A Collective Agreement is Not Inherently Anticompetitive in Japan: Trade Unions, Self-Employed Workers and the Antimonopoly Act

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Introduction

In Japan, convenience store franchisees form unions in order to negotiate with their franchisors. Online shopping mall operators selling their goods through the online platform Rakuten have also established unions to oppose its oppressive terms and conditions.\(^1\) In addition, gig workers such as Uber Eats drivers recently formed a union.\(^2\) Meanwhile, unions also exist for athletes, sole traders in the construction industry and freelancers such as screen writers. Most are similar to employees in that they mainly sell their labour to earn a living, are economically dependent on buyers and in a weak bargaining position relative to them. However, they tend to be categorised as sole traders or ‘self-employed person’, and it is not clear whether they constitute ‘workers’ whose rights to unionise are protected under the law. A further legal complication is whether their activities constitute a violation of competition law in Japan, known as the Antimonopoly Act (AMA),\(^3\) and are thus subject to the oversight of the Japanese Fair Trade Commission (JFTC), which is the authority that administers the AMA.

The Japanese Constitution\(^4\) and the Labour Union Act (LUA)\(^5\) guarantee the workers’ right to associate, to bargain collectively and to engage in strikes. The AMA is not applicable to these practices. However, this inapplicability hinges on the definition of ‘workers’ under the LUA. The LUA jurisprudence uses a multi-factor test to determine if the union members are

\(^{1}\) Asahi Shimbun, ‘Rakuten no soryomuryoka ga haramu hoteki mondai: Syuttensyara kumiai mezasu’ ['Free Shipping Policy and Legal Issues: Sellers to Form a Union'] (Asahi, 7 Nov 2019) <https://www.asahi.com/articles/ASMC64R7NMC6UTIL02P.html>


\(^{3}\) Shitekidokusen no kinshi oyobi koseitorihiki no kakuhiro horitsu [Antimonopoly Act (AMA)], Act No 54 of 1947, as last amended by Act No 45 of 26 June 2019

\(^{4}\) Kenpo, 3 Nov 1946, art 28

\(^{5}\) Rodo kumiai ho [Labour Union Act (LUA)], Act No 174 of 1949, as last amended by Act No 69 of 13 June 2014
considered workers. If the entities listed in the previous paragraph (hereinafter referred to as ‘self-employed workers’) are deemed non-workers, then their activities fall under the AMA.

It is not clear how the self-employed workers’ collective actions are assessed under the AMA. In extreme interpretations, they would be deemed illegal cartels upon which severe sanctions would be imposed. Several commentators suggest that cartel restrictions are applied to the self-employed workers’ collective activities.6 Under the AMA, civil fines and criminal sanctions would then be imposed upon these cartelists.7 Labelling them in this way will seriously discourage self-employed workers from conducting collective actions.

When deciding on which approach to take under the AMA, it would be helpful to know how the trade union activities are evaluated under the AMA if it is applied, as the aims and activities of self-employed workers’ organisations are largely the same. They both seek to bargain collectively with a powerful counterparty in order to obtain better contracts for their members and to enhance their economic position. Their members’ economic status is also similar. They are both economically dependent on another entity or entities and they tend to have a weak bargaining position. Furthermore, self-employed worker organisations may try to enhance their power by acting in concert with trade unions. The more powerful a trade union is, the more effective such a strategy will be. Understanding the trade unions’ power could help to predict the influence of the self-employed workers’ organisations.


7 AMA, arts 7-2(1), 8-3, 25, 89, 95
This article first reviews the current AMA approaches to self-employed workers, followed by a brief description of labour relations in Japan. I then analyse whether trade unions are considered monopolies or cartels. Next, I discuss the extent to which the market share, or union density, helps to determine the union’s market power. This is followed an assessment of the various trade union activities’ competitive natures and effects. I contend that trade union activities are generally unlikely to be anti-competitive. However, the analysis reveals that the AMA is used as a blunt tool that discourages pro-competitive self-employed workers’ collective activities. I argue that the legislature, not the AMA nor the JFTC, should determine whether self-employed workers are allowed to unionise and engage in collective actions. Globally, the market power is on the side of employers, or buyers in the case of freelancers, which presents serious issues. As such, I conclude by explaining how the Japanese experience can influence the solution to this problem.

1 The Antimonopoly Law Approach to Self-Employed Workers

Three types of issue involving to the relationship between self-employed workers and their counterparties, who may be the buyers of services or intermediary platforms (hereinafter called ‘buyers’), exist under the AMA. They are a buyers’ horizontal agreement such as non-poaching agreement, the buyer’s abusive treatment of self-employed workers and self-employed workers’ collective actions. The first two are clearly AMA issues, while no decisions or jurisprudence guide the third. This ambiguity is due to the rather recent influx of

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8 The JFTC has a long history of protecting the weaker party, such as subcontractors, in business to business transactions, by enforcing the prohibition of the abuse of superior bargaining position (AMA arts 2(9)(v) and 19) as well as special legislation to supplement these provisions. Shitauke daikin chien ho [Subcontract Act], Act No 120 of 1956, as last amended 10 June 2009. ‘Heisei 30 nendo ni okeru shitauke ho no unyojoky o oyobi kigyok an torihiki no koseikaheno torikumi’ [‘Subcontract Law Enforcement and Other Activities to Ensure Fair Trade Business to Business in FY2018’] (JFTC 29 May 2019) <https://www.jftc.go.jp/houdou/pressrelease/2019/may/190529.html> (On the state of enforcement of these provisions). The AMA is also applied to protect franchisees. Guidelines Concerning the Franchise System under the AMA (JFTC 24 Apr 2002, as last amended 23 June 2011). Recent JFTC activities in the area include survey relating to trading practices between franchisors and franchisees. ‘Convenience store honbu to kamei ten tonotorihiki to nikansuru jittai chosa ni tsuite’ [‘On the survey relating to convenience store franchisors and franchisees’] <https://www.jftc.go.jp/oshirase/200123oshirase.html> (JFTC 17 January 2020). Meanwhile, the JFTC and competition law commentators are also particularly concerned with employers’ horizontal agreements that include no-poaching agreements and practices that restrict athletes’ freedom to engage in sporting activities. The discussion on sports resulted in a JFTC guidance paper. Supotsu jigyo bunya ni okeru iseki seigen ruru ni kansuru dokusenkinshi ho jo no kangaekata ni tsuite [On transfer restrictions on athletes and the AMA] (JFTC 17 July 2019) <https://www.jftc.go.jp/houdou/pressrelease/2019/jun/190617.html>
atypical workers into the labour market as well as the worker/enterprise dichotomy established by the LUA and AMA.

