

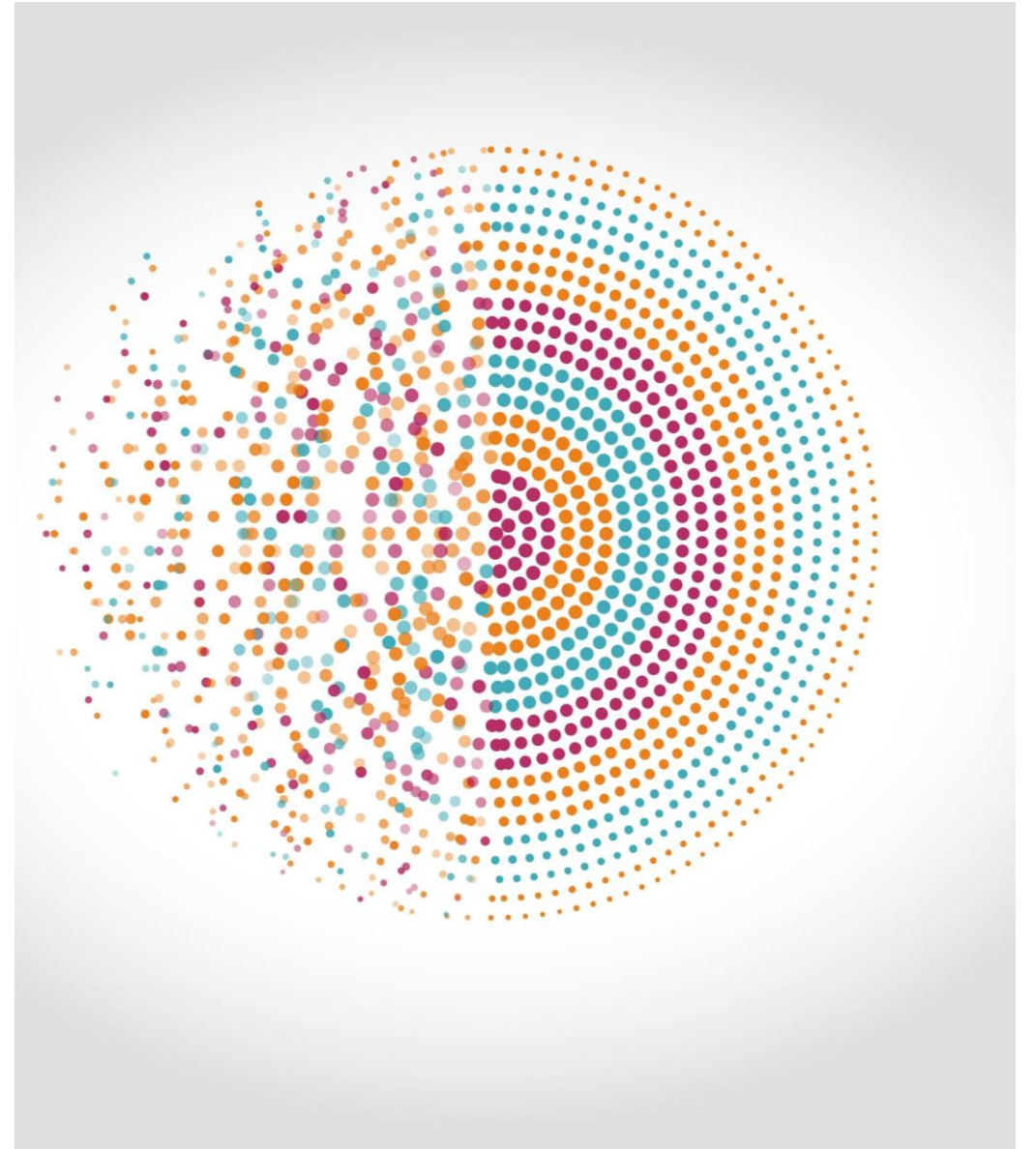
Seoul Workshop, Seoul National University, AI
Institute, 16 Dec 2022

ASBP in Japan

Junko Shibata, Kagawa University

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Abuse of superior bargaining position: definition

Antimonopoly Act (AMA) Art 2(9)(v)

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

(a) causing the counterparty in continuous transactions (including a party with whom one newly intends to engage in continuous transactions; the same applies in (b) below) to purchase goods or services other than those to which the relevant transactions pertain

(b) causing the counterparty in continuous transactions to provide [1] money, [2] services or [3] other economic benefits

(c) [1] refusing to receive goods in transactions with the counterparty, [2] causing the counterparty to take back such goods after receiving them from the counterparty, [3] delaying payment to the counterparty or [4] reducing the amount of payment, or *otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty* (emphasis and numbers in bracket added)

JFTC alerts in FY2021

JFTC, *Reiwa 3 Nenndo Kosei Torihiki Iinkai Nennji Hokoku (2021 Annual Report) 116* (modified by author).

取引形態 行為類型	合計	Type of practice
購入・利用強制	9	2 (9)(v)(a)
協賛金等の負担の要請	10	2 (9)(v)(b) 1
従業員等の派遣の要請	24	2 (9)(v)(b) 2
その他経済上の利益の提供の要請	4	2 (9)(v)(b) 3
受領拒否	1	2 (9)(v)(c) 1
返品	18	2 (9)(v)(c) 2
支払遅延	4	2 (9)(v)(c) 3
減額	26	2 (9)(v)(c) 4
取引の対価の一方的決定	1	2 (9)(v)(c) Others [unilateral determination of price]
不当な給付内容の変更及びやり直しの要請	6	2 (9)(v)(c) Others [retrospective changes to other trading terms and requirement to redo]
その他	4	(c) Others - others
合計	107	

Abuse of superior bargaining position

Procedures and Penalties

JFTC

Cease and desist order & Surcharge payment (1%) of turnover order

Warning and alert

Commitment procedure

Investigation-voluntary corrective measures-closure of the case

Private litigation: (single) damages and injunction.

