

# ABHANDLUNGEN

## **The Subtle Interplay between the FTC and the Civil Courts. Three Famous Termination Disputes within the Distribution System for Luxury Cosmetics**

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### I. INTRODUCTION

Recently, there have been significant pressures both to lower prices and to restructure distribution channels in Japan. This has put a greater strain on many continuing commercial contracts, which have been described so extensively in Japanese literature.<sup>1</sup> Economic pressures have not only caused the further restructuring of distribution systems and subsequent terminations of contracts by manufacturers, but have also resulted in a greater volume of termination disputes before the civil courts.

The most important factor is the current recession. It has left Japanese consumers with less purchasing power than before. Therefore, pressures to sell at lower prices have increased, even leading to deflationary pressures throughout the economy. This, in turn, triggered the sudden growth of discounters in the 1990s which had many repercussions in the distribution sector.

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<sup>1</sup> For example, K. KAWAGOE / K. IWAKI / N. KASHIWAGI / K. SHINDO, *Kakaku hakai genshōka no keizokuteki torihiki* [Continuing Trade and the Phenomenon of Price Destruction] *Zadankai* [Round Table Discussion]: 560 *New Business Law* 8-10 (1995).

### 1. *Japanese Anti-Trust Law and Contract Terminations with Discounters*

Some of these termination disputes were triggered when leading manufacturers cancelled contracts with distributors which started to sell the products at prices which were lower than those agreed upon with the manufacturer. It usually concerns regular distributors who have turned themselves into discounters so as to increase their competitive power and expand their sales by lowering resale prices. When such terminations occur in industries where leading manufacturers enjoy a great deal of control over the majority of their distributors with their own marketing methods,<sup>2</sup> Japanese anti-trust law can have an important influence in subsequent legal disputes.

In these cases manufacturers want to retain control over distribution channels and cancel contracts with distributors which do not abide by their trade policies. When these trade policies themselves are in violation of anti-trust law, the termination may be illegal. Not only the termination itself, but also the clauses on which this is justified may violate the Anti-monopoly Act.<sup>3</sup> This concerns the type of termination which occurs when manufacturers allegedly only cancel the agreement because the distributor resells to discounters or sells at prices lower than those agreed upon with the manufacturer. This constitutes resale price maintenance which is in violation of the Act. However, in most cases it is difficult to judge whether the Act has been violated since manufacturers seldom justify a termination of a distribution agreement by pointing to non-compliance on the part of the distributor with an obviously forbidden trade practice such as resale price maintenance.

Increasingly in response to such terminations the discounters have filed complaints with the FTC (Japan Fair Trade Commission, *Kôsei Torihiki I'in-kai*) against these manufacturers.<sup>4</sup> Sometimes they have also instigated civil proceedings against the manufacturers. Before the civil courts they have not only invoked contract law but also anti-trust law in order to deny the validity of the termination. They have claimed that the termination itself, or the clauses justifying it, were in violation of the Anti-monopoly Act and were therefore invalid. This means that in such cases not only the FTC but also the civil courts have become involved.

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2 These systems are often referred to by the Japanese term '*Distribution keiretsu*' describing the organisation and control of channels by a particular manufacturer in which the wholesale and resale outlets become integrated by means of a variety of ties and links.

3 *Shiteki dokusen no kinshi oyobi kôsei torihiki no kakuho ni kansuru hôritsu (Dokkin-hô)*, Law No. 54/1947, as amended by Law No. 80/2001.

4 For example in the business sector of luxury cosmetics, computer game software, designer sports footwear and mobile phones. After the FTC has found in its investigation that the Act has been violated it can order the manufacturer to cease a forbidden trade practice such as resale price maintenance and take appropriate measures, but it cannot demand that the violator actively resumes supplies to the distributor. However, the threat of a sanction by the FTC may cause the violator to resume supplies on its own initiative.

This article does not describe the role of contract law<sup>5</sup> in such termination disputes but focuses primarily on the influence of anti-trust law. This is because I want to describe the subtle interplay between the FTC and the civil courts.

## 2. *Termination Disputes within the Distribution System for Luxury Cosmetics*

Particularly within the distribution system for luxury cosmetics, there have been quite a number of such termination disputes. Especially three of these disputes have become well-known in Japan and have triggered much controversy. They started at the beginning of the 1990s, most of which have ended only recently. In these disputes not only contract law but also anti-trust law played an important role and discounters made use of all possible legal remedies to the bitter end, without compromise. These legal disputes generated a great deal of publicity in Japan and reflect the power struggle between leading cosmetics manufacturers and several of their distributors which did not abide by their marketing policies. These disputes have generated many influential decisions on the part of the higher courts and the FTC. In relation to the alleged infringements of the Anti-monopoly Act the issue in these cases was whether the so-called face-to-face sales method (*taimen hanbai seido*) and certain customer restrictions constituted a violation of the Act.

Accordingly, a detailed description of these cases can provide insights into the important interrelationship between the decisions of the FTC and the civil courts and the relationship between anti-trust law and contract law. For example, what is the influence of the FTC on civil courts and *vice versa*? An important question because of the fact that the private law enforcement of anti-trust law is becoming increasingly important in Japan.

## II. THREE FAMOUS TERMINATION DISPUTES

### 1. *Introduction*

The following description of these three cases is a much shorter version of the in-depth case studies as presented in my book.<sup>6</sup> In order to describe these cases I collected a great deal of primary material such as the legal documents associated with the lawsuits and secondary material such as articles concerning these cases in Japanese newspapers and legal journals. In addition, I conducted numerous interviews during two periods of field research in Japan. The first interview sessions were held during the second half of 1994.

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5 In such disputes distributors have primarily invoked general principles of contract law such as the principle of good faith. This has led to tension with the competing principle of the freedom of contract. This is described in much detail in my book: W. VISSER 'T HOOFT, *Japanese Contract and Anti-Trust Law, A Sociological and Comparative Study* (2002).

6 See VISSER 'T HOOFT, *supra* note 5 (Chapter 4).

The second interview sessions took place during the month of November 1997. These interviews were conducted in Japanese with the principal actors to these disputes such as the parties themselves, their lawyers, a Tokyo High Court judge who had delivered a very influential decision in these cases and FTC officials. In addition, I interviewed third-party observers such as a journalists, bureaucrats and legal academics. They were able to provide facts which I had not been able to collect myself.

## 2. *Background to these Disputes*

Large manufacturers of luxury cosmetics have established their own distribution system for luxury cosmetics. Their sales companies concluded standard-form contracts with a great number of small retailers. Through various business practices and duties imposed upon the retailers each manufacturer exerted a great deal of control over the retailers and the resale prices of their luxury cosmetics. One duty as provided in the standard-form contract was to provide a “proper explanation of the products and to provide an after-service to the customers according to the directions of the sales companies”. These contracts were also checked informally by the FTC.

