guidelines refers to a product market that consists of a group of products with the same or similar functions and utility as the product covered by a particular conduct, and competing with each other based on certain criteria, and which is defined, in principle, in terms of substitutability for users and also, when necessary, substitutability for suppliers.

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

The exchange of information between a supplier and buyer can contribute to the pro-competitive effects of vertical agreements, in particular the optimisation of production and distribution processes, and a vertical agreement would not necessarily be problematic under the AMA even where competitors are involved in a vertical relationship. The JFTC is yet to issue its official opinion, such as guidelines addressing the topic of dual distribution. However, the JFTC has already been officially consulted on the validity of specific transactional scenarios similar to dual distribution, involving raw materials and spare parts. The JFTC's viewpoint is that such situations are not immediately problematic under the AMA but, depending on the facts of the matter and the effects of the arrangements concerned, there could be room for unreasonable trade practices (e.g., trading on restrictive terms) or unreasonable restraints of trade under Article 3 of the AMA (as the exchange of certain types of information may raise horizontal concerns between competitors also in a vertical relationship).

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

Pursuant to the Distribution Guidelines, depending on the type of vertical restraint involved, the role of market share can be significant in determining whether an enterprise is influential in a market and whether competition is adversely affected.

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

Economic analysis can be used to determine whether competition is adversely affected by a vertical restraint. The JFTC tries to utilise economic analysis in various enforcement situations, including to establish theories of harms, define a relevant market, evaluate the impact of anticompetitive conduct or the contents of a commitment plan.

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

The role of efficiencies would be relevant as a defence to argue that a conduct does not impede fair competition. See question 2.16 on efficiencies in an RPM context (and question 2.7 on dual distribution).

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

See question 1.11. Also, as specified in the Guidelines on Exclusionary Private Monopolisation (EPM Guidelines), the Guidelines for the Use of Intellectual Property under the Antimonopoly Act of 28 September 2007 are relevant to assess whether restrictions pertaining to the use of technology fall under exclusionary conduct, and the Development Guidelines and the Guidelines on Standardisation and Patent Pool Arrangements of 29 June 2005 are relevant to determine whether joint R&D of technologies that will lead to standardisation falls under exclusionary conduct. The Development Guidelines cover joint R&D arrangements and their implementation. Even if the joint undertaking of R&D itself presents no problem under the AMA, arrangements accompanying the implementation of a joint R&D project may still affect competition in the market and create problems under the AMA. If an arrangement unjustly restricts the business activities of a participant and may thereby impede fair competition, the arrangement will constitute an unfair trade practice. Furthermore, in implementing a joint R&D project between competitors in a product market, if business activities are mutually restricted as to price and volume, that may constitute an unreasonable restraint of trade. The R&D Guidelines provide guidance to distinguish between arrangements that may, in principle, fall or not fall under unfair trade practices.

### 2.12 Does the enforcer have to demonstrate anticompetitive effects?

The JFTC has to demonstrate a tendency to impede fair competition in relation to unfair trade practices, and a "substantial restraint of competition" in a particular field of trade is required for exclusionary private monopolisation. In case law, a "substantial restraint of competition" means "establishing, maintaining, or strengthening the state in which a certain entrepreneur or group of entrepreneurs can control the market at will by being, to some extent, free to influence prices, quality, quantity, and various other terms and conditions after competition has decreased". With respect to unfair trade practices and the "likeliness of impeding fair competition", the courts and the JFTC assess such likeliness according to the circumstances of the case, but this test is typically subject to a lower standard of anti-competitive effect than the one applied to private monopolisation.

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

The JFTC will consider the potential benefits or efficiencies to assess the legality of a vertical restraint (both for unfair trade practices and exclusionary private monopolisation).

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

If a parent company owns all of the shares in a subsidiary, transactions between the parent company and its wholly owned subsidiary are, in substance, deemed to be equivalent to intra-company transactions and they are, in principle, not subject to the rules governing unfair trade practices. Likewise, the same principle applies if the parent company owns less than 100% – but more than 50% – of the shares.

