Vertical Agreements 2021

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LEXOLOGY
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2007
Fifteenth edition
ISBN 978-1-83862-732-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Vertical Agreements*, which is available in print and online at www.lexology.com/gtdt.

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Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
February 2021

Contents

Japan

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LEGAL FRAMEWORK

Antitrust law

1 | What are the legal sources that set out the antitrust law applicable to vertical restraints?

The Japanese Antimonopoly Act (Act No. 54 of 14 April 1947) (AMA), as amended, prohibits various 'unfair trade practices', including some vertical restraint conduct, under article 19 of the AMA.

Under the AMA, before the amendments in 2009, 'unfair trade practice' was defined as any act falling under the six basic categories statutorily provided that tends to impede fair competition and that is 'designated by the Japan Fair Trade Commission' (JFTC) under paragraph 9, article 2 of the AMA. Although, from a theoretical perspective, the scope has not been expanded, from an enforcement perspective, the amendments in 2009 divided them into two categories, namely:

- those subject to a monetary sanction (surcharge order) under items 1 to 5, paragraph 9, article 2 of the AMA on certain conditions as defined respectively; and
- the remainder under item 6 of the AMA.

'Private monopolisation' is prohibited under the first half of article 3 of the AMA, as defined under paragraph 5, article 2 of the AMA, which is said to have some practical coverage sharing with the unfair trade practices. The applicable JFTC's guidelines state that, while there is a wide variety of conduct deemed as exclusionary conduct, it lists four typical acts:

- below-cost pricing;
- exclusive dealing;
- tying; and
- refusal to supply and discriminatory treatment (see page 5 of the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act, the JFTC, 28 October 2009).

The latter half of article 3 prohibits 'unreasonable restraint of trade', which has been narrowly interpreted as horizontal restraint, including cartel or bid-rigging, based on the historical development of the law.

In addition to the above-mentioned statutory provisions and the relevant guidelines issued by the authority referred to in the respective questions below, the following list of precedents constitutes the legal sources for vertical restraints.

Court precedents

- *Wakodo v JFTC*, 22 Shinketsushu 237 (Sup Ct, 10 July 1975);
- *Meiji Shoji v JFTC*, 22 Shinketsushu 201 (Sup Ct, 11 July 1975);
- *Toyo Seimaiki v JFTC*, 30 Shinketsushu 136 (Tokyo High Ct, 17 February 1984);
- *Shiseido v Fujiki*, 45 Shinketsushu 455 (Sup Ct, 18 December 1998);
- *Kao v Egawa Kikaku*, 45 Shinketsushu 461 (Sup Ct, 18 December 1998); and
- *Hamanaka v JFTC*, 58-2, Shinketsushu 1 (Tokyo High Ct, 22 April 2011).

JFTC precedents

- JFTC recommendation decision against Nordion, 45 Shinketsushu 148 (3 September 1998);
- JFTC recommendation decision against Tottori Chuo Agricultural Association, 45 Shinketsushu 197 (9 March 1999);
- JFTC recommendation decision against Himeji-shi Plumbing Business Cooperative Association, 47 Shinketsushu 263 (10 May 2000);
- JFTC recommendation decision against Sagisaka, 47 Shinketsushu 267 (16 May 2000);
- JFTC recommendation decision against Matsushita Electric Industrial, 48 Shinketsushu 187 (27 July 2001);
- JFTC hearing decision re Sony Computer Entertainment, 48 Shinketsushu 3 (1 August 2001);
- JFTC Keikoku (warning) against Johnson & Johnson (12 December 2002);
- JFTC recommendation decision against Intel, 52 Shinketsushu 341 (13 April 2005);
- JFTC order against Oita Oyama-machi Agricultural Association, 56-2 Shinketsushu 79 (10 December 2009);
- JFTC order against Johnson & Johnson, 57-2 Shinketsushu 50 (1 December 2010);
- JFTC order against DeNA, 58-1 Shinketsushu 189 (9 June 2011); and
- JFTC order against Coleman Japan 63 Shinketsushu 133 (15 June 2016).

Types of vertical restraint

2 | List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

For unfair trade practices, in terms of describing the types of vertical restraints, the then Designation of Unfair Trade Practices (Japan Fair Trade Commission (JFTC) Public Notice No. 15 of 18 June 1982) (UTP Designation), which was in effect before, but is now amended by the amendments in 2009, may still be appropriate. Under the authorisation under the then paragraph 9, article 2 of the AMA, the then UTP Designation detailed and reorganised the six categories and reclassified them into 16 categories. The following describes the major categories among them.

Tie-in sales, etc

Unjustly causing another party to purchase goods or services from oneself or from another designated by oneself by tying the purchase to the supply of other goods or services, or otherwise coercing that party to trade with oneself or with another designated by oneself.

Trading on exclusive terms

Unjustly trading with another party on condition that the said party shall not trade with a competitor, thereby tending to reduce trading opportunities for that competitor.

Resale price restriction

Supplying goods to another party while imposing, without justifiable grounds, these restrictive terms as to cause that party or a subsequent repurchaser to maintain the selling price of the goods that was determined, or otherwise restricting that party's free decision on the selling price of the goods.

Trading on restrictive terms

Other than any act falling under the trading on exclusive terms or the resale price restriction above, trading with another party on conditions that unjustly restrict any trade between that party and its other transacting party or other business activities of that party.

Interference with a competitor's transaction

Unjustly interfering with a transaction between a domestic competitor (either competing with the interfering party, a company owned by the interfering party or at which the interfering party is an officer) and its transacting party, by preventing the execution of a contract, by inducing the breach of a contract, or by another means.

Abuse of superior bargaining position

Unjustly, in light of normal business practices, making use of one's superior bargaining position over the other party, by engaging in acts such as:

- causing that party in continuous transactions to purchase goods or services other than the one pertaining to that transaction;
- causing that party in continuous transactions to provide money, services or other economic benefits; and
- imposing a disadvantage on that party regarding terms or execution of the transaction, etc.