The system was very close and tight-knit and in principle the luxury cosmetics could only be sold at shops which had concluded these standard-form agreements with the sales companies. It proved to be very successful and the number of such retailers had grown very rapidly over the years. For example, at the end of the 1980s the largest manufacturer, Shiseido, had a contractual relationship with 25,000 retailers. However, at the end of the 1980s and the beginning of the 1990s some of these retailers had gradually grown larger than the others. They usually ran several shops and were selling the luxury cosmetics by mail order. Higher volumes of sales enabled them to provide discounts below the manufacturers’ recommended resale price.

Leading manufacturers such as Shiseido, Kao and Kanebo responded by exerting various pressures in order to force these retailers to stop selling by mail order with discounts. This did not prove to be effective and eventually they decided to terminate the contracts with these retailers. They argued that these measures were due to contractual violations by these discounters. They held that under the terms of the contract products must be sold “face-to-face” according to the guidance of the sales companies. Furthermore, they had resold cosmetics to other retailers which, according to them, was prohibited under the contract.

For the discounters this was a major loss. They were cut off from a large part of their business and they decided to file complaints with the FTC against the manufacturers. They appealed to the FTC to determine that the termination of the contract and the suspension of supplies had violated the Anti-monopoly Act, while invoking the Articles concerning resale price maintenance.<sup>7</sup> They had placed their hopes on the increasing

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7 They invoked Artt. 2 and 19 of the Anti-monopoly Act and No. 12 of the general designation.

US pressure as illustrated in the Structural Impediments Initiative talks and the subsequent promises by Japan to enforce the Anti-monopoly Act more strictly and to strengthen the FTC.<sup>8</sup>

Later on, they also decided to turn to civil litigation to fight the manufacturers in the courts. Since civil proceedings take a very long time this was not their first option.<sup>9</sup> Initially, they had applied for a provisional disposition (*kari-shobun*) before the Tokyo District Court demanding a declaration to confirm their contractual rights and demanding the delivery of the supplies on order. However, most of these were withdrawn after the judge in the *kari-shobun* proceedings told the discounters that an application for a provisional disposition would only have a slight chance of success.<sup>10</sup> Subsequently, they all brought main actions before the Tokyo District Court with similar demands to declare the unilateral termination of the contract invalid and to confirm their contractual rights.

Before the Tokyo District Court they collected evidence to prove that the breach of the duty to sell face-to-face was merely a pretext for the sales company to cancel for opportunistic reasons. They claimed that the manufacturer's real aim was to prevent the discount sales of their products. They tried to establish that the whole issue of face-to-face sales was a smokescreen by collecting evidence that luxury cosmetics were also sold in supermarkets and department stores without any prior explanation to the consumers. Before the Court they based their claim on contract law. At that time they had only briefly stated that the termination had violated the Anti-monopoly Act.

The manufacturers responded before the District Court by arguing that under the terms of their contracts all retailers are obliged to engage in direct face-to-face sales with their customers in order to explain to each customer individually the correct usage of the products. This was aimed at retaining the good name of the products, preventing skin problems caused by an incorrect application and thus promoting the interest of the customer. Accordingly, the manufacturers contended that the acts of the discounters violated this basic principle, because they sold on a mail-order basis.

### 3. *Applicable Articles of the Anti-monopoly Act and the FTC Guidelines*

One important issue in these cases was whether the termination of the contract, or the clauses justifying it, could be considered an 'unfair trade practice' as prohibited under

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8 K. FUJISAWA, President of Fujiki, one of the discounters. Personal communication, 12 November 1997.

9 J. YAMANE, the lawyer representing two of the three discounters, Fujiki and Egawa Kikaku. Personal communication, 10 November 1997.

10 There are doubts about the practicality of demands for such injunctions. For instance, these procedures may still take a great deal of time and Japanese courts lack the required enforcement powers for such injunctions. See K. IWAKI, *supra* note 1: 561 New Business Law 29-31.

Art. 19 of the Act. In Art. 2(9) these unfair trade practices are defined. Art. 2(9)iv of the Act provides that trading with another party on such conditions as will 'unjustly' restrict the business activities of such a party is an unfair trade practice. The legal dispute was related to the following two articles:

First, under this heading the FTC announced in the 1982 general designation<sup>11</sup> under No. 12 that resale price maintenance without good reason is prohibited. This means that a manufacturer may not sell a commodity to distributors on condition that they observe the resale price indicated by the manufacturer. Second, the FTC announced in the same designation under No. 13 that dealings on 'unjust' restrictive terms are prohibited. No. 13 can be applicable to a customer restriction for the purpose of maintaining resale prices. This means that a manufacturer may not demand that its customers suspend shipments to retailers who sell below the manufacturer's suggested resale prices.

In 1991 the rules within the general designations were further clarified by the FTC. It had issued special guidelines which turned out to be very influential in these termination disputes and had obviously stimulated the discounters to take on the manufacturers in legal proceedings. Partly in response to US pressure for a stronger enforcement of the Anti-monopoly Act, the FTC introduced Guidelines Concerning Distribution Systems and Business Practices, in order to increase compliance with the Anti-monopoly Act.<sup>12</sup> The official purpose of the introduction of the Guidelines was to clarify which trade practices in distribution violate the Act and which practices do not. In this way businesses could take preventive measures so as not to violate the Act.<sup>13</sup>

In relation to No. 12 of the general designation the Guidelines stipulate that resale prices are considered to be restricted when a written or oral agreement between a manufacturer and its distributors or "any artificial means" used by the manufacturer, causes distributors to sell at the price indicated by the manufacturer. One of these artificial means may consist of curtailments of shipments or a notification or suggestion to that effect if sales are not made at the manufacturer's indicated price.<sup>14</sup>

In relation to No. 13 of the general designation the provisions of the Guidelines regarding the restriction on customers and sales methods proved to be very important during these termination disputes. As for customer restriction the Guidelines declare such restriction illegal if, as a result of such conduct, the price level of the product covered by the restriction is likely to be maintained. For example, this concerns the

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11 For an activity to qualify as an unfair trade practice, one of the requirements is also that the FTC must have designated the activity as such. The FTC's 'general designations' (*ippan shitei*) specify certain broad practices coming under the purview of Art. 2(9) and apply to all fields of trade. The most recent general designation on unfair trade practices was promulgated in 1982.

12 For an explanation of the Guidelines see A. YAMADA / M. OKUMA / N. NARASAKI, *Ryûtsû torihiki kankô ni kansuru dokusen kinshi-hô gaidorain* [The Anti-monopoly Act Guidelines concerning Distribution Systems and Business Practices] (Tokyo 1993).