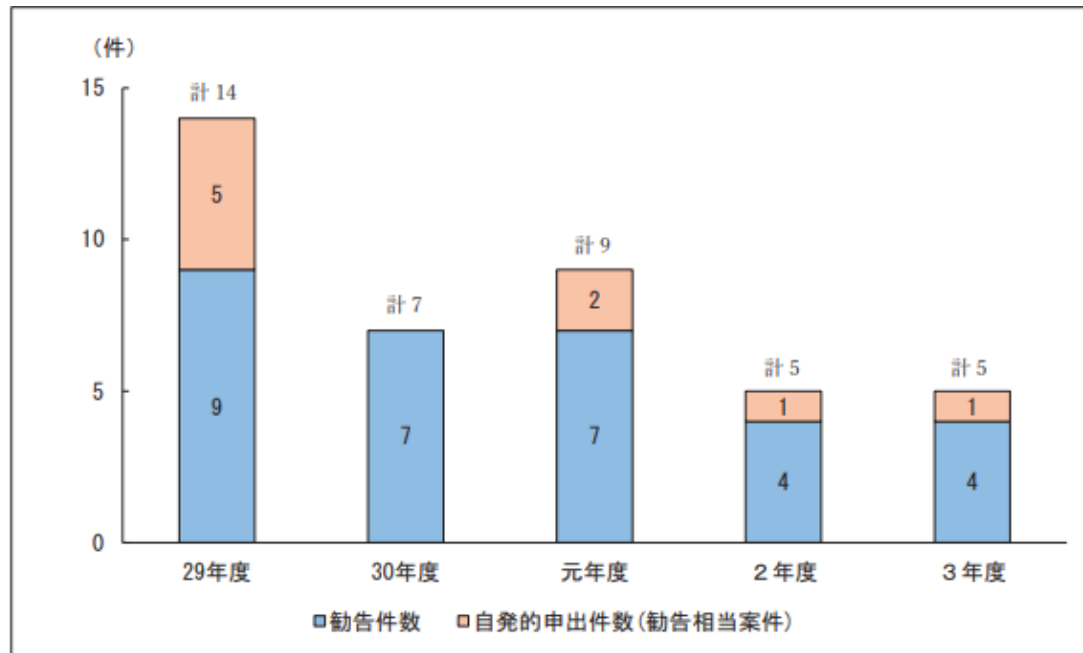
Criminal liability: n/a.

Supplemental legislation and designation

- Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (**Subcontract Act**).
- Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers, JFTC Notification No. 11 of 2005.*

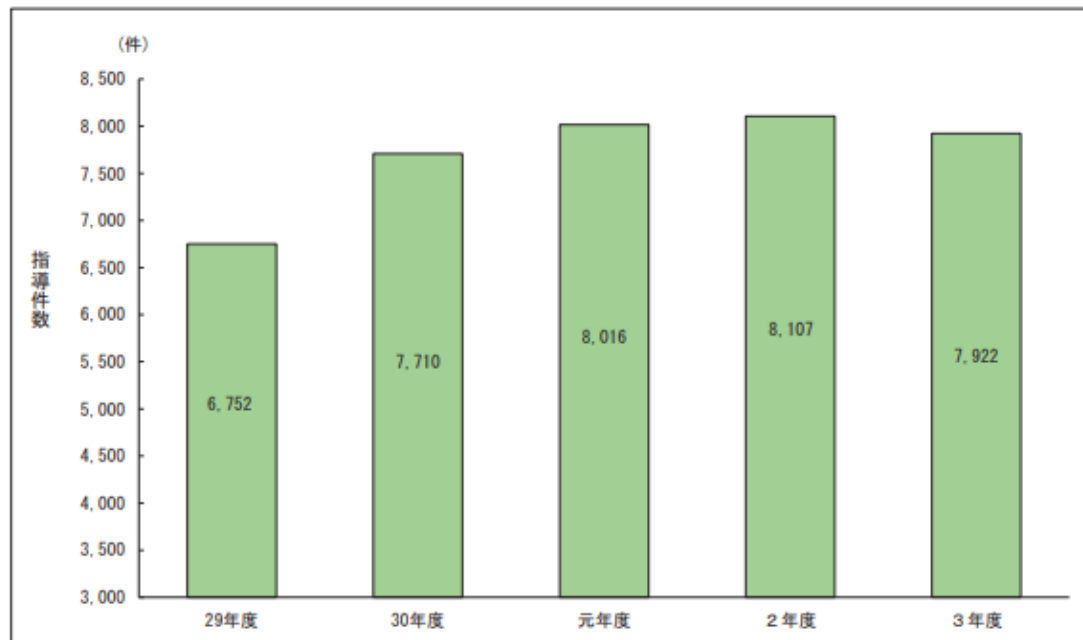
(*No case since 2009 AMA amendments to introduce administrative fine (surcharge) against ASBP.)

Subcontract Act JFTC, Annual Report FY 2021, p. 122



(注) 自発的の申出事案については後記 5 参照。

Number of recommendations (blue) and voluntary reporting (pink)



Number of guidance

Competence of the JFTC and other agencies

The JFTC and the Consumer Affairs Agency

- The Consumer Affairs Agency was established in 2009.
- Since its establishment, the Consumer Affairs Agency has been in charge of unfair practices that affect consumers.

Reference: The Consumer Affairs Agency <<https://www.caa.go.jp/en/>>

The JFTC and the Personal Information Protection Commission (PPC)

- The PPC was established in 2016 and enforces the Act on the Protection of Personal Information.

Reference: The Personal Data Protection Commission <<https://www.ppc.go.jp/en/index.html>>

Large Retailers and Suppliers

Case 1: Ralse

Case 1: *Ralse*, Tokyo High Court 3 March 2021

(JFTC Cease and Desist Order 3 July 2013; JFTC Examination Decision 25 March 2019; Tokyo High Court Judgement 3 March 2021; Supreme Court Cert. Rejected 18 May 2022)

Ralse: The **third largest** supermarket chain in Hokkaido area. Ranked **2nd** in Hokkaido in sales of foodstuffs. Total sales grew around 110 billion yen in FY 2009. Sales grew each year from 2009–2011.