For exclusive private monopolisation, the applicable JFTC's guidelines state that, while there is a wide variety of conduct deemed as exclusionary conduct, it lists four typical acts:

- below-cost pricing;
- exclusive dealing;
- tying; and
- refusal to supply and discriminatory treatment (see page 5 of the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act, the JFTC, 28 October 2009).

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The basic objective of the law is to protect and promote competition.

In this regard, the case law states that the direct purpose of the law is to protect and promote competition, while its ultimate purpose is 'to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers' (*Idemitsu Kosan et al v Japan*, 30 Shinketsushu 237 (Sup Ct, 24 February 1984)). While the Supreme Court issued this ruling in the context of horizontal restraints, it also applies to vertical restraints.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Japan Fair Trade Commission is responsible for enforcing the AMA. Article 28 of the AMA provides that the chairman and commissioners of the Fair Trade Commission exercise their authority independently and, among others, in connection with its enforcement of the law, this independence must be protected and respected from third parties, including the legislative body.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

Although article 6 of the AMA deals especially with international matters separately from regular prohibitions, owing to recent developments regarding the international service of process, there is a tendency towards dealing with both domestic and international cases under the same provisions. According to the broadly accepted interpretation, to find that the AMA applies to a certain case, the case must have a certain effect on the Japanese market. Concerning the extraterritorial application of the law, especially for horizontal restraints, on 22 May 2015, JFTC issued its hearing decision and found that the application of the law in such a case should be justified if, at least, the competition in a particular field of trade is the competition over customers in Japan and the competition in a particular field of trade is substantially restricted by the conduct at issue (the decision against five companies, including *MT Picture Display Co, Ltd* (a price-cartel case involving manufacturers and distributors of television cathode-ray tubes)). This was subject to judicial review and, on 12 December 2017, the Supreme Court found that if the particular field of trade in which the competition is substantially restricted by the conduct at issue includes Japan, then the JFTC should be entitled to issue its order (*Samsung SDI Malaysia v JFTC* (December 2017)). However, it is unclear whether the same finding also applies to vertical restraints. For the extraterritorial application, there is another issue of how to reach the prospective respondent for service and other procedural purposes. While the JFTC may attempt to reach a foreign entity via informal measures to request voluntary cooperation, eg, to ask it to retain Japanese legal counsel on its behalf, extraterritorial service of process via the Japanese consulate may apply for a vertical restraint case.

At this stage, there is no authoritative precedent that establishes a rule or criterion regarding the jurisdictional issue in a pure internet context.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The AMA regulates 'business activities' by 'entrepreneurs'. This concept of 'entrepreneur' is defined as 'a person who operates a commercial, industrial, financial or any other business' under paragraph 1, article 2 of the AMA, and the case law shows that even a public entity may be found to fall under the definition of 'entrepreneur' if, and as far as it deals with business activities, whether or not it generates a profit (see *Nippon Shokuhin KK v Tokyo Metropolitan Government*, 36

Shinketsushu 570 (Sup Ct, 14 December 1989) (commonly known as the *Tokyo Slaughterhouse* case); see also *Earth Meishi Co, Ltd et al v Japan*, 45 Shinketsushu 467 (Sup Ct, 18 December 1998)).

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

There are three particular regulations applicable to specific sectors of industry, such as the newspaper industry, specific shipping or transport businesses and large-scale retailers, which mainly cover abuse of a superior bargaining position only.

Also, there are regulated industries, such as public transport and communications. Even if a certain matter in the industry is regulated by a certain competent regulatory agency, it would not necessarily exempt it from the application of the AMA. However, depending on the nature or purpose of this regulation, it may, in effect, be found to supersede the application of the AMA (*Softbank Telecom Corp v Nippon Telegraph and Telephone East Corp*, 2232 Hanrei Jiho 102 (19 June 2014)).

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

There are some provisions regarding exemptions from the AMA. Among others, article 21 of the AMA provides for matters regarding intellectual property. Article 23 of the AMA provides for the general exemption from the resale price restriction regarding, among others, copyrighted products. It is narrowly construed to include newspapers, books, magazines, records (which includes audio tapes and audio compact discs) only, and does not include other (relatively newly invented) items, such as videotapes and digital video discs.

TYPES OF AGREEMENT

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

There is no definition of 'agreement' for vertical restraints. Rather, under Japanese law, the subject matter of the prohibition of the vertical restraints is 'restriction' itself and an 'agreement' may be found to be a measure by which a party binds the other party to a certain obligation. Put differently, an 'agreement' is not an indispensable factor and, for example, in the case of resale price restriction, it would suffice if it is found that a party successfully compelled the other party to comply with its instruction regarding pricing by using the 'carrot and stick' approach.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

Under Japanese law, to engage the Japanese Antimonopoly Act (Act No. 54 of 14 April 1947) (AMA) concerning vertical restraints, a formal written agreement is unnecessary. A mere informal or unwritten understanding, or a certain mechanism for a party to motivate the other party to comply with its instruction, may suffice, depending on the situation.

Parent and company-related agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

In theory, the vertical restraint rules would apply unless the agreement is between a parent and its wholly owned subsidiary (the Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (the DSBP Guidelines), Japan Fair Trade Commission, 11 July 1991). Under the DSBP Guidelines, it is also stated that, even if a parent owns less than 100 per cent of the shares of its subsidiary, if it is recognised that transactions between them are equivalent to intra-company transactions (in substance), the agreement would not be subject to the regulation of unfair trade practices. Whether transactions between a parent and its subsidiary are equivalent to intra-company transactions is to be determined case by case through a comprehensive examination of various factors; for example, the ratio of shares of the subsidiary held by the parent, the business relationship between the parent and subsidiary, and so on.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Article 19 of the AMA that deals with vertical restraints does not apply to these agreements. In this regard, the DSBP Guidelines state that if a dealer who purchases products from a manufacturer only functions as a commission agent, or if, in essence, the sale occurs between the manufacturer and the real purchasers through that dealer or agent, even if the manufacturer instructs the resale price to that dealer or agent, it is usually not illegal.

