

The 2nd BRICS International Competition Conference

21 September 2011, Beijing, China

## **Regulations against Unilateral Conduct in Japan**

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### **1 Introduction**

It is a great honor for me to be invited to the 2nd BRICS International Competition Conference. Today I would like to explain our regulations against unilateral conduct.

I was asked by the organizer of the conference to speak on the “The Experience of Prohibiting Abusive Behavior in the Context of Economic Globalization”.

When I was informed of this topic, I gave some thought to what subjects would be best for me to discuss. The wording of the topic, “in the Context of Economic Globalization,” provided me specific ideas on the issues I should talk about. Economic globalization has been advancing for some time in every corner of the world. The advancement of economic globalization will surely result in an expanding market and greater competitive pressure on prices. As a result, consumer choice will increase and there will be a number of new moderately priced, quality products and services. For this reason, economic globalization is essentially welcome.

On the other hand, economic globalization has given rise to enterprises with global market power. It is a fact that there have been incidents where those enterprises have abused their global market power. It is also true in almost all markets that there are differences in the relative strengths in the positions of the enterprises. Nonetheless, an equal footing in competitive terms, that is to say, a level playing field, needs to be ensured at the very least among these enterprises. I would say that so-called unilateral conduct, by which a level playing field is disrupted through the abuse of market power, has become more pronounced with economic globalization. In particular, this tendency is deemed stronger in fields where network externality and economies of scale are said to work. Microsoft practices from the 1990s and 2000s, which were brought into question by Japanese, U.S., and European antitrust authorities, are some of the typical examples. Accordingly, in the context of economic globalization, I have framed my thoughts around the unilateral conduct of enterprises that may become an important issue under the Japanese Antimonopoly Act or AMA.

Today, I would like to introduce you to the regulations against unilateral conduct in Japan.

## 2 Enforcement against private monopolization

We have two types of regulations against unilateral conduct in Japan: enforcement against private monopolization and enforcement against unfair trade practices.

Private Monopolization



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**Private Monopolization**

- The term "private monopolization" as used in this Act means such business activities, by which any undertaking, individually or by combination or conspiracy with other undertakings, or by any other manner, excludes or controls the business activities of other undertakings, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. (Antimonopoly ACT(AMA), Art. 2(5))

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First, we will look at enforcement against private monopolization. What I have been referring to as private monopolization is strictly defined in Article 2, Paragraph 5 of the AMA, as you can see here.

The detailed definition of the term shown here can be summarized as activities by which an enterprise causes a “substantial restraint of competition in the market” through the “exclusion” or “control” of other enterprises’ business activities.

Although the definition appears complicated at a glance, there are three crucial points:

The first point is the meaning of “exclusion.”

The second one is the meaning of “control.”

And the third one is how we determine whether the relevant situation is a “substantial restraint of competition.”

**What is "Exclusion"?**

To make competitors' business difficult to maintain, or to make new entry into the market difficult.

- Exclusion as a result of competition on merit is not "Exclusion."
- No need for competitors to have been actually excluded.
- No limitation to the methods of "Exclusion".

The Guidelines for Exclusionary Private Monopolization give the following examples of typical "Exclusion".

- Below-cost Pricing
- Exclusive Dealing( including Exclusive Rebate-giving)
- Tying
- Refusal to Supply and Discriminatory Treatment

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The first point is the meaning of "exclusion." Exclusion is construed as "making competitors' business difficult to maintain, or making new entry into the market difficult."

Although there are no legal limitations on the methods of exclusion, four examples of typical exclusionary conduct are listed under "The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act", announced by the Japan Fair Trade Commission/JFTC in October 2009.

They are: 1) below-cost pricing, 2) exclusive dealing, 3) tying and 4) refusal to supply and discriminatory treatment. Of course, exclusion as a result of competition on the merits is not regarded as exclusion. Furthermore, to establish exclusion, there is no requirement to prove that the competitors have been actually excluded.

**What is "Control"?**

- To control others' decision-making in business.
- To force others to submit to one's will.

- No limitations on the methods of "control"
- Examples: acquisition of stock, dispatch of officers, abuse of superior bargaining position.

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The next point is what is the meaning of "control." This is generally referred to as "controlling other enterprise's decision-making in business and forcing them to submit to one's will." There are no legal limitations on the methods of control.

Past examples of such control include: 1) the acquisition of competitor's stock; 2) the dispatch of officers; and 3) the abuse of a superior bargaining position.

**Substantial restraint of competition**

JFTC consider the following factors.

- Position of the alleged undertaking and the conditions of the competitors
- Potential competitive pressure
- User's countervailing bargaining power
- Efficiency
- Extraordinary circumstances to assure consumer interests

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The final point is how we determine the presence of a “substantial restraint of competition.” Determining the conclusion can be made after comprehensively taking various factors into account. The factors to be considered include: 1) the position of the alleged enterprise, e.g., the market share and its ranking in the relevant market and the situation of its competitors; 2) potential competitive pressure; 3) its user’s countervailing bargaining power; 4) efficiency improvement incidental to the enterprise’s conduct; and 5) Extraordinary circumstances to assure consumer interests.

