

Cartels

Enforcement, Appeals & Damages Actions

First Edition

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Japan

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Overview of the law and enforcement regime relating to cartels

(a) Cartel Regulations

The substantive provisions of the cartel prohibition are contained in the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Law No.54 of 1947, the “AMA”).

Under the AMA, three types of conduct are prohibited with respect to cartels:

- entering into a contract or an agreement among business entities (this term includes companies and individuals) which eliminates or restricts competition among them, and that substantially restrains competition in a particular field of trade;
- the substantial restraint of competition in any particular field of trade by a trade association; and
- entering into an international agreement which amounts to an unreasonable restraint of trade or unfair trade practice.

For companies, the applicable sanctions are administrative orders and a criminal fine. The administrative order includes cease and desist orders, as well as administrative fines called “surcharges”. Those sanctions can be applied cumulatively. In addition to that, companies are subject to suspension of nomination by various governmental authorities regarding tendering for government contracts, which in practice is a significant issue for large Japanese conglomerates that rely heavily on such government contracts. As to private enforcement, potential civil damage exposure from customers is a risk, although the number of such damage suits is so far small in Japan. There are no triple damages and no class actions in Japan.

For individuals, they are subject to criminal sanctions that include a maximum five-year jail term and a maximum fine of JPY 5m (approximately US\$60,000). Directors of the company are sometimes subject to civil claims from the company or the shareholders due to breach of their fiduciary duties.

(b) The principal enforcement agencies

The Japan Fair Trade Commission (the “JFTC”) is the principal competition agency and the enforcement system is unitary (i.e. consisting solely of the JFTC), except in the case of criminal investigations where the public prosecutor’s office is in charge of the criminal prosecution. However, the latter may indict for criminal offences only after the JFTC has submitted a criminal accusation to the Prosecutor General.

As to the cartel regulations, the JFTC has been one of the most active competition authorities in the Asian region, increasing its international profile through recent vigorous enforcement against international cartels resulting from parallel investigations and cooperation with foreign authorities including the US DOJ and the European Commission. The JFTC is playing an active role in international efforts toward strengthening links and cooperation among competition authorities, in particular in Asia, and has been active in training other Asian competition agencies, including in China and ASEAN countries.

Key issues in relation to enforcement policy and overview of cartel enforcement activity during the last 12 months

The JFTC has been particularly active in the area of cartel enforcement during the past ten years under the leadership of the current chairman, Mr. Takeshima, who was appointed in 2002. In Japan, cartels and bid-rigging have been traditionally common practices in certain business sectors, such as the

construction industry, partly because of the traditionally harmonious and non-litigious Japanese culture. The JFTC has stated that rigorous enforcement of the AMA with a view to swiftly eliminating cartels and bid-rigging is essential for the achievement of sound competition and providing increased benefits to consumers.

An important element of this increased focus on enforcement has been the ongoing strong take-up of the leniency programme which encourages cartel participants to voluntarily disclose to the JFTC their participation in cartel activities. During the 2011 fiscal year (which ended on 31 March 2012), the JFTC dealt with 143 leniency applications, meaning that a total of 623 leniency applications have been submitted to the JFTC since the leniency programme was introduced, through an amendment to the AMA, in January 2006.

The JFTC issued a formal administrative order for 17 cartel cases in the 2011 fiscal year. The surcharges imposed for cartels totalled as much as JPY 44bn (about US\$550m) which marks the second highest record for surcharges in the JFTC's history (the 2010 fiscal year saw the highest surcharges being imposed by the JFTC at JPY 72bn (approximately US\$900m)). The 2011 fiscal year record also includes JPY 9.6bn (about US\$120m) surcharges against Yazaki Sogyo in the wire harness cartel case, which is the highest single surcharge against a company.