13 Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

There are no specific rules or recent authority decisions on what constitutes an agent-principal relationship, and it is determined case by case through a comprehensive examination of various factors. For example, for the resale price restriction, the DSBP Guidelines state that if it is a consignment sales transaction, and if the transaction is made with a consignor at its own risk and account so that a consignee bears no risk beyond that associated with its obligation to exercise the care of a good manager in shortage and handling of goods, collection of payments etc, is, therefore, not liable for loss of goods, damages to them, or for unsold goods, even if the manufacturer or consignor instructs the resale price to the real purchaser (from the consignee), it is usually not illegal.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Article 21 of the AMA provides, as an exemption, that the Act's provisions shall not apply to these acts recognisable as the exercise of IPRs. The Guidelines for the Use of Intellectual Property under the Antimonopoly Act, Japan Fair Trade Commission, 28 September 2007, state that the AMA applies to restrictions on the use of technology that is essentially not considered to be the exercise of rights. Also, while an act by the rights-holder to block other parties from using its technology or to limit the scope of use may seem, on the face of it, to be an exercise of rights, if it cannot be recognised substantially as an exercise of a right, then it may be subject to the AMA enforcement if it is found to deviate from, or run counter to, the intent and objectives of the intellectual property systems (ie, to promote creative efforts and use of technology given the intent and the manner of the act and its degree of impact on competition).

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The 'substantial restraint of competition' is required for private monopolisation and the 'impediment of fair competition' is required for unfair trade practices. According to court precedent, the criteria for the former could be found to be more severe than that for the latter and, while a simple theoretical possibility of this impediment would not suffice, if it is found that certain conduct may impede fair competition, it would suffice. However, some recent academic analysis suggested that these two should be consolidated into one single standard as an appropriate and sufficient anticompetitive effect. In practice, vertical restraint cases have mainly been dealt with by unfair trade practices enforcement.

The analytical framework for the 'impediment of fair competition' depends on the type of vertical restraint at issue. In this regard, the Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (the DSBP Guidelines) state that, for the restriction on distributors' handling of competing products, it should be assessed based on whether a restriction may cause a foreclosure effect, which the DSBP Guidelines state refers to cases where vertical restraints would be likely to create those circumstances where that vertical restraint would result in making it difficult for new entrants or competitors to easily secure an alternative transactional counterparty, and excluding, or reducing the transactional opportunities of, these new entrants or competitors by raising costs for business activities or disincentivising new entry or developments of new products by them. The restrictions on distributors' sales territory or the restrictions on distributors' customers should be assessed based on whether the price level of the product covered by the restriction is likely to be maintained, which the DSBP Guidelines state refers to cases where vertical restraints would be likely to create the circumstances where that vertical restraint would impede competition between the contractual counterparties and their competitors, thereby enabling the contractual counterparties to reasonably freely control their price by their own volition, thus maintaining or raising their price of the product. Further to the latter, it is exceptional that the resale price restriction can be justified.

Also, analysis of whether the conduct at issue impairs transactions based on free and independent judgement by firms is required regarding abuse of superior bargaining position.

Market shares

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

In assessing either the 'substantial restraint of competition' or the 'impediment of fair competition', the Japan Fair Trade Commission (JFTC) considers whether the infringement is done by a firm that is influential in a market, which requires a consideration of market shares, market structures and other economic factors. The DSBP Guidelines state that for the 'impediment of fair competition', depending on the type of the vertical restraint, it would be considered whether a firm is 'influential in a market', which is first assessed by ascertaining the market share of the firm; that is, whether it has more than 20 per cent. However, even if a firm matches this criterion, the firm's conduct is not always illegal. While a simple theoretical possibility of such an impediment would not suffice, if it is found that certain conduct could tend to impede fair competition, it would suffice.

Concerning the consideration of the restriction widely used in the market, it is relevant from the perspective of the possible cumulative restrictive effects of such a restriction. The DSBP Guidelines state that if two or more manufacturers, individually and in parallel, adopt certain vertically restrictive measures, it is more likely to result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, compared to cases with only one manufacturer, which, therefore, makes it may more likely to be found illegal.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

In assessing a buyer's conduct, the JFTC considers whether the infringement is done by a firm that is influential in a market, which requires a consideration of market shares, market structures and other economic factors, and whether a firm is 'influential in a market' is first assessed by ascertaining the market share of the firm.

Notwithstanding this, as far as the abuse of superior bargaining position is concerned, it is rather typical that such a 'power buyer' (allegedly) abuses its superior bargaining position against its suppliers (although from the theoretical perspective, such a violation may not necessarily be classified as a typical vertical restraint).

On the other hand, in assessing a seller's conduct, usually, the anticompetitiveness of the conduct is to be evaluated by considering market shares (ie, whether the seller has more than 20 per cent in the market), market structures and other economic factors, regardless of how the buyer may be found to be influential in a market. Sometimes, certain factors, for example, the fact that a 'power buyer', or many buyers, widely agreed to certain types of restriction, may lead a fact-finder to find that the restriction at issue should be permissible. Alternatively, depending on the situation, similar facts may lead a fact-finder to find that the restriction at issue effectively works to an anticompetitive effect.

There is no guidance or authoritative precedents that deal specifically with this issue in the online sector.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Among various types of vertical restraints, the Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act list three substantial types of conduct for which the issue of whether it is made by a firm that is influential in a market should be one of the key elements. They are:

- exclusive deal (ie, the restriction on its transaction counterpart not to deal with its competitor) or the restriction on distributors' handling of competing products;

- certain types of restriction on the territory into which a buyer may resell contract products passively only; and
- tie-in sales, for which the criterion of whether it has more than 20 per cent of market share is applicable.

The reverse aspect of this criterion in practice works as a safe harbour for these vertical restraints.