1.1 Trade Unions and the AMA

The language of the AMA makes it clear that the law only applies to enterprises or the associations of enterprises. A worker does not constitute an enterprise under the AMA. Therefore, the AMA is not applicable to trade union activities.9

This clear division is particularly helpful when facilitating unionisation. Unionists were historically suppressed by the wartime government.10 The post-World War II constitution and the LUA guarantee that workers have the right to associate while the AMA has no role in industrial relations. This is in line with the AMA drafters’ intent. The AMA and LUA were both formulated when the United States occupied Japan following World War II. The US antitrust law is applied to ‘persons’ but there is a labour exemption.11 When legislators drafted the AMA, they discussed whether it needed a labour exemption but concluded that it

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11 15 US Code § 1, 2, 17; 29 US Code § 52
was not necessary as the law is applicable only to enterprises.\textsuperscript{12} Since then, neither scholars nor the JFTC have seriously examined the relationship between the AMA and trade unions.\textsuperscript{13}

### 1.2 Self-Employed Workers’ Collective Action and the AMA

The clear distinction between ‘workers’ and ‘enterprises’ is now blurred due to the increasing number of self-employed workers whose status under the LUA is not clear.\textsuperscript{14} LUA jurisprudence provides a multi-factor test to decide if a particular entity is a worker or not. The test looks into whether i) they are integrated into the business organisation, ii) if the contract terms are unilaterally decided by the employers or if a standard form of contract is used, iii) if payment is remuneration for the provision of labour, iv) if they have no or little discretion to refuse requests for work, v) if the service is performed on command and a supervisor system is in place, vi) if temporal and locational restrictions apply and vii) if there is no evident sign that the person is an enterprise.\textsuperscript{15} Upon applying such a test, two Prefectural Labour Relations Commissions found that franchisees running convenience stores and private tuition schools to be workers under the LUA.\textsuperscript{16} However, the Central Labour Relations

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\textsuperscript{13} Until 2018, the JFTC’s position was that the AMA should remain inapplicable not only to union activity but also to any issues relating to labour and employment. Then the study group established under the JFTC issued the report stating that the AMA should have an active role in employers’ horizontal agreements and the abuse of bargaining power. \textit{Jinzai to kyososeisaku ni kansuru kentokai hokokusho [Report of Study Group on Human Resource and Competition Policy]} (JFTC CPRC 15 February 2018) <https://www.jftc.go.jp/cprc/conference/index_files/180215jinzai01.pdf> 8–9


Commission, the appellate organ of the prefectural labour commissions, reversed two decisions relating to convenience stores in 2019. If they are not considered workers under the LUA, then the AMA may apply. However, it is not clear how the self-employed workers’ collective actions are assessed under the AMA. Due to such uncertainty, several groups of self-employed workers have opted to form co-operatives, which are expressly exempt from the AMA. The Rakuten union plans to become a co-op and the creative industry also includes many co-ops. However, the AMA only exempts them if they do not commit unfair trade practices and if they avoid unfair price increases. This can limit a co-op’s activities significantly. The formation of a co-op is also costly and cumbersome as the relevant laws require a specific internal structure and rules that must be followed.

Self-employed workers’ collective actions can be addressed under the AMA in three ways. First, as several commentators argue, such activities may be viewed as equivalent to a hardcore cartel and thus presumed to have an anticompetitive effect. Second, the collective actions may be assessed on a case-by-case basis in light of their actual effects and the nature

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18 AMA, art 22
20 See eg ‘Shorai no eiga jinzai soushutsu ni mukete eiga seisaku genba zittaichosa wo jissu shimasu’ [‘Film Industry Survey Planned to Further Develop Human Resources in the Business’] (Ministry of Economy, Trade and Industry, 7 June 2019) [https://www.meti.go.jp/press/2019/06/20190607006/20190607006.html]
21 AMA, art 22
22 See eg Nogyo kyokumiai ho, Act No 132 of 1947, as last amended by Act No 29 of 2018; Suisan gyo kyokumiai ho, Act No 242 of 1948, as last amended by Act No 29 of 2018; Chusho Kigyo to kyodo kumiai ho, Act No 181 of 1949, as last amended by Act No 29 of 2018
23 The AMA does not have per se violations. For there to be a violation, an enterprise’s agreement and activities must harm the competition. An agreement by companies to fix prices, restrict output and allocate customers is presumed to have such effect. The use of the presumptive rule is acceptable only where the anti-competitive nature and effect are clear. Masaaki Miyai, ‘Futona torihiki seijen ni okeru tai shijokoka yoken’ [‘Competitive Effect and Unreasonable Restraint of Trade Regulation’] (2016) 37 Nihon keizaiho gakkai renpo [Japan Association of Economic Law Annual] 58
of their practices. Third, the legislature or the JFTC has the power to establish exemptions for activities that fall under certain categories, thus ensuring that the collective activities are not subject to the AMA.

Either way, the policymakers should ascertain the nature and effect of the self-employed workers' collective actions. Understanding the competitive effect that trade unions have on the market will help to predict the effect that the self-employed workers’ organisations can have in turn. Japanese AMA scholars have never before made such an assessment. Antitrust scholars in the United States have produced a substantial body of work on the competitive effect of unionisation24 while Australian competition law has a unique exemption system for business-to-business collective bargaining and boycotting.25 Although these are informative, the labour law regimes as well as the social, economic and political backgrounds substantially differ between the jurisdictions.26 Therefore a jurisdiction-specific analysis is necessary to reveal the competitive effect of trade unions.

1.3 Trade Unions and Employment Relationships in Japan

Four primary factors affect wages and other working conditions in Japan: employment contracts, employment regulations (shugyo-kisoku), collective agreements and government regulations. Trade unions typically influence working conditions thorough collective

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agreements. These are concluded between the union and employer after collective bargaining. The Japanese Constitution guarantees the workers’ right to bargain collectively.\textsuperscript{27} To ensure that this right is upheld, the LUA obliges an employer to commence bargaining without delay once requested to do so by the union and to negotiate in good faith.\textsuperscript{28} However, this obligation arises only where the issue falls into the \textit{mandatory subject} category.\textsuperscript{29} Any subject that affects the working conditions of union members should be deemed a mandatory subject. However, employers often claim that strategic decisions such as investments, dividends, internal reserve ratios, business restructuring and the relocation of the business are not mandatory subjects.\textsuperscript{30} Meanwhile, unions are not required to conduct collective bargaining at any time.\textsuperscript{31}

Collective bargaining primarily takes place at the enterprise level and most unions in Japan are enterprise unions.\textsuperscript{32} Enterprise unions are comprised of employees whose jobs and working conditions often vary but full-time workers tend to constitute the majority.\textsuperscript{33}