13 *Supra* note 12 at 9.

14 Part II, Chapter 2, Sec. 1 and 2 of the Guidelines, *supra* note 12 at 136-155.

prohibition on sales among distributors and the prohibition on sales to discounters.<sup>15</sup> As regards the restrictions on the sales methods of retailers, the Guidelines first state that such restrictions would not violate the Act if they were necessary or helpful in ensuring proper sales of the product, product safety, quality control or the maintenance of goodwill and are imposed in a similar way on all other trading partners. However, such restrictions are regarded as unfair trade practices if they are used as a means to restrict the retailer's sales price and customers.<sup>16</sup>

#### 4. *Victories for Discounters before the Tokyo District Court (1993,1994)*

##### a) *The Tokyo District Court Decision (Shiseido v. Fujiki, 1993)*

On 27 September 1993, the Tokyo District Court delivered its verdict in the termination dispute between Shiseido and Fujiki, one of the three discounters. The presiding judge, *Nobuo Akatsuka*, ruled completely in favour of Fujiki and upheld the discounter's claim that the decision by Shiseido to terminate the contract was illegal.<sup>17</sup> The court ordered Shiseido to forward products which had been on order. It held that the obligation to carry out face-to-face sales is only justifiable if such sales are reasonably necessary to ensure the safety of products, to protect the quality thereof, to maintain the goodwill of products or to fulfil any other appropriate objectives. In this case it was not proven that the face-to-face sales method was designed to accomplish such goals. Rather, the court found that such face-to-face sales helped to discourage distributors from discounting the price of the products and assisted in maintaining the manufacturer's suggested retail price. Consequently the Court concluded that the obligation to carry out the face-to-face sales violated the 'spirit' of the Anti-monopoly Act. This was an important reason for determining that the termination of the contract by the manufacturer had not been justifiable and was therefore null and void. These statements by the court were very similar to the section on the restriction of sales methods in the Guidelines of 1991.

For Shiseido and other leading manufacturers this decision came as a great shock. Shiseido had not expected that the Tokyo District Court would refer to the Anti-monopoly Act, since Fujiki had not really invoked the Act as such.<sup>18</sup> Japanese judges may add legal grounds *ex officio* in their decisions but since there were so few precedents of cases in which the civil courts had applied the Act in termination disputes, for Shiseido it probably came as something of a surprise. Shiseido immediately appealed against the verdict to the Tokyo High Court arguing that the decision did not recognise the face-to-face sales system whereby trained sales staff from Shiseido and other cosmetics companies teach consumers how to use the products correctly.

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15 Part II, Chapter 2, Sec. 4 of the Guidelines, *supra* note 12 at 178-185.

16 Part II, Chapter 2, Sec. 5 of the Guidelines, *supra* note 12 at 185-189.

17 *Shiseido v. Fujiki*: 1474 *Hanrei Jihô* 25 (Tokyo District Court, 27 September 1993).

18 H. KUBO, Shiseido Legal Department, Personal communication, 20 November 1997.

Meanwhile, the FTC had also started to move. This was in response to a complaint by Kawachiya, the third discounter involved in these termination disputes. Previously, the other two discounters, Fujiki and Egawa Kikaku, had also filed complaints against the manufacturers but after a preliminary investigation the FTC had notified them one year later that the investigation had been halted since no violations had been found.

However, after the complaint by Kawachiya the FTC responded quickly. It commenced an extensive investigation and even decided to raid Shiseido's head office and nine affiliated sales companies for allegedly blocking the discount sales of cosmetics. These raids by the FTC generated a great deal of publicity in Japan. It was the first time for the FTC to search a major cosmetics manufacturer concerning a suspected violation of the Anti-monopoly Act.

*b) The Tokyo District Court Decision (Kao v. Egawa Kikaku, 1994)*

On July 18, 1994 almost one year after the decision in favour of Fujiki, the Tokyo District Court ruled for a second time in favour of a discounter, Egawa Kikaku. The presiding judge, *Harada*, agreed with Egawa Kikaku in its case against Kao and ordered the latter to supply goods to the discounter. The court justified its decision mainly on anti-trust law. The court held that Kao had only cancelled the agreement because it had suspected that sales were taking place at bargain prices, which is a 'serious' infringement of the Anti-monopoly Act, Art. 2(9) and No. 12 of the general designation. It argued that for this reason the termination amounted to an abuse of right and was therefore null and void.<sup>19</sup> Similar to Shiseido, Kao immediately decided to appeal against this verdict to the Tokyo High Court.

This decision also made newspaper headlines and was considered to be a follow up of the District Court decision in the Shiseido/Fujiki dispute. Both decisions also received a great deal of interest from a large number of legal scholars and lawyers who commented on these decisions in legal journals. They were divided, but some severely criticized the conclusion of the court that an act leading to price stability immediately corresponds to resale price maintenance. Furthermore, they argued that it is not the function of the state to judge whether a certain sales method is reasonable. Such a determination should be left to the market and the parties themselves.<sup>20</sup>

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19 *Kao v. Egawa Kikaku*:1500 *Hanrei Jihô* 3 (Tokyo District Court, 18 July 1994).

20 See e.g. K. KAWAGOE, *Hanbai hôhō ni kansuru yakujō to tokuyakuten keiyaku no kaijō* [Clauses Concerning Sales Methods and the Termination of Distribution Agreements]: *New Business Law* Vol. 532, 6-11, Vol. 533, 12-18, Vol. 534, 19-22 (1993). For support see for example K. TSUCHIDA, *Keizokuteki kyōkyū keiyaku no kaiyaku to fukōsei na torihiki hôhō* [The Termination of Continuing Supply Agreements and Unfair Trade Methods]: 1063 *Jurisuto* 122-124.



5. *The First Tokyo High Court Decision (Shiseido v. Fujiki, 1994)*

Because of the two court victories by Fujiki and Egawa Kikaku and the raids by the FTC on Shiseido, there had been much pressure on the cosmetics manufacturers. However, favourable developments for the discounters were somewhat diminished when on 14 September 1994 the Tokyo High Court overturned the District Court's decision in the dispute between Shiseido and Fujiki. After three court sessions the presiding judge *Kin'ichi Takahashi* came to a decision and found that Shiseido had been within its rights to cancel the contract. He mainly based this decision on contract law. On the issue of the alleged infringements of the Anti-monopoly Act, the Tokyo High Court found the following:

“It is clear that the requirement of the manufacturer to sell face-to-face leads to price stability but such an effect in itself does not lead to a violation of the Act. Only when this sales method functions as a means to restrict the prices of retailers can the Act be said to have been violated.”

The court held that there had not been sufficient evidence to prove such a causal relationship. The court referred to the fact that after a preliminary investigation, based on a complaint by Fujiki, the FTC had concluded in 1991 that Shiseido had not violated the Anti-monopoly Act.