Regarding criminal investigations, the JFTC has issued a policy paper that makes it clear that criminal penalties will be applied to violations that constitute serious cases that are likely to have a widespread influence on the national economy or involve firms or industries that are repeat offenders, and for which an administrative investigation would not be sufficient. Therefore, the criminal prosecution of cartels tends to stay limited to the most serious illegal conducts such as repeated bid-riggings. There have been just 20 criminal accusations so far.

On June 14, 2012, the JFTC, having investigated a potential price-fixing cartel case concerning industrial machinery bearings and automotive bearings, found a criminal violation of the AMA and filed a criminal accusation with the Prosecutor General against three companies including NSK Ltd and 7 individuals of the 3 companies accused who were engaged in the sales of bearings, except for the immunity applicant company and its employees. These were the first criminal charges filed by the JFTC in a price-fixing cartel case since 2008, and they are expected by the JFTC to have a great impact in preventing other price-fixing cartels.

Key issues in relation to investigation and decision-making procedures

(a) Key issues

The key issue in relation to the JFTC investigation is the relatively weak "rights of defence" for companies under the Japanese laws. For example, there is no attorney/client privilege in Japan. Attorneys must keep clients' information confidential, but the client can't refuse to provide information based on attorney/client privilege; also particular attention should be paid to documents possessed by a client containing attorney/client communications as those would normally be subject to disclosure. In-house legal staff also do not enjoy any attorney/client privilege in Japan; accordingly, documents held by in-house legal staff and correspondence with in-house legal staff can be, and most likely will be, obtained by the JFTC during the dawn raid and used for the investigation.

Under the investigation procedure, the JFTC has authority to question witnesses; normally it will conduct a so-called "voluntary interview" on site on the day of the dawn raid or later at the JFTC's premises. A "compulsory interview" can also be requested but it needs a formal order of the JFTC. Attorneys cannot usually be present at the interviews.

The same limitations to companies' rights of defence apply in case of a criminal investigation (see below) conducted by the public prosecutor's office.

Furthermore, the JFTC generally requests the party to submit a report relating to the violation as well as the sales revenues of the relevant products. Obstruction of justice such as false reporting, resistance to the JFTC's inspections and destruction of relevant documents could have serious negative effects in Japan which could include a criminal fine up to JPY 3m and a one year jail term for the individual who destroyed evidence.

(b) The principal procedural steps of an investigation

Two types of investigative procedures are available to the JFTC: the administrative procedure; and the criminal procedure.

For criminal proceedings, in addition to the JFTC's criminal procedure, public prosecutors can also conduct their own investigations if deemed necessary, but they cannot indict the target companies and their employees unless the JFTC requests them to do so.

The basic procedural steps of both procedures available to the JFTC are as follows:

- preliminary investigations (based on various sources such as leniency applications);
- commencement of a formal investigation; typically, the JFTC's formal investigation begins by conducting on-site inspections at the premises of the target companies and on-site interviews with executives and employees;
- issuance of a report order against target companies and, if deemed necessary, customers and other third parties, and interviews with executives and employees;
- after the JFTC has concluded its investigation, it issues and sends draft orders (similar to the European Commission's Statement of Objections) to the target companies and gives them an opportunity to submit opinions and relevant materials. The JFTC will examine these opinions and make amendments to the draft order, if deemed necessary; and
- the JFTC may issue cease-and-desist orders and surcharge payment orders.

The JFTC may seize original documents and materials, including IT equipment, held at the offices of companies and private premises such as employees' homes. When investigating IT equipment, however, the JFTC generally chooses not to remove the original equipment (e.g. hard disk drives) and prefers to make copies of stored data instead for further examination.

Investigations are quick by international standards and usually take less than one year from the commencement of on-site inspections. Regarding each investigative step, on-site inspections take one or two days and the target companies are given two or three weeks to respond to report orders. Generally, it takes six months or more for the JFTC to issue draft orders, and the target companies are given two weeks to submit their opinions. As to a right of access to the JFTC's file at the time of delivery of draft orders, companies under investigation are given an explanation of the contents of supporting evidence by the JFTC investigators. However, companies under investigation have no access to exculpatory documents. Due to the rapid pace of investigation and the limitation of the "rights of defence" described above, the defence of the targeted companies requires hard and intensive work.

