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# A comparative study between EU and Japanese Competition Law.

Abuse of a dominant position – exploitative abuses –

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## **Summary**

The competition policy is an area of law that moulds itself according to the structure of the society and evolves by habitually adjusting to the dynamics of the national economies. Due to various historical contexts as well as to the distinct economic systems, the competition law in EU and Japan walked on different paths at different rhythms. However, in both jurisdictions the dissimilarities have been built on the same foundation – the desire to ensure the consumer welfare and to preserve a free and fair competitive environment.

Exploitative abuses are practices that inflict harm directly on consumers and despite the fact that in EU such practices have not garnered much awareness in the past three decades their negative effects on the market cannot be overlooked. In EU law the exploitative conducts fall under article 102 TFEU which prohibits any abusive behaviour within the internal market committed by a dominant undertaking. In Japan, exploitative conducts are covered by two provisions within the Anti Monopoly Act: private monopolization by control and unfair trade practices.

The concept private monopolization by control depicts the business activity by means of which an entity, or a group of entities, substantially restricts competition in a particular field by controlling the business activities of other enterprises. Substantial restraint of competition is the Japanese correspondent for dominant position, both notions requiring a certain degree of market power. However while in the case of dominant position the market power is a prerequisite element of the abuse, substantial restraint of competition is judged based on the aftermaths of the abusive practice.

Unlike its EU counterpart, private monopolization can be executed by indirect control also. Indirect control illustrates a situation in which a certain undertaking is so influential over a market that its behaviour works like a Ripple effect dictating the conditions of the market.

When the abusive conduct carried out by an undertaking does not substantially restrict competition, but does however tend to impede competition then it could be classified as an unfair trade practice. The unfair trade practices are listed by the JFTC in a designation notice and are conducts that have a tendency to jeopardize competition on merits. Due to the fact that market power is irrelevant when identifying these practices it is unlikely that by EU standards they would be found infringing article 102 TFEU. Moreover, among them there are a few types of conducts that in EU would depart from the realm of competition law.

The abuse of superior bargaining position has been one of the main priorities pursued by the JFTC in the past few years and covers abuses executed by retailers against suppliers. In EU the concept is known as abuse of dominant buyer power and as confirmed by the CJEU can amount to a breach of article 102 TFEU.

## Preface

Thanks mom and dad for your continuous love and for always believing in me.

Secondly, I would like to thank Professor Henrik Norinder for being as excited about the topic of this thesis as I was. It was the best motivation and the amount of support was immeasurable.

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*Ioana Nicolae*

# **Chapter I Introduction**

## **I.1 General introduction**

Across the Globe competition law today is a plethora of rules. While in the 28 member states of the European Union (EU), through the efforts exerted by the Commission, a certain degree of uniformity has been established, beyond the borders of the union the competition policy is characterized by diversity, with every state adopting a legislation adjusted to their economical structure and historical heritage. As a result, international companies that have branches in more than one jurisdiction might find themselves in a predicament regarding which rules they need to abide by and where. The more a certain undertaking expands its business activity the deeper the doctrinal puzzlement it encounters.

This study is build around the competition policies of two major jurisdictions – EU and one of its most important trading partners, Japan – and is focused on the concept of exploitative abuse of dominant position and its Japanese counterparts Private Monopolization by control and Unfair Trade Practices. Once the EU competition law has crossed the thresholds into a modern era, the Commission's interest towards the abuses exploitative in character seems to have been unmoored from its enforcement priorities. However, in both jurisdictions, due to their immediate results, undertakings find it at hand to employ such practices and their severe outcomes cannot be undermined especially when considering that the harm is inflicted straight on the consumers. The purpose of this paper is to shed some light over the enforcement against exploitative abuses in EU and Japan and to shape a comprehensive theoretical model of the concept by pointing out the similarities, the differences and the peculiarities of the legislations in the two jurisdictions.

## **I.2 The research question and the hypothesis**

The main research question on which the herein study will be constructed around is *how does the EU approach on the legal concept of exploitative abuse of dominant position reflect in the competition policy of Japan and what are the differences and similarities generated in regard to its enforcement in the two jurisdictions?*

In order to properly understand such similarities or differences a series of sub-questions will need to be addressed. The first one would be - *how has the competition policy in the EU and Japan evolved over time?* The study will explore the historical development process of the competition law in the two areas from the moment the first provisions were inscribed on paper in the post war period and until the latest amendments to date.

The second sub-question pertinent to this research is *what are the main structural features of the Japanese competition law and what are their correspondents in EU law?* The

approach adopted in answering this question is presenting the Japanese Anti Monopoly Act through an European filter.

In order to answer the main research question it is of paramount necessity to identify how dominant position reflects in the AMA provisions and if the method of implementing it follows or otherwise departs from the European process. Thus, the third sub-question – *what is the approach adopted by the two jurisdictions regarding the concepts of dominant position, substantial restraint of trade and tendency to impede competition?* – bears intrinsic relevance for the purpose of this research.

The forth and last sub-question would be *what are the commonalities and dissimilarities between the concept of exploitative abuse and its Japanese counterparts private monopolization by control and exploitative unfair trade practice?* The main forms of such conducts will be analyzed in parallel by pointing out the similarities and the peculiarities specific to each jurisdiction.

The hypothesis from which this study proceeds forward is that while in both EU and Japan the treatment towards exploitative conducts has a lot of communalities, at the same time a lot of peculiarities specific to each jurisdiction arise.

### I.3 Method and materials

The methodology followed into creating this study was the library-based qualitative research. The first step employed was collecting the relevant information in connection with exploitative abuses in EU and Japan, by inspecting different sources of material like books, legislations, guidelines, articles, court decisions and various orders or decisions issued by the competition authorities. The second step was the analysis of the gathered information by structurally separating it according to the research plan and by determining the essential features that are going to be emphasized. Additionally, a second method has been utilized – the comparative method – which entails processing the information in parallel for both EU and Japan and pinpointing the common features as well as the distinguishable traits specific in the two jurisdictions. The process implies synthesizing the Japanese competition policy from the familiar perspective of EU competition law.

While the European Commission (“the Commission”) may not have displayed much concern towards exploitative abuses in the past few years, nonetheless gathering information about EU law did not prove to be a daunting challenge at all. Among the many books published on EU competition law the ones that inspired me the most and which were predominantly used during this research are “EU Competition Law. Text, Cases, and Materials” authored by Alison Jones and Brenda Sufrin and “European Competition Law: A Practitioner’s Guide” written Lennart Ritter and W. David Braun. An essential role within the comparison was played by the

case law of the Court of Justice of the European Union (CJEU), the EU treaties as well as other secondary sources of law like the Commission's guidance papers.

The research materials available in English in connection to the Japanese competition law were not as abundant. The main source of information was the English version of the website of the Japanese Fair Trade Commission (JFTC), which contains a large data base of cease and desist orders, warnings and recommendations issued to companies as well as the articles, reports, the Anti Monopoly Act (AMA) and other relevant acts and guidelines. Furthermore, the literary works of Mitsuo Matsushita, professor at Tokyo University, provided an insightful perspective over the purpose, content and functionality of the AMA provisions.

#### **I.4 Delimitations**

Competition law is a vast field of law, comprised of a wide array of issues and concepts. While other concepts like unreasonable restraint of trade (cartels and other horizontal agreements) and private monopolization by exclusion (exclusionary abuse of dominant position) are cursorily introduced within Chapter III, the study deals predominantly with the notion of exploitative abuse of dominant position and its Japanese correspondents private monopolization by control and exploitative unfair trade practices. Thus, issues related to mergers or acquisitions will not be addressed at all.

Furthermore, the research will focus only around the two territories mentioned - EU and Japan -, no reference to elements specific to competition policies pertaining to other jurisdictions will be addressed. Likewise, national legislation or case-law sprouted from the members states will not be covered by this study, as the European dimension will be considered only at the Union level.

Lastly, the research will revolve around comparing the characteristics and the intrinsic purposes of the elements composing the notion of exploitative abuse of dominant position and its Japanese counterparts. It will deal exclusively with the meanings behind the legal provisions as well as with their application; however it will not touch at all upon any procedural aspects employed by the Commission or by the JFTC.

#### **I.5 Disposition**

In the light of the research questions this study has been designed to comprise 5 chapters. The second chapter portrays a chronological evolution of the competition policies in EU and Japan by focusing on the major key moments that carved their print into what it is today competition law. The ups and downs of the policy enforcement will be depicted as well as the incongruities arising against the social and historical background.

The third chapter commences by firstly designating the aims and the purposes that competition law seeks to accomplish in the two territories. The pawns running around the

competition law board are enterprises and undertakings. Understanding who these pawns are is crucial for the rest of the analysis, thus the chapter continues by taking a general look into the concepts of undertaking/enterprise. The central pillars of the Japanese competition law - monopolization, unreasonable restraint of trade, unfair trade practices - are also presented within the third chapter in the light of their European correspondents.

The forth chapter addresses the central research question of the paper and is separated into two subchapters. The first subchapter contains a comparative assessment of the concepts of dominant position, substantial restraint of competition and tendency to impede competition. The second part deals with various forms of exploitative abuses and examines their projection into reality by taking a look at the cases pursued by the JFTC or the Commission.

The fifth and the last chapter sets forward the conclusions reached as a result of the research. In the light of the comparative analysis engaged within the study answers to the research questions will be provided accompanied by an overall view over the outcome of the paper.

## **Chapter II Historical Background and development of the provisions**

### **II.1 The post war period - the foundation of the competition policies in EU and Japan**

The birth of competition law can be pinpointed in the period following the Second World War, for both jurisdiction – Japan and the European Union, union which at that point was in its inception phase. It can be said in fact that competition law in the EU has come into existence and developed in parallel with the union itself and from the onset it has been regarded as a weapon to protect and maintain the internal market.

In Europe, in order to cool off the aftermaths of the war the so-called European integration process was set into motion and the first step was the creation of the European Coal and Steel Community which had as its primary goal the *de facto* partnership between Germany, France and other European states in the area of coal and steel. Thus, by the means of the Treaty of Paris in 1951, the aspiration towards the “United States of Europe” has planted its seed and together with it the first competition law provisions applicable at an European level were shaped into their incipient form within the article 65 and 66. The inter-war period was characterized by a high degree of tolerance towards cartels which together with the geographical price discrimination and the national trade barriers amounted to a distortion of the common market on the two markets.<sup>1</sup> The perceptions towards cartels, which were inherent in the economic structure at the time, changed. They began to be regarded as a malignant tumour which led to the elimination of competition and exploitation of the markets, practices which were not serving the public interest. The reasoning behind introducing a supra-national competition dimension was without a doubt the fight against cartels, with the High Authority being entrusted with the mission to create market conditions specific to perfect competition<sup>2</sup>.

On the other side of the world, in Japan the first piece of competition regulation was enacted also in the post World War II (WWII) period, more specifically in 1947; however the purpose behind it was somewhat different from the one on the European land. During the heavy industrialization of Japan which started in the late nineteenth century, the government itself was the one that managed the key industries and in the following period decided to sell them at extremely low prices to companies operating in the private sectors. This led to the creation of the

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<sup>1</sup> Laurent Warlouzet, *The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere*, European University Institute, Florence, Robert Schuman Center for Advanced Studies, p.7

<sup>2</sup> Anca D Chiriță, *A Legal Historical Review of the EU Competition Rules*, International & Comparative Law Quarterly, 63 ICLQ 2 (2014)

so-called *zaibatsus* (財閥), the family-dominated combines with substantial market shares<sup>3</sup>, and to the monopolization of the whole Japanese economy<sup>4</sup>. According to Mitsuo Matsushita, professor of law at the Tokyo University, the *zaibatsus* were “very large industrial conglomerates composed of many enterprises engaged in various industries controlled by a head company and linked through mutual stock holdings and interlocking directorates”<sup>5</sup>. Unlike Europe, where the cartels were merely tolerated in the inter-war period, in Japan in the 1930<sup>th</sup> the different legislations adopted created the perfect environment and actually encouraged the establishment of cartels. Until late 1970<sup>th</sup> some of cartels were formed and operated under the guidance of the government through its ministries.<sup>6</sup> Highly concentrated markets were not seen as being harmful and in 1942 there were 17 *zaibatsus* in Japan that dominated the economy. Japan was actively promoting a monopolistic system<sup>7</sup> and it is believed by some authors that even the “uniquely Japanese system” - main bank system, close government industry relation and life-long employment - prevalent today in the Japanese society has its roots in that monopolistic system and in that period.<sup>8</sup>

The situation, however, saw a great turn of events once the WWII ended, with Japan entering a period of political and economic reform under the supervision of the Occupational Forces whose central pillar were the United States of America. The democratization process which was more or less imposed on Japan targeted three major fields – agriculture, labour and industry- and was never intended to create an economically flourishing Japan, but rather to eliminate any trade barriers for foreign undertakings. The *zaibatsus* and their practices were seen by the United States as the driving force behind the “foreign aggression” that characterized the Japanese society at the time, and their dissolution became the primary goal of the economic democratization.<sup>9</sup> In the context of dismantling the *zaibatsus* the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (私的独占の禁止及び公正取引の確保に関する法律 - *Shiteki dokusen no kinshi oyobi kousei torihiki no kakuhō nikansuru houritsu*), simply known as the Antimonopoly Act (AMA) came into existence together with the Japanese Fair Trade Commission (JFTC) the government agency, with quasi-judicial and quasi-legislative powers that was in charge of implementing the antitrust law.<sup>10</sup>

Compared to the goal pursued by the newly established European Union through its competition provisions, which was basically the fight against cartels in order to ensure market integration, the Japanese AMA was seeking to establish a “free enterprise system” in a new

<sup>3</sup> Alex Y. Seita, Jiro Tamura, *The historical background of Japan's Antimonopoly Act*, University of Illinois Law Review, Vol. 1994, No. 115, 1994

<sup>4</sup> Oda Hiroshi, *Japanese Law*, Third Edition, Oxford University Press, 2009, p.327

<sup>5</sup> Matsushita Mitsuo, *International Trade and Competition Law in Japan*, Oxford University Press, 1993, p. 76

<sup>6</sup> Alex Y. Seita, Jiro Tamura, Idem 3, p. 327, p. 342

<sup>7</sup> Matsushita Mitsuo, *The Antimonopoly Law of Japan, Global Competition Policy*, Institute for International Economics, p. 151-199, p. 151

<sup>8</sup> Y.Noguchi, “1940 Nendai Taisei (The 1940<sup>th</sup> Regime)”, Tokyo, 1995, quoted by Hiroshi Yoda in *Japanese Law*

<sup>9</sup> Alex Y. Seita, Jiro Tamura, Idem 3

<sup>10</sup>Oda Hiroshi, Idem 4, p. 327

economically deconcentrated Japan. Although the danger of concentrations arising was foreseen, the first EU antitrust provisions were mainly prohibiting agreements, decisions by associations of undertakings and concerted practices that tend to prevent, distort or restrict competition, with weak provisions against monopolizations of markets or economic concentrations included in article 66 of the ECSC.<sup>11</sup> On the other hand the AMA appeared to focus more on prohibiting practices like private monopolization and unfair trade practices (provisions which are generally associated with the later abuse of dominance concept), rather than cartels<sup>12</sup>.