TYPES OF RESTRAINT

Assessment of restrictions

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

The Japanese Antimonopoly Act (Act No. 54 of 14 April 1947) (AMA) prohibits resale price restriction. There have been several formal administrative orders issued by the Japan Fair Trade Commission (JFTC) in the past 10 years, including the most recent cases, *Aprica Children's Products* and *Combi*. The AMA covers not only price-fixing and minimum resale price but also any measures with equivalent effects, such as limiting the buyer's ability to give rebates or discounts.

Concerning the maximum resale price, although it may arguably be beneficial for consumers or end-users, the statutory provision for this prohibition does not prima facie differentiate the restriction on maximum price from that on minimum price. Further, in practice, restriction on the maximum resale price may (intentionally or inadvertently) function similarly to the minimum resale price by making it easier than otherwise for competitors to raise the price of their products or services close to the same level. Also, even restriction on the maximum resale price would restrict the purchaser or reseller's free decision on its pricing. At this stage, there is no precedent where maximum resale price maintenance is differentiated from minimum resale price maintenance and should be found to be legal, except in a certain emergency like the covid-19 pandemic.

Concerning the suggested resale price, the Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (the DSBP Guidelines) state that if a manufacturer's suggested retail price or quotation is indicated to distributors solely as a reference price, the conduct itself is not a problem. Regardless of whether it is referred to as a 'suggested price', if the manufacturer tries to have its distributors follow the reference price, that conduct would constitute resale price restriction.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

It has been commonly understood that the assessment regarding the resale price restriction violation would not require the calculation and analysis of the respondent's market share. In *Wakodo v JFTC*, the court declined Wakodo's argument that it only had a minor presence in the market (approximately 10 per cent of the market share) and could strengthen its competitiveness by adopting the resale price restriction. From such a viewpoint, it is unlikely that the former factor listed in this question could justify the resale price restriction. However, some recent academic analysis suggested that court precedent can be found to be fact-specific and can be differentiated. If so, it may still be possible to argue the 'impediment of fair competition' based on the facts specific to the case at issue.

Moreover, the Supreme Court of Japan has stated that the resale price restriction cannot be justified if its purpose is to prevent a retailer using a brand as a loss leader (*Meiji Shoji v JFTC*). However, in this regard, recent academic analysis suggested that court precedent can be found to be silent or neutral regarding whether the resale price restriction can be justified if it is specifically introduced only for the retailers that use the brand as a loss leader.

Relevant decisions

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Resale price maintenance is to be found not solely based on the existence of an 'agreement', but possibly based on the existence of a certain measure by which a party binds the other party to a certain obligation. Therefore, if the other forms of restraint work as an incentive to compel the other party to comply with the resale price restriction, the other forms of restraint may be found to be linked with the resale price maintenance.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Concerning the possible benefits that may be rendered by the resale price restriction, such as the prevention of free-riding or the promotion of new entry, according to the DSBP Guidelines, as amended in 2015, resale price maintenance is not illegal as an exception on the condition that it has 'justifiable grounds', which might be granted within a reasonable scope and reasonable terms. This includes cases where:

- the resale price maintenance by a manufacturer will result in actual pro-competitive effects and promote inter-brand competition;
- will increase demand for the product, thus benefiting consumers; and
- pro-competitive effects will not result from less restrictive alternatives other than the resale price maintenance at issue.

It also states that, for example, in connection with the 'free-rider' problem, when a manufacturer performs resale price maintenance, as above, it will be granted as having 'justifiable grounds' where it results in pro-competitive effects through avoiding that problem, will promote inter-brand competition and will increase the demand for the product, thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives.

It has also been commonly understood that resale price restriction cannot be justified solely because it is necessary and reasonable, from a business-management perspective, for example, that stable supply is required (see *Wakodo v Japan Fair Trade Commission (JFTC)*, *Meiji Shoji v JFTC*), or that it is necessary to conserve a traditional industry (*Hamanaka v JFTC*). However, some recent academic analysis suggested that certain justification should still be available for the resale price restriction (eg, from the perspective of the necessity to assure product safety).

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

Depending on the situation, some certain possible links with resale price maintenance may be found. Otherwise, while there is no precedent regarding this issue at this stage, if a buyer has a substantial market share, this could be tantamount to substantially fixing retail market prices of the equivalent (or competing) products. Therefore, this could rather be found problematic from the perspective of these horizontal restraints.

Suppliers

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

Although there is no precedent regarding this issue at this stage, it would probably be assessed as a possible violation of the prohibition of trading on restrictive terms (ie, the buyer's restriction of the supplier's activities), unless the promise practically works as a cartel or other horizontal restraint (eg, multiple suppliers' widely warranting in the market, or a supplier's warranting widely for its multiple dealers in the market). That is, if it is found to have the aspects of avoiding competition, or that the price level of the product covered by the restriction is likely to be maintained, it may constitute the violation. Also, if it incentivises such a supplier not to deal with a new entrant buyer, one would need to examine whether aspects of excluding competitors exist.

It may also constitute the abuse of superior bargaining position.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

As far as this works as a supplier's warranting the most favoured price to some certain specific platform (eg, platform A in this question), the same rule applies as that concerning suppliers providing products on favourable terms to most-favoured customers.

On 1 June 2017, the JFTC issued its press release on the closing of the investigation into the suspected violation of the AMA by Amazon Japan GK. The alleged violating conduct consisted of price parity clauses and selection parity clauses in the seller contracts on Amazon Marketplace. The JFTC listed its concerns over the influence of this conduct as follows:

When an online shopping mall operator imposes price parity clauses and selection parity clauses . . . on sellers, these clauses may exert influence as shown below to negatively affect competition:

- restrict sellers' business activities by limiting the reduction of prices and expansions of lineups of goods that the sellers sell via other sales channels;
- distort competition among online shopping mall operators by allowing an online shopping mall operator imposing those parity clauses to achieve the lowest price and the richest lineup of goods sold in its online shopping mall without making any competitive effort; or
- reduce online shopping mall operators' incentive for innovation and hinder new entrants as the reduction of fees charged by an online shopping mall operator for sellers does not result in these sellers' reduction of prices and expansion of lineups.