\textsuperscript{27} Kenpo, art 28
\textsuperscript{28} LUA, art 7(2). Employers, however, are not obliged to agree with the union. Nishitani (n 10) 313; Araki (n 10) 599, 608–9; Sugeno (n 10) 906; Mizumachi (n 10) 1080–81
\textsuperscript{29} Nishitani (n 10) 296–301; Araki (n 10) 606–8; Sugeno (n 10) 900–5; Mizumachi (n 10) 1071–76
\textsuperscript{30} Nishitani (n 10) 299–300; Araki (n 10) 607; Mizumachi (n 10) 1075. Courts tend to rule that issues relating to non-members are not considered mandatory. Nishitani (n 10) 301; Araki (n 10) 607. See also Mizumachi (n 10) 1072 (citing court cases).
\textsuperscript{31} Nishitani (n 10) 56–57. Thirty-two per cent of unions did not undertake collective bargaining for three years from 1st July 2014 to 30th June 2017. ‘Heisei 29 nen roshikan no kosho to ni kansuru jittaichosa no gaikyo’ [‘Survey on Collective Bargaining and More in 2017’] (MHLW, 14 June 2018 <https://www.mhlw.go.jp/toukei/list/dl/18-29gaiyou06.pdf> 8. When a union bargains, it is free to choose what to bargain; a 2017 survey revealed that 89.7% of unions that engaged in collective bargaining sought a change in wage, 79% of unions discussed working hours and 65.9% brought up promotions and other human resource-related issues. ibid 7
\textsuperscript{32} Nishitani (n 10) 4, 281–82; Araki (n 10) 568; Sugeno (n 10) 885; Mizumachi (n 10) 1000. In English, see eg David Flath, \textit{The Japanese Economy} (3rd edn OUP 2014) 363–70
Often workers in one company belong to different unions and every union has the equal right to bargain. The employer must remain neutral and not discriminate between the unions. The minimum standards set by the collective agreement override both the existing employment contracts and the employment regulations. Generally the collective agreement applies only to union members.

On average, 17% of workers in Japan belong to a union. This indicates that the majority of workers are not party to any collective agreement and are subject to employment regulations. However, these do not outline the details of the working conditions concretely and the employer retains discretion regarding numerous aspects of the working conditions. Prior to the ‘equal work equal pay’ principle that took effect in April 2020, the wages were set by the human resource (HR) department which assesses numerous factors that are subject to a discretionary evaluation. These factors include rank, effort, ability, motivation and communication skills. The employer also decides on the


Nishitani (n 10) 99–100; Sugeno (n 10) 908–10; Mizumachi (n 10) 1063–64. There is no exclusive bargaining rule in Japan. Nishitani (n 10) 286–87; Araki (n 10) 602–3; Sugeno (n 10) 884; Mizumachi (n 10) 1016–17, 1062, 1064

It is uncertain whether an employer is free to move beyond the minimum standard to set a more favourable wage and working conditions for individual union members. Nishitani (n 10) 343–46

Nishitani (n 10) 371–72; Araki (n 10) 622–23; Sugeno (n 10) 939; Mizumachi (n 10) 151. Where more than three-quarters of the employees are union members, the collective agreement also applies to other employees. The percentage of workplaces where this occurs is unknown. However, in such cases the collective agreement would not apply to members of different unions. Araki (n 10) 629–30; Sugeno (n 10) 945; Mizumachi (n 10) 155–56. Act 18 of the LUA provides that collective bargaining may be applicable to a particular region beyond the enterprise. The provision has been rarely applied. See Mizumachi (n 10) [only eight cases have been brought]


number of working hours in general.\textsuperscript{41} Furthermore, the employers and HR are free to decide on promotions, relocations and moving workers to the subsidiaries of the company.\textsuperscript{42}

Meanwhile, the government directly regulates the working conditions such as how minimum wages are set for each prefecture and how the statutes obligate employees to follow certain health and safety measures. The compliance with such laws is monitored by the Labour Standards Inspection Office and violators are penalised.\textsuperscript{43}

Trade unions are involved in employer regulations and individual contractual relationships, although such activities may not be as obvious as in collective agreements. For example, trade unions may help ensure that an employment contract is honoured or assist in mobilising workers to influence legislative activities.

2 Preliminary Observations: A Trade Union is Neither a Monopoly nor a Cartel and a Market Share is Not Useful

Whether trade unions have a pro- or anti-competitive nature and effect depends on their power and actions. A union’s power is difficult to assess directly.\textsuperscript{44} An employer might elect to increase wages for various reasons including greater productivity, a shortage of workers or as compensation for long working hours. While the AMA is generally concerned with market power which is associated with monopoly rent, the source of the wage increase may be due to an efficiency gain or Ricardian rents.\textsuperscript{45} Statements regarding union influence, whether made by the union itself or the employer, cannot determine a union’s true power either.

\textsuperscript{41} Employers conventionally conclude agreements with the employees’ representative in such a way that they are exempt from statutory working hour limits, 8 hours a day and 40 hours a week. Sugeno (n 10) 504–07. On working hours at Japanese workplace in general, see Mizumachi (n 10) 641–46. In English, see Working Better with Age: Japan (Organisation for Economic Co-operation and Development, 2018) 101–11

\textsuperscript{42} Sugeno (n 10) 722, 725, 727; Mizumachi (n 10) 481, 491, 504

\textsuperscript{43} Rodo kijun ho [Labour Standards Act], Act No 49 of 1947, as last amended by Law No 45 of 24 Dec 2018; Saiteichingin ho [Minimum Wage Act], Act No 137 of 1959

\textsuperscript{44} Econometric research on union power has yet to produce a credible outcome. Hristos Doucouliagos and others, ‘How Credible is Trade Union Research? Forty Years of Evidence on the Monopoly-Voice Trade-Off’ (2018) 71 ILR 287, 304 (2018) (Little union research controls for endogeneity; more scholarship on the effects of unions should be conducted outside of manufacturing)

Due to their complexity, each disagreement regarding a collective agreement should be assessed on a case-by-case basis. Importantly, market share, the factor conventionally taken into account when assessing a company’s market power, is not helpful when making such an assessment when it comes to labour issues. On the other hand, it may be argued that a union is similar to a monopoly or a cartel.

### 2.1 Trade Unions vs. Monopolies

Economic textbooks often refer to the *monopoly-union model.*\(^{46}\) Although this helps students to quickly grasp how the economy can be affected by a union, unions differ from monopolies in many ways. First, a union is not a single economic entity. It is not in a position to determine whether and to what extent its members supply labour to the market.\(^ {47}\) In unions, such a determination requires the union members’ consent and taking such a step is rare in the current economic climate.\(^ {48}\) Furthermore, a union cannot control the entry of non-unionised employees into the market.\(^ {49}\)

### 2.2 Trade Unions vs. Cartels

Unions are also often likened to cartels or what are known as hardcore cartels under the AMA.\(^ {50}\) Hardcore cartels involve horizontal agreements in which the participants agree on price, output and/or other competitively sensitive issues solely for the purpose of restricting competition.\(^ {51}\) Under the AMA, it is presumed that they have an anticompetitive effect in the sense that they establish, maintain or strengthen their market power. *Market power* refers to a company’s ability to raise the price over the competitive level or to decrease output in the relevant market.\(^ {52}\) This presumption is based upon the understanding that hardcore cartel

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47 Arthur M Ross, ‘The Trade Union as a Wage-Fixing Institution’ (1947) 37 Am Econ Rev 566, 568–578, 587. For the historical development of the economic function of unions, see Bruce E Kaufman, ‘Historical Insights: The Early Institutionalists on Trade Unionism and Labor Policy’ (2005) 26 J Lab Res 1
48 See 3.1.2 below
49 Dau-Schmidt and Traynor (n 45) 105–06
52 Supreme Court, 20 February 2012, 58-II Shinketsu-shu 148; Tokyo High Court, 7 December 1953, 6–XIII Koto Saibansho Minji Hanrei-shu 868
agreements would not make economic sense if they did not generate this intended effect. In a competitive environment, a company risks losing customers to its rivals if it raises its prices. Thus, asserting that a hardcore cartel causes an anticompetitive effect without conducting a detailed effect analysis is justified.