The original AMA was shaped greatly after its American counterpart *The Sherman Act* but the content was considered by many to be harsher and more stringent, as during the occupation the attempt was to implement in Japan a model that was envisaged by the Americans but failed to be wholly introduced in the USA.<sup>13</sup> Levelling down the Japanese economy was the aim envisaged by means of a piece of legislation that never existed before nor after for that matter in any other jurisdiction. Bigness was condemned just for being big, large size was considered in itself the evil of all evils. Among the restrictions worth mentioning are the *per se* illegality of establishing a holding company, ban on non-financial companies to create subsidiaries or to engage in joint ventures, ban of large intercompany loans and on holding executive positions in more than one company. The original form of what today are “abuse of superior bargaining position” and “monopolistic situations” provisions was the “undue disparity of bargaining power”, however what was condemned was not the abuse of it but the disparity itself and the act conferred the JFTC competence to take any action it finds suited were such a situation to arise. The provision was probably the most surprising part of the AMA as it was according to some authors simply “attacking bigness for bigness’s sake”.<sup>14</sup>

The perception at the moment was that by adopting a more potent antitrust law than in the USA, the ultimate goal was to create in Japan an ideal business environment, radically different from the previous traditional system but in the end while the aspiration was noble at its core the practicability proved to be just a dream. Naturally the incompatibility between the Japanese society and the extreme stringent provisions included in the AMA led to its amendment to a new version in 1953 immediately after the end of the occupation period.<sup>15</sup> To state that the new version was more relaxed compared to the original one should be considered an understatement, as cartels were no longer prohibited *per se*, but only if they caused a “substantial restrained of competition”, “depression cartels” and “rationalization cartels” were permitted whereas article 8 concerning “undue disparity of bargaining power” was simply repealed in its entirety. However the amendment did not seek to bury competition altogether and resort to the old traditional

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<sup>11</sup> The Treaty Establishing the European Coal and Steel Community

<sup>12</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)

<sup>13</sup> Oda Hiroshi, *idem* 4, p.328

<sup>14</sup> Dan F. Henderson, *Foreign Enterprise in Japan: law and policies*, Chapel Hill, University of North Carolina Press, 1973, p.151

<sup>15</sup> Alex Y. Seita, Jiro Tamura, *The historical background of Japan’s Antimonopoly Act*, University of Illinois Law Review, Vol. 1994, No. 115, 1994, p.167

Japanese practices as the regulations regarding “unfair business practices” were somewhat widened to include further practices in order to protect small enterprises from the abusive behaviour of large enterprises.<sup>16</sup>

## II.2 The intermediate period – the broadening of the horizons

After its implementation in Japan, the AMA was ambitiously and somewhat unnaturally strongly enforced by JFTC under the pressure of the Occupational Forces until 1950, but in reality it is said that its application within the first two decades was anaemic at best.<sup>17</sup> While the Japanese were reluctant to the AMA as it appeared to stand against everything they previously thought good for their economy, in Europe, following the enactment of the ECSC, the situation was characterized by confusion and ignorance in what concerned the role of the competition rules in the bigger picture. It is in that context that the negotiations of the Treaty of Rome were set into motion. The common market was still the ultimate goal and its establishment was to be based on free movement regulations backed up by competition rules which were supposed to annihilate private barriers to trade.<sup>18</sup>

This idea was fully developed in the so-called Spaak report which is considered a preparatory work for the future Treaty of Rome (the EC Treaty). Furthermore, the report build up the basis of a *de minimis* criterion by stating that it is necessary first to identify practices that affect the cross-border competition and afterwards, whether such distortions are a real and serious threat to the competition relations.<sup>19</sup> The EC Treaty which officially gave life to the European Economic Community was signed in 1957 and entered into force on the 1<sup>st</sup> of January 1958, laying the basis also for what is today the EU Competition law. Unlike the ESCS Treaty’s antitrust provisions which were influenced by the American antitrust legislation, during the negotiations of the Treaty of Rome, the drafters chose to ignore the anti monopoly pattern specific to the *Sherman Act* although the possibility of adopting it was mentioned in the Spaak Report. The German delegation strongly opposed a law prohibiting monopolies or market dominance *per se* based on the view that the struggle of the undertakings to acquire market power could be an effective force to create a dynamic competition environment. It was in this context that the German suggestion to prohibit abuse of dominant market power found support even though it was a vague concept characterized by uncertainty in what it concerned applicability since at the time there was no “model” tested in other jurisdictions.

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<sup>16</sup> Matsushita Mitsuo, *idem* 5, p. 80

<sup>17</sup> Simon Vande Walle, Tadashi Shiraishi, *Competition Law in Japan*, January 1, 2015,  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2219881](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219881)

<sup>18</sup> Claus-Dieter Ehlermann, Mel Marquis, *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, First Edition, Hart Publishing, 2007, p. 128

<sup>19</sup> Carl Michael Quitzow, *State measures distorting free competition in the EC: a study of the need for a new Community policy towards anti-competitive State measures in the EMU perspective*, European business law & practice series, 2002, p. 7-8

The German Ordoliberalism doctrine seemed to have made its way into the new competition regulations, its beliefs being transposed especially by means of article 82 EC Treaty.<sup>20</sup> The French delegation had a victory of its own during the negotiations as the EC Treaty did not provide any insight as to how and by whom the provisions were to be enforced. That changed with the introduction of the *Council Regulation 17/62* in 1962 which founded a centralized enforcement system with the Commission (Directorate General for Competition – DG COMP) endowed with the power to ensure the applicability of the provisions. Despite the fact that the following period was characterized by some of the most seminal court decisions made by the Court of Justice of the European Union (CJEU), the development of competition in the EU was somewhat slow. The Commission found itself bogged up due to the mandatory notification system and its exclusive competence to apply article 81(3) of the EC Treaty. In order to counteract that and to speed up the case management time the Commission adopted a series of tools like the block exemption regulations, guidelines, negative clearance decisions, *de minimis* notices etc.<sup>21</sup>

Article 82 was not even once enforced in the first decade of its existence and many commentators at the time believed that the only purpose it served was to prevent exploitative abuses. The *Continental Can Case* changed that view and future case law went even further to opening new doors for the application of article 82 of the EC Treaty.<sup>22</sup> Among the judicial decisions worth mentioning are *Hoffman-La Roche*, in which the CJEU explained for the first time how the concept of abuse should be understood<sup>23</sup>, and *Michelin I* which introduced the so-called “special responsibility” that an undertaking acquires by default once it becomes dominant<sup>24</sup>.

In Japan, the practices pursued by the Ministry of International Trade and Industry (通商産業省 - *tsuushou sangyoushou* - MITI) of not only encouraging cartelization, but actually offering guidance and sponsoring them, resulted in an ongoing intense friction between the ministry and the JFTC.<sup>25</sup> Despite the circumstances, in 1960 the AMA and its enforcement started to gain public sympathy as due to the existence of the price-fixing cartels and resale price maintenance practices between retailers and manufacturers, the consumer prices were continuously rising, leading to a high inflation index. The JFTC seized the auspicious moment by organizing a task force and in 1977 the AMA was strengthened, the most notable change being

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<sup>20</sup> Claus-Dieter Ehlermann, Mel Marquis, *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, 2008, p. 133-135

<sup>21</sup> Damien Geradin, Dr Anne Layne-Farrar, Nicolas Petit, *EU Competition Law and Economics*, Hardback, 2012, p.17

<sup>22</sup> Claus-Dieter Ehlermann, Mel Marquis, idem 20, p. 140

<sup>23</sup> Case C-85/76, *Hoffman-La Roche v. Commission* [1979], EU:C:1979:36, para.91

<sup>24</sup> Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission*[1983], EU:C:1983:313, para. 57

<sup>25</sup> Alex Y. Seita, Jiro Tamura, idem 15, p. 180

the introduction of financial penalties – a surcharge of 2% from the turnover - on undertakings taking part in cartels that affected prices<sup>26</sup>.

Although at the time the attention seemed to have shifted towards the prevention of cartel practices, regulations of monopolistic situations have been reintroduced. The old provisions regarding imbalance of economic power between enterprises has been implemented again in the shape of a new system of “structure control”, under which the JFTC was authorized to impose certain measures, or in extreme cases deconcentration orders, whenever one company had a market share of 50% or above or two companies together owned 75% or more market shares and new entry into the market was difficult.<sup>27</sup>

Despite the fact that the AMA had a more strong content its application continued to be weak. The United States saw the lax application as one of the reasons behind the disproportionate trading relationship between the two countries and during the US-Japan Structural Impediments Initiatives (SII) negotiations (1989-1990) the AMA and its implementation have been reviewed. As a response to the SII report in 1991 the Japanese authorities increased the administrative surcharge to 6% from the turnover and by the end of the year “The Anti Monopoly Act Guidelines on Distribution and Trade Practices” has been published. The number of cases handled by the JFTC yearly has also increased.<sup>28</sup> Moreover the JFTC publicly declared that criminal proceedings were to be initiated whenever necessary and for the first time since the 1970s criminal proceedings were started against a cartel.<sup>29</sup>

### **II.3 The “coming of age” period – the path towards modernization**

In Europe, in 1999 the Commission made an overall assessment of its enforcement activity that far and issued the “White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty”. The result was gloomy and disappointing as it turned out that most of the investigations the Commission engaged in were concerning harmless agreements and the notification system employed that far was extremely costly. Due to the Commission’s exclusive competence over notifications and exemptions, a large number of agreements were reported however hardly any of them were posing any real threats to competition. In this context, the Regulation 1/2003 was adopted to replace Regulation 72/62. The new regulation basically “decentralized” the previous “centralized” enforcement system. The notification system was abolished and the burden shifted onto the undertakings that now need to self-assess the possible antitrust threats comprised in their agreements. Moreover, the Commission’s monopoly over the exemptions in article 82(3) was dissolved; National Competition Authorities of the Member States can now make use of the provision also. The entry into force of the Treaty of Lisbon in 2009 did not bring any major changes, the competition provisions remained remarkably stable

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<sup>26</sup> Kameoka Etsuko, *Competition Law and Policy in Japan and the EU*, Edward Elgar Publishing, 2014, p. 15

<sup>27</sup> Matsushita Mitsuo, idem 5, p. 82

<sup>28</sup> Matsushita Mitsuo, idem 7, p. 155-156

<sup>29</sup> Oda Hiroshi, idem 4, p. 329

over the past years. The *common market* became *internal market* and the new numbering of the competition articles are 101 and 102.<sup>30</sup>

The “coming of age” of the Japanese antitrust law took place in 2005 when the provisions have been firmly revitalized towards a modern system. The surcharges have been increased to 10%, a leniency program has been introduced and the previous “medieval” investigative proceedings conducted by the JFTC have been adapted to a modern approach.<sup>31</sup> In the following period the prevention of unfair trade practices started to garner more and more attention and by the 2009 amendment of the AMA the surcharges imposed on companies engaged in practices falling under those prohibitions were increased.<sup>32</sup> The latest amendment, concerning only institutional and procedural matters, was passed by the Japanese Diet in December 2013. The amendment is not into effect yet as the Cabinet has not issued any Order regarding it.<sup>33</sup>

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<sup>30</sup> Damien Geradin, Dr Anne Layne-Farrar, Nicolas Petit, *idem* 21, p.18

<sup>31</sup> Mel Marquis, Shingo Seryo, *The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation*, Competition Policy International, 2014

<sup>32</sup> Choi Yo Sop, Fuchikawa Kazuhiko, *Comparative Analysis of Competition Laws on Buyer Power in Korea and Japan*, 2010, 33 *World Competition*, Issue 3, p. 499–519, p. 506

<sup>33</sup> Mel Marquis, Shingo Seryo, *idem* 31

## **Chapter III Outline and general provisions of the Anti Monopoly Act**

### **III.1 The goals and the aims pursued by the competition policies in EU and Japan**

Although the Treaty on the Functioning of the European Union (TFEU) does not specifically make any mentions regarding the objectives pursued by the competition policy, the common perception in literature is that the first and foremost goal of the modern competition approach is consumer welfare followed by economic efficiency. In addition, depending on the situation, other objectives may spring forth into the realm of EU competition law, among which worth mentioning are market integration, effective competition, economic freedom and protection of competitors and fair competition, SME protection, productivity growth, public policy etc.<sup>34</sup>

At the first glance it might seem that the AMA adheres to a different approach as in article 1 it declares that its purpose is “to promote fair and free competition, stimulate the creative initiative of enterprises, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc., and all other unjust restrictions on business activity through combinations, agreements, etc.”. Although the focus of the provision seems to revolve around economic growth and effective competition, some opinions are that the ultimate objectives are the development of national economy and the interest of the consumer. The achievement of the ultimate goals is backed up by the so-called direct objectives represented by the promotion of fair and free competition, while the instruments implemented by the AMA in the pursuit of these aims are the prohibition of the anticompetitive practices. Thus, unlike the EU vision, where it appears that consumer welfare is the sole leading objective, in Japan the consumer dimension is accompanied by concern for national economy, while all the other elements are just means to an end.<sup>35</sup>

But, is the EU doctrine really different? Some opinions seem to indicate otherwise by making a distinction between intermediate goals and ultimate goals. Consumer welfare is indeed the ultimate goal and implementing measures to protect effective competition could be seen as the instrumental intermediary into achieving it. Subsequently, consumer welfare becomes the

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<sup>34</sup> Alison Jones, Brenda Sufrin, *EU Competition Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, p.1-18; Raimundas Moisejevas, Ana Novosat, *Some thoughts concerning the main goals of competition law*, Jurisprudencija, 2013

<sup>35</sup> Kobayashi Hideaki, *Competition Policy Objectives – A Japanese View*, Competition Workshop, Florence, Italy, June 1997

natural effect of the other goals pursued.<sup>36</sup> The mechanism seems to work in the same way. The reasoning is based on the general perception that in an utopic ideal country, where anticompetitive behaviour is nonexistent, all the consumers are happy.