The court argued that there was a rationale behind selling cosmetics to customers in person given the nature of luxury cosmetics. For example, these products may cause allergies on human skin if applied incorrectly. Furthermore, such requirements are not prohibited when they are necessary or helpful in ensuring the proper sales of the product, product safety and quality control as well as the maintenance of goodwill and if they are imposed in a similar way on all other trading partners. In this way it implicitly referred to what the Guidelines state in relation to No. 13 of the general designation on the restriction on sales methods. Finally, the court held that businesses are free to decide which sales policy or sales method they wish to adopt.<sup>21</sup>

For Judge *Takahashi*, it was the first time in his 37-year career that he had had to consider such a termination dispute in which a distribution agreement had been unilaterally cancelled. He stated that this case was exceptional since a violation of the Anti-monopoly Act is rarely an issue before the civil courts. *Takahashi* said that he had gathered and read many articles by legal scholars and lawyers concerning the initial District Court decision, including the very critical ones. According to him, in these kinds of exceptional cases the articles by legal scholars and lawyers have an important role. Concerning the possible influence of this decision on the still running FTC investigations, he held that this decision would not have much impact because the courts and the FTC are separate entities which cannot bind one another. The FTC is able to conduct detailed investigations whereas the Tokyo High Court is not. Furthermore, he had

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21 *Shiseido v. Fujiki*: 1507 *Hanrei Jihô* 43 (Tokyo High Court, 14 September 1994).

decided that there had been no violation of the Act. If he had decided that the Act had been violated, then this might have had some influence on the FTC.<sup>22</sup>

Although some legal scholars criticised this decision, while having doubts about the reasonableness of the face-to-face sales method many such scholars agreed with the reasoning of the court.<sup>23</sup> Fujiki appealed to the Supreme Court and in his grounds for appeal *Yamane* mainly invoked errors in interpreting violations of the Anti-monopoly Act in relation to Nos. 12 and 13 of the general designation. He strongly criticized the court for referring to the FTC notification to Fujiki in 1991. He argued that it was not clear to what extent the FTC had carried out its investigation and that such a notification by the FTC does not necessarily mean that no violations of the Act had in fact occurred.

This decision probably had an influence on a similar kind of decision almost six months later. That decision was delivered by the Urawa District Court in the dispute between Shiseido and Kawachiya. On February 17, 1995, the District Court of Urawa ruled in favour of Shiseido and rejected the injunction demanded by Kawachiya. This decision was also primarily based on contract law. The court did not decide upon the question of whether or not the obligation to sell face-to-face violated the Anti-monopoly Act, but only determined that there was insufficient evidence that the termination of the contract had violated the Act. The termination was therefore not against “public order and good morals” which could have made it null and void.<sup>24</sup>

#### 6. *The FTC Recommendation against Shiseido (1995)*

The three discounters' hopes rested on a recommendation by the FTC. On June 21, 1995, two years after the complaint by Kawachiya, the FTC finally delivered a recommendation against Shiseido. The recommendation, however, did not clarify whether the suspension of the supplies to Kawachiya amounted to a violation of the Act. The FTC remained vague on the essential point, namely whether or not the face-to-face sales method violated the Act. It had focused on acts of resale price maintenance and had discovered that Shiseido had concluded secret price fixing contracts with 19 Seikyô stores. Furthermore, it had found proof that Shiseido had dissuaded the large-scale retailers Jusco and Daiei from selling its products at bargain prices which constituted an infringement of Art. 19 of the Anti-monopoly Act. Therefore, within the recommendation, the FTC urged Shiseido to stop pressurising the large-scale retailers to sell at the price indicated and urged it to abandon the price fixing contracts with the Seikyô stores.

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22 K. TAKAHASHI, Personal communication, 26 December 1994.

23 See for example K. KAWAGOE, *Shiseido Tôkyô hanbai jiken kôsoshin hanketsu no gaiyô* [An Outline of the Appeal Decision in the Case Involving the Shiseido Tokyo Sales Company]: 555 *New Business Law* 19-24 (1994); M. MURAKAMI, *Keshôhin ryûtsû wo meguru dokusen kinshi-hô ihan jiken no bunseki* [Analysis of Violations of the Anti-monopoly Act in relation to Cosmetics Distribution]: 577 *New Business Law* 9-14 (1995).

24 *Shiseido v. Kawachiya*: 41 *Shinketsushû* 501 (Urawa District Court, 17 February, 1995).

One reason for the two-year gap before the decision may be that the FTC may have had difficulties in judging contracts which it had unofficially approved of earlier when the contracts were presented to it for prior approval. Another reason may have been the subtle influence of the Tokyo High Court decision, which was delivered in the middle of the FTC investigations. This decision, which ruled that the requirement of the face-to-face sales did not lead to a violation of the Act, may have created a problem for the FTC. A recommendation that would contradict the Tokyo High Court decision could always be rejected by Shiseido and a hearing procedure could be commenced. Shiseido would then be able to appeal against a hearing decision by the FTC to the same Tokyo High Court.<sup>25</sup> For this reason the FTC probably wanted to make doubly sure and needed more time to reconfirm all the material.<sup>26</sup>

The recommendation came as a shock to all the leading cosmetics manufacturers. Shiseido rejected the recommendation after which the FTC issued a complaint against the manufacturer and commenced a formal hearing procedure. A long-lasting legal dispute was expected but on October 2, 1995, three days before the commencement of the formal hearing Shiseido applied for a consent decision (*dôshi shinketsu*).<sup>27</sup>

Shiseido submitted a written statement in which it stated that it admitted the findings and the application of the law stated in the complaint and that it accepted a decision without resorting to further proceedings. It filed a plan containing concrete measures to eliminate the possibility of a violation. Eventually, on October 30, the FTC issued the consent decision.<sup>28</sup>

Several legal scholars commented on this decision and pointed to the fact that because the case had ended with a consent decision many facts still remained unclear. For example, the decision has not clarified the issue whether the face-to-face sales clause or the prohibition on re-sales to other retailers violates the Anti-monopoly Act.<sup>29</sup>

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25 Those who are dissatisfied with a decision of the FTC can file a lawsuit to quash the decision. The Tokyo High Court has exclusive jurisdiction to review a decision of the FTC. Finally, the Tokyo High Court decision can be appealed before the Supreme Court.

26 The reason why the FTC shifted all attention to the trading relationships with Seikyô stores may be that in this way it could point to clear price fixing contracts in order to take measures against Shiseido, without having to refer to the face-to-face sales method. In this way there could be no deviation from the line of thought in the decision of the Tokyo High Court.