Leniency/amnesty regime

(a) Overview

Importantly, the JFTC has no discretion in determining the order of leniency applications and the percentage of reduction granted for cooperation. A maximum of five companies will be granted immunity from or a reduction in the surcharge. Once these maximum five slots have been filled, the JFTC cannot offer any kind of leniency to other companies, irrespective of whether they make a useful contribution to the JFTC's investigation. Therefore, the timing of the application is critical in Japan.

In principle, the leniency programme only offers leniency with respect to surcharges. Leniency is not available for criminal enforcement and civil litigation. However, regarding criminal procedures, the JFTC has published a policy paper stating that it will not request the public prosecutors' office to indict the first leniency applicant (including the officers and employees) who applies for leniency before the start of the JFTC's investigation. In this regard, the Japanese Ministry of Justice has also issued a statement stating that the public prosecutors' office will pay due respect to the policy of the JFTC. Japan has no Amnesty Plus regime.

(b) The principal conditions for leniency

Under the leniency programme in Japan, a maximum of five companies (or group of companies) acting independently will be granted immunity from, or a reduction in, surcharges, by declaring their participation in a cartel.

The first applicant to apply for leniency before the start of a JFTC investigation is granted full immunity. The second applicant is granted a 50% reduction and the third, the fourth and the fifth are granted a 30% reduction.

All applicants who apply for leniency after the start of the JFTC's investigation are granted the same 30% reduction, as long as the number of applicants, whether they applied before or after the start of the JFTC's investigation, does not exceed five and the number of applicants after the start of the JFTC's investigation does not exceed three, and the applicant provides the JFTC with evidence relating to facts that the JFTC has not already ascertained through its own investigation.

In addition to the above, leniency will not be granted if any of the following factual circumstances arise:

- the report or materials submitted by the leniency applicant contain false information; or
- the leniency applicant fails to submit the requested reports or materials or submits false reports or materials (where the JFTC requests the leniency applicant submit additional reports); or
- the leniency applicant has coerced other cartel participants to engage in the given cartel, or has prevented cartel participants from leaving it; or
- the leniency applicant continued its participation in the cartel after the day of the commencement of the JFTC's on-site inspections (in the case of leniency applications after the JFTC's on-site inspections, the leniency applicant continued its participation in the cartel after the day of the submission of the applications).

(c) Marker system

Where leniency applications are made before the commencement of the JFTC's investigation, the ranking of each applicant will be determined based on the timing of the receipt of Form 1 by the JFTC. A detailed report as to the cartel agreement is only required to be made in Form 2, which is required to be submitted within 2 to 3 weeks of the receipt of Form 1 by the JFTC. The submission of Form 1 therefore functions as a quasi 'marker'.

(d) Oral applications and other procedures to reduce the disclosure risk for leniency statements

The JFTC accepts, in special circumstances, oral statements from the applicant in respect of most parts of the relevant Form, and the required attachments. However, it is still the case that the JFTC requires some of the information requested in the relevant Form to be provided in writing at the time of sending the Form by fax. The JFTC only discloses the identity of successful leniency applicants at the time of the issuance of orders and only if the applicants agree to such publication. In addition, the JFTC does not disclose leniency application forms to other defendants or interested parties. Therefore, applicants are generally able to keep their leniency applications confidential if desired.

Administrative settlement of cases and third party complaints

In Japan, there is no settlement and/or plea bargaining procedures outside the established leniency/amnesty policies because the JFTC has no discretion in setting the amount of the surcharge as well as determining the order of application and the percentage of the reduction granted for cooperation. Although it is possible to negotiate with the JFTC with regards to the scope of the relevant products or services or the scope of the sales revenues in Japan, the amount of the potential surcharges is very predictable and therefore easy to estimate, as compared to other jurisdictions.

