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**REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Japan**

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More documentation related to this discussion can be found at: [oe.cd/sctr](https://oe.cd/sctr).

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

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## *Remedies and Commitments in Abuse Cases*

### - Contribution from Japan -

#### 1. Introduction

1. In Japan, a single-firm conduct is governed by Article 3 of the Antimonopoly Act (hereinafter referred to as “AMA”), which prohibits private monopolization<sup>1</sup>, and Article 19 of the AMA, which prohibits unfair trade practices<sup>2</sup>. Article 3 of the AMA is basically enforced by the Japan Fair Trade Commission (hereinafter referred to as “JFTC”)<sup>3</sup>, and Article 19 is enforced through administrative procedures with the JFTC or through civil procedures including injunction lawsuits.

2. Enforcement by the JFTC against single-firm conducts has been mainly through cease-and-desist orders, which order enterprises to take remedies<sup>4</sup>. In recent years, the JFTC has also been handled single-firm conduct cases following the commitment procedure, although the procedure does not involve a finding of violation. In addition, the JFTC sometimes closes its case investigation, when the suspected violator voluntarily offers to take remedies, on the condition of implementation of the remedies.

3. This note discusses remedies in single-firm conduct cases in Japan, focusing on the procedures and systems regarding remedies, the details of remedies, selection of procedures, means of ensuring the implementation of remedies, and the status and trends of case handling by the JFTC in recent years.

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<sup>1</sup> Private monopolization refers to a conduct which excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in the relevant market (Article 2 (5) of the AMA). (“[C]ontrol” refers to an act to restrict decision-making of other enterprises by contract, shareholding or other ways to make them to follow one's own will.)

The scopes of “private monopolization” and “unfair trade practices” of the AMA are not the same as “abuse of a dominant position” of the EU competition law, etc.

<sup>2</sup> Most forms of conduct which may constitute unfair trade practices, (e.g., unilateral refusal to deal, predatory pricing, tying, exclusive dealing, etc.) may also constitute private monopolization. However, private monopolization requires a substantial restriction of competition in the relevant market, which means formation, maintenance or enhancement of a market power, while an unfair trade practice requires only a tendency to impede fair competition, which is established even with a weaker restriction effect on competition than a substantial restriction of competition.

<sup>3</sup> In cases where criminal penalties are imposed for violations of the article, the court is supposed to give a judgment after criminal procedures based on accusation brought by the JFTC, but there have been no cases where the JFTC brought accusation against a private monopolization.

<sup>4</sup> Private monopolizations may also be subject to a “surcharge” (administrative fine) payment order, and there has been only one case so far, against Mainami Aviation Services Co., Ltd. the outlines of which is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210219.html>. In addition, some types of unfair trade practices may also be subject to “surcharge” payment orders, and there have been four cases so far, all of which involved abuse of a superior bargaining position.

## 2. Procedures and systems

4. There are four types of procedures on remedies against a single-firm conduct which violates, or is suspected to violate, the AMA: (i) cease-and-desist order by the JFTC, (ii) commitment procedure, (iii) closing an investigation with a voluntary measure offered by the suspected violator, and (iv) civil litigation. Of these, (i) through (iii) may be used for both private monopolization and unfair trade practices, while (iv) may be used only for unfair trade practices.

### 2.1. Cease-and-desist order

5. A cease-and-desist order is an administrative order which may be issued by the JFTC when it finds a violation of the AMA.

6. With regard to a cease-and-desist order against private monopolization, Article 7, Paragraph 1 of the AMA provides that the JFTC may order enterprises to take necessary measures to eliminate the violation, including cease of the relevant act and partial transfer of the business. In addition, pursuant to Paragraph 2 of the same Article, even in cases where the violation has already ceased to exist, the JFTC may order enterprises to take measures necessary to ensure the elimination of the violation, including publicizing the fact that the violating act has already ceased to exist, when the JFTC finds such an order particularly necessary. Cease-and-desist orders against private monopolization have been issued three times during the period from 2006<sup>5</sup> to the end of September 2022<sup>6</sup>.

7. With regard to a cease-and-desist order against unfair trade practices, Article 20, Paragraph 1 of the AMA stipulates that the JFTC may order enterprises to take necessary measures to eliminate the violation, including cease of the relevant act and deletion of a contract term. In addition, pursuant to Paragraph 2 of the same Article, even in cases where the violation has already ceased to exist, the JFTC may order enterprises to take measures necessary to ensure the elimination of the violation, including publicizing the fact that the violating act has already ceased to exist, when the JFTC finds such an order particularly necessary. Cease-and-desist orders against unfair trade practices have been issued twenty-three times during the period from 2006<sup>7</sup> to the end of September 2022<sup>8</sup>.