In the EU, emphases on the consumers as the centre of competition started at the same time with the reform of the competition policy towards a more economic approach.<sup>37</sup> Since that moment the word “consumer” started to be the new trend, being mentioned quite often including in the Commission’s guidance paper on its enforcement priorities in applying Article 82 of the EC Treaty, according to which consumer harm is a criteria that needs to be fulfilled in order to prove an abusive practice. The CJEU itself also started displaying sympathy towards the new trend and in the *Post Danmark* case withheld that article 102 applies to conducts that hinder competition to the “detriment of the consumer”.<sup>38</sup>

In Japan, besides the efficiency defence (the term “user” is used), mention of the consumer is rarely, if ever, seen. The EU term “consumer” includes besides final consumers also the customers on the intermediate markets<sup>39</sup>, category of enterprises that in Japan are directly protected by the unfair trade practices provision. In fact, judging by its structural build, most of the provisions in the AMA seemed to have been shaped so that to protect the smaller enterprises. Kobayashi Hideaki, the former Deputy Secretary-General of the Fair Trade Commission of Japan, is of the opinion that the provision is enforced in order to prevent “socially undesirable effects” rather than to protect the weak, because in any case when “the strong and the weak compete without any hindrance, the strong will become stronger”.<sup>40</sup> Thus, it can be inferred that since anyway the weaker enterprise would lose, at least it should lose under fair conditions.

The public interest is mentioned on a number of occasions in the AMA, however the meaning behind it bears no substantial importance. The Supreme Court, in the *Oil Cartel Price Fixing Case* asserted that the term has no separate meaning from “substantial restraint of competition”; the practices substantially restraining competition are considered *per se* contrary to the public interest and thus public interest within the meaning of the AMA should be understood as competition as such, except in exceptional situations when an agreement has sufficient redeeming advantages to become lawful.<sup>41</sup>

Although, the competition policies of the two jurisdictions have experienced a somewhat different historical evolution, the basic philosophy, protection of the consumer, remains the same despite the different implementation approaches.

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<sup>36</sup> Laura Parret, *Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy*, European competition Journal, August 2010, p.339-376, p. 340

<sup>37</sup> Laura Parret, idem 36, p.358

<sup>38</sup> Case C-209/10, *Post Danmark A/S v Konkurrenserådet* [2012], ECLI:EU:C:2012:172, para. 24

<sup>39</sup> Alison Jones, Brenda Sufrin, idem 34, p. 13

<sup>40</sup> Kobayashi Hideaki, idem 35

<sup>41</sup> Matsushita Mitsu, *International Trade and Competition Law in Japan*, Oxford University Press, 1993, p. 96

### **III.2 Enterprise vs undertaking**

The prohibitions included in articles 101 and 102 of the TFEU are directed towards “undertakings”, while the AMA chose the term “enterprise” (original term is 事業者 - *jigyousha*) in order to nominate entities that could become culprits by infringing its provisions.

The TFEU does not give any indication towards what characteristics define an undertaking; however the issue has been tackled with by CJEU in a number of cases. An undertaking is considered any “entity engaged in an economic activity, regardless of its legal status or the way in which it is financed”.<sup>42</sup> Furthermore according to the case law an economic activity implies the existence of two elements: a) the offering of goods and services on the market<sup>43</sup>, and b) if the activity could be carried out by an undertaking in the pursuit of profits.<sup>44</sup>

In Japan, the term enterprise is defined in article 2(1) of the AMA as being any person who operates a commercial, industrial, financial or other business. Considering that business is understood as the “action of offering benefit in return for benefit, repeatedly and continuously, regardless of the profit”,<sup>45</sup> the similarity with the EU concept of “economic activity” can be spotted. Actually, the Japanese term “*jigyousha*” by itself implies economic activity, as it contains the kanji 業 whose basic philosophy is business activity. The CJEU, in the case *FENIN* explained that the “supply” dimension (offering goods) is what deems an entity undertaking and not its purchasing dimension.<sup>46</sup> In Japan, mere participation in a market by way of selling, buying or otherwise, done in a regular and continuous way, turns an entity into an enterprise<sup>47</sup>, thus although it is not clear, it seems that purchasing alone could be enough for the AMA prohibitions to be triggered.

In both of the jurisdictions the legal status of the entity is not relevant for its classification, thus both undertakings and enterprises encompass liberal professions, educational institutions, trade associations, professional bodies, non-profit organizations like agricultural cooperatives etc.<sup>48</sup>

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<sup>42</sup> Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991], ECLI:EU:C:1991:161, para. 21

<sup>43</sup> Case C-205/03 P, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission* [2006], ECLI:EU:T:2003:50, para. 25

<sup>44</sup> Alison Jones, Brenda Sufrin, idem 34, p. 127; Case C-180-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000], ECLI:EU:C:2000:428, para. 201

<sup>45</sup> Seryo Shingo, *Cartel and Bid Rigging*, Training Course on Competition Law and Policy, Japan International Cooperation Agency, 2004, p.5

<sup>46</sup> Alison Jones, Brenda Sufrin, idem 34, p. 134

<sup>47</sup> Matsushita Mitsuo, idem 41, p. 90

<sup>48</sup> Matsushita Mitsuo, idem 47, p. 90-91 ; Alison Jones, Brenda Sufrin, idem 34, p. 128

Public authorities, when engaged in economic activities and not acting within the exercise of their public power, should also consider the competition rules in both of the jurisdictions, as they are seen as undertakings or enterprises under the antitrust policies.<sup>49</sup>

To conclude, despite small differences the terms undertaking and entity do follow the same reasoning, referring to entities or bodies engaged in business activities, and for the purpose of this paper they will be used interchangeable, without any difference in the meaning.

### **III.3 Structure of the Antimonopoly Act**

The EU legislation regarding anticompetitive practices is concentrated into the two TFEU articles – article 101 and 102. Whereas article 101 is a downright ban on agreements between undertakings, decisions by associations of undertakings and concerted practices which affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, article 102 prohibits abusive behaviour within the internal market by undertakings holding a dominant position.<sup>50</sup> In other words article 101 deals with cartels and horizontal and vertical agreements bilaterally employed by undertakings while 102 is concerned with unilateral exploitative and exclusionary abuses of dominant position by undertakings.

The Japanese AMA has a different structure and it is centred on four pillars:

- a) Monopolization;
- b) Unreasonable Restraint of Trade;
- c) Unfair trade practices;
- d) Mergers and Stock Acquisitions.<sup>51</sup>

The third pillar, unfair trade practices, includes also the provisions regarding superior bargaining position and is a competition concept unique to Japan. Its content overlaps often with the other fields like private monopolization or unreasonable restraint of trade. Over time it has gained a lot of criticisms from companies as well as from academics for its lack of legal certainty and ambiguity concerning the standards of an illegal conduct.<sup>52</sup>

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<sup>49</sup> Seryo Shingo, idem 45, p. 5-6; Alison Jones, Brenda Sufrin, idem 34, p. 129

<sup>50</sup> Treaty on the Functioning of the European Union

<sup>51</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)

<sup>52</sup> Takigawa Yoshiaki, *Competition Law and Policy of Japan*, The Antitrust Bulletin: Vol. 54, No. 3/Fall 2009, p.435-515, p. 437

### ***III.3.1 Monopolization – monopolistic situations and private monopolization***

The provisions against monopolization are put forward by means of two concepts: private monopolization (defined in article 2(5), prohibited in article 3) and monopolistic situation (defined in article 2(7), dealt with in article 8-4).

The control over ***monopolistic situations*** was introduced by the 1977 amendment and deals with circumstances where one entrepreneur or a small number of entrepreneurs are dominant in a certain field of business in which there is little or no competition or free competition is inhibited.<sup>53</sup>

While in the EU it was stressed right from the start that being in a dominant position on a certain market is not a bad thing in itself and that market power in itself is not *per se* illegal, the Japanese control of monopolistic situations appears to be indicating otherwise. The provision considers the structure of the market without taking into account the behaviour of the entrepreneurs on such a market.

As it is defined in article 2(7) of the AMA, a monopolistic situation entails the existence of two elements: (1) market structure, and (2) market performance.<sup>54</sup> Structurally, to fall under this provision the aggregate total value of goods on a particular market (“field of business”) together with the value of goods having extremely similar function and utility (what in EU competition law would be considered substitutability of product) or the total value of services of the same description supplied in Japan in the previous year was over 100 billion yen and

- (i) one single enterprise has over one-half (50%) of the shares on that market, or two enterprises’ combined share exceeds three-fourths (75%) during the relevant period;
- (ii) market entry for new enterprises is extremely difficult due to conditions on the market.<sup>55</sup>

The market structure element seems to be very similar to the EU antitrust conditions regarding dominant position. The field of business is a concept similar to the product market and according to the Commission’s guidance paper on its enforcement priorities in applying Article 102 of the TFEU Treaty (“The Guidance Paper”), large market shares are indicative of a dominant position while other factors like trade barriers and countervailing buyer power must be also considered.

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<sup>53</sup> Oda Hiroshi, *Japanese Law*, Third Edition, Oxford University Press, 2009, p.335

<sup>54</sup> Abir Danny, *Monopoly and Merger Regulation in South Korea and Japan: A comparative Analysis*, 1996, Berkeley Journal of International Law, Volume 13, Issue 2, p.143-175, 166

<sup>55</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947), art.2(7)

The market performance element is assessed based on the price dynamics, or lack of it for that matter, of that particular product or service on the market. The two conditions that need to be fulfilled are:

- (i) a remarkable increase or a slight decrease in price of the particular good or service over a considerable period of time, and
- (ii) the enterprise has either made a profit at a rate far exceeding the profit rate specified by the Cabinet Order or has achieved extremely high sales or incurred administration costs that are far exceeding normal standards.<sup>56</sup>

If the JFTC establishes that a monopolistic situation exists, it has full power to order the enterprise to take action in order restore competition on the market. The measures, which include among others, partial transfer of business or assets, sale of shares, transfer of technology etc were rarely actually implemented as they are intended for deterrent purposes especially against concerted practices to increase prices.<sup>57</sup> Despite the fact that the condition on the market of the enterprise involved is similar to a dominant position by EU law standards, the “control of structure” part has no equivalent in Europe. The Commission is not competent, nor has ever been, to initiate proceedings against undertakings with market power where evidence of an abuse cannot be identified, regardless of the price fluctuation on the market. The legislation is pretty unique to the Japanese island and is most probably a “legacy” of its historical economic practices.

**Private monopolization** is the Japanese provision that is closest to the abuse of dominant position comprised in article 102 TFEU. Although the text of the provision does not explicitly require a dominant position as its EU counterpart emphasizes right from the onset, the conduct must however cause a “substantial restraint of competition” condition which entails a certain degree of market power. The term private monopolization is defined in article 2(5) of the AMA as being a “business activity by means of which an enterprise, individually or by combination or conspiracy with other enterprises, excludes or controls the business activities of other enterprises thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade”. If we were to split the definition into pieces following the EU model then the conditions that should be fulfilled in order for the prohibition to be activated are:

- a) undertaking -> enterprise;
- b) dominant position-> substantial restraint of competition in a particular field;
- c) exclusionary abuse-> business conduct that excludes the business activity of other enterprises, or exploitative abuse -> business conduct that controls the business activities of other companies.

When investigating whether a certain enterprise has engaged in private monopolization practices, the JFTC follows a different approach from the Commission. While the EU way is to first observe dominance and afterwards move onto the existence of abuse, when pursuing a case

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<sup>56</sup> The Anti Monopoly Act, art. 2(7)

<sup>57</sup> Oda Hiroshi, idem 53, p. 336

of private monopolization first it is necessary to establish that an exclusionary conduct took place. The second step is to analyze if the particular behaviour can be deemed as a conduct substantially restraining competition in particular field.<sup>58</sup> The guidelines make it clear that private monopolization does not exist unless both of the two conditions can be found to exist at once. However, in case it cannot be proved that a substantial restraint of competition on a particular field did occur, the conduct is still likely to fall under the prohibitions regulated in the article 2(9) of the AMA as an unfair trade practice.<sup>59</sup>

What is common in both jurisdictions is the meaning of the terms “exclusionary” and “exploitative”/“conduct that controls the business of other enterprises”. Exclusionary conduct refers to practices that prevent competition on the market by excluding the business activity of other players on the market<sup>60</sup>, while exploitative implies taking advantage of the market power to exploit other undertakings or exerting power over weaker enterprises in order to direct, prohibit or restrict their activity.<sup>61</sup>

In EU exclusionary abuse of dominant position can be any practice that “is likely to affect the structure of the market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders’ performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market”.<sup>62</sup> The Japanese approach towards exclusionary conduct is somewhat simpler compared to its European counterpart including various conducts that would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities.<sup>63</sup> However, in both jurisdictions the definitions are hardly used for identifying the prohibited conduct and the focus of the analysis is heavily centred on the foreclosure effects of the conduct.<sup>64</sup> The JFTC guidelines, much like the Commission’s guidelines offer a non-exhaustive list of practices that could fall under the prohibition, indicating for each of them the tests that are to be applied and the factors that should be considered when there’s suspicious that such conduct might exist. The types of conduct covered by the JFTC guidelines are:

- 1) Below-cost Pricing – practice similar to the EU predatory pricing; the test is roughly the same – profit sacrifice test – and the variables taken into account are the costs;

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<sup>58</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Japan Fair Trade Commission, October 28, 2009, p.2

<sup>59</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Idem 58, p.4

<sup>60</sup> Alison Jones, Brenda Sufrin, *EU Competition Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, p.368 and idem 42, p.1

<sup>61</sup> Matsushita Mitsuo, *The Antimonopoly Law of Japan, Law in Japan: An annual*, 1978, vol 11:57, p. 57-75, p. 60 and Idem 44, p.368

<sup>62</sup> Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission* [1983], EU:C:1983:313, para. 70

<sup>63</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, idem 58, p. 4

<sup>64</sup> Alison Jones, Brenda Sufrin, Idem 60, p. 380 quoting the Discussion paper

- 2) Exclusive dealing, including exclusive rebates - giving, concepts similar with the EU exclusive dealing and conditional rebates;
- 3) Tying – similar to the EU tying and bundling practices;
- 4) Refusal to supply and discriminatory treatment – similar to the EU refusal to supply.

