



# market intelligence

Volume 4 • Issue 3

GETTING THE  
DEAL THROUGH

## Cartels

In the crosshairs –  
'consumer industries'

*Hengeler Mueller leads a global interview  
panel analysing key economies and  
private damages actions*

North America • Asia-Pacific • Europe • Latin America  
Enforcement trends • Judicial review • Compliance developments • 2017/2018 forecast



# CARTELS IN JAPAN

Shigeyoshi Ezaki is a partner at Anderson Mori & Tomotsune with a general corporate practice, which includes advising and assisting Japanese and foreign clients on Japanese competition law, trade regulation, intellectual property law and corporate law. He represents many companies involved in cross-border mergers and acquisitions as well as joint venture arrangements. He also assists many clients in regulatory investigations with respect to price fixing and similar serious alleged violations before the Japan Fair Trade Commission as well as overseas regulatory authorities such as the US Department of Justice and the European Commission. He also represents many companies in the area of distribution agreements and licence agreements.

Vassili Moussis is listed as a leading individual for competition law in Japan by various directories and rankings and has been a GCR Who's Who nominee since 2010. He has practised competition law for close to 20 years in London, Brussels and Tokyo (where he has been based since 2009). He studied law in Belgium and the UK, and is qualified as an England and Wales solicitor as well as being registered with the Japanese Bar. Vassili has also worked at the European Commission's Directorate General for Competition in Brussels for one year as an administrative trainee. At Anderson Mori & Tomotsune his practice focuses on all aspects of competition law, including merger control and complex international cartel matters as well as, increasingly, follow-on civil litigation advice.

**GTDT: What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?**

**Shigeyoshi Ezaki and Vassili Moussis:** In recent times, the Japan Fair Trade Commission (JFTC) has turned its attention to enforcement against international cartels, imposing very high surcharge payments on the contravening companies. For example, in the 2016 international cartel case involving manufacturers of aluminum and tantalum electrolytic capacitor products (the ‘capacitors case’), the JFTC issued administrative fines amounting to approximately ¥6.7 billion. This follows another international cartel case in 2014 involving international ocean shipping companies, where the JFTC issued administrative fines totalling approximately ¥22.7 billion. Its success in international cartel enforcement has been the product of parallel investigations conducted in close cooperation with foreign antitrust authorities, including the European Commission and the US Department of Justice.

Additionally, the JFTC has recently been focusing on enforcement in the technology sector owing to a recent surge of economic activity in this area. In particular, it published the Report of the Study Group on Data and Competition Policy in 2017. This does not particularly focus on cartels, but clarifies preferable approaches to competition policy in relation to accumulation and utilisation of data.

Overall, however, it is important to note that the level of cartel enforcement has slowed down in the past five years, with the JFTC only issuing formal orders in seven cases for the 2015 fiscal year and nine cases for the 2016 fiscal year, compared to 20 formal orders in the 2012 fiscal year alone. Of the nine administrative formal orders issued by the JFTC in the 2016 fiscal year, one was a cartel case and the remaining eight were bid-rigging cases. Five of the latter concerned public procurement, which reflects the JFTC’s continued attention on an area that it has been traditionally concerned about in the domestic economy.

**GTDT: What do recent investigations in your jurisdiction teach us?**

**SE & VM:** Since its introduction in January 2006, the leniency programme has become a key driver of cartel enforcement in Japan. In fact, in the majority of instances, investigations are initiated by a leniency application. For the 2016 fiscal year, all nine cases for which administrative formal orders were issued by the JFTC were initiated this way. Despite initial doubts, few can now contest the importance of the programme as a key investigative tool for cartel enforcement in Japan.

Notwithstanding the slowdown in the level of cartel enforcement in recent years, there continues to be a strong uptake of the leniency programme.

For the past fiscal year, JFTC statistics indicate that the number of leniency applications has increased to 124, compared to 102 the previous fiscal year. With a total of 1,062 applications as of March 2017, the leniency system has been praised as a huge success.