Also, there is no particular procedure for third party complaints, although the JFTC can use those complaints as one of several sources that might lead to a formal investigation. Third parties have no access rights to the file prior to the JFTC's orders. Any interested party may, after the hearing has commenced, request the JFTC's permission to inspect or copy the hearing record, which may include materials submitted by defendants and other third parties. In disclosing such documents, the JFTC may, at its own discretion, redact business secrets and personal information.

Civil (Administrative) penalties and sanctions

For a surcharge against a company, the maximum base rate is 10% of the sales amount of the relevant products for the period of infringement (in cases of infringements lasting more than three years,

surcharges are calculated based on the most recent three years' sales amount only). The surcharge rate is increased by half of the original base rate, if the company played a leading role in the cartel.

As discussed above, the rates of the surcharge are fixed by the AMA. Base rates of the surcharge, which vary depending on the main type of business conducted in connection with the violation, are 10% for manufacturers, 3% for retailers and 2% for wholesalers.

Lower surcharge rates apply to medium and small-sized companies with lower capital and fewer employees. The lower rates are 4% for manufacturers, 1.2% for retailers and 1% for wholesalers.

Right of appeal against civil (administrative) liability and penalties

In Japan, any appeal against the JFTC's administrative orders must first be subject to the JFTC's administrative hearing procedures. Thereafter, such appeals are reviewed by the Tokyo High Court upon request by any of the parties. A party can also appeal the Tokyo High Court's decision to the Supreme Court if the reasons for appeal satisfy certain conditions set by the Civil Procedures Act. In almost all cases, the JFTC's findings have been upheld by both the first level appeals body (i.e. administrative hearings at the JFTC) and the subsequent appeal courts. Therefore, appeals as to the level of surcharges are rarely successful in Japan.

Criminal sanctions

For companies, the maximum criminal fine is JPY 5m (approximately US\$60,000). For individuals, the maximum prison term is five years and the maximum fine is JPY 5m (approximately US\$60,000). In judgments with prison terms of no longer than three years, probation is possible at the courts' discretion. The maximum prison sentence handed down to date is three years (with probation), which was the longest possible term at that time. The maximum fine imposed on an individual is JPY 5m (approximately US\$60,000). There are no fining or sentencing guidelines.

Japan has entered into criminal extradition treaties with only two countries: the US and Korea. Under the treaty with the US, individuals can only be extradited for cartel conduct, and not for related obstruction of justice charges.

Under both treaties, the government of Japan is not bound to extradite Japanese nationals, but may do so at its discretion. The government of Japan has, to date, not extradited any Japanese individuals for cartel cases.

Developments in private enforcement of antitrust laws

(a) Overview

Potential civil damage exposure to customers is a risk, although the number of such damage suits is so far small in Japan (partly due to the historic aversion for Japanese companies to use the court system for such claims). There are no triple damages and no class actions in Japan.

(b) Courts/tribunals that have jurisdiction to hear cartel damages claims

The most frequently used grounds for private actions for damages in relation to violations of the AMA are article 25 of the AMA and article 709 of the Civil Code. Article 25 of the AMA stipulates that any business entity that has committed a violation of the AMA shall be liable for damages suffered by another party, while article 709 of the Civil Code stipulates that a person, who has intentionally or negligently infringed any right or legally protected interest of another, shall be liable to compensate any resultant losses.

Private actions brought pursuant to article 25 of the AMA must be brought solely before the Tokyo High Court, acting as the court of first instance, after the JFTC's relevant orders become final. Actions brought pursuant to article 709 of the Civil Code should be brought in the relevant district court. An appropriate nexus for the choice of district court in article 709 actions is generally the place where the conspiracy or act occurred (or where the tortious loss arose), or the location of the defendant's headquarters.