The conduct of the undertaking does not have to completely eliminate competition or actually block the business activity of competitors. In both jurisdictions the likelihood that foreclosure is the natural effect of the practice is enough for the conduct to fall under the prohibition.<sup>65</sup> The only difference worth mentioning is that the JFTC guidelines require that it must be “highly likely” that the behaviour would cause difficulties for other enterprises to conduct their business.<sup>66</sup> Exclusionary intent is also not a requirement according to the JFTC guidelines; however where intent is established then it becomes a factor likely to influence the presumption that the alleged conduct is exclusionary in character.<sup>67</sup> Similarly, in the EU the exclusionary objective does not need to be proved as it is enough if the said conduct has the ability to exclude competition<sup>68</sup>, but if it turns out that the conduct was meant to have an anti-competitive result then it can be considered that the conduct is liable to achieve that result.<sup>69</sup>

The analysis of the exploitative abuse of dominant position/ “private monopolization by control” as well as the comparison between the concepts of dominant position and substantial restraint of trade are issues that are going to be dealt with in great depth within the next chapter.

### ***III.3.2 Unreasonable Restraint of Trade – Cartels and horizontal agreements***

The Japanese provision dealing with anticompetitive agreements is known under the name “unreasonable restraint of trade”. According to article 3, unreasonable restraints of trade are prohibited, and in the event of any infringement the JFTC issues a cease and desist order to ensure a halt of the anticompetitive practice. Similar to the competences of the Commission<sup>70</sup>, the JFTC is entitled also to impose structural and behavioural remedies, like the transfer of a part of the business, and financial penalties –surcharges- of up to 10% from the turnover registered in the previous year.<sup>71</sup> Criminal penalties (imprisonment with work for not more than five years or a fine of not more than five million yen) can also be imposed on enterprises engaged in the forbidden practices.<sup>72</sup>

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<sup>65</sup> Alison Jones, Brenda Sufrin, Idem 60, p. 380 quoting the Discussion paper

<sup>66</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Idem 58, p. 5

<sup>67</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Idem 58, p. 4

<sup>68</sup> Case 301/04, *Clearstream Banking v. Commission*[2009], ECLI:EU:T:2009:317, para. 142-144

<sup>69</sup> Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* [2003], ECLI:EU:T:2003:250, para. 241

<sup>70</sup> COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art. 7 and art.23

<sup>71</sup> The Anti Monopoly Act, art. 7 and 7-2 (Chapter II)

<sup>72</sup> The Anti Monopoly Act, art. 92

Unreasonable restraints of trade are “business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade”.<sup>73</sup> The EU counterpart included in article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. By analysing the concepts in parallel, it can be observed that a practice can trigger the two prohibitions when the following criteria are checked:

- a) Undertaking/enterprise;
- b) Agreements, decisions by associations of undertakings, concerted practices/concerted activities by means of contract, agreement or other form of understanding;
- c) Agreement which has as its object or effect the prevention, restriction or distortion of competition/ conduct that restricts business activities or fixes prices, limits production or other terms of business and which causes a substantial restraint of competition.

The Japanese law does not make a difference between agreements and concerted practices. The prohibited act is called concerted activity, whereas a contract or agreement is just the projection of the practice into reality, but does not bear any importance to the classification of the conduct. The European model is not very different, as concerted practices are considered the forms of collusion that fall short of an agreement<sup>74</sup>; however even though a concerted practice is subjected to the same prohibition as if an agreement was concluded, the standard of proof is different. In order for a concerted practice to fall under the article 101(1) umbrella subsequent implementation on the market is required, whereas an agreement is by itself a consensual act.<sup>75</sup> On the other hand, the Japanese provision requires a “substantial restraint of trade” making the JFTC competent to act only after the first step into the implementation of the conduct took place.<sup>76</sup>

In order to prove collusion, the Commission needs to establish that a “concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market”<sup>77</sup> has occurred. The Japanese law requires a similar concept - mutual consent achieved by proof of communication of intent. In *Yuasa Mokuzai*, a case concerning bid rigging, in which all the tenderers after finding out the intended price of one of the participants colluded to adopt the same practice, the JFTC asserted

<sup>73</sup> The Anti Monopoly Act, art. 2(6)

<sup>74</sup> Alison Jones, Brenda Sufrin, *Idem* 60, p. 166

<sup>75</sup> Case C-199/92 P, *Huls AG v. Commission (Polupropylene)*[1999], ECLI:EU:C:1999:358, para. 161

<sup>76</sup> Matsushita Mitsuo, *International Trade and Competition Law in Japan*, Oxford University Press, 1993, p. 141

<sup>77</sup> Case T-41/96, *Bayer AG v Commission* [2000], ECLI:EU:T:2000:242, para. 173

that conformity in conduct and results is not enough to establish a communication of intent. However, the existence of a reference price by which all the tenderers abided, followed by parallel conduct could suggest a mutual consent.<sup>78</sup> Thus, the correct formula in order to prove the existence of collusion is communication of intent followed by uniformity of conduct on the market.<sup>79</sup>

Perhaps the biggest difference between article 101(1) TFEU and its Japanese counterpart is the fact that the latter does not cover vertical agreements. In the *Consten&Grunding* case the CJEU made it clear that the prohibition renders any anticompetitive agreement illegal, regardless of whether it was concluded between competitors or between undertakings operating at different levels of the market, and that there is nothing within the wording of article 101(1) to suggest otherwise.<sup>80</sup> The text of the AMA however contains the words “mutual restriction” (相互制限-*sougo seigen*) which is interpreted as meaning that all colluding enterprises need to adhere to the same restriction in order for the prohibition to be triggered. While initially the JFTC applied the provision to both horizontal and vertical agreements, that practice changed in 1953 with the decision of the Tokyo High Court in the *Newspaper Distribution* case (新聞販路協定事件 – *shinbun hanro kyoutei jiken*).<sup>81</sup> The case concerned 5 newspaper companies which concluded vertical agreements with a number of distributors. By means of the agreements, each retailer was offered exclusivity to sell in a particular area, thus resulting into a partitioning of the market among the distributors. The Tokyo High Court held that the territorial restriction was imposed only onto one party of the agreement while a similar restriction onto the newspaper companies was nonexistent. As a result, the requirement “mutual restriction” was not satisfied so vertical agreements cannot be considered concerted activities.<sup>82</sup>

While the EU competition prohibition covers agreements that have as their object or effect the prevention, restriction or distortion of competition, the AMA took a different approach by providing a list of the types of practices which when causing a “substantial restraint of competition” become illegal. Among the factors that the JFTC takes into consideration when establishing substantial restraint of competition are the market shares of the enterprises, the conditions of competition in the market, the conditions of the competitors, the degree of entry barriers in practice etc<sup>83</sup> so it would be reasonable to assume that the Japanese approach is more similar to the EU effects analysis.

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<sup>78</sup> Seryo Shingo, *Cartel and Bid Rigging*, Training Course on Competition Law and Policy, Japan International Cooperation Agency, 2004

<sup>79</sup> Matsushita Mitsuo, *idem* 76, p. 143

<sup>80</sup> Cases 56 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966], ECLI:EU:C:1966:41

<sup>81</sup> Iyori Hiroshi, A *Comparison of U.S.- Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 1995, Pacific Rim Law & Policy Journal, 1995-03, p. 60-91, p. 71

<sup>82</sup> Matsushita Mitsuo, *idem* 76, p. 137

<sup>83</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, Japan Fair Trade Commission, October 28, 2009, p. 33-38

Similar to the article 101(3) TFEU, enterprises in Japan can make use of an efficiency defence. The defence is included among the factors that are considered when establishing substantial restraint of competition, so unlike its EU counterpart, which is considered an exemption for an agreement deemed already to be infringing the main prohibition, the Japanese defence functions as a “rule of reason”. The criteria that need to be cumulatively fulfilled are roughly similar:

- a) improvement of productivity, technological innovation, and the improvement of the efficiency of business activities / efficiencies;
- b) outcomes are returned to users and the welfare of users is improved/allowing consumers a fair share of the benefits;
- c) specific to the conduct and it cannot be achieved by other means that are less restrictive on competition/indispensable.<sup>84</sup>

### ***III.3.3 Unfair Trade Practices***

It was mentioned previously that unlike its EU counterpart the unreasonable restraint of trade prohibition does not cover vertical agreements. Anticompetitive behaviour involving undertakings operating at different levels of the market are covered by the unfair trade practices provision, and of course when the behaviour is deemed as substantially restricting competition it would become an act of private monopolization (abuse of dominant position by EU standards). The importance of the difference lies in the fact that the unfair trade practices are considered unilateral conducts and subsequently in the event such a practice arises the JFTC can impose surcharges only on the enterprise “employing” the practice, despite the fact that the practice might be collusive in character.<sup>85</sup>

While in the EU these type of practices trigger the prohibition under article 102 TFEU only when they are employed by undertakings designated as dominant, in Japan the enterprise does not have to be dominant, albeit in some cases where a certain degree of superior bargaining power is required. Furthermore the conduct does not have to actually prevent competition. If it can be proved that it has a tendency to impede competition then the unfair trade practice label can be stuck on it.<sup>86</sup>

The unfair trade practices prohibited by article 19 of the AMA are:

- refusal to trade – collective and individual;
- discriminatory pricing/treatment;
- unjust low price sales;
- unjust high price purchasing;

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<sup>84</sup> Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, idem 66, p. 37

<sup>85</sup> The Anti Monopoly Act, art. 19 and 20(1)

<sup>86</sup> Matsushita Mitsuo, idem 76, p. 148

- resale price restriction;
- deceptive customer inducement
- customer inducement by unjust benefits
- tie-in sales;
- trade on exclusive terms or other restrictive terms;
- abuse of superior bargaining position;
- interference with competitors' transactions;
- interference with internal operations of competitors.<sup>87</sup>

Applying the unfair trade practices clause instead of private monopolization is often more convenient since the burden of proof is much lighter, market power does not need to be established, and in any event in both situations the JFTC has the discretion to levy surcharges as penalties.<sup>88</sup>

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<sup>87</sup> Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982); The Anti Monopoly Act, art. 2(9)

<sup>88</sup> Takigawa Toshiaki, *Competition Law and Policy of Japan*, The Antitrust Bulletin: Vol. 54, No. 3/Fall 2009, p.435-515, p. 467

## **Chapter IV Abuse of dominant position – exploitative abuses**

### **IV.1 Exploitative Abuse of dominant position vs Private monopolization by control and exploitative unfair trade practices**

As previously stated, while in EU law the exploitative abuses of dominant position are covered by the prohibition included in article 102 TFEU, the Japanese AMA has two provisions designed, among others, to offer protection against such practices. When a particular abusive practice substantially restricts competition then the prohibition under the Private Monopolization clause (defined in article 2(5), prohibited in article 3) is triggered. However, if the practice does not substantially restrict competition, but it does have a “tendency to impede competition” it can still be prohibited under the unfair trade practices clause (defined in article 2(9), prohibited in article 19), despite the fact that the abusive enterprise might lack market power.

In order for the prohibitions against exploitative abuses included in article 102 TFEU and in the article 3 and 19 of the AMA to be applicable to a particular conduct the following conditions must be fulfilled:

- a) undertaking/enterprise;
- b) dominant position/substantial restraint of trade in a particular field of trade or tendency to impede competition;
- c) exploitative abuse/business conduct that controls the business activities of other companies or one of the exploitative conducts under the unfair trade practices clause.

#### ***IV.1.1 Dominant position vs. substantial restraint of competition in a particular field of trade/tendency to impede competition***

In EU law establishing dominant position is one of the main keys into determining whether a certain practice falls under the 102 prohibition. Similarly, the Japanese Private Monopolization provision requires that the abusive conduct be characterized by a “substantial restraint of competition”, which like the concept of dominant position implies inter alia a certain degree of market power.