A unique aspect of the leniency programme in Japan is that once the initial application for leniency is lodged, there is a very high level of predictability as to the final outcome of the leniency order. In comparison with other major jurisdictions, the striking difference in Japan is that there isn’t a ‘leniency race’ to secure or even improve on the original leniency rank provisionally allocated by the investigating authority. In that sense, the timing of the initial application for leniency is absolutely critical in Japan, as literally a few seconds can make the difference between complete immunity from the administrative surcharge or a partial reduction only.

Under the leniency programme, the first applicant is granted full immunity, while the second applicant is granted a 50 per cent reduction and the third, the fourth and the fifth are granted 30 per cent reductions in the surcharge payments. Contrary to the position in other major leniency systems, the JFTC has no discretion in deciding the range of the reduction to be granted to the applicant. Once the five slots are filled, the JFTC is unable to offer any kind of leniency to other companies, irrespective of whether they make a useful contribution to the JFTC’s investigation.

Interestingly, leniency applications have become a matter of corporate compliance in recent years. This development stems from some recent successful shareholder derivative actions against directors for breach of fiduciary duties over failing to properly apply for leniency and establish a compliance system.

Once initiated, the JFTC’s investigations typically involve dawn raids, extensive interviews of the relevant employees and information requests to the relevant companies. For international cartel cases, the JFTC will typically liaise closely with its foreign counterparts in order to coordinate dawn raids as well as to exchange information as to the ongoing investigations.

**GTDT: How is the leniency system developing, and which factors should clients consider before applying for leniency?**

**SE & VM:** The leniency system in Japan has not undergone any significant change in recent years. As mentioned, potential applicants should be attentive to the timing of the leniency applications, as this will determine the immunity or the amount of percentage reduction granted for cooperation. Such timing is particularly critical in Japan as the JFTC will only grant leniency treatment to a maximum of five companies (in addition to the fact that the JFTC has no discretion in determining the order of leniency applications or the percentage





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reduction in surcharge). A recent trend we have observed is that potential applicants have become quicker at deciding whether to cooperate with a JFTC investigation, including through applying for leniency. A key reason for this accelerated decision-making is that applying for leniency is now considered to be part of a company's culture of corporate compliance in Japan so that once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.

It is also important to note that, in contrast to many common law jurisdictions, there is no concept of attorney-client privilege in Japan. This means that during a JFTC investigation, documents held by a client containing attorney-client communications or any documents (including the results of internal investigations) held by in-house legal staff can be obtained by the JFTC dawn raid and used for the purpose of the investigation. Moreover, while the internal leniency programme (whereby employees who disclose cartel activities within a certain number of days receive immunity from punishment at company level) proves to be effective, the report of this internal disclosure can also be seized. Accordingly, as a practical matter, we usually encourage clients to maintain any records of attorney-client communications, legal memoranda and results of investigations with the outside legal counsel firm rather than the in-house legal department, wherever possible.

Furthermore, clients should be aware that attorneys are not usually allowed to be present during interviews conducted by the JFTC. In December 2015, the JFTC issued guidelines recognising the right for external counsel to be present during interviews under very limited circumstances, such as during interviews with foreign nationals. However, these guidelines did not comment on attorney-client privilege, therefore it is important to continue to be vigilant regarding any records of attorney-client correspondence.

**GTDT: What means exist in your jurisdiction to speed up or streamline the authority's decision-making, and what are your experiences in this regard?**

**SE & VM:** In Japan, there are no settlement or plea bargaining procedures outside the established leniency and amnesty policies, partly because the JFTC has no discretion in determining the amount of the surcharge payments, order of leniency applications or the percentage of reduction granted for cooperation.

The JFTC has, however, issued guidelines stipulating that it will endeavour to complete investigations within one year. Notwithstanding these guidelines, we have recently seen a trend for investigations lasting longer than one year, with more complex cases being investigated for 18 months or more.

Moreover, as part of the negotiations for the Trans-Pacific Partnership (TPP) Agreement, Japan has agreed to make the necessary amendments to its competition legal framework, including the introduction of a 'commitment' system for abuse of dominance cases and mergers. The commitment system that exists in the European Union, for example, is aimed at encouraging companies to voluntarily make commitments to end anticompetitive behaviour. It operates by providing a procedure that enables parties to work together with the regulator to reach an agreed resolution following an alleged violation of the competition rules.