Unions differ from cartels in many ways. First, joining a union does not mean that a member commits to limiting their output. Trade unions do not sell labour. It is up to the worker to decide how long he or she works for and under what conditions. To limit their output, a union would have to make the decision that its members must work only for certain hours at a particular wage. This rarely happens unless a strike occurs. Furthermore, a union’s goal might be to retain jobs rather than to limit output. Unions also often play a role in enhancing efficiency by facilitating better communication between an employer and an employee. On the other hand, a union could obtain a strong bargaining position by threatening to strike or by becoming involved in political and legislative activities. These features demonstrate that trade unions must be analysed differently than hardcore cartels.

2.3 Market Share (Union Density)

Where an anticompetitive nature and effect is not clear, the market share is often referred to when assessing the market power of the company or the association that the companies hold. It reveals whether competitive constraints exist outside of the parties. The greater the parties’ market share, the fewer competitive constraints exist. The parties to a particular agreement can easily raise the price over the competitive level. For trade unions however, market share is both less determinative and less useful.

While the relevant market must first be identified before the calculation of market share, it is difficult to define the relevant market where it relates to the supply of labour. The relevant market may be the internal labour market where the workers are already in an employment relationship with a particular employer. The cost to employ new workers is high and the time needed to train them is long. The relevant market may be defined even more narrowly by

54 See 3.3, 3.4 below
55 Peter B Doeringer and Michael J. Piore, Internal Labor Markets and Manpower Analysis (Armonk 1971) 13–40; Michael L. Wachter, ‘Neoclassical Labor Economics: Its Implications for Labor and
restricting it to workers with the knowledge and skillset necessary to perform specialised work. On the other hand, the employer remains free to hire new employees or to opt for part-timers and temporary workers (or workers dispatched from an agency). Self-employed workers and individual contractors may be an option as well. While there should be certain competitive constraints referring to the internal market, it is not easy to determine to what extent such constraints exist.

Difficulty in defining relevant markets is critical as union membership varies depending on how it is calculated. Union density in Japan is at 17% while it is 40.8% for large enterprises and 0.89–11.4% for small and medium-sized enterprises. In this context, it is important to remember that a collective agreement only binds the employer and union members and that the minimum wage is set by the government in Japan. In other words, a collective agreement on wages and working conditions only extends to the union members.

The union membership rate at the enterprise level may also ignore the impact of rivalries between unions. More than one union may exist at a particular employer, each offering different strategies to employees. For example, one union may try to attract members by being proactive and demanding higher wages while another may emphasis a harmonious and productive relationship with the employer. Alternatively, unions may act in concert. It is particularly important to understand how unions interact with each other in Japan, not only because every union has an equal right to demand the employer to bargain collectively as stated earlier, but also because the union shop agreement in Japan does not preclude multiplicity of trade union within an enterprise. The case law in Japan is clear that the union

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57 Reiwa gannnen (n 33) 4, 6
58 See 1.3 above
59 A 2013 survey revealed that around 60% of unions have a union shop agreement that prevents a company from employing non-union workers. Heisei 25 nen rodokumiai katsudo to ni kansuru jittaichosa no gaiyou [Summary of the Basic Survey on Labour Unions in 2013] (MHLW, 26 June 2014) <https://www.mhlw.go.jp/toukei/list/dl/18-25-gaiyou-12.pdf> 5
shop agreement does not force the employees to be a member of a particular union; employees are free to choose any union. Union plurality exists in several enterprises with union shop agreements in Japan. Many union shop agreements are also ineffective in that employers do not dismiss employees who leave the union and Japanese union shop agreements often apply to full-time workers only.

On the other hand, the membership rate at an enterprise level does not account for the possibility of collective actions taken by cross-enterprise unions, the impact of which varies over time and its current status is not known. In the past, enterprise unions actively engaged in collective action. Shunto (the Annual Spring Labour Offensive), through which the national and sectoral peak union associations coordinated their member unions’ positions to ready themselves for their annual collective bargaining, was once not only a powerful tool to increase the base wages of the member unions’ enterprises but it also had a diffusion effect beyond the participating unions, thus functioning as a national standard-setter.

However, by 2002, however, Shunto had lost its effectiveness and it functioned more as a political tool, such as when the government requests a rise in wages. However, there may be

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60 Supreme Court, 1989, 43 (12) Minshu 205; Supreme Court, 1989, 553 Rou-Han 6

61 A survey shows this plurality occurred at 86.7% of enterprises as of May 1986 while only 13.8% of companies contained more than one union in 2013. Katsuhiko Sunayama, ‘Fukusukumiai heizon to dantaikoshou, kijun jo no shokketsu, koyakusha, shugyokisoku’ ['Plurality of Unions: Collective Bargaining, Statutory Labour Agreements, Collective Agreements and Employment Regulations'] (1987) 40 Artes Liberales 183, 186. Meanwhile, 13.8% of employers observed this according to another survey. Heisei 25 nen rodokumiai katsudo to ni kansuru jittai chosa no gaikyo [Summary of the Basic Survey on Labour Unions in 2013] (MHLW, 26 June 2014) <https://www.mhlw.go.jp/toukei/list/dl/18-25-gaiyou-12.pdf>

62 Nishitani (n 10) 96; Araki (n 10) 586; Sugeno (n 10) 848; Mizumachi (n 10) 1039

63 Nishitani (n 10) 7. Several argue that union shop agreements infringe upon a worker’s freedom not to associate and thus should be deemed void. See Nishitani (n 10) 54–6, 96–104; Mizumachi (n 10) 131


66 Sako (n 65) 246–47. In those days, unions did not hesitate to go on strike. ibid 248

67 ibid 253

68 Government-Labor-Management Meeting for Realizing a Positive Cycle of the Economy (Cabinet Office, 20 December 2013) <https://japan.kantei.go.jp/96_abe/actions/201312/20seirousi_e.html>. In the same year, the unions recommenced requesting a wage increase through Shunto. The resultant wage increase
sectors where the unions’ collective actions give them greater influence than the membership rate at an enterprise level would suggest.