From the get go it is necessary to observe that while dominant position is a prerequisite condition for the abuse, substantial restraint of competition is an effect of such a conduct. Therefore, although there is no need for the undertaking to make use of its powerful position on the market while employed in the abusive practice<sup>89</sup>, nonetheless the undertaking must hold the

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<sup>89</sup> Case C- 85/76, *Hoffmann-La Roche & Co. AG v. Commission*[1979], ECLI:EU:C:1979:36, para 91

dominant position prior to the abuse and not as a result of it.<sup>90</sup> On the other hand, the substantial restraint of competition is the result of the abusive conduct of the undertaking on the market (“thereby causing”). The Japanese private monopolization clause is not concerned with the condition on the market of the enterprise prior to the moment where it engaged in excluding or controlling the business activity of other enterprises.<sup>91</sup> Subsequently, when analyzing an act of private monopolization, the JFTC first seeks to prove the existence of the abusive practice, by exclusion or control, and afterwards determines whether the said practice substantially restrains competition.<sup>92</sup>

The concept of dominant position was first defined by the CJEU in the *United Brands* case and only a year later the definition has been further elaborated in the *Hoffmann-La Roche* case. Ever since then both the CJEU and the Commission have been consistent in maintaining the same meaning behind the concept and the definition was also included in the Guidance Paper. Thus, dominance is considered a “position of economic strengths enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers”.<sup>93</sup>

In Japan, the Supreme Court of Japan, in the 1954 *Touhou-Shintouhou* case (東宝-新東宝事件), shaped the first definition of substantial restraint of competition as being the ability of one or a group of enterprises to “determine prices and other terms of business independent of market forces”.<sup>94</sup> In 2009, in an appeal trial seeking to revoke the JFTC’s decision in the *NTT East* case (NTT東日本事件- *NTT Higashi Nihon jiken*), the Tokyo High Court, based on the previous definition, expended the contour of the concept and provided a wider range of parameters that should be considered together during the analysis. The new definition has been also adopted by the JFTC in the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act and holds substantial restraint of competition to mean “establishing, maintaining, or strengthening the state in which a certain entrepreneur or a certain group of entrepreneurs can control the market at will by being, to some extent, free to influence the price, quality, quantity, and other various conditions after competition itself has lessened”.<sup>95</sup>

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<sup>90</sup> Case C- 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*[1973], ECLI:EU:C:1973:22

<sup>91</sup> The Anti Monopoly Act, art. 2 (5)

<sup>92</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p.4

<sup>93</sup> Guidance on the Commission’s enforcement in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009, art. 10; Case C-27/76, *United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 65; Case C- 85/76, *Hoffmann-La Roche &Co. AG v. Commission*[1979], ECLI:EU:C:1979:36, para 38

<sup>94</sup> Matsushita Mitsuo, *International Trade and Competition Law in Japan*, Oxford University Press, 1993, p. 94

<sup>95</sup> Case *NTT East* (NTT 東日本事件), Decision of the Tokyo High Court, 25 May 2009, Minshu Vol. 64, No. 8; The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p.34

Although phrased differently, the two definitions are focused around the same issues; both of them refer to the condition on the market of an undertaking, condition which is powerful enough to allow it to act somewhat freely (“independently/at will”) of any competitive pressure on a particular market/field of trade. The only difference lies in the fact that in the EU law, the powerful condition of the entity on the market endows the undertaking with the ability to prevent competition; however actual harmful effects on competition are not required when establishing dominance, evidence of a hypothetical and abstract ability is enough. In contrast, the Japanese provision does imply a certain degree of negative influence on the level of competition in a particular field (“competition itself has lessened”). This condition does not come as a surprise when considering the cause-effect relationship between the abusive conduct and the economic power of the enterprise that distinguishes the Japanese provision from its European counterpart.

It can be observed from the phrasing of the Private Monopolization clause itself (article 2(5) of the AMA) that the substantial restraint of competition must manifest itself “in a particular field”. Likewise, in EU, although the prohibition included in article 102 TFEU does not expressly state it, the dominant position can exist only in relation to a relevant market. As a result, identifying the relevant market is of paramount significance to determining whether an entity is dominant or not.<sup>96</sup> Both the Commission and the JFTC apply a two-fold test when establishing dominance and substantial restraint of competition: first defining the relevant market/ field of trade and afterwards assessing the position of the entity on the said market and the possible competitive repressions it faces.

**Field of trade** and **relevant market** are synonym concepts. The defining process is designed in the same manner and both of the concepts entail two dimensions:

- a) product market/scope of products;
- b) geographical market/geographical scope.<sup>97</sup>

Scope of products, similarly to the product market, refers to all the products that are to a certain degree substitutable from the viewpoint of the users. In both jurisdiction substitutability is primarily analyzed by looking at the demand substitutability, notion that in the Japanese antitrust law is known as the degree of similarity of a product’s utility for users. Additionally, both the Commission and the JFTC can also take into account the capacity of the manufacturer to switch from the production and sale of a certain good to another in a short period of time without incurring considerable extra costs (supply substitutability).<sup>98</sup>

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<sup>96</sup> Case C- 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*[1973], ECLI:EU:C:1973:22, para. 32

<sup>97</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p.31; Commission notice on the definition of the relevant market for the purpose of Community competition law (97/C 372/03), art. 4

<sup>98</sup>Idem 97,p.32; art. 7, 20

In EU law the cross-elasticity of demand is judged based on the products characteristics, their prices and intended use. Another tool used quite often by the Commission is the SSNIP (a small but non-transitory increase in prices) test.<sup>99</sup> According to the Guidelines for Exclusionary Private Monopolization, the criteria JFTC has to consider are:

- a) usage – the characteristics of the products (external features, material characteristics, quality, technological characteristics) and its different usages;
- b) changes in price, quantity etc – the JFTC adopts an approach similar to the EU SSNIP test, by considering products X and Y substitutable when in case of a price raise of X, the sales volume of Y or the price of Y increase also. However, two products could be found to belong to two different markets due to the fact that users rarely choose one over the other because of the price difference between the two. Furthermore, two products are considered not to be interchangeable when despite having equal prices, the users would be charged additional costs in order to make the switch from one to another.
- c) recognition and behaviour of the users – the perception of the consumer is taken into account as well as the past behaviour of the consumer in case of a price increase (evidence of substitution in the past).<sup>100</sup>

In the *United Brands* case the CJEU has focused on the external characteristic – “appearance”- and on the material features – “taste, softness, lack of seeds, easy handling and non-seasonal production”- of bananas in order to distinguish it from other fruits. Bananas are fruits addressing any consumer, despite age, and unlike other fruits the production process is not influenced by seasons as it can be supplied all around the year. Additionally, the price of bananas is not influenced, except to an insignificant extent, by the prices of the other fruits. In the light of these arguments, the CJEU determined that bananas by themselves have a market separate from the other fruits.<sup>101</sup> In the *Michelin I* case the CJEU considered the usages of the product and the particularly specialized distribution network that was required, in order to determine that the tyres for lorries and buses had their own single market.<sup>102</sup> In Japan, the JFTC, during merger proceedings in the case *Chuoseni-Teikoku Seima* (中央纖維株式会社帝国製麻株式会社両社合併), found that rope made of hemp yarn and rope made from chemical fibres belong to the same market due to its interchangeable use, and decided not to pursue proceedings against the merger any further.<sup>103</sup>

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<sup>99</sup> Commission notice on the definition of the relevant market, art. 7, 17

<sup>100</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p.33

<sup>101</sup> Case C-27/76, *United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 31-32

<sup>102</sup> Case C-322/81, *NV Nederlandse Banden Industrie Michelin v Commission of the European Communities* [1983], ECLI:EU:C:1983:313

<sup>103</sup> Matsushita Mitsuo, *International Trade and Competition Law in Japan*, Oxford University Press, 1993, p. 93

The geographic market or the geographical scope is the territory in which competition takes place.<sup>104</sup> The most significant factor that determines the geographical market is the real possibility of consumers to find a substitute product in a different area, in the light of the additional costs required, willingness of consumers to switch to products produced elsewhere, distribution channels etc.<sup>105</sup> The business area of suppliers and area for the users to purchase, the characteristics of the product (if the product is perishable or fragile transportation over long distances might not be an option) and the means and costs of transportation are, according to the Guidelines, the circumstances considered by the JFTC when establishing the geographical scope.

Once the relevant market/field of trade has been defined, the next step is to focus on the market position of the entity involved as well as to the constraints imposed by the said market on the undertaking. In doing so, both the Commission and the JFTC will take into account the following elements:

- a) market position of the alleged entity and of its competitors;
- b) barriers to expansion and entry/potential competitive pressure;
- c) countervailing buyer power/ countervailing bargaining power.<sup>106</sup>

The Commission considers **market shares**, interpreted in the light of market conditions, as a first indicator of dominance while the Japanese guidelines deem an entity with large market shares as more likely to substantially restrain competition. If the abusive conduct is capable of manipulating the conditions of the market then competition is more likely to be inhibited by Japanese standards. Similarly, the guidelines point out that in an oligopolistic market, reigned by few leading entrepreneurs, the odds that competitive harm would occur are higher.<sup>107</sup>

The Guidance Paper states that low market shares, below 40%, are not likely to bestow dominance on an undertaking while large market shares, held over some time, do set forward a presumption of dominance.<sup>108</sup> The Japanese guidelines do not refer to any parameters regarding the market shares, but do however mention that the JFTC will pursue a private monopolization case when, once engaged in the prohibited conduct, the shares of the alleged enterprise exceed 50%.<sup>109</sup> 50% seems to be the magic number in EU law also; in the *Akzo* case the CJEU held that when an enterprise owns half of the relevant market it is enough to precipitate a dominant position presumption.<sup>110</sup>

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<sup>104</sup> Matsushita Mitsuo, idem 103, p.93

<sup>105</sup> Commission notice on the definition of the relevant market, art.29-30

<sup>106</sup> Guidance on the Commission's enforcement in applying Article 82 of the EC Treaty art. 12-18; The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 34-36

<sup>107</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 35

<sup>108</sup> Case C- 85/76, *Hoffmann-La Roche & Co. AG v. Commission*[1979], ECLI:EU:C:1979:36, para 41

<sup>109</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 3

<sup>110</sup> Case C-62/86, *AKZO Chemie BV v. Commission* [1991], ECLI:EU:C:1991:286, para.60

When establishing the position on the market of the alleged enterprise, the JFTC takes into account also the effects the conduct has on the competitors. If the behaviour of the entity makes it difficult for the competitors to conduct their business activities freely then the behaviour can be most likely deemed as preventing competition. In EU law, since dominant position is not judged in the light of the abuse, the business conditions of the competitors are irrelevant; however their market shares when compared with the market shares of the alleged undertaking could influence the dominance diagnosis.<sup>111</sup> In *United Brands*, the undertaking was found dominant because despite having a 45% market share, the percentage was twice as large as its next competitor. In the *Michelin I* case, Michelin had a market share of 57-65% and while that by itself was a strong token of dominance, the fact that the rest of the market was fragmented among competitors having around 4-8% shares each convinced the CJEU that Michelin was indeed dominant.<sup>112</sup>

**Potential expansion by competitors and potential entries by new competitors** or **potential competitive pressure**, as the Japanese guidelines call it, is another element relevant for judging the existence of dominant position or substantial restraint of competition. In order to analyse the potential competitive pressure and assess whether entry on the market is feasible the JFTC takes a look at the degree of institutional entry barriers, the degree of entry barriers in practice and the degree of substitutability between the entrant's and the entrepreneur's products. Entry barriers, in both jurisdictions, refer to the same kind of circumstances which place an entrant in a disadvantageous position compared to the dominant undertaking. Among those circumstances worth mentioning are financial resources, superior technology, established sales and distribution systems, access to raw materials and key inputs etc.<sup>113</sup> Moreover, the Japanese view is that when the degree of substitutability between the entrant's and the entrepreneur's products is high, the users might find themselves reluctant to buy the entrant's product instead of a product they are familiar with, situation in which the competitive pressure of the market does not work efficiently.<sup>114</sup>

Competitive restraints could be imposed also by customers having enough bargaining strength over the alleged dominant undertaking so that not to allow it to behave independently and to freely influence prices or other conditions on the market. Consequently when the **countervailing buyer/bargaining power** has a sufficient impact on the entity's business activity then it is unlikely that competition would be substantially restrained or that the undertaking is dominant. Both the JFTC and the Commission assess countervailing buyer power in the light of the customer's size, its ability to easily switch suppliers or to pose a real threat that it will, its

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<sup>111</sup> Case C- 85/76, *Hoffmann-La Roche & Co. AG v. Commission*[1979], ECLI:EU:C:1979:36, para 48

<sup>112</sup> Alison Jones, Brenda Sufrin, *EU Competition Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, p.368 and idem 42, p.357

<sup>113</sup> Guidance on the Commission's enforcement in applying Article 82 of the EC Treaty, art. 16-17; The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 36

<sup>114</sup> The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 36

ability to promote new entry and to maintain the level of the prices on the market.<sup>115</sup> Moreover, if the bargaining power is strong enough to the level at which it could be abused, then the roles could be reversed and the retailer can become an infringer under the unfair trade practices clause of the AMA.

As previously stated when assessing if competition has been substantially restrained the JFTC looks at the circumstances of the case occurring after the abuse has been committed or at least when the abuse is in its first stage of completion. As a result, the *exemption defences* are included also under the substantial restraint of competition analysis. On the other hand, in EU law, the exemptions are analysed under the abuse element of the prohibition. The Japanese guidelines, similarly to the Guidance Paper, put forward two types of defences:

- a) Extraordinary circumstances to assure consumer interests – the equivalent of the objective necessity defence that justifies the conduct on grounds like interest of the consumer and public health and safety. The Japanese guidelines add development of national economy to the list by pointing out that when the conduct pursues such a goal it is not seen as substantially restricting competition.
- b) Efficiencies - in both jurisdictions for this defence to be effective the efficiencies must be specific to or a result of the prohibited conduct and should not be possible to obtain them by less anti-competitive means. Additionally, while the Guidance Paper requires the efficiencies to outweigh the negative effects the conduct has on competition, the Japanese Guideline is not concerned with balancing the positive and negative outcomes. Rather, the influence of the positive effects on consumer welfare is assessed, and in case an improvement is brought about, the conduct is not considered to fulfil the substantial restraint of competition criteria.<sup>116</sup>

In EU, the 1983 *Michelin I* case gave birth to the so called *special responsibility* doctrine according to which dominant undertakings must make sure that their behaviour on the market does not distort genuine competition.<sup>117</sup> In other words, practices in which non-dominant undertakings could engage without any legal repercussions may be prohibited for a dominant undertaking due to its powerful position on the market. In Japan, such a concept does not exist, and were it to exist would not serve its purpose since the market power of the enterprise is assessed as an aftermath of the abusive conduct. However, in reality an unofficial form of such a responsibility could be identified, but unlike in EU law, it applies to all enterprises regardless of their market power. The unfair trade practices prohibition is directed against any entity, in as far as their actions have a tendency to impede competition; therefore any undertaking, before engaging in business activities, must consider whether or not their conduct might be seen as an unfair practice.