With respect to agency agreements and RPM, a principal is generally allowed to set the prices at which the agent will be selling to customers. According to the Distribution Guidelines, in specific transactional situations (e.g., certain consignment sales), where an enterprise's direct trading partner only operates as a commission agent and a sale can, in substance, be deemed to be done by the enterprise, the sale is usually not illegal, even if the enterprise imposes a resale price on the direct trading partner.

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

See question 2.3.

### 2.16 How is resale price maintenance treated under the law?

Some categories of conduct can be viewed as likely to have anti-competitive effects and this is the case with RPM. Basically, a supplier is only permitted to impose fixed resale prices on an agent and not on a distributor. Under the AMA (Article 2(9)(iv) and Article 19), RPM is an unlawful unfair trade practice (except in very limited circumstances where proper justification exists), as it restricts the distributor's ability to determine its resale prices and reduces or eliminates competition.

Exceptionally, RPM can be lawful if it has "justifiable grounds". Justifiable grounds exist only within a reasonable scope and for a reasonable period, in cases where RPM has actual pro-competitive effects, which could not have been achieved through less restrictive means, promotes inter-brand competition, increases product demand, therefore benefitting consumers, and has public benefits that outweigh any detriment suffered by the public. For example, RPM may have competitive effects when some dealers are "free riding" on others by underinvesting in the supply of associated retail services necessary to support the sale of products and are accordingly only seeking to compete on price without providing those services.

A supplier is nonetheless allowed to suggest or recommend resale prices to the extent it is only a recommendation. A supplier may not use certain expressions in relation to a suggested resale price, including: true price (*seika*); set price (*teika*); and the price alone. A supplier may use non-binding indicative expressions such as reference price (*sanko kakaku*) or supplier's (manufacturer's) suggested retail price, and the supplier must provide a clear message to distributors that the suggested resale price is given solely for their reference and that each distributor should determine its resale price independently.

In May 2022, the JFTC expeditiously closed an investigation regarding suspected RPM under the commitment procedure for the first time instead of issuing a cease-and-desist order upon completion of its investigation.

### 2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive Purchase Obligations. According to the Distribution Guidelines, the AMA, in principle, permits a supplier to require its sole distributor to buy the products covered by the contract exclusively from the supplier or from the parties it designates. However, there must be no abuse, and the Designation of Unfair Trade Practices defines "trading on exclusive terms" (that is, unjustly trading with another party on condition that the party

shall not trade with a competitor, thereby reducing trading opportunities for the competitor) as an unfair trade practice.

Exclusive Distribution. Distribution agreements are not specifically regulated by the Civil Code or any other statute. There is, therefore, no statutory definition of exclusive distribution, but "exclusive" is generally understood to mean that the appointment excludes the activity of the supplier and the appointment by the supplier of any other distributor in the territory.

The Distribution Guidelines provide guidance on various business practices, highlighting some of the potential legal pitfalls. With respect to restrictions imposed on trading partners' dealings with competitors or their handling of competing products, an enterprise may legitimately restrict its trading partners from dealing with its competitors to market its products. However, these restrictions might impede current competitors' business activities or raise entry barriers depending on the enterprise's position in the market. Certain types of conduct by an influential enterprise in a given market may have foreclosure effects and could consequently be illegal as unfair trade practices. This may be the case with restrictions on sales territories. Enterprises may impose restrictions on distributors with respect to their sales territories as part of their marketing activities and strategy, and an agreement may validly assign a specific area to a distributor if it does not preclude the distributors from selling to customers outside such area on request (in other words, passive sales, as opposed to active sales, remain permissible), except as explained below. Business models typically include the following arrangements: an enterprise assigns a specific territory to each distributor as its area of primary responsibility and requires the distributor to carry out active marketing and sales activities within its own territory, without the restrictions associated with the last two business models described below (the area-of-responsibility system); an enterprise limits areas where a distributor may establish outlets or determines the location of the outlets, without imposing the restrictions associated with the last two business models (the location system); an enterprise assigns a specific area to each distributor and restricts the distributor's sales of the enterprise's products outside the assigned area (strict territorial restrictions); and an enterprise assigns a specific area to each distributor and limits the distributor's sales of the enterprise's products to customers outside this area to passive sales (restrictions on passive sales to outside customers). Because these systems do not usually have price maintenance effects, it is not illegal for an enterprise to adopt an area-of-responsibility system or a location system to develop efficient outlets or offer better after-sales services for the products, unless the restrictions are "strict territorial restrictions" or "restrictions on passive sales to outside customers". If an influential enterprise in a market imposes strict territorial restrictions on distributors and such restrictions have price maintenance effects, the restrictions are illegal as unfair trade practices. If an enterprise imposes restrictions on a distributor's passive sales to outside customers and such restrictions have price maintenance effects, the restrictions are illegal as unfair trade practices. In the latter case, anti-competitive effects are typically stronger, as restricting intra-brand competition more than strict territorial restrictions.