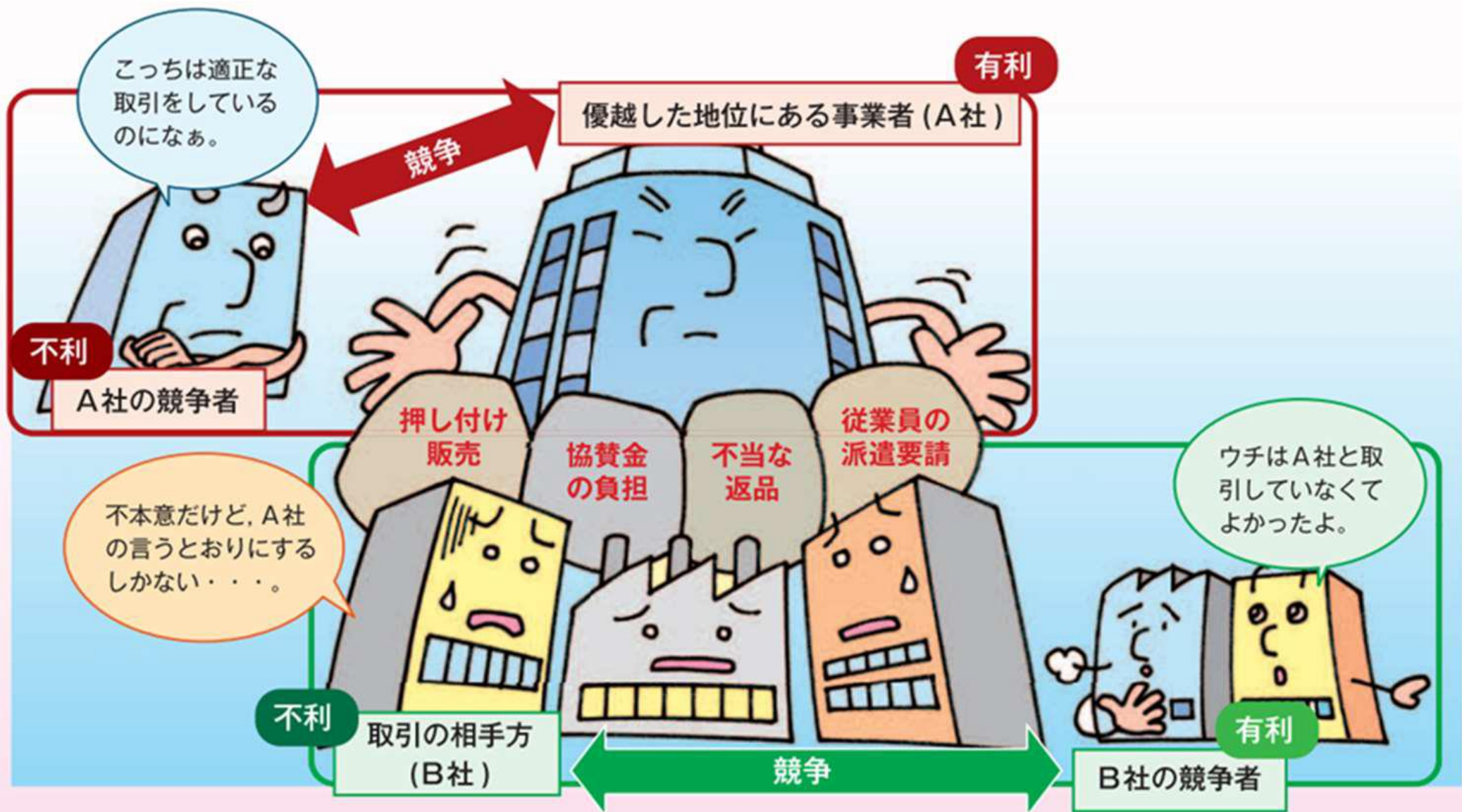
Practices at issue:

- Ralse made **53 suppliers dispatch their employees for display, replenishment and removal of goods.**
- Ralse made **54 suppliers pay ‘sponsorship money’ to Ralse when it carried out shop opening and renovation promotional sales.**
- Ralse made **86 suppliers pay ‘sponsorship money’ to Ralse when it ran bargain sales. The amount of money was set at 0.45–0.05% of each supplier’s sales made to Ralse.**
- Ralse made **18 suppliers buy suits and related products.**

Case 1: *Ralse*

Holdings: Goal of ASBP regulation

‘In light of these provisions . . . the transaction based on the **free and independent judgment** of the other party is hindered, while the other party is at a **competitive disadvantage** in its relationship with its competitors and while those who are engaged in such practices may gain a **competitive advantage** in relation to its competitors; thus such practice may impede fair competition and is regulated as an unfair trade practice (UTP).’



Competitive advantage and disadvantage. JFTC, Yuuetsuteki chii no rannyo [ASBP] <https://www.jftc.go.jp/houdou/panfu_files/yuuetsu.pdf>

Case 1: *Ralse*

Holdings: Superior bargaining position

‘In light of the aforementioned purpose, the aforementioned “superiority of one's trading position over the counterparty” (superiority) means **that the counterparty may be forced to accept the request even if the actor makes a request that is extremely disadvantageous to the counterparty, because the difficulty in continuing business with the actor would be a major obstacle to the business management of the counterparty.** Therefore, it is reasonable to conclude that the case where the actor is not only in a dominant market position or an absolutely superior position equivalent thereto, but also in a **relatively superior position** in relation to the counterparty to the transaction concerned is included.’

‘In determining whether a superior bargaining position exists, it is appropriate to comprehensively consider **(i) the market position of the defendant, (ii) the degree of dependence of the counterparty to the transaction on the defendant, (iii) the possibility of a change in the counterparty to the transaction, (iv) other specific facts** indicating the necessity and importance of doing business with the actor, and other factors. It should be reasonable to take into account the following factors.’

Case 1: *Ralse*

Holdings: Superior bargaining position

‘In view of the aforementioned interpretation, it can be said that a superior bargaining position can also be **applicable between companies of similar size.**’

‘Furthermore, causing **significant disadvantages to a specific business** may cause a significant hindrance to overall management, when the such specific business is relatively important in the overall management of the business.’

‘In determining the degree of dependence on transactions, the business form of each company and the actual status of ongoing transactions with the plaintiffs are taken into account, and **the degree of dependence on transactions is not necessarily determined by whether the degree of dependence on transactions exceeds 10%.**’

Case 1: *Ralse*

Stated facts and findings

- Degree of dependence (overall): 0.2–75%
- Possibility of changing retailers: ‘impossible’ or ‘difficult’ according to the counterparties.*
- Other facts

Case 1: *Ralse*

Stated facts and findings ‘JFTC questionnaires’

- ✓ Is Ralse in a leading position in the field of food supermarkets in the Hokkaido area?
- ✓ Is their degree of dependence on transactions with Ralse higher than that of other retailers?
- ✓ Are the branches doing business with Ralse important?
- ✓ Is it necessary to do business with Ralse at the branch concerned?
- ✓ Is it easy to substitute Ralse with other retailers?
- ✓ Do you expect Ralse to grow?
- ✓ Did you recognise the importance and necessity of doing business with Ralse to such an extent that you had no choice but to accept the request, even if it was detrimental to your company?

(Reconstructed by author based on the stated facts in Tokyo High Court Judgements.)