<sup>115</sup> Guidance on the Commission's enforcement in applying Article 82 of the EC, art.18; The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, p. 37

<sup>116</sup> Idem 115, art. 28-30; p. 37-38

<sup>117</sup> Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983], ECLI:EU:C:1983:313, para. 57

The prohibition of unfair trade practices is seen as a first step into the fight against monopolization. If not regulated in their early stages these kind of business dealings could confer the enterprise with enough market power to be able to pursue private monopolization. A particular conduct becomes an unfair trade practice when it has a *tendency to impede competition*, meaning that actual anticompetitive effects do not need to be observed, the likelihood that they might occur is enough to deem a practice unfair.<sup>118</sup> Tendency to impede competition implies, according to some authors, either a “reduction of competition, competition by unjust means or infringing the bases of free competition”. The text of article 2 (9), which provides the description of unfair trade practices does not always use the structure “tendency to impede competition”, however it uses expressions like “unjustly” or “without justifiable grounds” which are meant to be interpreted in that manner.<sup>119</sup> In EU law, such types of practices, that tend to prevent competition but which cannot be attributed to a dominant undertaking are not covered by any antitrust prohibitions. Many authors consider that they cross over the thresholds of competition law and protrude into the realm of tort law and subsequently no public authority should tackle them.<sup>120</sup>

The JFTC often initiates proceeding for unfair trade practice when it is difficult to prove that a specific conduct substantially restrains competition and thus a private monopolization case cannot be pursued.<sup>121</sup> That is what happened in the 2008 *Microsoft* case, in which the JFTC found Microsoft in violation of article 19 of the AMA (prohibition of unfair trade practices). Microsoft included in their licensing of Windows OS agreements a non-assertion clause, according to which the PC manufacturers were not allowed to sue Microsoft in case of any patent infringement related to audio visual technology. The JFTC identified the field of trade as being PC audio visual technology market (on which Microsoft was not dominant) and deemed the conduct to be trading on restrictive terms practices falling within section 13 (now 12) of the Designation of Unfair Trade Practices Notice.<sup>122</sup> The JFTC was criticized for choosing the easy way out and not applying the globally accepted private monopolization/abuse of dominant position provision. Many commentators consider that the field of trade could have been narrowed down further, for example to Windows OS related audio-visual technology, market on which Microsoft would hold without any doubt a powerful position.<sup>123</sup> An alternative would have been applying the EU reasoning in the *Tetra Pak II* case, where the Commission found that the undertaking abused its dominant position on the aseptic carton market by its behaviour on the

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<sup>118</sup> Matsushita Mitsuo, *idem* 103, p.148

<sup>119</sup> Matsumoto Taku, Nakano Yusuke, *Chapter 6: Japan* in Katrina Groshinski and Caitlin Davies, *Competition Law in Asia Pacific: A Practical Guide*, (Kluwer Law International; Kluwer Law International 2015) p. 351 - 403

<sup>120</sup> Takigawa Yoshiaki, *idem* 88, p. 469

<sup>121</sup> Matsumoto Taku, Nakano Yusuke, *idem* 119

<sup>122</sup> Hearing Decision against Microsoft Corporation, Japan Fair Trade Commission (マイクロソフトヨーポレーションに対する審判審決について), September 2008

<sup>123</sup> Takigawa Yoshiaki, *A comparative analysis of U.S., EU, and Japanese Microsoft cases: How to regulate exclusionary conduct by a dominant firm in a network industry*, The Antitrust Bulletin: Vol. 50, No. 2/Summer 2005, p. 236-265, p. 263

non-aseptic carton market on which it was not dominant.<sup>124</sup> Similarly Microsoft could have been found that it leveraged its powerful position from the PC operating systems market to gain advantages on the audio visual technology market.

#### ***IV.1.2 2 Abusive practices: exploitative abuses vs controlling conduct/ exploitative unfair trade practices***

After the prohibition on abuse of dominant position was first implemented in the EU the general perception was that the provision was meant to be enforced only against the exploitative types of conduct. The work of the Commission and the jurisprudence of the CJEU were also consistent in that view. That mentality was dispersed by the CJEU judgement in the 1973 *Continental Can* case, which affirmed the double role of the provision as being challenging the legality of both exploitative and exclusionary conducts. The year 1973 is a milestone in the history of EU competition law because it marks the beginning of the three decades long saga of the Commission's fight against exclusionary abuses as well as the beginning of the veil of ignorance regarding the exploitative practices.<sup>125</sup>

In what it concerns the private monopolization clause of the AMA there was never any doubt about the types of conduct it prohibited. The provision stated from the very beginning that it refers to both conducts that exclude as well as to conducts that control the business activities of other enterprises. However, the implementation of the provision against exploitative behaviour saw the same fate as its European counterpart; the provision has hardly ever been applied in relation to private monopolization practices by control.<sup>126</sup> That is partly because most of the cases have been qualified as unfair trade practices, under which, as stated previously the JFTC has only to prove a tendency to impede competition.

Private monopolization by control is not defined in the AMA, and unlike the exclusionary conducts, the JFTC has never published guidelines regarding its application. The concept of control has been however defined in 1957 by the Tokyo High Court in the *Noda Soy-Sauce* case (野田醤油事件- *Noda shouyu jiken*) as being the act of “taking away from other entrepreneurs their free decision in business activities and such an act must be distinguishable from those normal means of competition in a market”.<sup>127</sup> Thus, control entails imposing the intention of the controlling enterprise on another entity by depriving it of the freedom to make decisions regarding its business activities.<sup>128</sup> In EU, in the *United Brands* case, the CJEU stated that an undertaking abuses its dominant position in an exploitative manner when it makes use “of the

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<sup>124</sup> Case C-333/94 P, *Tetra Pak International SA v. Commission* [1996], ECLI:EU:C:1996:436 , para. 29-31

<sup>125</sup> Pinar Akman, *Exploitative Abuse in Article 82EC: Back to Basics?*, Cambridge yearbook of European Legal Studies, 2008, p. 10

<sup>126</sup> Roger D Blair, D Daniel Sokol, *The Oxford Handbook of International Antitrust Economics*, volume 2, Oxford University Press, 2015, p.201

<sup>127</sup> Igarashi Osamu, *Regulation on Monopolization in Japan*, APEC Training Course on Competition Law, 2005

<sup>128</sup> Kiyofumi Koutani, *Private Monopolization / Corporate Combination*, Osaka Gakuin University

opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition".<sup>129</sup> Exploitative abuses are meant to cause harm directly to the consumers and provide an advantage to the dominant undertaking.<sup>130</sup> While the criteria in case of the private monopolization by control can be easily identified – competition must be substantially restrained by manipulating the business activities of another enterprise -, the same cannot be said about its EU counterpart. There are no clear parameters in EU law when considering exploitative abuses, however the general opinion is that their main characteristic is the direct harm to customers<sup>131</sup>, which is not different from the Japanese approach where the enterprise being controlled is in fact a customer of the controlling enterprise.

Private monopolization, unlike abuse of dominant position, can be achieved by two types of conducts: direct control and indirect control. Direct control means any sort of behaviour by which the dominant enterprise exerts its power straight on the controlled entity. The issue of indirect control was first introduced by the Tokyo High Court in the *Noda Soy-Sauce* case. In the 1950<sup>th</sup> in Japan the soy sauce market was highly oligopolistic; only four companies were supplying soy sauce at a national scale, among which Noda was the leading player with a market share of 37% in Tokyo (geographical market established by the JFTC). Noda engaged in resale price maintenance and by different tactics managed to determine its retailers to raise the prices of soy sauce to a certain suggested level. Subsequently, the other three major companies on the market adopted the same behaviour and their retail price for soy sauce was raised as the same level as the one practiced by Noda's retailers. The JFTC considered that due to the peculiar build of the market Noda was capable to manipulate and indirectly control the price policies of the other companies. The conduct amounted to private monopolization by indirect control. The Tokyo High Court upheld the decision explaining that there is no indication in the definition offered by article 2(5) of the AMA that indirect control was excluded. The decision was highly criticized, mainly due to the wide spectrum that the concept of control seems to cover.<sup>132</sup> Needless to say, to the day the JFTC has never initiated a similar investigation. In EU, the behaviour of the soy sauce producers would be considered mere tacit collusion and the Commission would not have competence to interfere in the matter.

The unfair trade practices are listed and defined by the JFTC in the Designation of Unfair Trade Practices Notice. Identifying them seems like an easy job for the JFTC. As long as they can be found on the list and they pose even the slightest threat that as a result competition might be inhibited, proceedings against them can be initiated. Among the unfair trade practices, the ones exploitative in character are: discriminatory consideration, discriminatory treatment on

<sup>129</sup> Case C-27/76, *United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 249

<sup>130</sup> Joanna Goyder, Albertina Albors-Llorens, *EC Competition Law*, Fifth Edition, Oxford University Press, 2009, p. 315

<sup>131</sup> Pinar Akman, idem 125, p. 8

<sup>132</sup> Matsushita Mitsuo, idem 103, p.121

trade terms, unjust high price purchasing, resale price restriction, deceptive customer inducement, customer inducement by unjust benefits, tying, trade on exclusive terms or other restrictive terms, abuse of superior bargaining position, interference with competitors' transactions and interference with internal operations of competitors. As it can be observed, some of them like interference with a competitor's transactions or their internal operations belong to the private area, which in Europe the Commission would probably never touch.

The *discriminatory practices* can be identified in the Designation of Unfair Trade Practices Notice under two forms: discriminatory consideration (price discrimination) and discriminatory treatment on trade terms. In EU law they are included in article 102 (c) TFEU – applying dissimilar conditions to equivalent transactions. In both jurisdictions the simple fact of applying different prices is not in itself unlawful, but when it is used to inhibit competition (indicated by the word “unjustly” in the AMA) or to cause a “competitive disadvantage” the thresholds of legality are passed.

In the *Asahi Breweries* case (アサヒ ビール会社), the JFTC found that Asahi's conduct, discriminatorily reimbursing the costs of sales promotion only for particular distributors from the south part of Osaka Prefecture, to amount to discriminatory treatment in as far as competition between retailers was affected in a negative manner.<sup>133</sup> In *United Brands* and *Tetra Pak II* the CJEU accepted the premises that different prices can be justified by objective market conditions, however in these two cases the situation was found to have occurred due to the desire of the entities to partition the market rather than due to external conditions. Moreover, in *Tetra Pak II* the General Court ascertained that by applying lower prices in Italy the practice was in fact designed to preclude competition.<sup>134</sup> Similarly, in the *British Sugar* case, the aim of the discriminatory price between the customers buying sugar in bulk and the ones buying packaged sugar was to drive out competitors from the market.<sup>135</sup> The JFTC dealt with a related issue in the 1967 *Hokkoku Shinbun* case (北国新聞事件), in which an undertaking wishing to increase its market shares in a particular area sold its newspaper for a price lower than in another area where it already held market power.<sup>136</sup>

Article 102(c) TFEU states that discrimination can occur only in cases involving equivalent transactions, which according to the case law (cases T-289/11 *Deutsche Bahn*, C-266/96 *Corsica Ferries*) can be judged based on the total sales, costs incurred for transporting, storing, servicing, for promotional activities etc.<sup>137</sup> Similarly, the JFTC in the *Nippon Oil* case

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<sup>133</sup> JJFTC warns Asahi Breweries Ltd., against a possible unfair trade practice in beer trading, 8 December 2003

<sup>134</sup> *United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 65; Case T-83/91, *Tetra Pak International SA v. Commission* [1994], ECLI:EU:T:1994:246, para. 170, para.

<sup>135</sup> Case C-359/01 P, *British Sugar plc v Commission of the European Communities*[2004], ECLI:EU:C:2004:255, 54–55 and 65–68

<sup>136</sup> Matsushita Mitsuo, idem 103, p.151

<sup>137</sup> Lennart Ritter, W. David Braun, *European Competition Law: A Practitioner's Guide*, 3rd Edition, 2004, Kluwer Law International, p. 444

(新日本石油株式会社 - *Shin Nihon Sekiyu Kabushiki Kaisha*), took into account the dissimilarities in the content and the conditions of the transactions, as well as the differences in the size of the purchases and ruled that Nippon Oil was not involved in discriminatory consideration. Nippon Oil was suspected of selling gasoline to the entities issuing the so-called Pricing Cards (like affiliates of car leasing undertakings) at prices considerably lower than the ones applied to its other customers.<sup>138</sup>

**Trading on restrictive terms** refers to situations when an enterprise is “trading with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party”.<sup>139</sup> Perhaps the most famous case involving trading on restrictive terms is the previously mentioned *Microsoft* case. During the negotiations for the conclusion of Windows licensing agreements, the manufacturers and sellers of PCs were compelled by Microsoft to accept a non-assertion provision according to which, they were not allowed to initiate litigations against neither Microsoft nor its subsidiaries in case of an infringement of their patent rights related to audio visual technology. The JFTC concluded that even though there was no sufficient evidence in the case that the competitive environment has been harmed, the conduct did inhibit the incentive of the PC manufacturers to invest in research and development and amounted to an unfair trade practice.<sup>140</sup> In EU these types of practices are known as **unfair trading conditions**. The matter was brought up in the case *BRT v. SABAM*, in which a dominant undertaking, specialized in the management of copyrights, required its authors to assign both past and present rights and in case of the withdrawal of a particular member, the undertaking would continue exercising his rights for a period of 5 years afterwards. The CJEU found the conduct to be an abuse within the meaning of article 102, in as much as it goes beyond what is absolutely necessary in order to achieve the object of the agreement.<sup>141</sup>

A private monopolization by control case involving restrictive conditions was the 1972 *Toyo-Seikan* case (東洋製罐事件). Toyo-Seikan, a tin-manufacturing enterprise was holding 29% of the shares of Hokkai-Seikan, another tin-producing company. In order to limit the market of Hokkai to the Hokkaido Prefecture, Toyo-Seikan imposed a series of restrictions on its activity. Moreover, Hokkai was allowed to build a plant on the mainland, in the Saitama Prefecture, only after accepting certain conditions regarding the type of cans that were to be produced and sold. The JFTC found these actions to be unlawful, issued a cease and desist order and ordered Toyo-Seikan to dispose of the Hokkai shares it owned.<sup>142</sup> In the *Tetra Pak II* case the General Court found the clauses involving exclusive rights to maintain and fix the equipment,

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<sup>138</sup> Treatment of Suspected Violation against the Antimonopoly Act in relation to the Issuer Pricing Card by Nippon Oil Corporation, October 3, 2008, Japan Fair Trade Commission

<sup>139</sup> Designation of Unfair Trade Practices, idem 87, article 15

<sup>140</sup> Hearing Decision against Microsoft Corporation, Japan Fair Trade Commission, idem 122