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

The JFTC acknowledges in its Distribution Guidelines that adding new value by offering multiple products tied or integrated to trading partners can have positive effects (e.g., foster technological innovation). Tying in and of itself does not immediately constitute a problem under the AMA, but if an enterprise compels its trading partners, in connection with the supply of a product (tying product) to the trading partners, to purchase another product (tied product), this conduct may impede current competitors' business activities or raise entry barriers in the market for the tied product, depending on the enterprise's position in the market for the tying product. If an influential enterprise in a market for a tying product compels its trading partners to purchase a tied product in connection with the influential enterprise's supply of the tying product and such conduct has foreclosure effects in a market for the tied product, then it is illegal as an unfair trade practice. Tie-in sales tend to impede the freedom of choice of customers and are unlawful as unfair trade practices if they are not justifiable on the merits from a competition standpoint, focusing on prices, quality and services. Whether or not tie-in sales are unjustifiable as a means to compete is assessed taking into account the tying product's attractiveness, the tied product's characteristics, the tie-in sales method, and the popularity of the practice.

Likewise, in the Exclusionary Private Monopolisation Guidelines of 28 October 2009 (last amended in 2020), the JFTC considers that offering multiple products tied or integrated together to trading partners is not *per se* a conduct that would automatically constitute an exclusionary conduct. However, where an enterprise supplies the tying product only on condition that the trading partners also purchase the tied product, this may adversely affect the business activities of competitors who are unable to easily find alternative trading partners in the market for the tied product, and therefore this may impede competition in the tied product market. In that case, "tying" with another product may fall under the exclusionary conduct qualification. Whether the product required to be purchased as a condition for the supply of a product is deemed to be "another product" is assessed based on whether the combined products have distinctive characteristics and are traded independently. More specifically, the following factors are considered: whether users are different; whether contents and functions are different (including whether the contents and functions of the combined products differ substantially from those of each individual product before combination); and whether users can buy them separately (and whether each product is normally sold or used as a single unit).

The JFTC considers the following factors as a whole to assess whether an entrepreneur's conduct is exclusionary and has foreclosure effects in the market for the tied product:

- Conditions prevailing on the market of the tying and the tied products (such as the degree of market concentration, characteristics of the products, economies of scale, degree of differentiation of the products, distribution channels, dynamics of the market, and market entry difficulty).
- Position of the entrepreneur in the tying product market (such as its share of the tying product, its ranking, brand value of the tying product, excess supply capacity, and the scale of operations).
- Position of the entrepreneur and its competitors in the market for the tied product (respective share of the tied product, their ranking, brand value of the tied product, excess supply capacity, and scale of operations).
- Duration of the conduct, number of trading partners, and volume of transactions (duration of the tying period, number of counterparties for whom the tying is intended, and volume of trade).
- Conditions of the conduct (such as the price of the tied products, tying conditions and degree of coercion by, and intentions of, the entrepreneur.

### 2.19 How do enforcers and courts examine price discrimination claims?

In principle, an enterprise has full discretion to select its trading partners and on what terms it is willing to trade and supply goods. Accordingly, if an enterprise independently selects a party to whom the product is supplied and determines supply conditions, including as to price, in consideration of the details and results of supply transactions with its trading customers, this practice does not fall under exclusionary conduct and does not, in general, constitute an unfair trade practice. However, if an enterprise engages in discriminatory treatment beyond a reasonable degree with respect to certain customers concerning a product necessary for the said customers to carry out their downstream market business activities, such discriminatory treatment may constitute exclusionary private monopolisation or an unfair trade practice.