The JFTC publicised that it recognised that the measures proposed by Amazon Japan, including the proposal that it will not exercise its rights concerning these parity clauses, would eliminate the suspected violation of the AMA, and decided to close the investigation on this case after confirming that the measures mentioned above had been taken.

Also, on 15 August 2017, the JFTC issued another press release on the report on the e-Books Agreements from Amazon Services International, Inc (ASII). This was also about parity clauses, whereby, concerning e-books of publishers that are delivered from the amazon.co.jp website, including retail prices to general consumers, the parity clauses oblige those publishers to ensure the parity between their transactions with ASII or with general consumers on the amazon.co.jp website, and their transactions with other e-books delivery platform operators or with general consumers on e-books delivery platforms operated by those other operators. Similarly to the above, ASII proposed, among other things, not to enforce the contractual obligations of publishers regarding the parity clauses, and to take these proposed measures for at least five years, and these were found to be satisfactory to eliminate potential anticompetitive concerns by the JFTC.

Some academic analyses find that the above may be understood to be authoritative in that it illustrates a rule or criterion regarding this issue. However, others do not necessarily agree that it establishes such a rule or criterion.

In October 2019, the JFTC issued a press release about its approval of the commitment plan submitted by Rakuten Inc, where it was alleged that, in contracts between Rakuten and accommodation operators that shared information about accommodations on the website Rakuten Travel (operated by Rakuten), Rakuten had set conditions to require the operators to make the prices and the numbers of rooms that they place on the website equal to, or better than, those through other distribution channels with a requirement for a minimum number of rooms. In this case, the JFTC suspected that activities by Rakuten mentioned above violated the law on trading on restrictive terms. As a matter of legal procedure, this approval of the commitment plan does not represent a determination that the activities of Rakuten constituted a violation of the AMA.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

In *Johnson & Johnson* (JFTC order, 1 December 2010), the JFTC found that, regardless of the price range, Johnson & Johnson's forcing of its retailers not to refer to their retail prices of its products on their advertisements constituted a violation. It can be construed that, although it was not a restraint on pricing, but rather on sales methods, owing to the pricing aspects of the restraint at issue, it was subject to the level of higher scrutiny. That is, as far as such a restraint has any pricing aspects, it may be subject to higher scrutiny, namely, whether the price of the product covered by the restriction is likely to be maintained.

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

This is likely to be assessed as a possible violation of the prohibition of trading on restrictive terms (ie, the supplier's restriction of the buyer's activities) unless it practically works as a cartel or other horizontal restraint (eg, among multiple suppliers to which that buyer warrants similarly in parallel, or among multiple buyers that warrant similarly to that supplier in parallel). That is, from the perspective of vertical restraints, if it is found to have the aspects of avoiding competition, or that the price level of the product covered by the restriction is likely to be maintained, it may constitute the violation. Also, if it incentivises such a supplier not to deal with a new entrant buyer, one would need to examine whether aspects of excluding competitors exist.

It may also constitute an abuse of a superior bargaining position.

Restrictions on territory

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Although there has been no precedent specifically analysing this matter in the past 10 years, the DSBP Guidelines state that a restriction of this type is assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of unfair trade practices. Whether the price level of the product covered by the restriction is likely to be maintained is to be determined comprehensively, taking into account the following factors:

- actual conditions of inter-brand competition; and
- actual conditions of intra-brand competition for the product, etc.

The DSBP Guidelines also state that, if the agreement assigns a specific area to each distributor but does not restrict the distributor from selling to customers outside each area upon request (ie, if it does not restrict 'passive' sales but 'active' sales only) whether the restriction is imposed by an influential supplier in the market may also be taken into account.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Although there is no precedent regarding this issue at this stage, the DSBP Guidelines, as amended in 2017, stated that the restrictions on the territory into which a buyer selling via the internet resells those contract products, would constitute a restriction on passive sales. Hence, a violation could be found depending on whether the price level of the product covered by the restriction is likely to be maintained.

Restrictions on customers

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

This restriction is to be assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of unfair trade practices as adopted by the DSBP Guidelines. In *Matsushita Electric Industrial*, a violation was found after a supplier had its contract dealers refuse to deal with non-contract price-cutting dealers (although the applicable type of conduct was indirect refusal to deal, another type of unfair trade practice, as opposed to trading on restrictive terms). If it could be found that the supplier traded on these restrictive terms, *Matsushita Electric Industrial* could be regarded as a case where said assessment criterion applied. On the other hand, even though vertical restraints may have a price maintenance effect to some extent, if it is to achieve something plausibly rational (eg, to improve brand image) and the restriction on the customers is found to be necessary for that purpose, then it could be allowed, to that extent. In *Kao v Egawa Kikaku*, it was found that as far as it is tailored to achieve a plausibly rational business purpose, in that buyers were only prohibited from selling the suppliers' products to unauthorised or non-contract dealers, and it is applied non-discriminatorily, restricting the customers to whom a buyer may resell contract products could usually be found permissible.

In *Sony Computer Entertainment*, however, the JFTC differentiated the case from what was found in Kao, and it was found that the price level of the product covered by the restriction is likely to be maintained, and also it is not reasonably tailored to achieve its purpose, and therefore the supplier's requiring a buyer not to resell products to the other wholesalers or retailers violated the law.

Concerning the prevention of the customer's ability to resell products to end-consumers, the same rule applies as regards restrictions on territory.

Restrictions on use

31 How is restricting the uses to which a buyer puts the contract products assessed?

Restraints other than trading on exclusive terms and resale price restriction are classified as trading on restrictive terms. Although there is no authoritative precedent showing what kind of scrutiny applies to this issue, considering the analogy with the restriction on the buyer or distributor's sales methods, if it is plausibly rational and non-discriminatory to the other distributor, it would usually be found to be permissible. This issue may also require analysis from the IP-protection perspective.