<sup>141</sup> Case 127/73, *Belgische Radio en Televisie en société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*[1974], ECLI:EU:C:1974:25, para. 4-15

<sup>142</sup> Matsushita Mitsuo, idem 103, p.120

exclusive rights to supply spare parts, prior consent from Tetra Pak before selling or transferring the use of the equipment, notifications in case of any improvement or modifications etc, to be abusive in character in the light of article 102 TFEU.<sup>143</sup>

Fox Japan, a film distributor, was also found in breach of article 19 AMA by compelling theatres to apply the indicated admission fee to its movies and implementing a prior authorization of discounts system.<sup>144</sup> Likewise, prohibiting retailers from disclosing into their advertisements the price of the product (in this case contact lenses)<sup>145</sup>, as well as forcing the retailers to display in the shop and on leaflets a reference price for their products (mobile phones)<sup>146</sup> were found by the JFTC to be restrictive practices. In the *Alsatel v SA Novasam* the CJEU considered the unilateral conduct of the dominant undertaking to determine the prices of the supplements to the contract as well as the automatic renewal of the contract for another 15 years when certain conditions are fulfilled to amount to unfair trading conditions.<sup>147</sup>

In EU, according to article 102(a) TFEU the dominant position can be also abused by imposing *unfair prices*. An unfair price is usually understood as being an excessive price, and the Commission has been using a set of cost parameters in order to determine at which level a certain price becomes excessive and subsequently unlawful. In *General Motors* the CJEU said that excessiveness is judged in relation to the economic value of the product or of the service.<sup>148</sup> In *United Brands* the CJEU dismissed the Commission's allegation that the company was engaged in unfair price practices due to lack of evidence, however it reiterated that adopting an incredibly high price that cannot be reasonably explained by the economic value of the product is an abusive conduct within the meaning of article 102 TFEU.<sup>149</sup> In what way the economic value of a product can be quantified remains a mystery, as the Court did not seem willing to detail on the subject. The Japanese AMA, under unfair trade practices, covers only the unjust price purchasing, referring only to the act of buying products or services for a high consideration and not to the act of selling for a high price.<sup>150</sup> Excessive pricing could still fall under the private monopolization prohibition, however no such case has been recorded so far.

***Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations*** is also prohibited under article 102(d) TFEU. The practice is known as *tying* and has gained a lot of attention due to its capacity of eliminating competition and being treated by the Commission as an exclusionary abuse. However, the practice is exploitative by

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<sup>143</sup>Case T-83/91, *Tetra Pak International SA v. Commission*, idem 134

<sup>144</sup>Recommendation to Twentieth Century Fox Japan Inc. on restriction on admission charge of cinema theaters, October 8, 2003

<sup>145</sup>Cease and Desist Order against Johnson & Johnson K.K, December 1, 2010

<sup>146</sup>Recommendation to J-Phone Co. Ltd. About restriction on price indication, July 28, 2003

<sup>147</sup>Case C-247/86, *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v SA Novasam* [1986], ECLI:EU:C:1988:469, para. 10

<sup>148</sup>Pinar Akman, idem 125, p. 13

<sup>149</sup>*United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 250

<sup>150</sup>Designation of Unfair Trade Practices, idem 87, article 7

nature, matter emphasized by the General Court in the *Microsoft* case, where supplying the Windows OS with Windows Media Player pre-installed was deemed as “coercion”.<sup>151</sup> In *Hilti* the conduct was seen by the Commission as limiting the consumer choice in what it concerned the type of nails that could be purchased and thus resulting in exploitation.<sup>152</sup> In Japan, in the 1965 *Textbook* case, a textbook wholesaler, and the only textbook supplier in the Nagano Prefecture, coerced its retailers to acquire also normal books to the value of two-thirds of the value of textbooks they purchased.<sup>153</sup> In a more recent case, in 2004 *Canon* was investigated by the JFTC for tie-in unfair trade practices by manufacturing its printers so that they wouldn’t work with recycled cartridges produced by other undertakings.<sup>154</sup>

The AMA, under unfair trade practices, also prohibits the *interference with a competitor’s transaction*, referring to situations in which an undertaking precludes one of its competitors from entering a contract or from benefiting from the effects of a contract concluded with a third party. The provision is pretty unique to Japanese competition law and it does not have an equivalent in EU law. In 2003, the JFTC issued a recommendation to Yonex, a manufacturer of sports equipment, who was considered to be hampering with the business activity of its competitors (others companies selling or importing shuttlecocks) and their customers. Yonex was urging all of its retailers, as well as the organizers of badminton competitions, to abstain from selling or using shuttlecocks distributed by other enterprises. The pressure was backed by the threat that Yonex would otherwise cease supplying its own shuttlecocks.<sup>155</sup> A similar situation was in the *United Brands* case, where the dominant undertaking stopped supplying its brand of bananas to a Danish retailer who was involved in an advertisement campaign for the bananas of a competing supplier. However, United Brands did not threaten but actually discontinued its supply, so the case was treated by the Commission as a refusal to supply type of conduct.<sup>156</sup>

Another recommendation was issued by the JFTC against Daiichikosho Ltd (第一興商株式会社) a company specialized in the selling and renting of karaoke machines, for determining two companies that managed the music of such karaoke machines not to offer their services for the machines produced by a competitor.<sup>157</sup> As it can be observed, the pressure is usually exerted by means of intermediates (retailers), by instructing them not to honour their obligations under the contract with the competitor. In a more recent case, DeNa, the operator of the “Mobage-Town” mobile Social Networking Service (SNS) as well as a game developer, prevented other game developers from providing their games on the SNS platform of a competitor (“GREE”).

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<sup>151</sup> Case T-201/04, *Microsoft Corp v EC Commission* [2007], ECLI:EU:T:2007:289, para. 961

<sup>152</sup> 88/138/EEC: *Eurofix-Bauco v Hilti* Commission Decision [1998] (IV/30.787 OJ [1988] and 31.488), para. 74-75

<sup>153</sup> Matsushita Mitsuo, idem 103, p.154

<sup>154</sup> Result of investigation into Canon Inc based on the Anti Monopoly Act, October 21, 2004

<sup>155</sup> Recommendation to a manufacturer of sporting equipments Yonex K.K, October 24, 2003

<sup>156</sup> Case C-27/76, *United Brands Company and United Brands Continental v Commission*[1978], ECLI:EU:C:1978:22, para. 1

<sup>157</sup> Recommendation to a karaoke producer/distributor Daiichikosho Co. Ltd, October 31, 2003

DeNa threatened that it would disconnect the games from its own SNS platform in case they would be made available on GREE.<sup>158</sup>

Another provision which is unique to Japanese Competition law is the *deceptive customer inducement*, defined in article 8 of the Designation of Unfair Trade Practices Notice as being the “unjustly inducement of the customers of a competitor to trade with oneself by causing them to misunderstand that the substance of goods or services supplied by oneself, or its trade terms, or other matters relevant to such trade are much better or much more favorable than the actual ones or than those pertaining to the competitor”. In Europe such a situation would be a matter belonging exclusively to private law (contractual and tort law) and no public authority would have competence to get involved.

The provision is supplemented by section 4, Prohibition of misleading representation, of the Act against Unjustifiable Premiums and Misleading Representations<sup>159</sup> and between 2003 and 2008 the JFTC has investigated approximately 20 such cases. The most common cases are the ones concerning misleading representation on quality (the “Lucky Wallet” case<sup>160</sup>, the electric scooters case<sup>161</sup>) and misleading representation on country of origin (the Tomorrowland Co. and World Co.case<sup>162</sup>, Daimatu Kogyo K.k case<sup>163</sup> etc).

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<sup>158</sup> Cease and Desist Order against DeNA Co., Ltd., June 9, 2011

<sup>159</sup> The Act against Unjustifiable Premiums and Misleading Representations, Law no. 134 of 1962

<sup>160</sup> Cease and desist order to K.K. Fuji Art Group about misleading representations on “lucky wallet”, December 5 2003

<sup>161</sup> Cease and desist order to dealers in electronic scooters on misleading representation, November 28, 2003

<sup>162</sup> Hearing Decisions against Tomorrowland Co., Ltd. and World Co., Ltd., December 6, 2007

<sup>163</sup> Cease and desist order to Daimatu Kogyo K.K. about misleading representations on manufacturing country of sandals, December 4, 2003

## **IV.2 Abuse of superior bargaining position vs abuse of dominant buyer power**

The Anti Monopoly Act prohibits also, as unfair trade practices, abuses by enterprises that hold a superior bargaining position. Many commentators consider that the provision was drafted more for the purpose of protecting small and medium-sized enterprises against the pressure exerted by companies that have an upper hand in negotiations, rather than for the purpose of combating anticompetitive behaviour.<sup>164</sup>

Unlike the rest of the provisions comprised by the AMA the abuse of superior bargaining prohibition is directed against abuses performed from the downstream level of the market by retailers against companies in the upper level of the market (suppliers). The Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act asserts that the terms of the transactions between undertakings are left at the independent latitude of the parties. However, when an enterprise uses its superior bargaining position in order to gain a competitive advantage imposing on the other party a disadvantage, “unjustly in light of normal business practices”, then there is a risk that fair competition on the market might be impeded.<sup>165</sup>

The eradication of such type of practices seems to be one of the leading goals pursued by the JFTC in the last few years. In November 2009, a task force on superior bargaining position has been established, and since 2007 the JFTC has issued approximately 20 warnings and cease and desist orders and more than 100 cautions to undertaking (retailers and hotels) whose practices could amount to infringements.<sup>166</sup>

The provision against abuse of superior bargaining position is infringed when an undertaking, by making use of its superior bargaining position, unjustly in light of normal business practices engages in the following types of practices:

- a) Causes the other party (including a party with whom one newly intends to engage in continuous transactions) to purchase goods or services other than those to which said transactions pertain (tying);
- b) Causes the other party to provide money, services or other economic benefits;
- c) Refuses to receive goods in transactions with said party, causing said counterparty to take back such goods, delays payment or reduces the amount of payment, or otherwise establishes or changes trade terms or executes the transactions in a way disadvantageous to the other party.<sup>167</sup>

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<sup>164</sup> Matsushita Mitsuo, *The Antimonopoly Law of Japan, Global Competition Policy*, Institute for International Economics, p. 151-199, p. 192

<sup>165</sup> Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act, November 30, 2010, p. 3

<sup>166</sup> Enforcement of the Antimonopoly Act in FY2012 (Summary), May 29, 2013, Japan Fair Trade Commission

<sup>167</sup> The AMA, article 2(5)(v)

In EU such kind of practices are known as abuses of buyer power and the general thinking is that article 102 is not designed to tackle with such conducts.<sup>168</sup> However, in the *CICCE* case the CJEU confirmed that a dominant purchaser could be an infringer of article 102. The case concerned an association of film producers who alleged that three French television companies were in breach of article 102 for setting unreasonably low license fees. The CJEU dismissed the claim against the television companies, because the association failed to prove that the prices were indeed unfair, but nonetheless it did not deny that such a practice when employed by a dominant buyer could amount to an infringement.<sup>169</sup> Article 102 may not have been originally designed for these kind of situations, but nor was it designed to deal with exclusionary abuses and nonetheless it was successfully used for 30 years in the fight against foreclosure of competition. Moreover, there is nothing in its wording that would prevent the Commission from applying it against dominant retailers.

Superior market power does not entail market-domination, however the market shares of the abusive enterprise are considered when assessing superior bargaining position. The supplier, from a need to expand its business, might find it more compelling to engage in transactions with retailers that have large market shares. Other factors considered by the JFTC that might reflect bargaining advantage are the degree of dependence of the supplier on the transaction, the possibility of the supplier to choose another retailer and other facts that might indicate the need of the supplier to carry out the transaction.<sup>170</sup>

Among the abuse of superior bargaining position cases pursued by the JFTC the most famous are the *Toys "R" Us* and *Seven-Eleven* cases. In 2011, the JFTC issued a cease and desist order and imposed a surcharge on Toys "R" Us, a retailer for children products, who unjustly returned the unsold goods to its suppliers and reduced the amount of considerations that were supposed to be paid to them.<sup>171</sup> Seven-Eleven Japan was found by the JFTC to preclude some of its franchises from adopting discount sales of certain daily products and was ordered to refrain from the said conduct.<sup>172</sup> In a more recent case, the JFTC imposed a surcharge of approximately 9 million Euros (1274.16 million yen) on Direx, a retailer owning several discount stores in the Kyushu region, for forcing its suppliers to dispatch personnel and to provide monetary contributions for promotions which brought no benefit on the suppliers. Moreover, the suppliers were also compelled to bear the costs of the merchandize that was lost or damaged during a fire disaster at one of the Direx stores.<sup>173</sup>

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<sup>168</sup> Kameoka Etsuko, *Competition Law and Policy in Japan and the EU*, Edward Elgar Publishing, 2014, p. 89

<sup>169</sup> Case C-298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities*[1985], ECLI:EU:C:1985:150

<sup>170</sup> Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act, idem 165, p. 8

<sup>171</sup> Cease and Desist Order and Surcharge Payment Order against Toys "R" Us-Japan, Ltd, December 13, 2011

<sup>172</sup> Cease and Desist Order against Seven-Eleven Japan Co., Ltd., June 22, 2009

<sup>173</sup> Cease and Desist Order and Surcharge Payment Order to DIREX Corporation, June 5, 2014

## Chapter V Conclusions

The post World War II period marks the moment when the first competition provisions were inked on paper in both EU and Japan. The Sherman Antitrust Act served as a model for both the EU legislation as well as the AMA however the manner of implementation was overwhelmingly distinctive in the two territories. Thus, the first research sub-question - *how has the competition policy in the EU and Japan evolved over time?* – will be addressed by firstly dwelling into the incentives that urged the central authorities to initiate the antitrust enforcement.