Case 1: *Ralse*

Stated facts and findings: ‘supplier 83’

Low degree of dependence in terms of percentage and superior bargaining position:

‘a 《supplier (83)》 is a manufacturer located in 《location omitted》 The company’s capital during the period in question was [amount] yen and its total annual turnover was between [amount] yen and [amount] yen. . . The annual sales to Ralse . . . amounted to approximately [amount] to [amount] JPY, **the degree of dependence on Ralse was approximately 0.2% or approximately 0.3% . . . in relation to 4 or 5 business branches, the degree of dependence on Ralse was approximately 3.7% to 5.7%, and Ralse 's ranking in the degree of dependence on Ralse was approximately 6th to 10th place out of approximately [number of clients] to approximately [number of retailers] . . . [Supplier (83)] states that it is not easy to replace the business with Ralse with other retailers because it is impossible to find new retailers.**’

Case 1: *Ralse*

Stated facts and findings: ‘supplier 83’

‘While it is possible to cover the loss of one large business partner with other business partners in Kanto area, **the number of major business partners is limited in Hokkaido and it is impossible to make up the volume of business with Ralse with other business partners.**’

‘**The loss of business with a major company such as Ralse would have a significant impact on management.**’

[Supplier 83] have **a factory in Hokkaido** and basically manufacture the products sold in Hokkaido at Plant X. If business with Ralse were to cease, **‘the operation rate of Plant X would be affected and the number of part-timers working there would have to be reduced,** which would have an impact on the employment aspect.’

Case 1: *Ralse*

On listed practices and disadvantage

... where the other party is subjected to a **disadvantage that cannot be calculated in advance** [1]

... where, even if the conditions are clear in advance, **the burden exceeds the extent that is deemed reasonable**, taking into account the direct benefits, etc., to be obtained by the other party, to the detriment of the other party [2]

Case 1: *Ralse*

Findings: Unfairness

Ralse had committed the practices at issue ‘**against a large number of suppliers (88 companies) over a long period of time**, from 20 April 2009 to 13 March 2012, which is the period covered by the present case, **in a systematic and planned manner under the direction of the officers of Ralse**, and as a series of acts, Ralse had committed the Acts in question to the detriment of its counterparties. Therefore, it should be said that the Ralse had been continuously committing the relevant acts constituting detrimental acts over a certain period of time and over a wide area under the relationship such that if Ralse made a request for detrimental acts to the suppliers, the suppliers would be forced to respond to such request. It is reasonable to consider that there is a risk that the supplier will be prevented from conducting transactions based on the free and independent judgment of the supplier and, as a result, the supplier will be at a disadvantage in relation to its competitors and the plaintiff will have an advantage in relation to its competitors, which may have an adverse effect on the order of fair competition.’

(DeepL translation. emphasis added.)

JFTC ASBP Guidelines (2010)

On ‘spreadness’

‘The risk of impeding fair competition is identified case-by-case, considering factors including the degree of the disadvantage at issue and the **extensiveness [spreadness]** of the act. For example, the act is likely to be found to impede fair competition [1] when the party having superior bargaining position organizationally imposes a disadvantage on a large number of transacting parties, or [2] when the party having superior bargaining position imposes a disadvantage only on a specific transacting party, but the degree of disadvantage is high or such act, if left unaddressed, is likely to be carried out to other transacting parties.’

parties.’ <https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf>

Examples in which the large retailer lacked superior bargaining position relative to suppliers: *Edion (JFTC Examination Decision 2 Oct 2019)*

The JFTC cease and desist order (initial decision) stated Edion held a superior position in relation to 127 suppliers. However, after an appeal and review, the JFTC partially annulled the initial decision, finding that Edion was not in a superior position with respect to 35 of the 127 suppliers, because:

- These 35 suppliers differed in their degree of dependence as well as other circumstances—see Annex 5. [‘35 suppliers’ include Suppliers 111, 115, 116, 124 and 125 in Annex 5 (next page)]
- Answering the JFTC questionnaire, these 35 suppliers denied it was difficult to change suppliers; rather, they stated that it would be easy to compensate for the losses caused by the suspension of business with Edion by finding alternative retailers or by increasing business with other retailers.
- Although all 35 suppliers accepted the disadvantages requested by Edion, the JFTC did not find they had no choice but to accept the significant disadvantages because the difficulty in continuing business with Edion would have been a major hindrance to their business management.

Large Retailer ASBP Cases

- 1) ***Sanyo-Marunaka***: JFTC Cease and Desist Order 22 June 2011, JFTC Examination Decision 20 February 2019, Tokyo High Court Judgement 11 December 2020, JFTC Examination Decision 27 January 2021 (total revocation)
- 2) ***ToysRus***: JFTC Cease and Desist Order 13 Dec 2011, JFTC Examination Decision 4 June 2015
- 3) ***Edion***: JFTC Cease and Desist Order 16 Feb 2012, JFTC Examination Decision 2 Oct 2019, Appeal to Tokyo High Court on 1 Nov 2019 (pending at the time of writing)
- 4) ***Ralse***: JFTC Cease and Desist Order 3 July 2013, JFTC Examination Decision 25 March 2019 Tokyo High Court Judgement 3 March 2021, Supreme Court cert. denied 18 May 2022
- 5) ***Direx***: JFTC Cease and Desist Order 5 June 2014, JFTC Examination Decision 25 March 2020, Appeal to Tokyo High Court on 2 April 2020

Note: significance of these five cases – after amendment of the AMA to introduce surcharge in re ASBP.