### 2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty and volume discounts and rebates constitute a classical form of price competition and an effective commercial tool by providing price breaks to buyers that remain sufficiently loyal to a supplier. Shifting incremental purchases from a rival supplier may allow a buyer to satisfy a loyalty requirement and thereby enjoy lower prices. However, under particular conditions, loyalty and volume discounts and rebates may have an exclusionary effect. For the JFTC, giving rebates can be treated as exclusionary dealing (where an entrepreneur deals with its trading partners on the condition of prohibition or restraint of transactions with competitors, and competitors cannot easily find an alternative supply destination to the said trading partners, such conduct may adversely affect the business activities of said competitors and undermine competition) under certain circumstances. In the Guidelines for Exclusionary Private Monopolisation, the JFTC recognises that rebates can have pro-competitive effects by stimulating demand or involving prices adjustments reflecting the actual market situation. Therefore, offering rebates does not in and of itself immediately qualify as an exclusionary conduct. However, if an entrepreneur offers rebates to its trading partners on the condition that the amount or volume of purchases from the entrepreneur or the proportion of the volume of purchases from the entrepreneur to the total amount of their purchases reaches a particular threshold during a specified period, such conduct may affect the trading partners' ability to buy a competitor's products. Thus, loyalty discounts may have the same effect as exclusive dealing, competitors may be foreclosed, and the corresponding conduct could fall under exclusionary conduct. The JFTC considers the following factors to assess whether offering rebates can restrain dealings in the competing products of rival suppliers in the same manner as exclusive dealing:

- Rebate levels. Where the amount or rate of rebate is set at a high level, trading partners are more likely to purchase more products from the entrepreneur to the detriment of competitors.
- Thresholds. Where rebates are subject to high thresholds within the achievable range of the trading partners, rebates function more effectively to induce trading partners to buy multiple products from a single entrepreneur rather than from its competitors.
- Rebate progressivity. If rebate levels are set progressively to reflect trading volumes, etc. in a specified period, rebates function more effectively to induce trading partners to buy from a single entrepreneur.
- Retroactive nature of the rebates. If rebates are given for the entire amount of trade made thus far in case the amount of trade has exceeded a certain threshold, the rebates function more effectively to cause trading partners to purchase products from the entrepreneur to the detriment of its competitors.

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

Bundled loyalty discounts provide price breaks on one or more products to buyers that remain sufficiently loyal to a supplier and can often have pro-competitive effects. Nonetheless, the practice could also have anti-competitive effects. The JFTC reports that tying and bundled discounting practiced by a firm can be examined under AMA provisions dealing with private monopolisation and unfair trade practices. Of these provisions, the provisions concerning unfair trade practices apply to firms that do not have a dominant position or significant market power.

Bundled discounting can raise competitive concerns in several ways. By discounting two or more products that comprise a bundle, bundled discounting may constitute predatory conduct. Also, to the extent that bundling may raise the cost of non-bundling rivals, it may become more difficult to compete in the market for standalone products, leading to possible exclusion of competitors, as with tying. The exclusionary effect of bundling can arise when competitors of a bundling firm are unable to offer the bundler's additional products, making it more difficult for non-bundling firms to compete. With respect to predation, a bundling firm could cut prices to a bundle below cost in order to drive competitors out, and if barriers to entry are present, recoup losses by raising the price of the product. The practice can be considered exclusionary, having foreclosure effects from a predatory pricing perspective under the AMA ("[w]ithout justifiable grounds, supplying goods or services continuously for a consideration which is excessively below the cost incurred in the said supply, thereby tending to cause difficulties to the business activities of other entrepreneurs").

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

Unfair trade practices also include, without limitation, predatory pricing, refusal to deal, discriminatory treatment, dealing on exclusive or restrictive terms and ASBP. An ASBP (Article 2(9)(v) of the AMA and Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act of 2010) is a type of conduct regulated as an unfair trade practice that does not require dominance or market power but focuses, *inter alia*, on the degree of dependence of the parties, market position of a party, and changeability of the transactional partner from the other party's perspective. An ASBP exists when a party in a relative superior bargaining position engages in abusive conduct that runs the risk of being an impediment to competition.