Finally, a market share assessment does not take into account the union’s unique mode of influence, namely the possibility of a strike. The unions are also engaged in regulatory processes. The next section addresses how these actions affect the balance of power between the union and the employer and how to assess their competitive nature and effect.\textsuperscript{69}

3 Varieties of Union Activity and Competition

Analysing the competitive nature and effect of unions on a case-by-case basis requires identifying the ways that they influence both the wages and working conditions. Factors that give unions influence are difficult to discern\textsuperscript{70}; the risk of striking may earn a union more political power, for example. However, an AMA analysis requires distinct sources to be identified as it entails a normative analysis. For the AMA analysis, both how influential the union is matters, but so does how the union gains such an influence. One would have to evaluate if the union’s method are unacceptable from the point of public policy. In the following analysis, the primary ways for unions affecting working conditions, namely strikes and collective bargaining as well as their involvement in regulatory, judicial and entrepreneurial processes, are assessed.

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\textsuperscript{69} Sullivan points out that, although looking at union density makes sense in relation to collective bargaining, it is not decisive given how unions have other sources of influence. Richard Sullivan, ‘Density Matters: The Union Density Bias and its Implications for Labor Movement Revitalization’ (2009) 14 Mobilization: An Intl Q 239, 242–43

3.1 Strikes and Collective Bargaining

3.1.1 The right to strike and the reality of doing so

A union’s ability to go on strike is a source of power unique to this type of organisation. While the company is not allowed to employ coercive means, the union can force the employer to concede to its demands through collective bargaining by threatening to strike. The resulting consensus becomes a collective agreement that binds the employer and union members. Therefore the union can raise wages without limiting the labour supply.\footnote{Charles E Lindblom, ‘The Union as a Monopoly’ (1948) 62 QJ Econ, 671, 75}

In Japan, the workers’ right to strike is protected under the Constitution\footnote{Kenpo, art 28} and union members face no liability for breaching their employment contract.\footnote{LUA, art 8} The workers’ right to strike is not restrained by matters such as public welfare.\footnote{Special legislation applies to public servants, who are not allowed to strike. Kokka koumuin ho, Act No 120 of 1947, as last amended by Act No 37 of 14 June 2019, art 98(2); Chiho koumuin ho, Act No 261 of 1950, as last amended by Act No 69 of 13 June 2014, art 37(1). There are also limited cases where other strike actions are restricted. See Nishitani (n 10) 407–12.} A slight variation on the strike, the slowdown, is another tactic used by unions.\footnote{Heisei 30 nen rodo sogi tokeichosa no gaikyo [Survey on Labour Disputes 2018] (MHLW,2018) <https://www.mhlw.go.jp/toukei/list/dl/14-30-08.pdf> 6. Although there are other ways to compel an employer to accept the union’s demand such as encouraging consumer to boycott or not buy the employers’ product, unions in Japan rarely use such tactics. Noboru Kataoka, Revision by Takashi Muranaka, Rodo ho I [Labour Law I] 156 (4th edn, 2007 Yuhikaku). Thus, the section focuses on strikes.}

The right to strike does not mean that union members often do so. In practice, striking carries several repercussions. Strikers are not in compliance with employment contracts, so the employer is not obligated to pay any wages in full during the strike.\footnote{Nishitani (n 10) 458–62; Sugeno (n 10) 990–95} The union needs to have sufficient financial resources to support the members undergoing this type of financial burden.\footnote{A recent survey shows that half of unions no longer maintain a tososhikin (strike fund). Dai 18 kai rodkumiai hi n kansuru chosa ho koku — October 2015 [18th Survey on Union Dues as of October 2015] (Rengo and the Research Institute for Advancement of Living Standards, 2016) <https://www.rengo-soken.or.jp/work/201609-04_02.pdf> 8}
In addition, employers are allowed to counteract strikes by employing substitutes.\(^78\) If the union members are easily replaced by non-members then the strike will have little impact.\(^79\) The LUA prohibits an employer from making strikers redundant\(^80\) so the company needs to be careful not to hire too many substitutes on a permanent basis during the strike. In this regard, the multiplicity of unions within an enterprise, or the fact that many enterprises have more than one union, matters. Traditionally, employer is able to find substitutes from a rival union’s members or from among the managers who do not belong to any union. The recent increase in part-time workers should further facilitate the employers’ ability to find substitutes.

Furthermore, union members may be adversely affected in the long run if they inconvenience customers. Should the company’s reputation falter, it will lose customers to its rivals which makes their business less profitable. This can lead to lower wages as well as fewer employees.\(^81\) This negative impact will be felt by most of the enterprise’s union members, particularly when they expect to work for that employer on a full-time basis throughout their working life as in the case of long term employment. This has been known to be a characteristic of Japanese employment practices.\(^82\)

The employers might retaliate against the strikers as well.\(^83\) The unfavourable treatment of union members on the grounds of their collective action is unlawful under the LUA. The union can make a complaint to the Prefectural Labour Relations Commission regarding unfair labour practices.\(^84\) However, it takes 600 days or more to obtain a remedial order from the Prefectural Labour Relations Commission.\(^85\) The commission’s order then may be appealed

\(^{78}\) Araki (n 10) 653; Sugeno (n 10) 995
\(^{79}\) A lock-out, the employers’ counterstrategy to exclude workers from the workplace until the employer and employees reach a consensus, is also possible.
\(^{80}\) Sugeno (n 10) 957, 995–96; Mizumachi (n 10) 1092
\(^{81}\) In its extreme, a strike can lead to bankruptcy. See Kume (n 65) 77 (on Amagaski Steel strike in 1954)
\(^{83}\) The various tactics employed by the management in the early days included hiring yakuza, or organized crime syndicates, to interfere with the unions’ activities. Allen (n 64) 159–73
\(^{84}\) LUA, art 7(1)
to the Central Labour Commission or the district courts. This prolongs the length of the legal proceedings and increases the cost to the union.\textsuperscript{86} Should a remedy be granted, it is only restorative\textsuperscript{87}—the company must reinstate the employee and pay damages. This falls far short of a deterrent effect that would prevent employers from engaging in unfair labour practices in the first place.