**Enforcement against Private Monopolization**

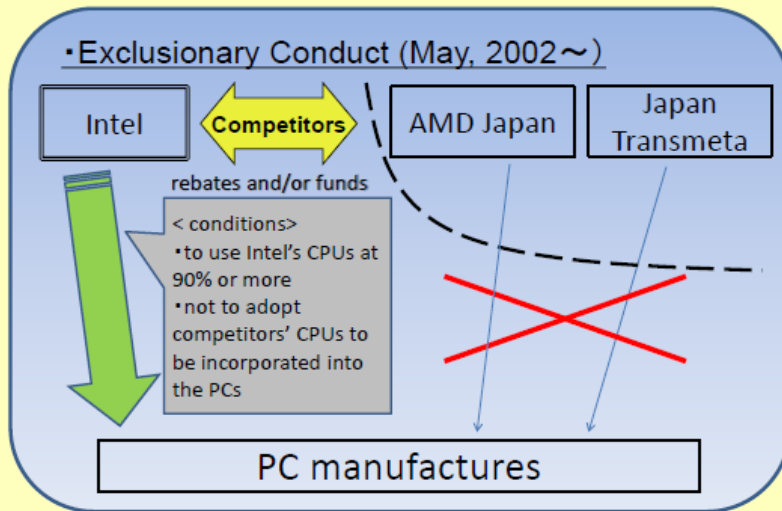
- **No undertaking shall employ private monopolization or unreasonable restraint of trade.(AMA Art. 3)**

- **Cease and Desist Order (AMA Art.7)**
- **Surcharge Payment Order (AMA Art.7-2)**
- **Civil damages claim (AMA Art.25 and Civil Code Art.709)**
- **Criminal Punishment (AMA Art.89, 95)**

\*individual : maximum three years' imprisonment or ¥5,000,000 fine

\*legal person: maximum ¥500,000,000.

Private monopolization is prohibited under Article 3 of the Antimonopoly Act. A violator can be subject to an administrative measure known as a “cease and desist order” from the JFTC and be ordered to pay a surcharge. In addition, victims may file a civil action to recover damages in court against the violator. In the case of a serious and significant impact, there is a possibility that the violator may become subject to a criminal penalty.



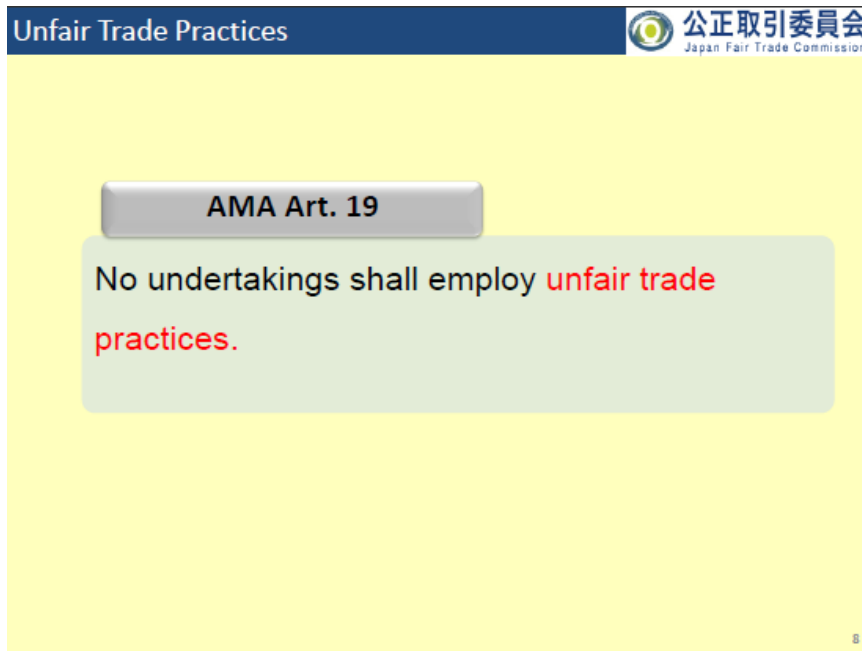
I would now like to introduce to you briefly an actual case of private monopolization in 2005, where the JFTC took administrative action against Intel Corp.

JFTC found that Intel had conducted transactions with computer manufacturers in Japan subject to a condition of achieving a 90% or greater ratio of Intel's CPUs incorporated in computers manufactured and sold in Japan, and shutting out competitors' CPUs. JFTC determined that this was a case of exclusionary private monopolization. For more details, please visit the JFTC's web page.



### **3 Enforcement against unfair trade practices**

Next, I would like to outline enforcement against unfair trade practices. “Unfair trade practices,” which I am going to explain, are often used as methods of “control” and “exclusion” relating to private monopolization.



Article 19 of the Antimonopoly Act stipulates, “No undertakings shall employ unfair trade practices.” The term “unfair trade practices” means “any acts that might impede fair competition” which are either provided by the AMA itself or designated by the JFTC by means of a public notice.