27 If in the middle of hearing procedures the respondent submits a written statement in which the facts in the application of the law as stated in the complaint are accepted and measures are proposed to eliminate the violation the FTC can issue such a decision. See Art. 53(3) of the Anti-monopoly Act. In the event that hearing procedures are completed without such a consent decision the FTC issues a hearing decision (*seishiki shinketsu*) based on Art. 54 of the Anti-monopoly Act.

28 For the contents of this decision see *Shinketsushû* No. 41, 30 November 1995.

29 See M. MURAKAMI, *supra* note 23: 581 New Business Law 33-35; Also M. MATSUSHITA, *Saikin no dokusen kinshi-hô jô no shinketsurei* [Recent Decisions involving the Anti-monopoly Act]: 610 New Business Law 22-26 (1997).

Other luxury cosmetics manufacturers which had frictions with discounters were disappointed by Shiseido's decision to give in to the FTC demands. They had expected that Shiseido would continue to fight since an acceptance of the decision by the FTC might have detrimental effects for the manufacturers in the still running legal disputes before the civil courts. Therefore, one reason for Shiseido initially not giving in may have been to prevent a negative influence on the still running cases before the civil courts if Shiseido would have agreed that it had carried out resale price maintenance.

Meanwhile, leading manufacturers had become more cautious. They had decided to change their marketing policies and standard-form contracts. New contracts were used for newly introduced brands which were to be sold only face-to-face. Within these contracts the duty to sell face-to-face was made much more explicit. In this way they also tried to emphasize the importance of this sales method. They were all informally checked by the FTC during prior consultation.

#### 7. *The Second Tokyo High Court Decision (Kao v. Egawa Kikaku, 1997)*

The second decision of the Tokyo High Court was delivered in the termination dispute between Kao and Egawa Kikaku. On 31 July 1997 the Tokyo High Court decided in favour of Kao. This decision took two years longer than the decision by the same court in the case between Shiseido and Fujiki. The presiding judge *Suzuki* was very cautious and had presided over 10 court sessions in which many witnesses had been examined. In this decision the court dealt more extensively with the alleged violation of anti-trust law. The issues were whether the face-to-face sales method and the prohibition on resales to other retailers as stipulated in the standard-form Kao contract were in violation of Nos. 12 and 13 of the general designation.

In relation to the face-to-face sales method the Court argued that it leads to price stability, but as long as it is not used as a means to restrict resale prices its relative rights or wrongs should be entrusted to the free choice of the market. The court held that in this case there was insufficient evidence to conclude that the sales method had been used as a means to restrict resale prices. Furthermore, Kao had concluded contracts containing identical clauses with other retailers.

This time the court explicitly mentioned that a similar situation existed as that referred to in the Guidelines which state that restrictions on sales methods are allowed as long as they are necessary or helpful in ensuring proper sales of the product, product safety, quality control and the maintenance of goodwill and if they are imposed in a similar way on all other trading partners. The court also referred to the decision of the FTC in January 1996 upon Egawa Kikaku's complaint against Kao. The FTC had decided not to take any measures against Kao since no violation of the Anti-monopoly Act had been found.

In relation to the prohibition on re-sales to other retailers the Court held that this did not violate the Act since it was nothing more than a means by which to secure the enforcement of the face-to-face sales method.<sup>30</sup>

In response, Egawa Kikaku immediately appealed to the Supreme Court. According to *Jirô Yamane* representing the discounter in court, the FTC notification of January 1996, in which it had concluded that Kao had not violated the Anti-monopoly Act, had a great deal of impact on the final decision.<sup>31</sup> According to him, the timing of the FTC was not a coincidence but was aimed at assisting Kao before the Tokyo High Court.<sup>32</sup>

#### 8. *The Supreme Court Decision (Kao v. Egawa Kikaku / Shiseido v. Fujiki, 1998)*

On 18 December 1998 the Supreme Court delivered its decision in the case between Shiseido and Fujiki and between Kao and Egawa Kikaku.<sup>33</sup> The five judges of the Reduced Bench unanimously found in Shiseido's and Kao's favour. The decision entirely involved issues of anti-trust law, since in the grounds for appeal the two discounters had mainly invoked the Anti-monopoly Act. The Supreme Court considered whether Nos. 12 and 13 of the general designation had been violated. It first provided the following general rule:

“In view of the fact that the freedom of choice as regards the sales policy and the sales method of a manufacturer or wholesaler must be respected, as long as the restrictions on the sales method imposed upon the retailers are based on reasonable grounds for the sale of such products and as long as similar restrictions are imposed upon the other trading partners, they do not exert a detrimental influence on the fair competition order and therefore do not correspond to dealing on terms which ‘unjustly’ restrict the business activities of the other party as stipulated in No. 13 of the general designation.”

Applied to the case between Shiseido and Fujiki the Court ruled that in view of the characteristics of cosmetic products, it is reasonable that Shiseido has adopted the face-to-face sales method. Furthermore, given the fact that Shiseido has concluded similar contract clauses with other trading partners and that in practice a fair number of

30 *Kao v. Egawa Kikaku*: 1624 *Hanrei Jihô* 55 (Tokyo High Court, 31 July 1997). Again, the response of the legal academics was divided but most were supportive. See for example H. IYORI, *Tokuyakuten keiyaku no nin'i kaiyaku-ken to hanbai nettowâku shisutemu* [The Right to Terminate a Distribution Agreement at Will and a System of Network Sales]: *New Business Law* Vol. 626, 17-23 and Vol. 627, 48-54 (1997).

31 Although the civil courts are not legally bound by FTC measures, whatever their nature may be, these notifications that the Act had not been violated can still have an influence.

32 J. YAMANE, *Dokkin-hô wo azawarau Kao kôsai kôshuin to taiketsu suru* [Taking on the FTC, The High Court and Kao which ridicule the Anti-monopoly Act]: *Kokusai Shôgyô* (November 1997) 28. In this article he stated that normally administrative bodies, including the FTC, are very reticent in deciding on issues which are still running before the civil courts.

33 *Shiseido v. Fujiki*: 1664 *Hanrei Jihô* 3; *Kao v. Egawa Kikaku*: 1664 *Hanrei Jihô* 14 (Supreme Court, 18 December 1998).

Shiseido products are sold face-to-face, Fujiki's obligation to sell face-to-face does not violate the Anti-monopoly Act.

In relation to No. 12 of the general designation the court held that when the restrictions on sales methods function as a means to restrict resale prices, such sales methods might violate the Anti-monopoly Act. However, the fact that such restriction leads to price stability in itself does not immediately signify that the freedom to set resale prices is thereby restricted.