Japan has passed an Act for the amendments (though not yet in effect) and the JFTC set procedural rules in January 2017. In January 2018, procedural rules for a new commitment system were set out by the JFTC. It is anticipated that these rules will be implemented when the TPP Agreement, or a modified version of it, comes into effect. Furthermore, the JFTC's chairman, Kazuyuki Sugimoto, has said that he considers that the commitment procedure would enable the swift resolution of cases and serve as an effective

## *“Private cartel enforcement remains relatively rare in Japan, partly owing to Japanese companies’ historic aversion to using the court system for damages claims.”*

enforcement tool. As the JFTC admitted that the commitment system is not expected to apply to cartels, there may be scope to argue that a similar commitment system, granting effectively more discretion to the JFTC, should be introduced in relation to cartels.

**GTDT: Tell us about the authority’s most important decisions over the year. What made them so significant?**

**SE & VM:** In December 2017, the Supreme Court rejected Samsung SDI (Malaysia) Bhd’s appeal against the JFTC’s decision to issue a cease-and-desist order in relation to a pricing cartel concerning television cathode ray tubes (CRTs). Samsung SDI argued, inter alia, against the JFTC’s ability to apply the Antimonopoly Act to foreign companies that produced and sold products overseas. The CRTs were sold to Japanese manufacturing subsidiaries outside of Japan and the price-fixing agreement also took place outside Japan. However, the Supreme Court held that even if the cartel agreement took place outside of Japan, so long as the cartel has caused a competitive restraint to the Japanese market, Japanese antitrust law would be applicable. The Supreme Court listed various factors to determine a competitive restraint to the Japanese market. In particular, it pointed out that although the Japanese TV manufacturers purchased CRTs through their manufacturing subsidiaries outside of Japan, the Japanese manufacturers controlled these entities by giving instructions regarding important purchase conditions. The Supreme Court also pointed that direct negotiations took place between the Japanese TV manufacturers and the cartel participants on the condition that the CRTs would be purchased by their manufacturing subsidiaries. As compared to the High Court’s judgment that defined the scope of ‘user’ (entities on the demand side) perhaps too broadly, the Supreme Court did not mention the concept of user and focused instead on a detailed review

of the facts. The judgment also held that even if the delivery of the products covered by the cartel took place outside of Japan, the turnover of those products could still be included as the basis for calculating surcharges. The Supreme Court’s judgment is noteworthy as it relates to the first case in which the JFTC ordered surcharges against foreign companies and it confirms such an extraterritorial application of the Antimonopoly Act by the JFTC.

**GTDT: What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority’s decisions in the courts over the past year?**

**SE & VM:** With the implementation of a new appellate system in April 2015, we expect to see a rise in the level of judicial review of JFTC decisions in Japan. The new appellate system aims to address the main criticism of the old administrative hearing procedure as being a rubber stamping process, where the JFTC tribunal heard challenges to orders issued by the JFTC. Following sustained criticism of this internal review system, legislative reform abolished the administrative hearing procedure and replaced it with a system where challenges to the JFTC’s cease-and-desist orders and surcharge payment orders are to be heard by the commercial affairs division of the Tokyo District Court. Additionally, the legislative reform provided for a new procedure for hearings prior to the issuing of the JFTC’s order, with a greater emphasis on due process.

Notably, the first case heard under this new hearing procedure took place in October 2015, involving 11 companies that had participated in bidding for snow-melting equipment works for the Hokuriku Shinkansen (bullet train) ordered by the Japan Railway Construction, transportation and Technology Agency. Under the new hearing procedure, the JFTC provided the 11 companies written notice of the contents of the proposed

# THE INSIDE TRACK

*What was the most interesting case you worked on recently?*

We were recently involved in the capacitors case, involving several manufacturers of aluminium and tantalum electrolytic capacitor products. The JFTC found that the participants in the cartel communicated their intention to raise the prices of the capacitor products through regular meetings and consequently issued cease-and-desist orders and administrative fines amounting to approximately 6.7 billion yen. Parallel investigations in other jurisdictions are ongoing.