**Unfair Trade Practices**

- Discriminatory Pricing (AMA Art. 2⑨ii)
  - Unjust Low Price Sales (AMA Art. 2⑨iii)
  - Resale Price Restriction (AMA Art. 2⑨iv)
  - Abuse of Superior Bargaining Position (AMA Art. 2⑨v)
- etc

These are unfair trade practices provided by the AMA, which include: 1) discriminatory pricing; 2) unjust low price sales; 3) resale price restriction; and 4) the abuse of a superior bargaining position.

**Unfair Trade Practices****General designation**

(established in 1982, revised in 2009)

1. Discriminatory Treatment on Transaction Terms, etc.
2. Discriminatory Treatment in a Trade association, etc.
3. Tie-in Sales, etc.
4. Dealing on Exclusive Terms
5. Dealing on Restrictive Terms

etc

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These are unfair trade practices designated by the JFTC by means of a public notice, which include: 1) discriminatory treatment; 2) tie-in sales; 3) dealing on exclusive or restrictive terms; and 4) interference with a competitor's transactions.

**Enforcement against Unfair Trade Practice**

- **Cease and Desist Order (AMA Art.20)**
- **Surcharge Payment Order**
  - Discriminatory Pricing (AMA Art. 20-3)
  - Unjust Low Price Sales (AMA Art. 20-4)
  - Resale Price Restriction (AMA Art. 20-5)
  - Abuse of Superior Bargaining Position (AMA Art. 20-6)
  - etc
- **Civil damages claims (AMA Art.25 and Civil Code Art. 709)**

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Any person in violation of the provisions prohibiting unfair trade practices will be subject to a cease and desist order. In addition, the specific conduct described in this slide will be subject to an order to pay a surcharge. Earlier, I mentioned that certain unfair trade practices are stipulated by the AMA itself, and that other practices are designated by the JFTC. Unfair trade practices subject to surcharges are limited to those provided by the AMA itself, with other conduct being subject only to cease and desist orders.

Unfair trade practices can constitute sufficient grounds for a civil action to recover damages, as in the case of private monopolization.

**Definition (AMA Art.2 (9) v)**

Taking any act specified in one of the following, unjustly in light of the normal business practices by making use of **one's superior bargaining position** over the other party:

- (a) Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions
- (b) Causing the said party in regular transactions to provide for oneself money, services or other economic benefits
- (c) Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party

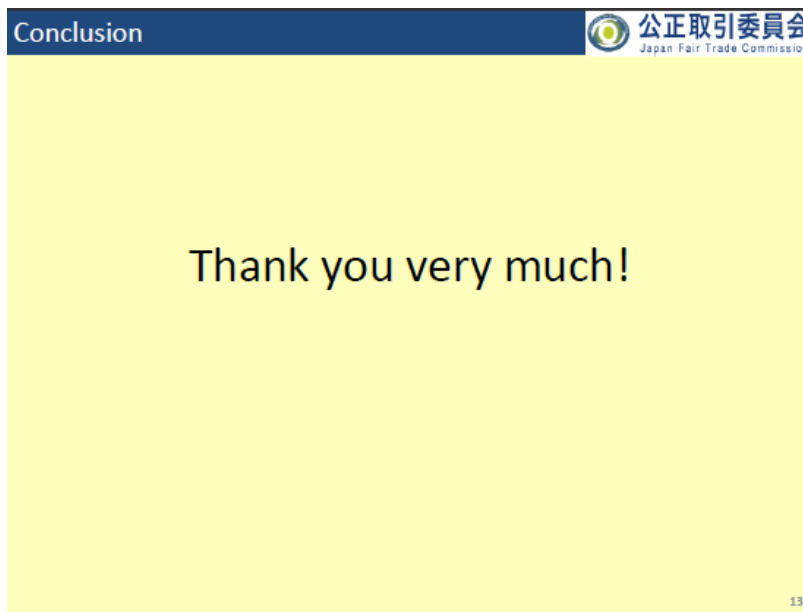
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Among those unfair trade practices, there is a type of conduct referred to as “abuse of a superior bargaining position.” The definition of the term is described here in detail.

Typically, this term refers to the abuse of the bargaining power of buyers. There are a number of cases where a large-scale supermarket abused its bargaining power against suppliers.

The regulation against unfair trade practices is different from private monopolization in terms of the content and purpose of the regulation, which presupposes the existence of a certain degree of market power and focuses on abusive behaviors exercised directly or indirectly against competitors. Moreover, to establish unfair trade practices, there is no need to prove the existence of a substantial restraint of competition.

## **4 Conclusion**



So far, I have provided a very brief explanation of the regulations against unilateral conduct in Japan. It goes without saying that every antitrust authority needs to take strict actions against any acts that may infringe the benefits of economic globalization. At the same time, a level playing field or an equal footing in competitive terms in globalized markets must also be secured not only among large companies, but also between the relationship of large companies vis-a-vis small and midsize companies. To achieve this goal, I believe the regulations against unilateral conduct in Japan are functioning very effectively at present.

Through this presentation, I have briefly explained our regulations against unilateral conduct. I hope that our experiences will be of some assistance to my colleagues gathered here today.

I thank you for kind attention.