In EU, organization that was in a commencement stage at the time, the provisions were directed mainly against collusive practices between undertakings; the prohibition was concocted to become a potent instrument for the eradication of cartels which at the time were perceived as a threat against the ardently contemplated market integration process. On the other hand in Japan, following the dissolution of the *zaibatus*, the Occupational Forces led by the USA imposed a radical antitrust system intended to prevent monopolization or concentration of power from never occurring again. Needless to say when the occupation ended in 1953 the AMA was amended to a less rigid version and 20 years later the noxious effects of cartelization on the market were experienced by the public. Thus the provisions against cartels and monopolistic situations were strengthened and a surcharge was introduced against infringers.

The notion of abuse of dominant position as we know it today was the result of the efforts exerted by the German delegation during the negotiation of the EC Treaty which constitutes the foundation of EU competition law. In 1973, in the *Continental Can* case the CJEU clarified the confusion regarding the range of practices covered by the provision by stating that the exclusionary conducts fall under the prohibition as well.

In the following period the degree of implementation of the antitrust provisions fluctuated in both of the jurisdictions and in the first half of the 21<sup>st</sup> century a more modern approach was adopted in regard to the enforcement process. In EU, a “decentralization” of the enforcement system took place with the Regulation 1/2003 delegating more power on the competition authorities of the member states and annulling the notification system. In Japan the surcharges were increased while the rather “byzantine” procedural system was replaced by a new one adjusted to the dynamics of the modern society.

The second sub-question pursued by this study - *what are the main structural features of the Japanese competition law and what are their correspondents in EU law?* – is dealt with in the third chapter and starts by making a small excursion into the goals pursued by the competition policy in EU and Japan. While in EU the Commission declares as its main aim the consumer welfare, the Japanese AMA bestows a great deal of importance on the national economy together with the consumer interest. The system, in both countries, is designed to have

two levels. The first level is represented by the intermediate goals or direct objectives (effective competition), whereas the second level refers to the ultimate goals (consumer welfare/development of national economy and consumer interest). The mechanism employed is reaching the second level through the pursuit of the objectives from the first level by maintaining a fair and free competitive environment and the instruments used for that purpose are the legal prohibitions.

The recipients of the competition policies are the undertakings, by EU standards, and enterprises, by Japanese standards. Despite some negligible differences, both of the two concepts embody the same type of entity engaged in economic activity.

While the EU competition policy is concentrated in two TFEU articles, 101 prohibiting collusive behaviour and 102 prohibiting abuse of dominant position, the Japanese AMA has a more complex structure supported by 4 pillars: monopolization (monopolistic situations, private monopolization), unreasonable restraint of trade, unfair trade practices and mergers and stock acquisitions.

The control over monopolistic situations was introduced in the light of the historical economic heritage of the country and has no correspondent in EU law. Moreover, in EU it has been emphasized that dominant position is not by itself illicit as long as the undertaking does not engage in abusing it. In Japan on the other hand, if the JFTC validates that a certain enterprise amounts to monopolistic situation in a particular field it has liberty to order it to take any measure necessary to counteract the anticompetitive effects. A monopolistic situation exists when two elements are cumulatively satisfied – a market structure element (when the value of goods on a particular market reaches a certain level) and a market performance element (when the price fluctuation on the market follows a particular pattern).

Private monopolization refers to the type of conducts by which an enterprise or a group of enterprises excludes or controls the business activity of other entities causing, contrary to the public interest, a substantial restraint of competition in a particular field. The corresponding EU provision is the abuse of dominant position as the two concepts share a high degree of resemblance. Both provisions require a certain degree of market power (dominant position/substantial restraint of competition) and proclaim a downright ban on practices designed to prevent the business activity of other entities and foreclose the market (exclusionary practices) as well as on practices involving manipulating the business activity of a weaker entity and placing it in a disadvantageous position (exploitative/control practices). It is necessary to mention that by Japanese standards, when a certain conduct is not found to be substantially restraining competition it is not immediately absolved of illegality. Even in the presence of lack of market power the unfair trade practices prohibition can still be triggered.

In the past the concern towards the exclusionary practices was prevalent as both the Commission and the JFTC published guidelines in relation to the shape in which this kind of

practices can be encountered as well as in relation to the enforcement of the provision against such conducts. The likelihood that their outcomes amount to a partial elimination of competition is sufficient ground to judge a conduct abusive. Evidence that actual foreclosure occurred is not required.

The correspondent of article 101 TFEU in the AMA is the unreasonable restraint of trade stipulation, however it is necessary to emphasize that the correspondence is only partial. The EU prohibition covers, legacy of the *Consten and Grunding* case, both horizontal and vertical agreements or concerted practices that affect trade between member states and have as their object or effect the prevention of competition. Unreasonable restraint of trade on the other hand is classified as any business activity between enterprises, materialized by contract, agreement or any other means, by which the entities *mutually* restrict or conduct their business activities in such a manner as to fix, maintain or increase prices or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. In the *Newspaper Distribution* case the Tokyo High Court held that the expression “mutual restriction” predicates that all colluding parties need to adhere to the same kind of restrictions, condition which cannot be fulfilled in the case of vertical agreements. As a result the prohibition is directed only against cartels and other horizontal agreements.

Agreements between parties operating at different levels of the market are covered by the private monopolization clause when there is indication that they inflict a substantial restraint on competition. Otherwise, if the conduct only has a tendency to impede competition then it will fall under the umbrella of the unfair trade practices provision. Albeit in a few cases, where a certain degree of superior bargaining power is needed, undertakings which are not dominant in a particular field can become the target of the unfair trade practices provision. The conducts are listed in the Designation of Unfair Trade Practices Notice issued by the JFTC and include both conducts exclusionary in character as well as exploitative behaviours.

In order to be able to proceed to the main research question of this study - *how does the EU approach on the legal concept of exploitative abuse of dominant position reflect in the competition policy of Japan and what are the differences and similarities generated in regard to its enforcement in the two jurisdictions?* – it is essential first to establish the correlation chart of the exploitative behaviours in the two territories. While in the EU the exploitative abuses of dominant position are prohibited by means of article 102 TFEU, the AMA has two provisions that serve that purpose. When the exploitative conduct is capable of substantially restraining competition then the abuse is considered to be private monopolization by control. On the other hand, if the harm inflicted on competition does not reach a considerable level but rather only has a tendency to inflict competition then the behaviour turns into an unfair trade practice.

Substantial restraint of competition, similarly to the dominant position concept refers to the powerful condition on the market enjoyed by an enterprise which endows it with a certain degree of independency from the competitive restraints of the market when conducting its business activity. Dominant position can exist only in relation to a relevant market whereas competition must be substantially restraint in a particular field trade. Relevant market and particular field of trade are synonym concepts and both compile two dimensions: a product market/scope and a geographical market/scope. The product market is identified in both jurisdictions based on demand substitutability and where the circumstances allow it on supply substitutability. The parameters considered are roughly the same, the most notable difference being that in relation to prices the JFTC employs a slightly different test from the one preferred by the Commission (SSNIP).

After establishing the relevant market/particular field of trade both the Commission and the JFTC carry out the same method by examining the market shares of the alleged entity and of its competitors, the potential competitive pressure and the countervailing buyer power/countervailing bargaining power. There are no remarkable difference in the course of this process however it is paramount to observe that unlike the Commission the JFTC has to apply an after the fact approach when examining substantial restraint of competition. While in the EU the dominance on market is a prerequisite condition for an abuse to be established, in Japan the market domination can be the outcome of the abusive conduct and it is irrelevant if prior the enterprise was not very powerful on the market.

As previously stated triggering the unfair trade practices clause does not entail market domination, in fact far from it, the JFTC is satisfied with as much as just a tendency to impede competition. Virtually if the conduct is likely to bring forth even a small degree of competitive harm it is enough to be considered a breach; actual anticompetitive effects do not need to be observed. This is the reason why the JFTC often resorts to classifying cases as unfair trade practices instead of private monopolization. In the 2008 *Microsoft* case the JFTC found the undertaking engaged in trading on restrictive terms practices and thus infringing section 12 of the Designation of Unfair Trade Practices Notice. Had the field of trade (PV audio-visual technology market) been narrowed down further a private monopolization case by control could have been established. The decision does not come as a surprise when taking into consideration the paltry case law on private monopolization.

In EU holding market power burdens the undertaking with the so-called special responsibility. The doctrine first saw the light of day in the 1983 *Michelin I* case and basically predicates that a dominant undertaking can infringe the competition policy when engaged in practices which if employed by non-dominant entities would bear no legal repercussions. Such a concept does not exist in the Japanese policy, however considering that an unfair trade practice needs only to have a tendency to impede competition an unofficial form of such a concept can be

identified. Moreover, unlike the European one the Japanese “special responsibility” is addressed towards all enterprises regardless of their market power.

The phrasing of the last sub-question addressed in this study is - *What are the commonalities and dissimilarities between the concept of exploitative abuse and its Japanese counterparts private monopolization by control and exploitative unfair trade practice?* In order to proceed towards an answer it is necessary to note that both abuse of dominant position as well as private monopolization by control refer to the act of gaining material benefits to the detriment of another entity by making use of its superior market power. In both jurisdictions the common denominator is the proximity between the harm and the consumers as the aftermath of the conduct.

The first difference that arises in connection with private monopolization is the fact that the provision can be infringed by exerting mere indirect control, unlike in EU where direct control is essential in every single case. The first and only case involving indirect control was the 1957 *Noda Soy-Sauce* case, in which Noda’s conduct of raising the retail price of its soy-sauce functioned as a Ripple effect and within short time the soy-sauce supplied by the other players on the market reached the same price thresholds. The Tokyo High Court considered that Noda proved to have indirectly influenced the market and deemed its conduct as private monopolization by indirect control. In EU if such a situation were to occur it would be regarded as mere tacit collusion, which no matter how much harm would deliver on the market it cannot be deemed illegal.

The first forms of exploitative practices dealt with in this study are the *discriminatory practices*. Article 102(c) TFEU prohibits applying dissimilar conditions to equivalent transactions while the AMA prohibits discriminatory consideration and discriminatory treatment on trade terms. In both jurisdictions the simple fact of applying different prices is not in itself illicit, however if the conduct has a potential negative influence on the competition between retailers or if the pricing system was adopted in order to partition the market then the prohibition is triggered.

*Trading on restrictive terms* and its European equivalent *unfair trading conditions* portray the situation when an undertaking unjustly imposes restrictions on the business activity of another party. The most representative example of such a practice is the non-assertion clause that Microsoft unilaterally inserted in all of the licensing agreements concluded with PC manufacturers in Japan. In EU the conduct of an undertaking, specialized in the management of copyrights, of requiring its members to assign both their current and past works as well as the practice of exercising the rights of its former members for 5 years following their withdrawal were deemed by the Commission as unfair trading conditions. A film distributor coercing the cinema theatres broadcasting their films to apply a certain admission fee was found by the JFTC to be an unfair trade practice while the Commission classified the conduct of an undertaking

unilaterally determining the prices of the supplements to the contract as an infringement of article 102 TFEU.

In the cases *General Motors* and *United Brands* the CJEU established that when an undertaking charges an *excessive price* that cannot be justified in the light of the economic value of the product it is in breach of the 102 prohibition. In Japan imposing an excessive price is not covered by the unfair trade practices prohibition. Although there has been no record of such a case so far, if such behaviour would substantially restrain competition it could fall under the private monopolization provision.

*Tying*, a type of practice that has garnered a lot of attention due to its ability to exclude competition, was originally treated as an exploitative abuse due to its harmful effects directed against consumers. Its implementation functions similarly in both EU and Japan. In the 2007 *Microsoft* case the General Court deemed the act of supplying the Windows OS with Windows Media Player pre-installed as “coercion”. In *Hilti* the CJEU emphasized that such a practice results in a limitation in relation to the consumer choice. Canon was also subjected in 2004 to a JFTC investigation for allegedly manufacturing its printers so that they wouldn’t work properly with recycled cartridges produced by other enterprises.

Perhaps the most notable difference between the two legislations is the fact that the Japanese AMA covers a wider array of practices, conferring the JFTC with a broader authority to get involved in practices that might cross paths with other areas of law. One such practice is *interference with a competitor’s transaction* which in most cases entails exerting pressure on intermediates (retailers) and instructing them either not to honour their contractual obligations with a competitor or not to conclude such an agreement with a competitor of the alleged enterprise. As an example, it is worth mentioning Yonex who threatened their retailers and the organizers of badminton events that they will stop supplying their shuttlecocks in case they chose to also sell or use shuttlecocks provided by competitors. Similarly, the practice of a mobile SNS operator of urging game developers not to provide their games on the SNS platform of a competitor was considered an infringement by the JFTC. In EU, a similar situation occurred in the *United Brands* case where the dominant undertaking refused to supply their bananas to a retailer involved in an advertisement campaign for the bananas of a competitor. The practice was classified refusal to supply, however it would have been interesting to find out how the Commission would have dealt with the case if United Brands wouldn’t have actually discontinued its supply but only threatened to do so.

Another unfair trade practice provision that is unique to the Japanese competition policy, with no correspondent in EU law is *deceptive customer inducement*. The most common cases are the ones concerning misleading representation on quality and misleading representation on country of origin.

One of the main priorities pursued by the JFTC in the past few years was identifying and eliminating the situations where an enterprise makes use of its superior bargaining position and unjustly in the light of normal business practices determines another party either to buy goods or services other than those pertaining to the transaction, or to provide money, services or other economic benefits, or refuses to receive the transaction goods, delays the payment or otherwise executes the agreement in a way disadvantageous to the other party. The prohibition is directed towards abuses performed from the downstream level of the market, by retailers, against the suppliers from the upstream level of the market. In Europe, such practices are known as abuses of dominant buyer power, however unlike in Japan, the Commission has rarely if ever displayed any concern towards their anticompetitive effects. The CJEU has nonetheless predicated in the *CICCE* case that dominant buyers can become infringers within the meaning of article 102 TFEU.

To conclude, the exploitative abuses of dominant position and their Japanese correspondents - private monopolization by control and unfair trade practices - reflect a lot of common features related to the type of prohibited conducts and the way they are enforced. This does not come as a surprise when considering that both jurisdictions hold the protection of the consumers as one of their leading goals. At the same time a lot of differences arise, the most notable being the degree of market power required to trigger the prohibition, or lack of it for that matter, and the wider spectrum of authority that the JFTC has, enabling it to intervene in matters that go outside the jurisdiction of the Commission.

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