Restrictions on online sales

32 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

This restriction is to be assessed as a possible violation of trading on restrictive terms. That is, the basic analytical framework is similar to the restriction on the territory or customer (ie, whether the price level of the product covered by the restriction is likely to be maintained).

At this stage, there is no court judgment regarding this issue and the only available material is *Johnson & Johnson* (JFTC warning, 12 December 2002) for restricting the buyer's ability to sell its contact lenses via the internet. In this case, it was found that the restriction at issue practically hindered low pricing, although the transactions were appropriately approved by an ophthalmologist. It was also found that Johnson & Johnson voluntarily ceased that practice more than one year before the issuance of the said warning, and the JFTC did not issue its formal cease-and-desist order in this case.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

At this stage, there is no court decision or guidelines from the JFTC about this issue. Although this is not restricting the customers to whom a buyer may resell contract products, but just restricting the type of sales channel, it is still likely that the same rule applies as with restrictions on customers. Concerning restrictions on internet sales (including the ban whereby these approved distributors are not allowed to sell the products on certain types of internet platforms, typically those owned or managed by a third party), the assessment for restrictions on online sales is also applicable here.

Selective distribution systems

34 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The DSBP Guidelines, as amended in 2015, state that a manufacturer may set up certain criteria to limit the distributors that handle its product to those that meet the criteria, and in such a case, the manufacturer may prohibit distributors from reselling its product to other distributors that do not meet the criteria. This is called 'selective distribution', defined thereunder, which the DSBP Guidelines state may result in pro-competitive effects, and is generally not illegal in itself (even if the criteria of the selective distribution were to result in preventing certain incompetent price-cutters, etc, from handling the product) provided that the criteria are recognised to have plausibly rational reasons from the viewpoint of the consumers' interests, such as related to the preservation of its qualities and assuring appropriate use, and that these criteria are equally applied to other distributors who want to deal in the product.

However, in this regard, recent academic analysis has pointed out that the above is the case only 'generally', and depending on the nature of the applicable restrictions, it could also be assessed in the light of the restrictions on trading on restrictive terms. The DSBP Guidelines, as amended in 2017, did not change the analytical framework above. Hence, it is unclear whether there must be any control over the application (eg, a right to challenge refusals to admit). However, considering that, as above, these criteria must be applied equally, refusals to admit should be able to be challenged from that perspective, and it would be difficult to limit the total number of distributors to be admitted to the system in advance.

35 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

At this stage, there is no authoritative precedent showing that selective distribution systems may be more likely to be lawful where they relate to certain types of product. However, generally speaking, from a practical perspective, it is possible that, for a certain product, the plausibly rational reasons from the viewpoint of the consumers' interests (eg, related to the preservation of its qualities, assuring appropriate use) may be found more than in certain other products, by paying attention to whether or how this preservation of quality or assuring appropriate use could actually be an issue.

36 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

At this stage, there is no recent decision that deals with internet sales restrictions imposed on approved buyers in connection with selective distribution systems, and generally, the same rule could likely apply as that for assessing selective distribution systems. This aspect of selective distribution systems could be analysed in light of the restrictions on trading on restrictive terms, and therefore, concerning the restrictions on internet sales (including the ban whereby these approved distributors are not allowed to sell the products on certain types of internet platforms, typically those owned or managed by a third party), the assessment for restrictions on online sales is also applicable here.

37 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

There is no decision specifically dealing with this issue.

Before the amendment of the DSBP Guidelines to introduce the concept of selective distribution systems therein in 2015, as far as this aspect of the restrictions on retailers' sales methods is concerned, in *Shiseido v Fujiki*, one of the most famous cases regarding this matter in Japan, the Supreme Court of Japan issued its judgment that Shiseido, a manufacturer of cosmetics, could enforce its contractual terms regarding the distributorship if the terms themselves were plausibly rational and non-discriminatory towards the other distributors. The restriction at issue was to have the sales staff of its retailers provide appropriate support and explanation to end-user customers so that they could use the products appropriately; this conduct could be helpful to improve the supplier's (products') brand image and was found plausibly rational and non-discriminatory.

38 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

As far as these cumulative restrictive effects of selective distribution systems are concerned, although no decision or guidelines is dealing with this issue, the DSBP Guidelines state that, in connection with the restriction on trading on restrictive terms, if two or more manufacturers, individually and in tandem, adopt these systems, the price level of the product is likely to be maintained more than otherwise and these cumulative effects may lead the authority to find the likelihood of maintenance of the price level.

39 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

Although there is no precedent from the past 10 years specifically analysing the matter of restriction on the territory, under the DSBP Guidelines, the aspect of restricting territory is subject to the analysis of the analytical framework for the 'impediment of fair competition' (whether or not the price level of the product covered by the restriction is likely to be maintained). Also, a selective distribution system would be subject to this analytical framework. Hence, this would be analysed on a combined basis by considering the relevant factors altogether.

Other restrictions

40 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Concerning the prevention of distributors buying or selling the supplier's products among themselves, the DSBP Guidelines apply the same analytical framework that is used for the restriction of selling to certain customers. Therefore, this is to be assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of the unfair trade practices restriction. In *Sony Computer Entertainment*, the JFTC differentiated the case from what was found in *Kao*, and applied the same rule to the restriction at issue, and, where it was restricted to buy and sell even between the qualified dealers, it was found to be anticompetitive. In this regard, the DSBP Guidelines, as amended in 2017, made it clearer that, if the buyer's ability to 'provide' the products to a price cutter as its alternative source is to be restricted, it should be assessed from the same criteria as for resale price maintenance.

41 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restraints other than trading on exclusive terms and the resale price restriction are classified as trading on restrictive terms. So, although there is no authoritative precedent showing what kind of scrutiny applies to this issue, considering the analogy with the restriction on buyers' or distributors' sales methods, if it is plausibly rational and non-discriminatory to the other distributors, it would usually be found to be permissible.