Digital platforms and business users

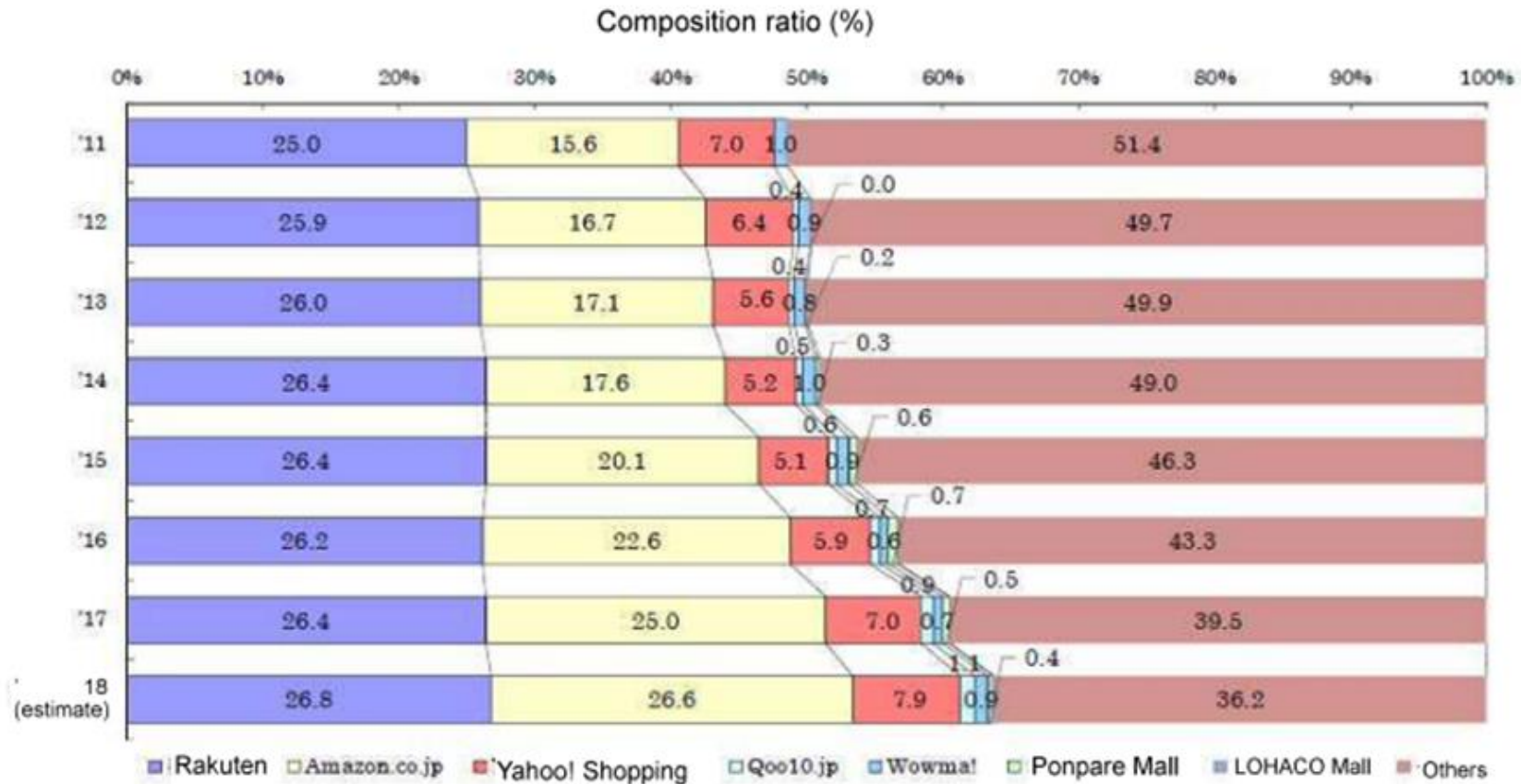
Case 2: Amazon (ASBP)

Case 2: *Amazon (ASBP)*

JFTC Approval of Commitments 10 Sep 2020

- Amazon Japan (hereinafter Amazon): Online shopping platform operators
- Suppliers: Sellers of products to Amazon Japan [amazon as a wholeseller – not agency model]

<Chart 2-3 Consumer e-commerce market shares¹⁷>



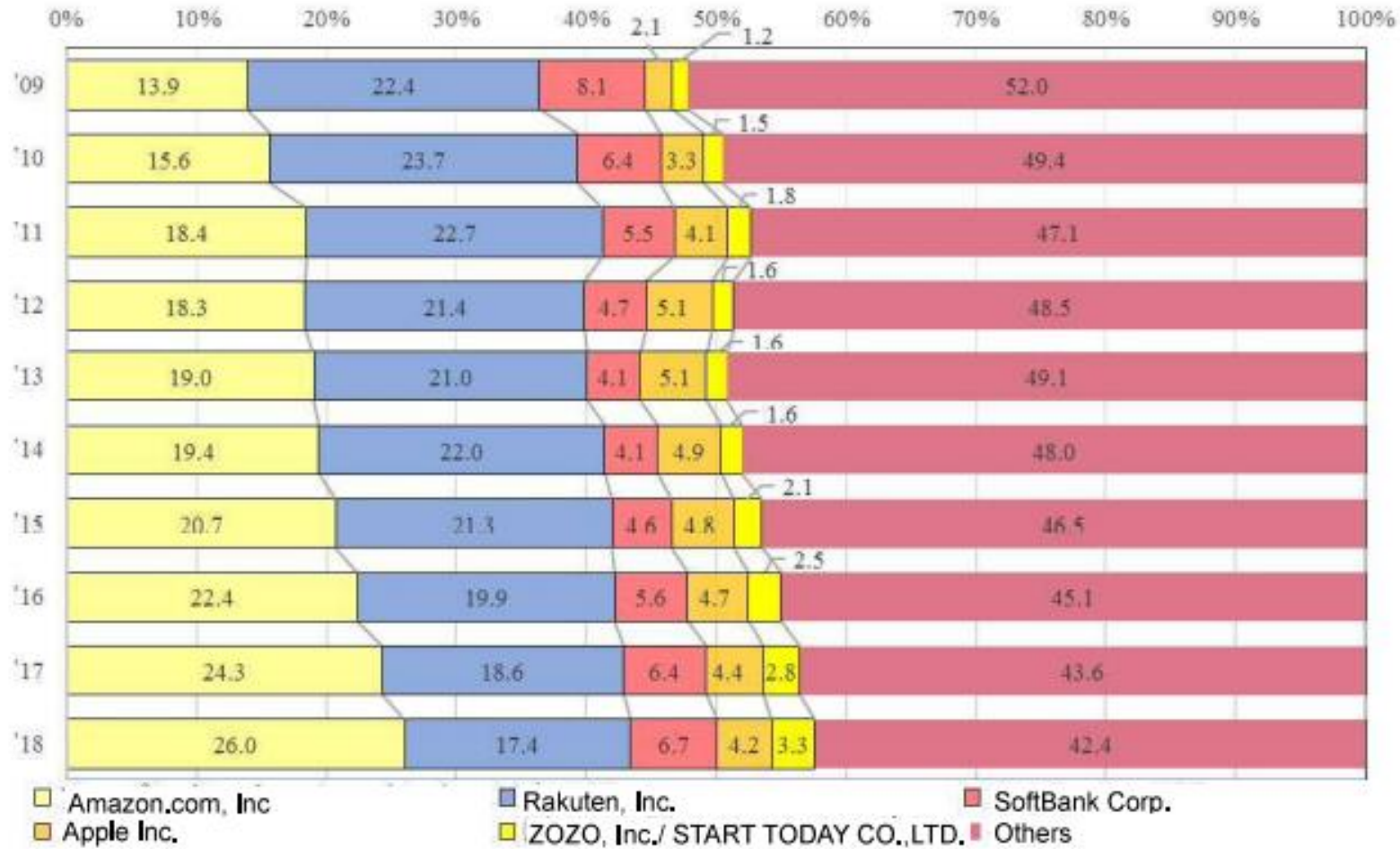
* "Others" mean businesses excluding the seven malls or companies that have their independent mail-order sites

Source: Fuji Keizai Management Co., Ltd "Actual Status of Mail-order/e-commerce Businesses and Future Outlook 2019"

JFTC Report Regarding Trade Practices on Digital Platforms, 16. 31 October 2019.