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<sup>5</sup> The current system of cease-and-desist orders was introduced by the amendment of the AMA in 2005, which came into effect on January 4, 2006. Prior to that, remedies were ordered by the JFTC through a different procedure.

<sup>6</sup> Cease-and-desist orders against Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) on February 27, 2009, the outlines of which are available at <https://www.jftc.go.jp/en/pressreleases/yearly-2009/feb/individual-000063.html>, against the JA Fukui Prefectural Economic Federation of Agricultural Cooperatives on January 16, 2015, the outlines of which are available at <https://www.jftc.go.jp/en/pressreleases/yearly-2015/January/150116.html>, and against Mainami Aviation Services Co., Ltd., the outlines of which are available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/July/200707.html>.

<sup>7</sup> See footnote 5 above.

<sup>8</sup> During the same period, the JFTC also issued seven cease-and-desist orders against resale price maintenance or the like and a cease-and-desist order against group boycott. Although they fall under the category of unfair trade practices, they are excluded from the count because they are not similar to abuse of dominant position in light of the conduct types.

8. A natural or legal person who fails to comply with a cease-and-desist order after it has become final and binding is subject to criminal penalties according to Article 90, Item (iii) of the AMA, but there have been no applicable cases to date.

## 2.2. Commitment procedure

9. The commitment procedure is a procedure whereby a suspected violation of the AMA is resolved by agreement between the JFTC and the suspected violator. In the procedure, the JFTC does not find that the relevant conduct consists a violation of the AMA.

10. The commitment procedure is initiated when the JFTC notifies the suspected violator of the AMA that the suspected violator is suspected of violating the provisions of the AMA, that it may apply for certification of a commitment plan, and so on. The JFTC may, when finding it particularly necessary, give such a notice even if the suspected conduct has already ceased to exist.

11. The enterprise who has received the notification may voluntarily prepare a plan for remedies (hereinafter referred to as “commitment plan”) and apply for approval of the plan to the JFTC. If the JFTC finds that the remedies are sufficient and expected to be reliably conducted, it approves the commitment plan. In this case, to the extent that the enterprise executes the commitment plan, the JFTC will not issue a cease and desist order or a “surcharge” payment order (Articles 48-2 to 48-9 of the AMA). For an enterprise who has received the notification, applying for approval of a commitment plan is optional, and, if no application is filed, the JFTC is supposed to reopen the investigation of the case<sup>9</sup>.

12. From the beginning of 2019, when the commitment procedure was virtually put into operation<sup>10</sup>, to the end of September 2022, there was nine cases<sup>11</sup> in which the JFTC approved commitment plans.

13. If an enterprise which was approved for a commitment plan fails to execute it, the approval is rescinded and the JFTC is supposed to reopen the investigation.

## 2.3. Closing investigation with voluntary remedies

14. When a suspected violator voluntarily offers to take remedies during the case investigation, the JFTC may terminate the investigation on the condition that the remedies

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<sup>9</sup> The details of the commitment procedure are described in the “Policies Concerning Commitment Procedures,” which is available at [https://www.jftc.go.jp/en/legislation\\_gls/antimonopoly\\_rules\\_files/policies\\_concerning\\_commitment\\_procedures.pdf](https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/policies_concerning_commitment_procedures.pdf).

<sup>10</sup> The commitment procedure was introduced by the amendment of the AMA in 2016, which came into effect on December 30, 2018.

<sup>11</sup> Cases involving acts that are not considered to be single-firm conduct internationally, such as resale price maintenance, are excluded. However, MFN or parity cases (three cases involving online travel agents) were included in the number of cases because, while internationally it is often regarded as a matter of a concerted action or vertical agreement, there are some cases in which such a conduct was considered to potentially constitute an abuse of dominant position. See e.g. Case AT.40153 E-book MFNs and related matters (Amazon), commitment decision by the DG COMP on May 4, 2017, and the case of Booking.com, commitment decision by the Autorité de la concurrence (French competition authority) on April 21, 2015.

are implemented. This is considered to be based on the discretion of the JFTC regarding whether or not to conduct investigation.

15. In this case, there are no rules, including laws and regulations, regarding the content of remedies. Also, unlike the commitment procedure, it does not have the legal effect that the suspected violator will not be subject to a subsequent cease-and-desist order or “surcharge” payment order.

16. The JFTC published five cases in which the investigation was closed with voluntary measures offered by the suspected violator from the beginning of 2019 to the end of September 2022.

## 2.4. Injunction suit

17. Unfair trade practices may also be eliminated through civil injunction suits<sup>12</sup>. Article 24 of the AMA provides that a person whose profits have been infringed or are likely to be infringed by a violation may, if considerable damage has been caused or is likely to be caused by the violation, seek a halt to or prevention of the infringement.