This case is of particular significance as it was the only decision delivered by the JFTC involving an international cartel in 2016–2017.

*If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?*

We think that it is imperative that the JFTC be given some degree of discretion in the surcharge payment system. The

high transparency and predictability of the current system (owing to statutorily fixed surcharge rates) can, in certain cases, result in less economic incentive for companies to cooperate with the JFTC and undermine the intended deterrent effect of competition rules.

With greater discretion, the JFTC would have more flexibility to create such incentives, which would ultimately culminate in more sophisticated cartel enforcement in Japan as well as a more harmonised environment for international cartel enforcement. It is also hoped that such an increase in the JFTC's discretion would be accompanied by a strengthening of due process rules in JFTC investigations, particularly through an increased role played by outside counsel during the interview process and better protection of documents through the introduction of some form of legal professional privilege.

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orders and gave them opportunities to view and copy the evidence forming the basis for the orders and to submit their opinions and evidence to the JFTC. If there was any dissatisfaction with an order, a party could appeal within six months from such knowledge or within a year from the date of the JFTC cease-and-desist order to the Tokyo District Court.

It is also relevant to note that there are pending appellate cases before the Tokyo District Court brought by some of the parties involved in the capacitors case.

**GTDT: How is private cartel enforcement developing in your jurisdiction?**

**SE & VM:** Private cartel enforcement remains relatively rare in Japan, partly owing to Japanese companies' historic aversion to using the court system for damages claims. Private mediation or arbitration is likewise uncommon and there are no class actions in Japan.

However, it is relevant to note that the large number of cartel enforcement cases is concentrated in the construction industry for the procurement of public works (typically for the local government) where, generally, there is a stipulation in the contract providing that 10–20 per cent of the contract price is recoverable if the company is involved in illegal activities. Accordingly, given the existence of contractual protection and out-of-court settlement in the vast majority of cartel cases as well as the historically low levels of damages claims, we expect that private cartel enforcement will continue to remain relatively limited in Japan.

**GTDT: What developments do you see in antitrust compliance?**

**SE & VM:** We have certainly seen a strengthening of antitrust compliance in Japan. Driven by recent shareholder derivative actions, there has been an increased uptake of the leniency system based on the recent focus on corporate compliance. The JFTC has also continued to play an active role in international cartel enforcement.

In addition, regulators seem to have a growing interest in information exchange. Although information exchange does not, in itself, constitute a violation of the competition rules in Japan, the act of exchanging competitively sensitive information raises concern as it may lead to pricing cartels or bid rigging. The JFTC is generally only concerned with competitively sensitive information for the purpose of finding breaches of the competition rules. However, the exchange of non-competitively sensitive information (eg, environment and safety issues) may also be relevant where the information exchange was intended to monitor price restrictions or gives a common indication of current or future prices.

Based on our experience, one of the greatest challenges for clients in antitrust compliance is the social aspects of the Japanese business environment. In Japan, social gatherings and greetings between key industry players are commonplace and traditionally considered to be an indispensable part of the business culture. Business associations also provide opportunities for competing businesses to engage in discussion. Given the comparatively high frequency of interaction between competitors in Japan, there is increased potential for the regulator to



draw inferences of agreed price increases from extraneous outside events. This is especially the case where the conduct in question potentially affects competition in territories outside Japan and in particular in jurisdictions that take a much stricter view as to exchange of information between competitors (eg, the EU).