Of course, the employer suffers too. The outcome of the strike is likely dependent on how much the union members and the employer can endure the economic loss arising from a strike.\textsuperscript{88} The amount of information shared by the employees and the employer is also critical. If both sides have sufficient information as to what working conditions can be agreed on and to what extent the counterparty can endure, they will reach a consensus more easily.\textsuperscript{89}

\subsection*{3.1.2 Current state of strikes and their effect}
Since 2010, the number of strikes in Japan has been fewer than 80 per year. This is significantly less than in 1974, the peak year that saw 9,581 strikes.\textsuperscript{90} In 2018 across Japan, 320 disputes arose out of which 58 strikes and slowdowns emerged. In total, 1,477 working days were lost due to these activities.\textsuperscript{91} Assuming that an employee works 221 days per year,\textsuperscript{92} such a loss is equivalent to losing 6.7 workers for a year.\textsuperscript{93}

\textsuperscript{86} Appeals are filed against 60\% or more of the Prefectural Labour Relation Commissions’ orders. ibid 10
\textsuperscript{87} Nishitani (n 10) 217–23; Araki (n 10) 703–09; Mizumachi (n 10) 1205
\textsuperscript{88} JR Hicks, \textit{The Theory of Wages} (Macmillan 1932) 140–45; John Kennan, \textit{The Economics of Strikes}, in Richard Layard and Orley C. Ashenfelter (eds), \textit{Handbook of Labor Economics II} (North Holland 1987). The intensity of the competition in the company’s market also matters, as it affects the likelihood of an increase in wages for union members and its amount, as well as the expected profit the management retains. For a comprehensive list of determinative factors, see Dau-Schmidt and Traynor (n 45) 114–22
\textsuperscript{89} See Hicks (n 88) 147.
\textsuperscript{90} MHLW (n 75) 12. The number includes strikes that lasted for less than half a day. The number of strikes that lasted longer than half a day was 5,197 in 1974, and 26 in 2018. ibid.
\textsuperscript{91} ibid 5, 7. In the same year, 320 disputes arose and 262 disputes were resolved without a strike. ibid 5, 7. Only 1.7\% of unions engaged in disputes with employers in 2017–2019; out of the remaining 98.3\%, half the unions had no issue between the union and employer, while about 35\% solved their problems by discussion and 10\% felt their conflicting views with their employers were not very serious. Heisei 29 (n 31) 9–10
\textsuperscript{92} The 2018 yearly average of working days at workplaces employing more than four employees was 221. \textit{Matsuki kinro tokei chosa heisei 30 nen bun kekkakakuhono kaisetsu} [Explaining the Results of Monthly Labour Surveys in 2018: Explanatory Notes] (MHLW,2018)\footnote{https://www.mhlw.go.jp/toukei/itiran/roudou/monthly/30/30r/dl/sankou30cr.pdf} 21
\textsuperscript{93} Since 2005, the average number of working days lost per 1,000 salaried employees per year in Japan has been zero. \textit{Collective Bargaining in OECD and Accession Countries} (OECD 2017)\footnote{https://www.oecd.org/els/emp/Industrial-disputes.pdf} 1. Gordon states that the strike has become unthinkable over time in Japan. Andrew Gordon, \textit{Nihon rodokankeishi 1853-2010 [Industrial Relations in Japan 1853-2010]} (Iwanami shoten 2012) ch 11
Such a low number of strikes is indicative of the Japanese workers’ reluctance to strike. The majority of union members must vote in favour before one can take place. The JR East union’s recent experience, in which when the union leaders planned to strike, resulted in about 32,000 (70%) members quitting the union. This likely reflects how the employees feel about strikes. Generally what matters to the employer is the risk of strike, not the actual action. However, because strikes are so rare, the risk of one does not provide unions with a strong bargaining position.

However, this does not negate the importance of taking into account the possibility of strikes in assessing the influence of unions. The above analysis only illustrates the unique and complicated manner through which the union may obtain an influence and the need to apply different analytical methods when examining whether a company has market power in light of the AMA.

3.2 Political and Legislative Activities

Trade unions may become involved in the legislative and regulatory processes regarding the issues regulating working conditions and employment contracts. The compliance with such laws is monitored by the Labour Standards Inspection Office and violators are penalised.

In Japan, the workers’ representatives take part in the standard-setting and policymaking processes. When the directors of the Prefectural Labour Bureau, a sub-organ of the MHLW, set the minimum wage, they are obliged to hear the opinion of the Minimum Wage Board. The following laws are related to this process:

94 LUA, art 5(8)
95 ‘JR East’s Largest Labor Union has Lost 70% of Membership since Feb’ (Mainichi, 7 June 2018) <https://mainichi.jp/english/articles/20180607/p2a000m00na019000c>
96 The low number of strikes was once explained by the great amount of information shared by both the employees and the employer. Kenneth G. Dau-Schmidt, ‘Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan under the Bargaining Model’ (2000) 8 Tulane J Int’l Comp Law 117, 144–45; Kenichi Sotoo, Nihon no roushikankei to ho [Industrial Relations and Law in Japan] (Shinzansha 2004) 211–12
98 Labor Standards Act, arts 101, 102, 107–21; Minimum Wage Act, arts 33, 39–42
99 Minimum Wage Act, arts 9–14
Councils whose members represent employers, workers and the general public. The rodoseisakushingikai (Labour Policy Council), established by the MHLW, is also consulted during the government’s labour policy-making process. The union representatives on the Council can give their opinion.

Empirical studies are required to assess how influential the unions are on legislative and regulatory issues. Regardless of their influence however, no entity violates the AMA by engaging in the legislative process or policymaking activities. Interpreting the law otherwise would conflict with the Constitution which guarantees the freedom to engage in political activities.

### 3.3 Involvement in the Individual Employment Relationship

Unions can influence working conditions by involving themselves in individual labour disputes or contractual issues between an employer and an employee. The union might aid a member by bringing up a lawsuit regarding a breach of contract or non-compliance with mandatory labour standards. They may also provide advice during a negotiation or mediation between a member and an employer. The union may have the expertise and financial resources to be in a position to monitor the employer’s behaviour on a continuous basis. The union members might be more willing to provide their information in relation to their

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100 ibid art 10
101 Rodo seisaku shingikai rei, Cabinet Order No 284 of 7 June 2000, art 3(1)
102 Kosei rodosho secchi ho, Act No 97 of 1999, as last amended by Act No 14 of 24 April 2019, arts 6, 9
103 Econometric analysis shows setting or raising the minimum wage boosts the overall wage in Japan. Ryo Kanbayashi, Seiki no sekai, hiseiki no sekai: Gendai Nihon keizaigaku no ki honmondai [The Standard and Nonstandard Working Worlds: Fundamental Issues in Modern Japanese Economics] (Keio University Press 2017) 355–75. Yet, Imai suggests that union influence on Japan’s national labour policy is rather weak. Imai (n 33) 43–49, 168–69. See also Hiroaki Richard Watanabe, Labour Market Deregulation in Japan and Italy: Worker Protection under Neoliberal Globalisation (Routledge 2014) 68–86
104 Kenpo, art 21. See also Guidelines Concerning the Activities of Trade Associations under the AMA (JFTC 30 October 1995, as last amended 1 January 2010) pt II 12(6)
105 Concerning its potential and significance, see eg Cynthia Estlund, ‘Rebuilding the Law of the Workplace in an Era of Self-Regulation’ (2005) 105 Colum L Rev 319, 357–59, 366–70; Kaufman (n 70) 375; Cynthia L Estlund, ‘Why Workers Still Need a Collective Voice in the Era of Norms and Mandates’, in Cynthia L Estlund and Michael L Wachter (eds), Research Handbook on the Economics of Labor and Employment Law (Edward Elgar 2012) 485, 487–88. In Japan such involvement may be through collective actions to oppose an employee’s redundancy. Note that individual contractual issues fall under the mandatory subjects that the union has the right to bargain with the employer over. Mizumachi (n 10) 1058, 1074. Tokyo Court, 19 Aug 2009, 1001 Rouhan 94
preference and skills. Bargaining and monitoring are public goods in the sense that they benefit many employees but there is a great incentive to freeride. The union may resolve freeriding issues as well.