### 2.23 How are MFNs treated under the law?

MFN clauses *per se* do not present an issue under the AMA as they can have pro-competitive effects. According to the Distribution Guidelines, one needs to take into account network effects in considering the market position of the company imposing a vertical restraint. Amazon Japan had been suspected of unduly restricting the activities of Amazon Marketplace sellers by

including price parity clauses and product line-up requirements in its agreements with sellers; however, the JFTC eventually closed its investigation in mid-2017, as Amazon had voluntarily implemented corrective measures, including the removal of its MFN clauses. In the wake of the Amazon case, the JFTC made public its concerns regarding MFN clauses imposed on sellers by operators of online shopping malls. It considers that MFN clauses may have negative effects on competition as they can restrict sellers' business activities by limiting price reductions and expansions of line-ups of goods that the sellers sell via other sales channels, distort competition among online shopping mall operators by allowing online shopping mall operators imposing price and selection parity clauses to easily secure the lowest price and the broadest line-up of goods, and hinder new entrants, as the reduction of fees charged to sellers by an online shopping mall operator does not result in these sellers' reduction of prices and expansion of line-ups.

## 3 Dominant Firms

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

Monopolies and abuses of dominance are regulated as private monopolisation. Generally, the prohibition only applies to entities with dominant market power in the relevant market. The JFTC has only issued a few cease-and-desist orders as, in order to establish private monopolisation, it must prove both dominant market power in the relevant market and the substantial restraint of competition caused in this market by the exclusionary or controlling activity. Although there are a few landmark cases, the JFTC prefers to rely on the legal ground of unfair trade practice for the issuance of cease-and-desist orders and avoid the burden of proof requirement. Unfair trade practices (concerted boycotts, discriminatory pricing, unjust low-price sales, RPM, ASBP and other anti-competitive practices designated by the JFTC) necessitate an impediment to fair competition, which can be established more easily than what is required for private monopolisation and does not require the JFTC to precisely determine the relevant market.

### 3.2 What are the laws governing dominant firms?

The AMA, which prohibits private monopolisation, is the main statute. See question 2.3.

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

Monopolies and abuses of market power are regulated as private monopolisation. Generally, the prohibition only applies to entities with dominant market power in the relevant market.

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The AMA provides for administrative and criminal sanctions for private monopolisation, but in practice, at the time of writing, the criminal provisions for private monopolisation have never been applied.

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

The AMA's main focus in this monopolisation context is to prohibit business activities that exclude or control the business activities of other entrepreneurs that cause a substantial restraint of competition in any particular field of trade. Dominance and market power are not cardinal AMA concepts. An enterprise is not required to have a dominant position or market power in the relevant market to infringe the AMA through private monopolisation or unfair trade practices. In contrast, market definition plays a more fundamental role in assessing whether a certain conduct has anti-competitive effects as a substantial restraint of competition in the relevant market is an essential feature of monopolisation.

The EPM Guidelines and the Distribution Guidelines provide some guidance but do not provide a market definition as extensive as that entrenched in the merger control guidelines. The EPM Guidelines indicate that when deciding to investigate a case as exclusionary private monopolisation, the JFTC will prioritise cases where the share of the product supplied by the entrepreneur exceeds approximately 50% after the commencement of the conduct and where the conduct is deemed to have a serious impact on people's lives, considering relevant factors as a whole, such as market size, the scope of the business activities of the entrepreneur and characteristics of the product.

To commit abuses of superior bargaining position (see question 2.22), an enterprise does not need to have a dominant market position or an absolutely dominant bargaining position, it only needs a relatively superior bargaining position compared with the other contracting party.

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

Becoming a monopolist or being dominant in a given market is not prohibited or illegal *per se*. In a judgment dated 17 December 2010 (*NTT East Japan*, 64-8 Minshu 2067), the Supreme Court held that there should be "artificiality" in the conduct of the dominant enterprise, with the effect of deviating from the scope of normal competitive actions and hampering the market entry of competitors, for private monopolisation to be found. The AMA does not specify the types of conduct prohibited as private monopolisation.