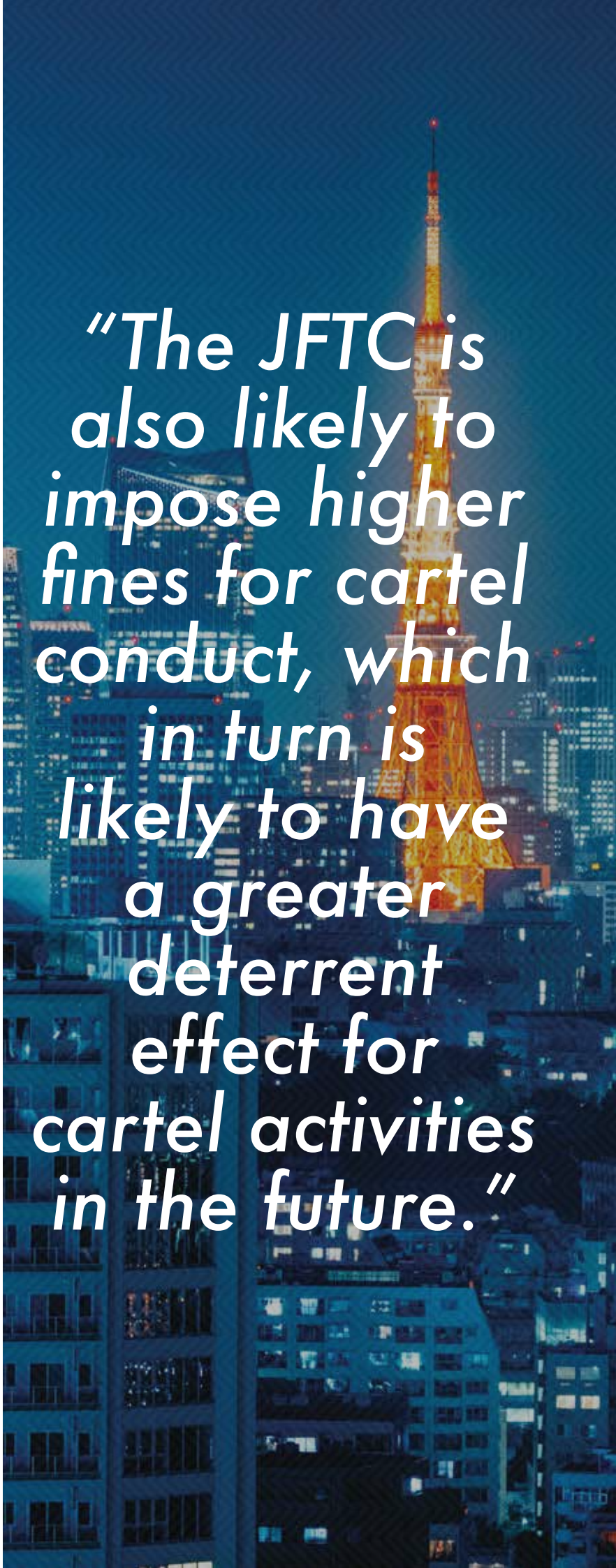
The traditional lack of dedicated antitrust specialists in legal in-house teams in Japan could also pose potential challenges to antitrust compliance. Furthermore, the lack of recognition of attorney-client privilege in Japan could serve as another barrier to antitrust compliance.

*GTDT: What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?*

**SE & VM:** If the ongoing discussion about the potential introduction of increased discretion in setting the fine eventually leads to the JFTC being granted such discretion, we anticipate there will be significant implications for clients. The introduction of a level of discretion would enable the JFTC to take into account various factors in determining the amount of the fine and the level of reduction to be granted to leniency applicants, including, for example, the degree of cooperation and additional value of evidence provided by a leniency application. If this policy is implemented, we expect clients to compete increasingly harder for evidence, particularly value-adding evidence (which is a requirement in some jurisdictions such as the EU). The JFTC is also likely to impose higher fines for cartel conduct, which in turn is likely to have a greater deterrent effect for cartel activities in the future. Should the JFTC align the basic tenets of its leniency system with that of other major jurisdictions such as the EU and the US, it would also mean that the current discrepancy between the test applied by enforcers in Japan and other jurisdictions would make it easier and more cost-effective for leniency applicants in international cartel cases to obtain leniency in multiple jurisdictions by essentially relying on a single set of corporate statements and supporting evidence. The JFTC was aiming to submit the draft bill of this new policy to the Diet session that started in January 2018. On 10 January 2018, however, it announced that it had decided to hold off submitting the bill because of difficulties in gaining a consensus at the Diet. Given this development, it is difficult to predict with any certainty whether and when the amendments to the surcharge system will take effect.

Moreover, we also expect to see more appeals in the coming year as a result of the new appellate system and dedicated courts for judicial review.

GTDT: Market Intelligence – Cartels



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