

MASAKO WAKUI,
Antimonopoly Law: Competition Law and Policy in Japan

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The Japanese Antimonopoly Act¹, the main statute dealing with antitrust law in Japan, has been on the books since 1947. For decades, however, enforcement of the law was lax and, as a result, antitrust law long played only a minor role in Japanese society.² In recent years, this situation has changed. Enforcement by the Japan Fair Trade Commission (JFTC), the authority charged with the enforcement of the Antimonopoly Act, has become more effective, spurred on by a 2005 amendment that strengthened the JFTC's investigative powers, increased penalties and introduced a leniency program.³ As enforcement has become stricter, Japanese antitrust law has gained in stature and is attracting increased attention, both from within Japan and from abroad.

Yet despite the increased attention, handbooks in English on Japanese antitrust law are still scant and most of them pre-date the major changes of 2005.⁴ A number of excellent law review articles and book chapters on Japanese antitrust law exist, but they

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- 1 *Shiteki dokusen no kinshi oyobi kôsei torihiki no kakuhô ni kansuru hôritsu* [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54/1947, as amended by Law No. 51/2009; Engl. transl.: <http://www.jftc.go.jp/e-page/legislation> (as of 2010).
 - 2 See, e.g., D.F. HENDERSON, *Foreign Enterprise in Japan: Laws and Policies* (Chapel Hill 1973) 144-154; J.M. RAMSEYER, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, in: *Yale Law Journal* 94 (1985) 637. This view was also repeatedly expressed by the U.S. government during the Structural Impediments Initiative negotiations: S.R. WEISMAN, *Trade Talks with Japan Face Stormy Re-opening*, in: *New York Times*, 13 January 1991; J. STERNGOLD, *U.S. and Japan Give Out Economic "Report Cards"*, in: *New York Times*, 21 May 1991.
 - 3 *Shiteki dokusen no kinshi oyobi kôsei torihiki no kakuhô ni kansuru hôritsu no ichibu o kaisei suru hôritsu* [Act to Partially Amend the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 35/2005; no English translation of this amendment is available, but an English translation of the consolidated version of the Antimonopoly Act is available at <http://www.jftc.go.jp/e-page/legislation> (as of 2010).
 - 4 The only handbook in English published after 2005 is A. INOUE, *Japanese Antitrust Law Manual: Law, Cases and Interpretation of the Japanese Antimonopoly Act* (Alphen aan den Rijn 2007). For handbooks pre-dating the 2005 amendments, see M. MURAKAMI, *The Japanese Antimonopoly Act – Nihon no dokusen kinshi-hô* (Tokyo 2003); H. IYORI / A. UESUGI, *The Antimonopoly Laws and Policies of Japan* (New York 1994); M. MATSUSHITA, *International Trade and Competition Law in Japan* (Oxford 1993) 74-169.

too were mostly written before the 2005 amendments.⁵ Masako Wakui's *Antimonopoly Law: Competition Law and Policy in Japan*⁶ is therefore a welcome addition to the existing literature on Japanese antitrust law.

The book's style and approach is descriptive-analytical. Readers looking for a straightforward analysis of Japanese antitrust legislation and case law will find what they are looking for in the book. The book does not, however, aim to give an in-depth scholarly analysis and, compared with handbooks on U.S. and EU antitrust law, devotes little attention to the economic reasoning behind the rules.⁷

The book's introductory chapter charts the historical background of Japanese antitrust law and introduces some basic concepts, such as "substantial restraint of competition," a concept similar to the term "market effect" in the EU and the U.S., and "unfair trade practices," a notion that has taken on a peculiar meaning in Japan, as explained below.

The book then tackles the core rules of Japanese antitrust law, discussing each of the key provisions of the Antimonopoly Act in turn. The first one is the prohibition on unreasonable restraints of trade,⁸ which is roughly equivalent to Section 1 of the Sherman Act⁹ and Article 101 of the Treaty on the Functioning of the European Union.¹⁰ In Japan, however, the notion of unreasonable restraints of trade is interpreted as including only horizontal agreements, and not vertical agreements, a limitation that is increasingly criticized by scholars.¹¹

5 See M. MURAKAMI, Competition Rules and Enforcement in the US, EU and Japan, in: Jones/Matsushita (eds.), *Competition Policy in the Global Trading System* (The Hague 2002) 95-105; M. MATSUSHITA, The Antimonopoly Law of Japan, in: Graham/Richardson (eds.), *Global Competition Policy* (Washington 1997) 151-197. For an article specifically on enforcement, see H. FIRST / T. SHIRAIISHI, Concentrated Power: The Paradox of Antitrust in Japan, in: Foote (ed.) *Law in Japan: A Turning Point* (Seattle 2007) 521-554. On merger control, see S. HAYASHI, Merger Regulation in the Antimonopoly Law, in: Nagoya Daigaku Hôsei Ronshû 224 (2008) 21-117.