As regards the case between Kao and Egawa Kikaku the Supreme Court used identical arguments to reach the same conclusion but also dealt with the question of whether or not the prohibition on reselling to other retailers violates the Anti-monopoly Act or not. The Court found that

“if cosmetics are being resold to retailers which have not concluded distribution agreements and which are not obliged to sell face-to-face, the purpose of the distribution agreement to maintain the brand image of the Kao cosmetics, can no longer be realised. Therefore, the prohibition on resales to retailers with which Kao has not concluded this agreement must inevitably go together with a duty to sell face-to-face. In case the face-to-face sales clause is not held to violate Art. 19 of this Act, then such a prohibition automatically does not contravene this Article.“

Again the Japanese legal scholars were divided. Some of them strongly supported this decision because it respects the freedom of manufacturers to adopt their own sales policies.<sup>34</sup> Other legal scholars have doubts about the reasonableness of the face-to-face sales and have argued that the options for retailers to choose their own sales methods are very limited.<sup>35</sup> However, they all agree that this decision exerts enormous influence in Japanese legal practice. It has a great impact upon Japanese distribution agreements and distribution systems. This is particularly so for the distribution of brand-name products, where the duty to sell face-to-face is often imposed.

This decision also has a great deal of influence on the still running legal disputes between cosmetics manufacturers and discounters. It is unlikely that the discounters will enjoy any further victories. In the civil proceedings between Shiseido and Kawachiya and another similar case between Kawachiya and Kanebo the Tokyo District Court has already decided along similar lines as the Supreme Court.<sup>36</sup>

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34 See for example H. IYORI, *Keshôhin taimen hanbai jôkô ni kansuru Saikô-sai no futatsu no hanketsu* [Both Supreme Court decisions in relation to the Cosmetics Face-to-face Sales Clauses]: 658 *New Business Law* 11-15 (1999); M. MURAKAMI, *Shiseido Kao jiken Saikô-sai no nokoshita kadai* [Remaining Issues after the Supreme Court Decisions in the Shiseido and Kao Cases]: 667 *New Business Law* 8-9 (1999).

35 See for example H. NAKAGAWA, *Keshôhin no taimen hanbai to dokusen kinshi-hô* [The Face-to-face Sales of Cosmetics and the Anti-monopoly Act]: 1154 *Jurisuto* 92-98 (1999).

36 *Kanebo v. Kawachiya*: 1731 *Hanrei Jihô* 13 (Tokyo District Court, 28 February 2000), and *Shiseido v. Kawachiya*: 1191 *Jurisuto* 70 (Tokyo District Court, 30 June 2000).

### 9. Conclusion

In order to understand why these unilateral terminations of contracts by leading manufacturers have led to such major termination disputes it is important to realise that the discounters were larger and more powerful than the other retailers. They had grown rapidly with their new sales methods and discounts and were more able to take on such large manufacturers. It had largely become a power struggle between manufacturers and discounters which had started to undermine their own carefully built distribution systems.

It was exceptional that these discounters fought until the very end. They had been cut off from the supplies of the manufacturers since the beginning of the 1990s so there was no longer very much that could be gained. They did not want to settle the dispute by way of compensation because this would betray their customers and the Japanese consumers which they had come to represent. *Ken Fujisawa* of Fujiki even explained that such a long battle would not have been possible if he would not have enjoyed it to some extent. So far, he and the other two discounters have spent an enormous amount of money in all the legal proceedings initiated. *Jirô Yamane* has even dipped into his own pocket.<sup>37</sup> These case studies made me realise how difficult it is for litigants to maintain the initiative and by doing so to generate clearer rules on anti-trust law issues.

In these cases the Supreme Court has eventually provided an important legal precedent which only clarifies the important function of the courts as the final decision maker to settle difficult and complicated issues of anti-trust law. The explanation of No. 13 of the general designation was first provided by the FTC Guidelines but ultimately by case law. Because of this decision there is more clarity concerning the restriction on sales methods and customers and the sections of the Guidelines, which contravene the decision, may have lost their validity.<sup>38</sup>

First, the Guidelines stipulate that customer restrictions are illegal if, as a result of such conduct, the price level of the product covered by the restriction is “likely” to be maintained. However, as regards the question whether resale prices are restricted or not, the Supreme Court held that restrictions on the sales method may lead to price stability but that such an effect in itself does not immediately signify that the freedom to set resale prices is thereby restricted.<sup>39</sup>

Furthermore, the Guidelines state that the prohibition on sales among distributors and sales to discounters is illegal if it is carried out in order to prevent resales of its product to discounters. However, the Supreme Court held that if the obligation upon distributors to sell face-to-face, as stipulated in the distribution agreement, is based on

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37 K. FUJISAWA, Personal communication, 12 November 1997.

38 H. IYORI, *supra* note 34 at 16-18 (1999); also M. MURAKAMI, *supra* note 34 at 14-15 (1999).

39 H. IYORI argues that the Guidelines do not clarify to what extent the price level must be maintained in order to make such types of conduct illegal. According to him the Guidelines leave many questions unanswered. See H. IYORI, *Dokusen kinshi seisaku to dokusen kinshi-hô* [Anti-trust Policy and the Anti-monopoly Act] (Tokyo 1997) 641, 651.

reasonable grounds, than the prohibition on reselling to other retailers which had not concluded these agreements (this may include discounters) also does not violate the Act.

### III. THE COMPLEX RELATIONSHIP BETWEEN THE FTC AND THE CIVIL COURTS

#### 1. *The Influence of the FTC on the Civil Courts*

Formally, the civil courts are independent of the FTC and are not bound by its decisions.<sup>40</sup> They can only be used as a point of reference, which means that the civil courts may reach different conclusions than the FTC. The Japanese Constitution proclaims that the final interpretation of laws lies in the hands of the courts. Furthermore, Art. 85 of the Anti-monopoly Act provides that an appeal from an FTC decision lies exclusively to a special section of the Tokyo High Court.

However, in these three cases where the civil courts had to rule on new legal issues the FTC obviously had a great deal of influence. For example, in order to substantiate their conclusion that the Act had not been violated the Tokyo High Court twice referred in its decision to the fact that the FTC had not taken any measures after the complaints by Fujiki and Egawa Kikaku. After a preliminary investigation the FTC had concluded that Shiseido and Kao had not violated the Anti-monopoly Act.