<https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html>

Composition ratio (%)



Source: Created by the JFTC based on the Euromonitor International Ltd. "Passport"

FTC Report Regarding Trade Practices on Digital Platforms, 16. 31 October 2019.

<https://www.jftc.go.jp/en/pre-releases/yearly-2019/October/191031.html>

Case 2: Amazon (ASBP)

JFTC Approval of Commitments 10 Sep 2020

Practices at issue:

- ❑ Under an Inventory Compensation Contract, Amazon **reduced the price** payable to the supplier. The Contract was concluded when there was a reduction in the price that the supplier pays to procure the product. Under the Contract, the supplier was to pay Amazon the amount calculated by multiplying the stock quantity of the product at Amazon by the difference between before and after the purchase price change.
- ❑ Amazon made suppliers **pay money on the grounds that Amazon could not achieve its target profit** from the sale of the goods purchased from the supplier.
- ❑ Amazon made suppliers **pay Amazon the money** under the Joint Marketing Programme Agreement, under which Amazon provides the suppliers with a service **for posting information** on products purchased from the supplier and the suppliers pay Amazon an amount calculated by multiplying the monthly sales amount to Amazon by a certain pre-determined fee rate as compensation for the use of the service.
- ❑ Amazon made the suppliers to **pay sponsorship money and other money** claiming that they were for investment in Amazon systems.
- ❑ Amazon **returned goods to the suppliers that Amazon considered to be excess stock**, where there were no reasons attributable to the supplier at issue.

Case 2: *Amazon (ASBP)*

JFTC Approval of Commitments 10 Sep 2020

Commitments include:

- ✓ stop the above practices
- ✓ restore monetary value to the suppliers
- ✓ establish a code of conduct on AMA compliance and run staff training programme

<<https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html>>

Case 2: Amazon (ASBP) JFTC Approval of Commitments 10 Sep 2020

Not retrospective changes?

Practices at issue:

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- ❑ Amazon **returned goods to the suppliers that Amazon considered to be excess stock**, where there were no reasons attributable to the supplier at issue.

From *Ralse*

On listed practices and disadvantage

- 1) ‘where the other party is subjected to a **disadvantage that cannot be calculated in advance**’
- 2) ‘where, even if the conditions are clear in advance, the burden exceeds the extent that is deemed reasonable, taking into account the direct benefits, etc., to be obtained by the other party, to the detriment of the other party’

‘imposing a disadvantage on the counterparty which the counterparty cannot calculate in advance’



JFTC (Video), Ki wo tsukeyou! Torihiki no ruru: Yuetsuteki chii no ranyo kisei [Be aware! The rule of [fair] trade: The regulation of ASBP] <<https://www.youtube.com/watch?v=gQlXm11a8M8&t=944s>>

Amazon (ASBP) JFTC Press Release 11 Apr 2019

Change to point programme, ASBP – voluntary remedial measures and case closed

‘On 20 February 1991, Amazon Japan G.K. (corporate number 3040001028447) changed the terms and conditions of the Amazon Point Service with sellers on the Amazon Marketplace to the effect that a **minimum of 1% of points would be given for all products listed on the Amazon Marketplace and that the seller would bear the cost of the points**. The company was conducting a necessary investigation because there were concerns under the Antimonopoly Law (abuse of a superior bargaining position) about the content of the agreement, which stated that a minimum of 1 per cent of points would be given to all products listed and that the seller would be responsible for the cost of the points.

Under these circumstances, on 10 April 1991, **Amazon Japan G.K. amended the above-mentioned changes to the terms and conditions, making it optional for sellers to make their products eligible for the points service**, and the Fair Trade Commission decided not to continue the above investigation into the said changes to the terms and conditions.’

<<https://www.jftc.go.jp/houdou/pressrelease/2019/apr/190411.html>> (DeepL translation)

ASBP and Other Unfair Trade Practices

Case 3: MFN Cases

The JFTC AMA Enforcement in Relation to Digital Platforms

30 Jun 2022 *Sinex & Smart Value (Commitment)*, General Designation (GD) Para. 14 (unfair interference to competitor's trade, relating to public tendering)

2 June 2022 *Expedia (Commitment)*, MFN GD Para. 12 [Lessening Free Competition (LFC)] [LFC]

16 Mar 2022 *Booking.com (Commitment)*, MFN GD Para. 12 [LFC]

2 Dec 2021 *UniQuest**, GD Paras. 11 & 12 (exclusivity) [LFC]

10 Sep 2020 *Amazon (Commitment)*, ASBP

28 Feb 2020–6 Dec 2021 *Rakuten (Shipment Fee)**, ASBP

25 Oct 2019 *Rakuten (Commitment)*, MFN GD Para. 12 [LFC]

11 Apr 2019 *Amazon**, (*Change to point programme*) ASBP

10 Oct 2018 *Airbnb**, Private Monopolisation and/or UTP GD Paras. 11 & 12 (exclusivity) [LFC]

11 July 2018 *Mobile phones**, GD Para. 12 [LFC]

23 May 2018 *Minnano Pet Online*, GD Para. 11 (exclusivity) [LFC]

15 Aug 2017 *Amazon (book)**, MFN GD 12 [LFC]

1 Jun 2017 *Amazon (marketplace)**, MFN GD 12 [LFC]

*LFC: Lessening free competition [incipiency theory]

Designation of Unfair Trade Practices (known as GD) para. 12

Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982)
'General Designation (GD)'

(Trading on Restrictive Terms)

Para 12. ... 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.

Designation of Unfair Trade Practices (known as GD) para. 12

JFTC, Guidelines Concerning Distribution Systems and Business Practices (1991, last revised 2017)

‘In some cases, vertical restraints may have **anti-competitive effects**: for example, such restraints **may prevent innovative business activities, reduce or eliminate inter-brand or intra-brand competition, raise entry barriers and thereby hold back new market entrants, or limit consumers’ choice of products.**’

‘... effects of vertical non-price restraints on competition in markets differ depending upon the types of restraints and specifics of each case. Vertical non-price restraints include the following two categories: (i) those which should not be considered illegal merely based on types of the restraints, but should be determined on a case-by-case basis whether or not tend to impede fair competition (i.e., whether or not they have **foreclosure effects** or **price maintenance effects**) taking into account, among others, a position in the market of an enterprise which imposes the restraint; and ...’

<https://www.jftc.go.jp/en/legislation_gls/210122.pdf> (emphasis added.)