Of course, not all unions have sufficient expertise and resources. The employers might inhibit union activities in the workplace. The majority of union members might not view gender discrimination as a problem. The minority who want to resolve the problem may not be able to mobilise the union to act. Again, a case-by-case, in-depth examination of each union is necessary.

Detailing the various unions’ activities in this regard in Japan is beyond the scope of this article. However, it would be useful to provide an overview. In Japan, 92.6% of unions are involved in individual employment issues, 58.3% of unions appoint shop stewards in each workplace, 57% use a labour-management consultation system and 29.1% use a grievance procedure. Additionally, 14.7% of unions resolve any issues through an external regulatory system such as the Prefectural Labour Bureau or they can refer the issue to external experts. Compared with other union activities such as going on strike, becoming involved in individual employment relations appears to be a better means of exerting influence.

The next question is about what kind of impact these union activities will have on the economy and society. Normatively, the answer should be clear. Interference with business...
activities by way of an injunction or other lawsuits is lawful so long as it does not constitute an abuse of judicial procedure, and an enterprise’s activities that promote compliance with the law are obviously permissible under the AMA. Even outside a normative assessment, the union activities should be viewed in a positive light. So long as such activities ensure the employer’s compliance with the employment contract, this kind of union activity is likely to increase efficiency.

3.4 Involvement in Management

The previous sections describe how the unions make their demands heard when they are ignored by their employers. The way that unions influence the working conditions experienced is different if the employers are willing to listen. The employer might be willing if they believe that the union will help to resolve the issues effectively. This may lead them to retaining the workers or motivating them to invest more in their skills.

113 Kenpo, art 32 (right to fair trial)
115 In Japan, employers are not legally required to listen to their employees’ opinion and, unlike in Germany, there is no formal system under which employee representatives sit on the supervisory board and participate in the company’s decision-making. Although unions promote the idea that the workplace can be run by workers and demonstrated this by occupying and managing several workplaces during industrial disputes immediately after WWII, neither the law nor industrial relationships have moved in this direction. By the mid-1950s, the principle that the management has the exclusive keiei-ken (right to manage) permeated the workforce. Price (n 70) 100–60; Kenichi Kuroda, Sengonihon no jinjiroumu kanri [Human Resource Management in Postwar Japan] (Minervashobo 2018) 37–45. Company law scholars, nonetheless, note directors in Japan tend to have a close relationship with their employees, typically by bringing in board members who were originally employees. Hideki Kanda, ‘Comparative Corporate Governance—Country Report: Japan’, in Klaus J Hopt and others (eds), Comparative Corporate Governance: The State of the Art and Emerging Research (OUP 1998) 938. Managers of Japanese companies also care about their employees’ welfare. Takeo Hoshi, ‘Japanese Corporate Governance as a System’, in Klaus J Hopt and others (eds), Comparative Corporate Governance: The State of the Art and Emerging Research (OUP 1998) 861–62. The US-style shareholder model is unlikely to replace the employee-centred Japanese stakeholder model. Takashi Araki, ‘Changes in Japan’s Practice-Dependent Stakeholder Model and Employee-Centred Corporate Governance’, in D Hugh Whittaker and Simon Deakin (eds), Corporate Governance and Managerial Reform in Japan (OUP 2010) 246–51
116 Theoretically see Kaufman (n 70) 374–75; Dau-Schmidt (n 108) 804–09. In the Japanese context, see Hiroyuki Fujimura ‘Kigyobetsu Kumiia’ ['Enterprise unions'] in Norio Hisamoto (ed) Roshi Kommyunikeshon [Labour-Management Communication] (Minerva shobo 2009)245–48
117 Richard B Freeman and James L Medoff, What Do Unions Do? (Basic Books 1984); Kenneth G. Dau-Schmidt, ‘A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace’ (1992) 91 Mich L Rev 419, 431–33; Dau-Schmidt (n 108) 805; Shinya Ougchi and Daiji Kawaguchi, Ho to keizai de yomitoku koyo no sekai [Understanding the World of Employment] (New edn, Yuhikaku 2014) 303-05; Daiji Kawaguchi, Rodokeizaigaku [Labour Economics] (Yuhikaku 2017) (Whilst freeriding can be an issue when monitoring employer treatment of employees who make relation-specific investments, enterprise unions in Japan may offer assurance that the employer will not engage in opportunistinc behaviour against employees, thus encouraging employees to make an enterprise-specific investment.)
employees, such an involvement is particularly efficient where there are scale economies and freeriding issues on the side of the employees in the sense that a particular employee’s effort to monitor and resolve employment contractual issues positively affects the other employees’ working conditions. The employees tend not to be engaged in these activities and instead freeride off other employees’ effort.¹¹⁸

A 2007 survey shows that more than half of the employers in Japan view unions as useful vehicles from which to learn about their employees’ wants and wishes.¹¹⁹ The same survey indicates that more than half of large company managers view unions as a necessity for their companies.¹²⁰

Clearly, if employers voluntarily choose to give a union a voice that will improve efficiency, then the activities of that union could hardly contradict any provision of the AMA. Cooperative activities conducted to improve efficiency generally escape AMA condemnation so far as the pro-competitive effect exceeds the anti-competitive effect.¹²¹ This standard applies to the horizontal agreement. The relationship between the workers and the employer is vertical and the competitive concern is generally less so. There is no reason why the union’s engagement in management should be subject to a more stringent standard than the companies’ horizontal agreement.¹²²

¹¹⁸Dau-Schmidt (n 117) 432–34
¹²²In theory, a union may facilitate employers’ anti-competitive collusion by providing a coordinating tool for employers, or the employer may use a collective agreement to raise the cost of labour across the sector to exclude a labour-intensive rival; however, these strategies are only possible where unions can raise wages beyond a single enterprise. Michael T Maloney and others, ‘Achieving Cartel Profits through Unionization’ (1979) 46 S Econ J 628 (1979); Thomas M. Carroll, ‘Achieving Cartel Profits Through Unionization: Comment’ (1981) 47 Southern Econ J 1152; Oliver E. Williamson, ‘Wage Rates as a Barrier to Entry: The Pennington Case in Perspective’ (1968) 82 QJ Econ 85, 91, 113. However, this is unlikely where the collective bargaining takes place at the individual enterprise level and unions’ collective action beyond the enterprise does not arise.
4 Conclusions

While the formation of unions by sole traders presents a new legal issue under the AMA, the article analysed the influence conventional trade unions have in Japan. In the process, I examined how their impact can be assessed, demonstrating it cannot be done within the analytical framework conventionally used under the AMA. Trade unions are neither monopolies nor cartels and should be examined on a case-by-case basis. Neither the market share nor union density is indicative of the union’s power. A detailed analysis regarding the membership of the union and the interrelationships between other unions is necessary. How unions elect to strike is also critical, and the likelihood and effectiveness of strikes depend not only on the membership rate and rivalries among unions but also on the extent that the employer and employees share the same interests and information. Conventionally, the AMA does not address these factors.