6 M. WAKUI, *Antimonopoly Law: Competition Law and Policy in Japan* (Suffolk 2008).

7 Compare, e.g., R. WHISH, *Competition Law*, 6th ed. (Oxford 2009) 1-18; G. MONTI, *EC Competition Law* (Cambridge 2007) 53-88 and E. GELLHORN / W.E. KOVACIC, *Antitrust Law and Economics in a Nutshell*, 4th ed. (St. Paul 1994) 42-85 (all including chapters on antitrust economics), while no chapter on antitrust economics is included in Wakui's work. Compare also WHISH, 604-08, 612-18; MONTI, 348-356 and GELLHORN / KOVACIC, 286-292 (all explaining the economics of vertical restraints) with WAKUI, *supra* note 6, 103 (no explanation of the economics of vertical restraints).

8 Art. 2 (6) and art. 3 (last part of the sentence) Antimonopoly Act, discussed in WAKUI, *supra* note 6, 53-84.

9 15 U.S.C. §1.

10 Treaty on the Functioning of the European Union, 30 March 2010, 2010 O.J. (C 83) 47.

11 WAKUI, *supra* note 6, 53, 57-60.

Second, Wakui examines the rules on private monopolization,¹² which are roughly analogous to the U.S. rules on monopolization (Section 2 of the Sherman Act) and the EU rules on abuse of dominance (Article 102 of the Treaty on the Functioning of the European Union). The next chapter covers the prohibition of unfair trade practices,¹³ a term that has a different meaning in Japan than in the European Union and the U.S., where the term is a usual synonym of unfair competition, which, in spite of its name, has little to do with antitrust law or competition law. It includes practices such as deceptive advertising and labeling, passing off and trademark infringements. By contrast, in Japan, “unfair trade practices” is the term used for sixteen specific types of anticompetitive conduct designated by the Japanese Fair Trade Commission.¹⁴ The list contains, among others, vertical price fixing, tie-in sales, refusals to deal and discriminatory pricing. Wakui ends her discussion of substantive antitrust law with a long chapter on merger regulation and a chapter on the rules governing trade associations.¹⁵

Apart from explaining the substantive rules, the book also pays ample attention to the enforcement mechanisms of antitrust law, which, in Japan, can be criminal, administrative and civil in nature.¹⁶ Finally, two short chapters deal with the relation between antitrust law and intellectual property¹⁷ and the relation between the Antimonopoly Act and other laws.¹⁸

Unfortunately for the author, the Antimonopoly Act was again amended in 2009,¹⁹ after the book was published, rendering it out of date on some specific topics. The 2009 amendments, most of which entered into force on 1 January 2010, introduced administrative fines (so-called surcharges) for exclusionary types of unilateral conduct and for certain unfair trade practices. They also increased surcharges for cartel ringleaders, lengthened prison sentences for individuals and brought changes to the leniency program and the rules on merger control.

12 Art. 2 (5) and Art. 3 (first part of the sentence) Antimonopoly Act, discussed in WAKUI, *supra* note 6, 85-101.

13 Art. 2 (9) and Art. 19 Antimonopoly Act, discussed in WAKUI, *supra* note 6, 103-189 (Chapter 4).

14 *Fukōsei-na torihiki hōhō* [Designation of Unfair Trade Practices], Japan Fair Trade Commission, Public Notice 15/1982; Engl. Transl.: <http://www.jftc.go.jp/e-page/legislation>.

15 WAKUI, *supra* note 6, 191-250 (Chapters 5 and 6).

16 WAKUI, *supra* note 6, 279-300 (Chapter 10).

17 WAKUI, *supra* note 6, 251-255 (Chapter 7).

18 WAKUI, *supra* note 6, 257- 269 (Chapter 8).

19 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuhō ni kansuru hōritsu no ichibu o kaisei suru hōritsu*, Law [Act to Partially Amend the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], No. 51/2009; a summary in English of the main changes can be found at <http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf>.

Hopefully, the author will publish a second edition to reflect these changes. However, writing a book about Japanese antitrust law seems somewhat like shooting at a moving target, as fresh amendments are already in the offing. In March 2010, the Japanese government submitted a number of new amendments to the Diet.²⁰ If enacted, these amendments will abolish the administrative hearing system, whereby appeals against JFTC decisions are first heard by the JFTC itself, with a possible further appeal to the Tokyo High Court. Instead, JFTC decisions would be subject to judicial review by the Tokyo District Court and, on appeal, the Tokyo High Court.

To obtain accurate information in English on the areas affected by the 2009 and 2010 amendments, observers of Japanese competition law will need to rely on the sometimes parsimonious information on the JFTC website²¹ or on some recently published summaries.²² For all other areas, Masako Wakui's book offers an informative and to-the-point analysis of the law.

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20 Japan Fair Trade Commission, Submission of the Antimonopoly Act Amendment Bill to the Diet (12 March 2010), at <http://www.jftc.go.jp/e-page/pressreleases/2010/March/0312a.pdf>.

21 <http://www.jftc.go.jp>.

22 E. WATANABE, *The International Comparative Legal Guide to Cartels & Leniency 2010* (London 2009) 142-148; Y. ONO / Y. SAKANO, Amendment in Line with International Practices, in: Young (ed.), *The 2010 Guide to Japan – Supplement to International Financial Law Review*, 8th ed. (London 2010), at <http://www.iflr.com/Supplement/74290/The-2010-Guide-to-Japan.html>. For a handbook in Japanese that covers the 2009 changes, see T. SHIRAISHI, *Dokkin-hô kôgi* [An Introduction to the Competition Law of Japan], 5th ed. (Tokyo 2010).