Case 3: *Booking.com* (MFN)

JFTC Approval of Commitments 16 Mar 2022

- Wide parity (most favoured nation [MFN]) clause. UTP GD Para. 12
- **Booking.com**: Online travel agency platform
vs hotels and other accommodation providers

Case 3: *Booking.com* (MFN)

JFTC Approval of Commitments 16 Mar 2022

Practice at issue:

(Parity clause imposed by Booking.com.)

- **Accommodation rates**
- **Number of rooms**

Listings are *same as or more advantageous than* those of other sales channels (excl. those of the accommodation provider's own website or other sales channels) [implying broad MFN].

Case 3: *Booking.com (MFN)*

JFTC Approval of Commitments 16 Mar 2022

As a result...

- ‘When another OTA platform discounted the price of the accommodations listed on its website at its own expense, accommodation operators requested they cease this practice, claiming they would be forced to publish accommodation rates on Booking.com that were equivalent to the discounted accommodation rates at their own expense’.
- ‘After another OTA proposed reducing the price of accommodations listed on its website for a certain period of time to promote their platform, other accommodation operators refused to join in the price reduction as they would then have to adjust the prices listed at Booking.com.’.

Case 3: *Booking.com* (MFN)

JFTC Approval of Commitments 16 Mar 2022

Commitments include:

- ceasing practice as above
- not become involved in the same or similar practice as above for three years

Case 3: *Booking.com* (MFN)

JFTC Approval of Commitments 16 Mar 2022

On narrow parity clause:

The JFTC stated the narrow parity clause did not raise a competitive issue because ‘**they are not always complied with** by the accommodation operators concerned However, in the future . . . it may cause a problem under the Antimonopoly Act (AMA) So the JFTC will continue to closely monitor the impact of the narrow parity conditions.’

<<https://www.jftc.go.jp/en/pressreleases/yearly-2022/March/220316.html>>

MFN as an ASBP?

- Not ASBP in Japan (in general, to my knowledge.).
- Theory of harm: softening competition or excluding its rivals by inhibiting them from listing attractive prices, implying more concrete anticompetitive effects.
- The focus is on neither independent and free judgements, nor disadvantages imposed upon hotels.
- GD para. 12 is better suited as this addresses minor but more immediate anticompetitive effect.
- What if anticompetitive effect, which is necessary for GD para. 12, is absent? (Answer: No AMA violation.)
- Find AMA violation anyway calling it as an ASBP? (Answer: This is not the course that the JFTC takes generally – to my knowledge.)

Private monopolisation

Private monopolisation (AMA Art. 3 violation)

Definition AMA Art. 2(5) ‘The term “private monopolization” as used in this Act means such business activities ... 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.’

Penalties:

JFTC: cease and desist order and administrative fine (surcharge) **10% or 6%**

Criminal penalties: fine and imprisonment

ASBP and Other Unfair Trade Practices (UTPs)

JFTC

ASBP (AMA Art. 2(9)(v)):

Cease and desist order & Surcharge payment (1%) of turnover order

UTPs AMA Art 2(9)(i)-(iv)

Cease and desist order (& Surcharge payment when repeated)

UTPs JFTC GD

Cease and desist order

Criminal liability: n/a.

Private monopolisation

Private monopolisation (AMA Art. 3 violation)

Definition AMA Art. 2(5) ‘The term “private monopolization” as used in this Act means such business activities ... **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.**’

Penalties:

JFTC: cease and desist order and administrative fine (surcharge) **10% or 6%**

Criminal penalties: fine and imprisonment

Private monopolisation and ASBP

Escalation?

Private monopolisation:

exclusion or control

+

Δ market power

UTPs that lessens free competition

(e.g., GD para. 12):

designated practices

+

anticompetitive effect

(foreclosure or the effect to keep price high)

ASBP:

superior bargaining position

+

abuse

Digital ASBP in the civil litigation

Case 4: Tabelog

The Asahi Shimbun > National Report > article

Court orders food review site to pay damages to store for rating change

THE ASAHI SHIMBUN
June 17, 2022 at 18:00 JST

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A search through the Tabelog site shows restaurants in the area. (Satoru Eguchi)

The Tokyo District Court has ordered the operator of a leading peer-to-peer restaurant review site to pay 38.4 million yen (\$286,000) in damages to a Korean barbecue chain.

The court recognized that the defendant's changed algorithm at the Tabelog website caused a drop in sales at the barbecue chain's outlets.

Tabelog (2022)

'The Tokyo District Court has ordered the operator of a leading peer-to-peer restaurant review site to pay 38.4 million yen (\$286,000) in damages to a Korean barbecue chain.

The court recognized that the defendant's changed algorithm at the Tabelog website caused a drop in sales at the barbecue chain's outlets.

"The defendant violated antimonopoly law by abusing its dominant bargaining position," Presiding Judge Fumitaka Hayashi said in a June 16 ruling.'

'The plaintiff ... arguing its ratings were unfairly lowered on the grounds that it is a chain restaurant establishment.'

The Asahi Shimubun, 17 June 2022,
<https://www.asahi.com/ajw/articles/14647220>

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

Plaintiff operates a number of yakiniku restaurants and is a paid member of Tabelog.

Defendant operates Tabelog.

Paid membership system: There are free and paid membership of Tabelog. In addition to profile registration system, the paid member can use more functionalities such as reservation system and secure better visibility.

Without giving notification to the restaurants including the Plaintiff, Tabelog changed the algorithm that is used to calculate the scores of the restaurants. As a result, the Plaintiff's score was lowered.

AMA Art. 24 (Civil injunction)

A person whose interests are infringed upon or likely to be infringed upon by an act in violation of the provisions of Article 8, item (v) or Article 19 and who is thereby **suffering or likely to suffer considerable damage** is entitled to seek the suspension or prevention of such infringements from an enterprise or a trade association that infringes upon or is likely to infringe upon such interests.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On superior bargaining position:

The Plaintiff's dependence on the defendant for business:

- The percentage of sales via Tabelog's internet reservations and its dedicated telephone line in the plaintiff's sales for each month was 31% on average.
- The Plaintiff continued to be a paid shop member of Tabelog even after the change to the algorithm.
- These facts indicate that the Plaintiff depends on Tabelog's membership to a significant extent on its sales.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

The Defendant's position in the market:

- Tabelog has reviews of almost all restaurants that can be listed across Japan.
- The number of reviews was approximately 30.9 million.
- Tabelog listed 49,000 paid member restaurants.
- The number of listing and paid members of Tabelog either exceeded other restaurant portal sites or was one of the greatest amongst such sites.
- Many restaurants use more than one restaurant portal sites.
- Thus, Tabelog was one of the major restaurant portal site and the defendant had a leading position.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On ‘executing transactions in a way disadvantageous to the counterparty’:

The Defendant’s conduct in making the present change to the Algorithm for calculating the ratings to be published on the pages of the Yakiniku chain of restaurants operated by the Plaintiff ... constitutes executing transactions in a way disadvantageous to the the Plaintiff.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On unfairness:

“[It] is assessed taking account of the intent, purpose, manner, content and degree of disadvantage

(e.g. <1> Whether or not the practice is to impose **the disadvantages that cannot be calculated in advance;**

<2> Whether or not **the burden exceeds the extent that is deemed reasonable**, taking into account the direct benefits, etc., to be obtained by the other party, to the detriment of the other party.)”