From such a perspective, I have conducted an analysis of the influence of trade unions in Japan and reached the conclusion that trade unions organised by typical workers do not have an adverse effect on competition in Japan. The following factors were decisive when drawing this conclusion; i) the majority of trade unions in Japan are formed at the enterprise level and each union usually acts individually; ii) the rivalries amongst employees remain to great extent in Japan because of a lack of an exclusive representation system and a multiplicity of unions even within an individual enterprise, and because the scope of a collective agreement is limited to the members of the union; iii) un-unionised part-time and temporary workers put great competitive pressure on unionised workers; and iv) the low number of strikes presumably due to the ease of replaceability of strikers and long-term employment practices leading to a high degree of shared interest and information between the employer and employees.

The above analysis implicates that the self-employed workers’ collective activities, similar to those of traditional workers, are also unlikely to be anticompetitive and that the AMA should not be applied to them so long as they are individuals engaged in the activities such as those LUA allows for trade unions. There is no reason to believe that self-employed workers’ organisations would be more powerful than unions consisting of traditional employees. While
trade unions have various mechanisms available such as mandatory collective bargaining and representation in the policymaking process, newly-created self-employed workers’ organisations do not. The trade unions organised by conventional employees within enterprises often do not allow temporary workers to join and even more rarely do they allow self-employed workers to join. If they are allowed to join, the trade union is generally weak and joining such an organisation would not provide the self-employed worker with more power. The data reveals self-employed workers can best influence policymaking and the regulatory process. Such activities are generally not anticompetitive.

More fundamentally, the policy question exists as to whether the AMA and the JFTC should intervene in the self-employed workers’ efforts in a way that could possibly change the future of industrial relations in Japan. As this analysis shows, a trade union can influence economic, judicial and political systems. The decision as to whether similar groups for self-employed workers should be allowed to exist is beyond the JFTC’s competence. It should be left to the policymakers and ultimately, the public. The JFTC is an independent administrative organ dedicated to competition law enforcement and lacks the democratic legitimacy required to determine such an issue. The AMA does not provide clear guidance for either the JFTC or the courts. Its essential role is to protect the right to free and fair competition in the market. Although Article 1 of the AMA refers to the democratic development of the economy as well as the interests of the general public, such terms are too abstract and provide little guidance on how to adjudicate where social and political issues are at stake. The legal and regulatory issues that self-employed workers present vary and special legislation should be constructed because of this. The best that the AMA and JFTC can do is to step back and not apply the AMA to this novel phenomenon until legislators explicitly direct them to do so.

This does not mean that the JFTC has no role to play. The JFTC could publish a statement or guidelines that clarify that they will treat the self-employed workers’ collective actions as they do those of trade unions, thus not applying the AMA. Although such JFTC pronouncements do not bind the courts, they can influence them given the generally accepted JFTC level of competence and expertise in competition matters in Japan. The JFTC could

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There is no indication that self-employed workers are keener to unionise than traditional employees. A survey shows that more than 60% of self-employed workers who find jobs through online matching platforms and earn from those jobs (called ‘full-time crowd workers’ in the survey) are unwilling to join a union. Hatarakikata no tayo ka to hotekihogo no arikata [Varieties of engagement and legal protection] (Rengo, 2017) <https://www.rengo-soken.or.jp/work/201712-01.pdf> 52
also clarify which activities are outside of the reach of the AMA. Typically, the union bargains with an employer who is engaged in professional business activities under its own name, employing a set of physical or virtual assets, technologies and know-how in addition to human labour. The JFTC can clarify that the AMA is inapplicable to self-employed worker interactions when the buyer needs their characteristics. Alternatively, the JFTC may clarify that the AMA does not apply where there is a certain degree of economic dependence or subordination on the side of the self-employed worker and where the bargaining power is on the side of the buyer. This would clarify that no exemption exists regarding collective bargaining with general consumers and when fixing the trading conditions in concert for the goods and services supplied to them.

Globally, the market power is on the side of employers and buyers, which this presents serious economic, political and social issues. An increasing number of articles are examining whether expanding the definition of ‘workers’ to include self-employed workers and exempting them from competition laws is an appropriate solution. This article demonstrates how Japanese labour markets, corporate management and labour law substantially affect the way that trade unions operate in the country. Although the LUA ensures that workers have the right to associate and engage in collective bargaining, the same law does not preclude employees from forming different unions within the same workplace. Nor do the unions include part-time and temporary workers. This fundamentally undermines the effectiveness of any strikes. Furthermore, trade unions are composed at the single enterprise level and cannot collectively bargain at the sectorial level. Finally, the minimum wage and other working conditions are set by the government, not by collective bargaining. Competition among the workers remains across a range of enterprises which further weakens the union’s bargaining position. On the other hand, trade unions provide a valuable monitoring mechanism through which enterprise-specific investments are facilitated. Consequently, trade unions in Japan do not have substantial bargaining power; if they have any impact, it would only be a pro-competitive effect.

My conclusion that the AMA should not be applicable to certain types of collective activities for particular categories of self-employed workers is based on the analysis of the state of trade union and industrial relationships in Japan. Various factors unique to Japan are contributing to bringing about such situation, including Japanese labour law. In other countries, the situation surrounding trade unions may significantly differ. If trade unions are composed at the sectorial level and cover workers with the same or similar skills, the minimum wage may be set through collective bargaining and a union may represent non-members and negotiate with employers regarding their wages. Thus, they are far more influential. The exclusive representative system adopted in the United States, under which a particular union exclusively negotiates with an employer, changes the bargaining dynamics as well. These differences may lead to different conclusions about how to deal with self-employed workers’ collective actions under the competition laws abroad. There is no single answer as to what exemption should be granted to self-employed workers. Each jurisdiction must examine the issue by taking into account their labour laws, industrial relations and employment practice as well as the position that the trade unions are in.

Having said that, the Japanese experience and analysis in this article may have two broader implications internationally where the buyers’ power in the labour market is a serious issue. First, the analysis of the trade union’s influence requires complex considerations that are not done in ordinary competition law analysis, as already mentioned. Second, trade unions can be vulnerable, even with exemptions from competition law and active protection. Organising workers has been seen of as an effective way to solve the buyer's market power problem but the experience of Japanese trade unions shows that such an approach is limited. Even for small businesses, if allowing them to organise does not solve the problems of bargaining disparity and abuse, they will have to consider alternative protection.