Article 9 of the AMA on merger control prohibits companies from establishing what would cause an excessive concentration of economic power due to a shareholding in other companies in Japan or from becoming a company that causes an excessive concentration of economic power in Japan by acquiring shares in other companies in Japan. "Excessive concentration of economic power" means that the overall business scale of a company, its subsidiaries, and other domestic companies whose business activities it controls through shareholding, is extremely large across a considerable number of business fields, can exercise

a great deal of influence over other firms through financial transactions, or occupy influential positions in a significant number of interrelated fields of business, and any of these factors have a large effect on the national economy and hamper fair and free competition. The JFTC's Guidelines Concerning Companies Which Constitute an Excessive Concentration of Economic Power of 12 November 2002 provide further guidance on when a company has excessive economic power.

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

Economic analysis can be used to define a relevant market, evaluate the impact of anti-competitive conduct or the contents of a commitment plan but has so far not often been used in relation to private monopolisation. In 2021, the JFTC expressed the view that the role of economic analysis is becoming more important than ever for conducting in-depth antitrust investigations and proper assessments, especially at a time when the digitalisation of the economy is progressing rapidly. According to the JFTC, there are many areas or cases for which economic analysis can be utilised, including abuse cases.

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

See questions 3.2 and 3.4.

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

Arguing there is no substantial restraint of competition is a possible defence as it is a prerequisite to private monopolisation. The EPM Guidelines provide guidance on how to assess the impact of any particular conduct on competition. Case law interprets a substantial restraint of competition as "establishing, maintaining, or strengthening the state in which a certain entrepreneur or group of entrepreneurs can control the market at will by being, to some extent, free to influence prices, quality, quantity, and various other terms and conditions after competition has decreased". The JFTC comprehensively considers the following factors on a case-by-case basis to assess whether competition is substantially restrained: position of the entrepreneur and situation of its competitors (including market share, ranking of the entrepreneur); potential competitive pressure (institutional and practical entry barriers, degree of substitutability between the products of an entrant and those of the entrepreneur); users' countervailing bargaining power; and efficiencies.

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

Under the EPM Guidelines, if an entrepreneur is expected to take pro-competitive action owing to the improvement of productivity, technological innovation, and the improvement of business efficacy through economies of scale, integration of production facilities, reduction of transportation costs, and improved R&D that are incidental to an exclusionary conduct, such circumstances may be taken into account to determine whether competition is substantially restrained. Efficiencies will be considered under certain circumstances, if they cannot be achieved by other less anti-competitive means and users can derive some benefits (such as cheaper, new or better products).

### 3.10 Do the governing laws apply to "collective" dominance?

Private monopolisation includes behaviour that is carried out collectively. Such collective behaviour (for instance, bid-rigging or cartels) may alternatively be treated as unreasonable restraints of trade instead of private monopolisation. The EPM Guidelines discuss various types of conduct of an enterprise, in concert with its competitors, customers or suppliers, or of a trade association (concerted refusals to deal (boycotts)), preventing new entrants from entering a market or excluding existing enterprises from the market, which are, in principle, illegal.

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

In theory, the AMA could apply to dominant purchasers but, in practice, no dominant purchaser has been found guilty of private monopolisation.

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

Private monopolisation covers exclusionary conduct and controlling conduct. Exclusionary private monopolisation includes various types of conduct. The four classic types of exclusionary conduct are below-cost pricing, exclusive dealing, tying, and refusal to supply and discriminatory treatment by reference to past cases. Exclusionary conduct that constitutes exclusionary private monopolisation is not limited thereto. Setting a price exclusively either in the sales territory where an entrepreneur competes with others or for customers, for whom an entrepreneur competes with others, or interfering with the business activities of other entrepreneurs may be regarded as exclusionary conduct in certain cases. Furthermore, multiple acts may be collectively regarded as a series of integrated exclusionary conduct.

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

See question 2.11. The JFTC considers restrictions pertaining to the use of technology from the viewpoint of private monopolisation, i.e., if they "exclude or control the business activities of other entrepreneurs". This is judged specifically by examining the intent behind the individual conduct and its effects. The Guidelines for the Use of Intellectual Property categorise restrictions into inhibiting the use of technology, limiting the scope of use of technology and imposing conditions for the use of technology.

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

The JFTC and the courts can consider "direct effects" evidence of the substantial restraint of trade.