42 | Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Concerning the restrictions on distributors' handling of competing products, in *Toyo Seimaiki v JFTC*, the High Court stated that this is to be assessed from the perspective of how the restriction would make the distribution channel foreclosed or exclusive. Subsequently, the same rule was adopted by the DSBP Guidelines, stating that this type of restriction is to be assessed from the perspective of whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. It also points out that, if the restriction is carried out by an influential supplier in the market, it may lead to a finding that the restriction causes the 'impediment of fair competition'.

43 | How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

This will be assessed from the perspective of how the restriction would make the distribution channel foreclosed or exclusive, especially if, in practice, the requirement restricts the buyer from dealing with competing products. The DSBP Guidelines address the situation of requiring distributors to deal with such a large volume of their products (which is close to their capacity) in the same manner as the restriction on distributors handling competing products.

In *Nordion*, the long-term, total amount of purchase obligation was found to be anticompetitive. Although it was found in the context of exclusionary private monopolisation, it is broadly understood that the foreclosure found therein should also apply to the trading on exclusive terms as unfair trade practices. Also, in *Intel*, while it was not expressly required, Intel's licensing terms and conditions, especially in connection with the applicable rebate settings, incentivised the licensees and original personal computer equipment manufacturers to purchase all or almost all of the central processing units to be installed in their personal computers from Intel, and it was found that this constituted exclusionary private monopolisation. In this regard, Intel's market share was found to be approximately 89 per cent of the Japanese market.

Further, such a requirement for the buyer to purchase a full range of the supplier's products may constitute tie-in sales, etc, depending on the situation.

44 | Explain how restricting the supplier's ability to supply to other buyers is assessed.

The DSBP Guidelines apply the analytical framework for the 'impediment of fair competition' – that is, whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. It also points out that if the restriction is carried out by an influential reseller or customer in the market, it may lead to a finding that the restriction causes the 'impediment of fair competition'. The restriction may still be found to be legal if:

- a finished product manufacturer supplies materials to the manufacture of a part that commissions them to make parts and requires them to sell all parts exclusively to itself; or
- a finished product manufacturer provides the know-how to parts manufacturers, commissions them to make parts and requires them to sell all parts exclusively to itself, and if that restriction is deemed necessary for keeping the know-how confidential or preventing the unauthorised diversion of it.

In *Oita Oyamacho Agriculture Association*, the JFTC concluded that the restraint at issue made it difficult for a certain specific competitor to secure an alternative supply source, and was found anticompetitive. In this regard, in *DeNA*, although it was similarly intended to restrain the suppliers' abilities to supply to a certain specific competitor, the category of the applied violation was not the trading on restrictive terms, but the interference with a competitor's transactions. Although the reason why those two cases were differentiated has not been made clear, considering that interference with a competitor's transaction does not necessarily require the level of the anticompetitiveness for trading on restrictive terms in this context (ie, whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative sources of supply), close attention needs to be paid to whether, practically, making restraint of this kind illegal by less strict scrutiny may be the case in the future.

45 | Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

In *Tottori Chuo Agricultural Association*, while the same restriction was found anticompetitive, the reasoning was not necessarily clear. See also *Himeji-shi Plumbing Business Cooperative Association* and *Sagisaka*.

Although there is no guidance or authoritative precedents regarding this issue at this stage, the potential anticompetitive effect caused hereby could be found equivalent to the restriction on the distribution channel, although it is made by the distributor, as opposed to the supplier. Therefore, it should be assessed, in the context of trading on restrictive terms from the perspective of whether or not a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels.

46 | Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

The DSBP Guidelines deal – as for the restrictions on suppliers other than those covered above – with the issue of how the request by a certain distributor A (appointed for a certain territory X) to the effect that the supplier should prevent another distributor B (appointed for another certain territory Y) from selling products into territory X, especially in connection with exclusive distributorship agreement should be dealt with. It is stated that it is permissible. On the other hand, assuming that territory X is Japan while territory Y is a foreign country, and a certain third-party customer of distributor B purchases products in territory Y and then tries to sell (export) them into territory X (Japan), if the distributor A (in Japan) requires the supplier (or its distributor B) to prevent the third party from their exporting to Japan to maintain prices of the products, it would be found to be anticompetitive, either as trading on restrictive terms or as interference with a competitor's transaction, as the case may be.

NOTIFICATION

Notifying agreements

47 | Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no formal procedure for notification.

Authority guidance

48 | If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

It is possible to obtain guidance from the Japan Fair Trade Commission through the consultation procedure.

ENFORCEMENT

Complaints procedure for private parties

49 | Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Paragraph 1, article 45 of the Japanese Antimonopoly Act (Act No. 54 of 14 April 1947) (AMA) provides that any person may, when he or she considers that a fact involving a violation of the provisions of the AMA exists, report this fact to the Japan Fair Trade Commission (JFTC) and ask for appropriate measures to be taken. Paragraph 2, article 45 of the AMA provides that the JFTC, upon receipt of the report as prescribed in the preceding paragraph, shall make necessary investigations concerning the case.

Regulatory enforcement

50 | How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

According to the JFTC's annual report for 2019 (April 2019 to March 2020) issued in June 2020, the JFTC issued seven formal orders regarding unfair trade practices within the past five years. Of these seven cases, one concerns abuse of a superior bargaining position, one concerns interference with a competitor's transaction, two concern trading on restrictive terms and three deals with resale price restriction.

Out of the above, in July 2019, the JFTC found that two baby product manufacturers, Aprica Children's Products GK and Combi Co Ltd, violated the law (resale price maintenance), and issued its administrative orders against them respectively. The JFTC press releases regarding these matters are, respectively:

- www.jftc.go.jp/en/pressreleases/yearly-2019/July/190701.html; and
- www.jftc.go.jp/en/pressreleases/yearly-2019/July/190724.html.

Also, in October 2019, the JFTC issued a press release about its approval of the commitment plan submitted by Rakuten Inc, where it was alleged that, in contracts between Rakuten and accommodation operators that shared information about accommodations on the website Rakuten Travel (operated by Rakuten), Rakuten had set conditions to require the operators to make the prices and the numbers of rooms that they place on the website equal to, or better than, those through other distribution channels with a requirement for a minimum number of rooms (see www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html).