18. Although it is difficult to ascertain the exact number of injunction claims, it is believed that there have been only a few cases where injunction was affirmed by the courts. Since the introduction of the injunction system in 2000 with the amendment of the AMA, only a few cases are known in which injunction was affirmed in whole or in part by the courts.

## 3. Details of remedies

### 3.1. General measures

19. Remedies given by a cease-and-desist order or a commitment generally include termination and non-repetition of the violation or suspected violation, dissemination of the remedies to relevant players including consumers and business partners, establishment of a system to prevent recurrence such as formulating guidelines for compliance with the AMA, and periodic reporting to the JFTC on the status of the implementation of the measures.

20. In cases of closing of investigation, voluntary remedies generally include termination of the suspected violation.

### 3.2. Specific measures

21. Details of remedies may be designed on a case-by-case basis to the extent allowed by the requirements described in 2.1. above for cease-and-desist orders and in 2.2. above for commitment procedures. For example, in the commitment case of Amazon Japan G.K. in 2020<sup>13</sup>, the approved remedies included payment by Amazon Japan to its suppliers of

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<sup>12</sup> Although injunctive actions may not be filed for private monopolization, most of types of conduct which may constitute private monopolization may also constitute unfair trade practices. See footnote 2 above.

<sup>13</sup> In this case, retrospective reduction of purchase prices and requests for monetary provision to suppliers by Amazon Japan were investigated on suspicion

money to recover the disadvantages caused by the suspected violation. In the commitment case of BMW Japan Corp. in 2021<sup>14</sup>, the remedies included establishment of a contact point outside BMW for dealers to report suspected violations of the AMA.

22. Also, in cases of closing of investigation, other measures as well as termination of suspected violation may be adopted. For example, in the Apple Inc. case publicized by the JFTC in 2021<sup>15</sup>, the remedies offered by Apple Inc. included annual reporting to the JFTC of the implementation status of remedies for three years.

23. For another example, in Osaka Gas Co., Ltd. case publicized by the JFTC in 2020<sup>16</sup>, Osaka Gas was suspected of unfairly excluding competitors by entering into a contract with customers that stipulated, among other things, that the customer would incur a large amount of financial burden in the event of a mid-term termination of the contract with Osaka Gas. The remedies included revision of the stipulations of the relevant contracts to reduce the amount of financial burden on customers in the event of change of a gas supplier from Osaka Gas to a competitor. In the press release of this case, the JFTC stated that, in determining whether or not imposing a mid-term termination fee is "unfair" under the AMA, it takes into account the amount of damages reasonably expected to be incurred due to mid-term termination of contracts and other factors.

### 3.3. Structural remedies

24. Given that Article 7, Paragraph 1 of the Antimonopoly Act states that the JFTC may order an enterprise to cease and desist the relevant act, transfer a part of its business, or to take any other measures necessary to eliminate the act in violation of the Article 3 as described in 2.1. above, it should be possible for the JFTC to order a structural remedy, at least a partial transfer of business, against private monopolization in a cease-and-desist order, if necessary.

25. However, with respect to private monopolization, measures that may be ordered are those *necessary* to eliminate the violation, as described in 2.1. above, and this is also true for unfair trade practices, as stated in 2.2. above. At present, there is no specific or clear standard for when it is necessary to order structural remedies to eliminate private monopolization or unfair trade practices and the necessity of such remedies should be considered on a case-by-case basis from the perspective of eliminating violations.

26. In cases of violation or suspected violation of exclusionary private monopolization or unfair trade practices, no structural measures have ever been taken as remedies.

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of abuse of superior bargaining position. See <https://www.iftc.go.jp/en/pressreleases/yearly-2020/September/200910.html>.

<sup>14</sup> In this case, BMW Japan's setting of excessive sales volume targets for dealers and other conducts were investigated on suspicion of abuse of superior bargaining position. See <https://www.iftc.go.jp/en/pressreleases/yearly-2021/March/210312.html>.

<sup>15</sup> <https://www.iftc.go.jp/en/pressreleases/yearly-2021/September/210902.html>

<sup>16</sup> <https://www.iftc.go.jp/en/pressreleases/yearly-2020/June/200602.html>

27. On the other hand, regarding control type of private monopolization, means of “control” may include shareholding, and there was a case in which disposition of shares was ordered as a part of remedies for controlling by shareholding<sup>17</sup>.

#### 4. Selection of procedures

28. The basic policy of the JFTC is to strictly enforce the law, by cease-and-desist orders and other tools, with respect to single-firm conduct. A cease-and-desist order has the following advantages: the conditions under which an single-firm conduct constitutes a violation may be clarified since a violation is found before a legal measure; the implementation of remedies may be ensured by criminal penalties for violations of the order; and if a revocation action is filed, the judgment may clarify the criteria for determining illegality.