Furthermore, there had been a great deal of reliance upon the FTC Guidelines of 1991. They obviously had a strong influence on the decisions from the various civil courts. At the same time this also illustrates the ambiguity of the expressions used within the Guidelines, since the Tokyo District Court and the Tokyo High Court both referred to the guidelines but reached different conclusions. It is therefore also not surprising that the Supreme Court may have contravened the Guidelines to some extent. However, in general they have hardly been challenged by formal FTC or Court decisions. The Guidelines are presented as an informal expression of the FTC's viewpoint, which cannot bind the courts, but in actual practice they exert a great deal of influence. As described in these case studies many civil court judges tend to use the expressions set out in the Guidelines. Furthermore, in the explanatory notes to a decision the FTC bureaucrats take more care to ensure that their decision matches that which is written down in the Guidelines than that it matches that which is laid down in the Anti-monopoly Act.<sup>41</sup> The influence of FTC decisions and its Guidelines has to do with the strong dependency of civil court judges upon the expertise of the FTC. This can be explained by the fact that the necessary expertise on anti-trust law issues is usually lacking among lawyers and judges. This may be most evident in *kari-shobun* proceedings where usually young and inexperienced judges are hesitant to deliver decisions on difficult legal issues such as anti-trust law. Another problem is that the civil courts do

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40 863 *Hanrei Jihô* 20 (Supreme Court, 19 September 1977).

41 T. SHIRAIISHI, *Dokkin-hô kôgi* [Lessons in the Anti-monopoly Act] (Tokyo 1997) 138-139.



not have the investigative powers of the FTC. They can ask for information from the FTC, but have so far rarely done so. They are dependent on the evidence presented to them by both parties and the problem is that collecting evidence proves very difficult for plaintiffs invoking anti-trust law before the civil courts.<sup>42</sup> One of the reasons for this lies in the lack of clarity in anti-trust law in Japan which is caused by the informal public law enforcement and the corresponding limited number of legal precedents in the form of formal decisions by the FTC and the Courts. Generally speaking, in the event that the FTC takes measures, these are usually informal, such as warnings (*keikoku*) or cautions (*chûi*), which do not formally establish that the Act has been violated. Formal measures such as recommendation decisions or consent decisions may have more influence. For example, as shown in these cases Shiseido very much feared the negative influence upon the still running civil disputes when it would apply for a consent decision. However, even these formal decisions may not always be decisive. These decisions are not based on a finding of a violation based on evidence but are based solely on the respondent's agreement to accept the decision voluntarily.<sup>43</sup> Only a hearing decision, after the completion of a hearing procedure, might provide sufficient evidence of a violation because such decisions are based on a finding that a violation has been proved by evidence.<sup>44</sup>

Generally speaking, at present the relationship between civil procedural law and the Anti-monopoly Act is not very clear. Japanese legal scholars are divided about the influence of FTC decisions on the civil courts. One school argues that FTC decisions are always binding upon the courts, while a second holds that these decisions only have a 'presumptive value' (*suiteiryoku*) and the courts may deliver a different decision to that of the FTC. Finally, a third school takes an intermediate position. It only acknowledges the binding force of hearing decisions, whereas recommendation decisions or consent decisions only have a presumptive value.<sup>45</sup>

To summarise, it can be concluded that the FTC exerts a great deal of influence upon the civil courts but it is necessary to follow the courts in order to determine how they evaluate the decisions of the FTC.

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42 This not only applies to private suits for specific performance but also in general for private suits for damages based on Art. 709 of the Civil Code, the general tort provision. Even more difficult is a private suit for damages as regulated by the Anti-monopoly Act itself (Art. 25) which is to be filed before the Tokyo High Court. This is virtually non-functional.

43 M. MURAKAMI, *Dokusen kinshi-hô kenkyû* [A Study of the Anti-monopoly Act] (Tokyo 1997) 81; H. IYORI, *supra* note 39 at 613-616; K. KAWAGOE argues that within the recommendation and consent decisions, there is a column with facts (*jjitsu*), which should not be ignored by the courts. See K. KAWAGOE, *Dokusen kinshi-hô* [The Anti-monopoly Act] (Tokyo 1997) 431.

44 It must be noted that such a hearing decision may not be final if the respondent decides to commence proceedings to quash the FTC decision before the Tokyo High Court.

45 K. KAWAGOE, *supra* note 43 at 430-431.

## 2. *The Influence of the Civil Courts on the FTC*

As shown in these cases the influence of the civil courts on the FTC lies primarily in the decisions of the higher courts, irrespective of whether or not they have determined that the Act has been violated. It is evident that the Supreme Court decision has had a great impact on the FTC. It even contravened its Guidelines to some extent. Also the first Tokyo High Court decision obviously had impact on the FTC. The FTC investigations into Shiseido were probably influenced by the first Tokyo High Court decision. It had ruled that there had been no violation of the Act. If the FTC would have delivered a recommendation that would have contradicted the Tokyo High Court decision, Shiseido might possibly not have accepted the recommendation but might have decided to wait for a hearing decision against which it could appeal before the same Tokyo High Court.

However, as regards the decisions of the District Courts there is not much clarity about their influence on the FTC. If they decide that the Act has not been violated this will probably have little effect upon the FTC but when they decide that there has been a violation of anti-trust law this might have some influence. In the termination disputes within the cosmetics industry the Tokyo District Court decisions inevitably exerted some influence on the FTC which became active when the Shiseido head office was searched.

Although such types of decisions are still limited in number, the courts are increasingly delivering decisions concerning violations of anti-trust law. The majority of civil court judges currently agree that anti-trust issues must also be resolved before their courts because the enforcement by the FTC alone is not sufficient. This will only increase the influence upon the FTC.

Another important factor may be that even if the court concludes that the Act has been violated, in many cases it still has to decide upon the enforceability of contracts. When it decides that the contract is null and void this will probably have more impact. This depends on the way the court responds to the general question of the enforceability of contracts in violation of the Anti-monopoly Act. On this issue there has been a great deal of controversy in Japan. The Anti-monopoly Act and the Civil Code do not contain any provisions which may provide clarity. The courts are divided, although the District Courts in particular, as shown in these cases, have started to declare contracts void partly because of a violation of anti-trust law.<sup>46</sup> This is also concurrent with recent developments in Japanese legal doctrine. Recently, an increasing number of legal scholars have supported a more constructive role of civil law in order to protect competition. Interest has increasingly grown in incorporating competition into the 'public order' principle of private law. They support the general invalidity of acts which violate anti-trust law and argue that a violation of the Act may contravene the public order and good morals as

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46 T. SHIRAISHI, *supra* note 41 at 150 (1997).

stipulated in Art. 90 of the Civil Code.<sup>47</sup> Therefore, it automatically renders such an action null and void. This trend will obviously have a positive impact on the influence of civil court decisions upon the FTC.