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On unfairness:

The Defendants' decision to make this change was to the detriment of the Plaintiffs, which **could not be calculated in advance**, in light of the significance of the grades and the method of evaluation published by the Defendants in advance. Nor can it be said that this was **the burden was within the extent that is deemed reasonable**.

There was a reasonable means of achieving the intention and purpose of the change as alleged by the defendant, either.

In light of the above, the change made by the Defendant is unfair in light of normal commercial practice.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On substantial damage (injunction):

The rating is not the only indicator in consumers' choice of restaurants, and the number of visitors to the 21 yakiniku chain restaurants operated by the Plaintiff after the change has remained constant. The amount of monetary damages that can be found to have resulted from the change itself is only approximately 20% of the Plaintiff's operating profit. Even if the Algorithm continues to be applied ..., once the Defendant clarifies the changes, consumers are likely to choose restaurants on this basis.

It is thus impossible to conclude that ... the decrease in the Plaintiff's operating profits resulting from the change will continue in the same manner in the future. Furthermore, even if the Algorithm continues to be applied in the future, the financial damage suffered by the Plaintiff as a result of the Algorithm cannot be considered to have caused or to be likely to cause substantial damage to the Plaintiff.

Case 4: *Tabelog (civil)*

Tokyo District Court 16 June 2022

On damages:

... taking into consideration the change in the amount of sales from customers via Tabelog at the 21 yakiniku chain restaurants operated by the Plaintiff, the change in the operating profit margin at the Plaintiff and other factors that may affect the Plaintiff's sales, the amount of operating damage that has a reasonable causal relationship with the Defendant's implementation of the change is 38.4 million yen, which is equivalent to 1.6 million yen per month for 24 months, out of the amount of the decrease in operating profit at the 21 shops concerned.

The Civil Courts and the JFTC

Advisory opinion

AMA Art 79 (1) When an action to suspend or prevent an infringement under the provisions of Article 24 [civil injunction] has been filed, the court is to notify the JFTC to that effect.

(2) When an action set forth in the preceding paragraph has been filed, the court may ask for the opinion of the JFTC with respect to the application of the AMA in the case concerned or with respect to other necessary matters.

(3) When an action set forth in paragraph (1) has been filed, the JFTC may, with the permission of the court, state an opinion to the court on the application of the AMA in the case concerned or with respect to other necessary matters.

Article 84 (1) Whenever an action for damages under the provisions of Article 25 [follow-on damage suits] has been filed, the court may ask for the opinion of the JFTC with respect to the amount of damages caused by such violations as provided in the same Article.

JFTC Survey Report Regarding Trading Practices of Online Restaurant-Review Portal Sites (18 March 2020)

飲食店ポータルサイトに関する
取引実態調査報告書

令和2年3月
公正取引委員会

‘In recent years, the market growth of the restaurant industry has been in the trend of increasing, and consumers’ behaviours and restaurants’ marketing strategies are shifting their styles according to the spread of using Internet or smartphones. Based on those background, restaurant-review portal sites have continuously a large effect on consuming-society as a platform connecting consumers and restaurants.’

‘The JFTC has focused on improving trading environment surrounding digital platforms, and conducted a fact-finding survey concerning trading practices of online restaurant review portal sites, and published’ the Survey Report.

Annual Report on Competition Policy Developments in Japan (FY 2019)
<https://www.jftc.go.jp/en/about_jftc/annual_reports/oecd_files/japan2019.pdf>

Case 4: Tabelog (civil)

JFTC's opinions submitted to the Tokyo District Court

‘In determining whether the establishment and operation of the algorithm in question [are **unfair in light of normal commercial practice and amount to the detriment of the counterparty**], the following should be taken into account:

- whether it is against the counterparty's will and has **the character of suppressing its autonomy**;

- whether it causes a **disadvantage to the counterparty that cannot be calculated in advance**.

Case 4: Tabelog (civil)

JFTC's opinions submitted to the Tokyo District Court

The Plaintiff alleges that the setting and operation of the Algorithm is an act of disadvantageous change carried out **secretly and unilaterally without the knowledge of the plaintiff.**

Such an argument is considered to relate to whether the establishment and operation of the Algorithm is such that it has **the character of suppressing the autonomy of the plaintiff against their will, and whether it causes them a disadvantage that cannot be calculated in advance.**

Case 4: *Tabelog (civil)*

JFTC's opinions submitted to the Tokyo District Court

In addition, the degree of disadvantage in question, the **spreadness** of the practice and other factors are taken into account with regard to fair competition impediment. Therefore . . . in addition to the overall content of the algorithm applied to the shop scores and the circumstances of the change . . . when and by what method the algorithm in question is set up and operated **for what range of restaurants** . . . is to be taken into account in examining fair competition impediment.'

Case 4: *Tabelog (civil)*

JFTC's opinions submitted following the request of Tokyo District Court

Regarding *the JFTC Survey Report Regarding Trading Practices of Online Restaurant-Review Portal Sites*:

‘[A]rbitrarily setting, operating, etc., without justifiable reason, an algorithm that goes beyond the setting and operation of normal algorithms and applies only to specific restaurants, and degrading the reputation of a restaurant on a restaurant portal site does not, by itself, fall under Article 2(9)(v)(c) of the AMA.

In determining whether or not the case falls under Article 2(9)(v)(c) of the AMA, consideration is also given to whether the case causes the other party a disadvantage that cannot be calculated in advance.’

Case 4: *Tabelog (civil)*

JFTC's opinions submitted to the Tokyo District Court

Regarding the *JFTC Survey Report Regarding Trading Practices of Online Restaurant-Review Portal Sites*:

‘[I]t is not intended to say that the restaurant portal must benefit directly from the disadvantages caused to the restaurant.’

Seoul Workshop, Seoul National University, AI Institute, 16 Dec 2022

Thank you.

Junko Shibata, Kagawa University

Arisa Wakabayashi, Komazawa University

Masako Wakui, Kyoto University

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