### 3.15 How is "platform dominance" assessed in your jurisdiction?

See questions 1.15 and 1.16.

### 3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

See question 1.5. The Guidelines on the Application of the Antimonopoly Act Concerning the Review of Business Combinations (2004) and the Policies Concerning Review Procedures for Business Combinations (2011) were amended in 2019 to allow the JFTC to review business combinations in the digital market. On 17 December 2019, the JFTC published Guidelines Concerning Abuses of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information. As a result of the surveys mentioned below, a number of laws have been introduced to regulate the digital economy including the Act on Improving Transparency and Fairness of Digital Platforms and the Act for the Protection of Consumers On Digital Platforms, which came into force in 2021. Under the former, major digital platform operators (overseas and domestic specified digital platform operators as defined by law based on financial thresholds) must disclose terms and conditions and other information, secure fairness in operating digital platforms, submit annual reports on the current situation of business operation, and conduct self-assessments. The latter seeks to ensure the cooperation of digital platform providers in optimising transactions and promoting dispute resolution relating to mail order sales (as defined in the Act on Specified Commercial Transactions (Act No. 57 of 1976) conducted using digital platforms and thereby to protect consumers using digital platforms by providing for measures intended to promote consumer protection.

The JFTC has conducted several fact-finding surveys on the digital market to identify issues under the AMA and competition policies. In 2019, the JFTC published its final report regarding trade practices on digital platforms (B2B transactions on online retail platforms and app stores). On 17 February 2021, the JFTC published its final report on digital advertising. On 31 March 2021, the Study Group on Competition Policy in the Digital Markets released its Report on Algorithms/AI and Competition Policy. In June 2022, the JFTC published its market survey report on cloud services in which it emphasised its concern about the anti-competitive effects of market concentration and limited switching from major cloud services operators (who have significantly increased their market shares) to other players. In a June 2022 statement, the JFTC released a statement on its active promotion of competition policy. It seeks to strengthen its response to fast-changing markets, including the digital market, by focusing on advocacy and enforcement.

### 3.17 Under what circumstances are refusals to deal considered anticompetitive?

In principle, an enterprise has full discretion to select its business partners and on what terms it is willing to trade and supply goods. Accordingly, if an enterprise independently selects a party to whom the product is supplied and determines the supply conditions, including as to price, in consideration of the details and results of supply transactions with its trading customers, this practice does not fall under exclusionary conduct and does not constitute an unfair trade practice in general. However, if an enterprise engages in discriminatory treatment beyond a reasonable degree (refuses to supply, imposes restrictions on the quantity or contents, or applies discriminatory treatment to the conditions or implementation of supply in the upstream market) with respect to certain customers concerning a product necessary for the said customers to carry out their downstream market business activities, such refusals to supply and discriminatory treatment may constitute exclusionary private monopolisation or an unfair trade practice because such conduct may cause difficulties in the downstream market activities of the trading customers who are unable to easily find an alternative supplier in the upstream market, and may undermine competition in the downstream market.

If an entrepreneur engaged in wholesale or retail business in the downstream market has distribution channels, such as a sales network, indispensable to sell products downstream, and the entrepreneur refuses to buy from a manufacturer or discriminates against a manufacturer beyond a reasonable degree in the upstream market, the manufacturer may have difficulties in establishing a new distribution channel in the downstream market. In such cases, the entrepreneur's conduct in the downstream market might fall under exclusionary conduct and this is assessed from the viewpoint of refusals to supply and discriminatory treatment.

## 4 Miscellaneous

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

Although not uniquely or distinctively Japanese, there are two features that are important to note. **ASBP** (see question 2.22): the rules and sanctions have been controversial as they regulate the conduct of powerful firms without the need to establish monopoly power or dominance or to show anti-competitive effects. What must be shown is that the conduct is unfair and oppressive under some fairly vague standard. With inequality of bargaining power being frequent, the concept often sits uncomfortably with large companies dealing with weaker players (retailers, dealers, etc.). **The Subcontract Act** (see question 2.3), which aims to ensure the fairness of subcontracting transactions and protect the interests of subcontractors by regulating certain practices, is a regular source of dispute.

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