### 3. *Future Prospects*

In view of these developments it is somewhat easier to understand the recent amendment of the Anti-monopoly Act which came into force on April 1, 2001. A new civil remedy system has been introduced enabling the victims of unfair trade practices to take their cases to court more easily.<sup>48</sup> In cases where the violation of anti-trust law constitutes an unfair trade practice as stipulated in Art. 19 of the Act there is a possibility of a private law injunction before the civil courts. The new Art. 24 of the Act stipulates that a person whose interests are infringed or are likely to be infringed by an act in violation of Art. 19 and who thereby suffers or is likely to suffer notable damage is entitled to demand the suspension or prevention of such infringements. It is important to follow the effectiveness of this new civil remedy system and its effect upon the interrelationship between the FTC and the civil courts. There are doubts, however, about its immediate effect. The difficulties in gathering sufficient evidence to prove that a violation of the Act has occurred remain the same. Civil courts will still most of the time conclude that the Anti-monopoly Act has not been violated because of insufficient evidence.<sup>49</sup>

Still, it is expected that gradually the balance of power will shift somewhat from the FTC to the civil courts. It is likely that there will be a shift from preventive and informal enforcement by the FTC to more subsequent control which will create more clarity as to which actions violate the Act.<sup>50</sup>

Many Japanese legal scholars argue that this new system also provides an impetus to the judicial reforms in Japan which are currently under way.<sup>51</sup> These reforms will make the civil courts more easily accessible. This means that more victims of violations of the Act will bring their cases to court which will have a positive impact upon the influence of the civil courts upon the FTC.

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47 See H. NAKATA, *Keizokuteki torihiki no kenkyû* [A Study of Continuing Trade] (Tokyo 2000) 12.

48 The initiatives for stronger private law enforcement were commenced under the auspices of the Ministry of Economy, Trade and Industry (METI, *Keizai Sangyôshô*). The FTC joined in and also undertook the necessary research which led to this amendment. It has obviously competed to some extent with the METI.

49 See M. MURAKAMI, *Dokusen kinshi-hô ihan kôni ni tsuite no shijin ni yoru sashi-seikyûken* [Private Individuals's Right to an Injunction in Relation to a Violation of the Anti-monopoly Act]: 686 *New Business Law* 11-13 (2000).

50 T. SHIRAIISHI, *Sashi-seikyû seido wo dônnyû suru dokkin-hô kaisei* [The Amendment of the Anti-monopoly Act Introducing a System of Injunctions]: 696 *New Business Law* 59-60 (2000); and M. MURAKAMI, *supra* note 49 at 12-13.

51 T. SHIRAIISHI, *supra* note 50 at 60; M. MURAKAMI, *supra* note 49 at 13.

Finally, it is also important to closely follow the recent initiatives to strengthen the enforcement of the Anti-monopoly Act supported by Prime Minister *Koizumi*. On 14 November 2001 a study group established as a private advisory committee to the FTC has published a report in which it issued concrete plans to strengthen the enforcement of anti-trust law in Japan. One of the proposals is to strengthen enforcement by private individuals. This can be done by widening the scope of the new civil remedy system which is currently only applicable to acts which constitute "unfair trade practice". Furthermore, another suggestion is to change the system of the Tokyo High Court's exclusive jurisdiction at first instance in private claims for damages based on Art. 25 of the Act.<sup>52</sup>

These new initiatives will probably have a great deal of impact upon the interrelationship between the decisions of the FTC and the decisions of the civil courts. It is obvious that the initiative will shift somewhat to the civil courts and it is important to keep an eye on what extent the FTC will actively encourage the use of the civil courts to enforce anti-trust law.

However, at present more clarity is necessary as regards the interrelationship between the decisions of the FTC and the civil courts. Japan may need more discounters, such as we have seen in these case studies, who are willing to take on manufacturers before the FTC and the civil courts and are prepared for a long battle.

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52 See H. MABUCHI, *Nijû isseiki ni okeru kyôshô seisaku to Kôsei Torihiki I'inkai no arikata, nijû isseiki ni fusawashii kyôshô-seisaku wo kangaeru kondankai no teigensho* [The FTC and the Competition Policy in the Twenty-first Century, The Proposal of the Round-table Conference on the Proper Competition Policy for the Twenty-first Century] 729 *New Business Law* 55-56 (2002).

## ZUSAMMENFASSUNG

*Der Beitrag untersucht das Zusammenspiel der Zivilgerichte und der japanischen Wettbewerbsbehörde bei Entscheidungen über einen Verstoß gegen wettbewerbsrechtliche Bestimmungen anhand von Rechtsstreitigkeiten über die Kündigung von exklusiven Vertriebsverträgen in der Luxuskosmetikbranche.*

*Verträge dieser Art seien in Japan dadurch gekennzeichnet, daß hierin den Vertriebspartnern durch die Kosmetikhersteller in der Regel eine Reihe von Pflichten auferlegt würden, unter welchen Bedingungen (z.B. nur im Direktverkauf unter Gewährleistung einer angemessenen Beratung des Kunden) und zu welchem Preis sie die Waren vertreiben dürfen. Aufgrund der anhaltenden Rezession auf dem japanischen Markt und der dadurch bedingten Verschärfung des Wettbewerbs in den 1990er Jahre hätten einige größere Vertriebsunternehmen ihren Umsatz jedoch dadurch zu steigern versucht, daß sie entgegen der Vereinbarung mit dem Hersteller die Ware zu verbilligten Preisen und nicht im Direktverkauf an den Kunden, sondern im Versandhandel verkauften. Dies habe dazu geführt, daß viele Hersteller die Vertriebsverträge kündigten, um die Kontrolle über den Vertriebsweg aufrecht zu halten. Die Vertriebsunternehmen hätten diese Kündigung für rechtswidrig gehalten, weil die Konditionen des Vertrages selbst, insbesondere die Preisbindung, einen Verstoß gegen das Antimonopolgesetz (AMG) darstellten. Sie hätten daher Beschwerde bei der japanischen Wettbewerbsbehörde erhoben und schließlich auch die Zivilgerichte angerufen.*

*Im Zusammenhang hierzu kam es in den 1990er Jahren dann zu mehreren Entscheidungen der Wettbewerbsbehörde und auch der Zivilgerichte bis hin zum OGH. Zentrale Frage dabei sei immer auch gewesen, ob die Bedingungen des Vertriebsvertrages einen Verstoß gegen das AMG darstellen und damit als rechtswidrig anzusehen sind. Im Detail wird untersucht, in wieweit sich die Entscheidungen der Gerichte und der Wettbewerbsbehörde dabei gegenseitig beeinflusst haben. Die Hersteller hätten schließlich sowohl vor den Gerichten als auch im Untersuchungsverfahren der Wettbewerbsbehörde obsiegt.*

*Der Verfasser kommt zu dem Ergebnis, daß die Entscheidungen der Gerichte und der Wettbewerbsbehörde über einen Verstoß gegen das AMG sich offenbar gegenseitig beeinflussen, obwohl eine rechtliche Bindung in keiner Richtung besteht. Im einzelnen sei hier zwar vieles noch unklar, aber es sei der Trend zu einem Zuwachs des Einflusses der Gerichte gegenüber der Wettbewerbsbehörde zu beobachten.*

*(die Red.)*