29. On the other hand, commitment procedures and closing of investigation with remedies, since it is not necessary for the JFTC to collect the evidence to find a violation, have the advantages that the investigation may be terminated earlier and remedies may be taken more quickly. In addition, a wider range of remedies may be taken than with a cease-and-desist order, because the suspected violator itself designs the remedies and there is no "necessity for elimination of violation" requirement which exists with a cease-and-desist order (see 2.1. above). Furthermore, since case investigation may be terminated earlier and there is no possibility of a revocation lawsuit being filed, the JFTC may save resources and use them to investigate new cases. On the other hand, commitment procedures and closing of investigation with remedies may only be adopted when the suspected violator is willing to take a remedy.

30. In Japan, procedures for single-firm cases are selected depending on the characteristics of individual cases while taking the above points into consideration.

#### 5. Implementation and monitoring

31. When remedies include periodic reporting to the JFTC, the status of implementation of the remedies may be monitored through the reporting. In addition, if remedies include dissemination of the details of the remedies to other entities such as consumers and business partners, it is expected that the entities disseminated will report to the JFTC if the violator or suspected violator does not implement the remedies.

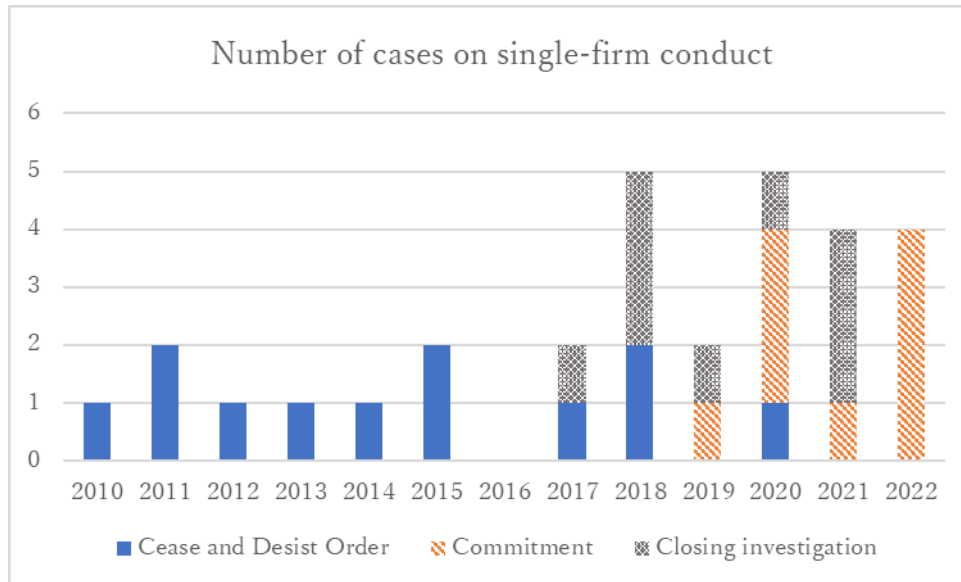
#### 6. Status and trends of case handling by the JFTC

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<sup>17</sup> Toyo Seikan case (recommendation decision in 1972). For more information on the Toyo Seikan case, see contribution from Japan for “Remedies and Sanctions in Abuse of Dominance Cases” (OECD, 2006), which is available at <https://www.oecd.org/competition/abuse/38623413.pdf>.

32. The chart below shows the number of single-firm cases which were handled by the JFTC and accompanied by remedies since 2010<sup>18</sup>.

**Figure 1. Number of cases on single-firm conduct**



33. Before 2016, the number of cases was 1 or 2 per year (around 1.3 cases per year in average), while, after 2016, the number of cases ranged from 2 to 5 per year (around 3.7 cases per year in average).

34. The chart shows that the number of single-firm cases handled by the JFTC has increased, as closing of investigation with remedies has taken place since 2017 and commitments have been utilized since 2019.

## 7. Conclusion

35. In cases involving single-firm conduct, remedies are taken based on a cease-and-desist order, commitment or voluntary offer from enterprises with closing of investigation.

36. The JFTC has a basic policy of taking a strict measure including a cease-and-desist order against single-firm conduct, while, if suitable in light of the characteristics of individual cases, it also deals with problems arising from single-firm conduct in a proper and prompt manner by utilizing commitment procedures and closing of investigation with remedies, which have the advantage of correcting competition problems at an early stage.

<sup>18</sup> It shows the number of cases for which remedies were taken and the details of which were disclosed. In 2016, the number was zero. The figures for 2022 represent number of cases up to the end of September.