51 | What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

It is commonly understood that, if it is found that a certain contract provision violates the law, it would be found void or unenforceable, although this is not necessarily an automatic decision. Also, while the contractual provision that is found to violate antitrust law may be determined to be unenforceable, the other contractual provisions contained in the same agreement may still be found to be enforceable, even without such an explicit severability clause.

52 | May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The JFTC has the power to directly impose a monetary sanction (surcharge order), in addition to a cease-and-desist order, in connection with certain categories of vertical restraints under the AMA amendment in effect as of January 2010. Besides horizontal restraints, while those constituting private monopolisation or abuse of a superior bargaining position would be subject to a monetary sanction for the violation in question, for the four other categories subject thereto (ie, joint refusal to deal, discriminatory pricing, below-cost pricing and resale price restriction), it is applicable only when the same violation is repeated within 10 years.

Since the said amendment, there have been five cases where a monetary sanction was levied on target companies in connection with unfair trade practices (abuse of superior bargaining position), where it was alleged that the target companies forced their suppliers and others to unduly bear additional costs for the benefit of those target companies, for instance, by forcing these suppliers to accept the return of unsold goods etc. The JFTC orders *re Sanyo Marunaka*, 58-1 Shinketsushu 312 (22 June 2011); *Toys 'R' Us Japan*, 58-1 Shinketsushu 352 (13 December 2011); *Edion*, 58-1 Shinketsushu 384 (16 February 2012); *Ralse*, 60-1 Shinketsushu 435 (3 July 2013); and *Direx*, 61 Shinketsushu 103 (5 June 2014) were all subject to the examination procedure with the JFTC's hearing examiner.

In *Toys 'R' Us Japan*, the JFTC issued its hearing decision on 4 June 2015, whereby the JFTC's order was partially reversed and partially retained. Subsequently, in *Sanyo Marunaka*, the JFTC issued its hearing decision on 22 February 2019, whereby the JFTC's order was partially reversed and partially retained. In *Ralse*, the JFTC issued its hearing decision on 28 March 2019, whereby its order was retained, in *Edion*, the JFTC issued its hearing decision on 4 October 2019, whereby its order was partially reversed and partially retained, and in Direx, the JFTC issued its hearing decision on 25 March 2020, whereby its order was partially reversed and partially retained. Those listed above, except for Toys 'R' Us Japan, are still subject to the judicial review process.

Investigative powers of the authority

53 | What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Under article 47 of 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 holding books and documents and other materials to submit these materials, or keep these submitted materials in its custody; and
- enter any business office of the persons concerned with a case, or other necessary sites, and inspect conditions of business operation and property, books and documents, and other materials.

Although these powers are available only within its jurisdiction in Japan, the JFTC has demanded information from a supplier domiciled outside Japan (through its representative in Japan), based on the power in the first bullet point.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Non-parties do not have standing in private enforcement unless it is found that the agreement at issue causes an anticompetitive effect on the non-party. Parties to agreements can bring damage claims as well as injunction claims at the competent district court. The length of time that a company should expect for a private enforcement action would depend on the facts and situation. Japanese courts do not usually conduct consecutive-day concentrated hearings or trials, so if witness examination is required, it would likely take at least one year.

OTHER ISSUES

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

The unfair trade practices include the abuse of superior bargaining position. It has been commonly understood that the requirement of 'impediment of fair competition' for ascertaining the abuse of superior bargaining position is different for the other types of restraint. For example, the Guidelines concerning Abuse of Superior Bargaining Position (the ASBP Guidelines), the JFTC stated, on 30 November 2010, that this aims at eliminating these types of conduct if they are likely to impede fair competition among retailers or suppliers, and also state that the conduct impairs transactions based on free and independent judgement by firms (as opposed to whether a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels or whether the price level of the product covered by the restriction is likely to be maintained).

According to the ASBP Guidelines, a party shall be found to be 'in a superior bargaining position' over the other party to the transaction, based on comprehensive consideration that is to be given to those factors as the degree of dependence on the party, the position of the party in the market, changeability of the transactional partner from the other party's perspective, and so on.

Also, in December 2019, the JFTC published the 'Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc' to ensure transparency and predictability for digital platform operators by clarifying the concepts of the regulation on abuse of a superior bargaining position about acquiring or using personal information, etc, between digital platform operators and consumers that provide them. In practice, a digital platform operator that is found to be in a market-dominant position could also be found to be in such a superior bargaining position toward its users and consumers, so that its exploitative conduct would be impermissible.

UPDATE AND TRENDS

Recent developments

56 What were the most significant two or three decisions or developments in this area in the last 12 months?

On 4 June 2020, and 12 November 2020, respectively, the Japan Fair Trade Commission (JFTC) issued press releases on its approvals of the commitment plans submitted by CooperVision Japan and Seed, contact lens manufacturers. In both cases, the JFTC suspected that they were restricting retailers by:

- not referring to the retail prices of the products on their advertisements; and
- not selling the products via the internet and that these restrictions constituted violations.

Anticipated developments

57 Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

On 2 September 2020, the JFTC published its report on its investigation into the actual circumstances about the business relationship between the franchiser and franchisee in the convenience store franchise business. Among others, the policy of 24-hour sales and operations, as well as the franchiser's covenant to respect its franchisee's (certain secured) territory and not to introduce another competing franchisee within the same, were researched and analysed. If a party who has superior bargaining position against the other transacting party makes use of such position to impose a disadvantage on the transacting party, unjustly in light of normal business practices, such act would be regulated as 'abuse of superior bargaining position', which constitutes a category of unfair trade practices.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Japan Fair Trade Commission issued its press release on the covid-19 emergency on 28 April 2020. Among others, it covered the manner of resale price maintenance prohibition enforcement against retailers offering masks at an excessively high price and clarified that it should be permissible that a mask manufacturer would try to maintain the maximum resale price of its masks.

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ISBN 978-1-83862-732-4