(c) Are administrative cartel decisions binding on the courts as regards the issue of liability in

subsequent civil cartel damages claims (i.e. in so-called ‘follow-on claims’)?

In the case of litigation based on article 25 of the AMA, there is a rebuttable presumption, based on the JFTC’s relevant decision, that the defendant violated the AMA and, in practice, it is difficult for the defendant to rebut this presumption. In addition, in the case of litigation based on article 25 of the AMA, plaintiffs are exempt from the requirement to prove the defendant’s wilful or negligent violation of the AMA although this is still required for actions based on article 709 of the Civil Code. That being said, plaintiffs are still required to prove the amount of damages and the existence of a causal relationship between the losses and the illegal conduct.

An article 709 litigation may be brought without a final decision of the JFTC concluding that the defendant has violated the AMA, in which case the plaintiff must prove the existence of a violation.

(d) The general rules for damage calculation and cost for civil damages claims in cartel cases

In general, damages are limited to actual losses that have a reasonable causal link to the harmful act or conspiracy. With regard to the calculation of damages, article 248 of the Code of Civil Procedure stipulates that where this calculation is extremely difficult owing to the nature of the losses, the court may determine a reasonable amount of damages, based on the evidence and oral submissions.

In addition, for litigation based on article 25 of the AMA, the court may ask for the JFTC’s opinion as to the amount of damages. Essentially, the JFTC bases its opinion on a comparison of prices before and after the cartel conduct.

Both direct and indirect purchasers claim cartel damages. To date, there are no precedents where the courts have explicitly allowed a ‘passing-on defence’ by that name in Japan, though such defence may be taken into account by the courts as one of the considerations for evaluating damages. There are provisions for joint and several liability in the Civil Code and this general principle has also been applied to damages claims in cartel cases.

As to costs, the general rule is that the defeated party bears the costs of the proceedings in civil lawsuits (which usually do not include each party’s attorneys’ fees) pursuant to the Code of Civil Procedure, and this also applies to damages claims in cartel cases.

(e) The other general procedures for civil damages actions for loss suffered as a result of cartel conduct

Regarding measures allowing plaintiffs to collect evidence, a party to a lawsuit may request the court to commission, or order, the holder of a specific document (e.g. evidence in the JFTC’s case file) to send that document to court, so that the plaintiff may, under certain conditions and subject to certain exceptions, use it as evidence. In addition, any interested person (including plaintiffs of cartel damages claims) may, after the hearing has commenced, request from the JFTC an inspection or a copy of the hearing record, including briefs and evidence submitted by the JFTC and the defendants.

Cross-border issues

(a) Cross-border enforcement

Article 3 of the AMA does not expressly stipulate a limitation on the scope of the JFTC’s jurisdiction. The JFTC reportedly considers that it has jurisdiction over activities that affect Japanese domestic markets, irrespective of where cartel agreements have been concluded.

For example, the JFTC issued a cease-and-desist order against European companies in the marine hose case in 2008. In addition, the JFTC issued a cease-and-desist order and surcharge payment orders against foreign corporations in the CRT (cathode ray tubes for televisions) case in 2009/2010. Both cases were the result of parallel investigations and cooperation with foreign authorities including the US DOJ and the European Commission.

(b) The scope for international cooperation regarding investigations

The AMA includes provisions which allow the JFTC to exchange information with foreign competition authorities. In addition, the JFTC has entered into bilateral cooperation agreements with the US and the European Commission, which are mainly focused at general level cooperation between the agencies such as through exchange of information.

Disclosure of confidential investigative information and evidence is a violation of the government officials' secrecy obligations and is subject to criminal sanctions. Therefore during the course of the administrative procedure, JFTC officials cannot exchange information which includes business secrets of the target companies without prior permission or waiver to do so by the said companies.

In examining leniency applications, however, the JFTC reportedly exchanges confidential information including the contents of leniency applications, with the applicants' permission.

Reform proposals

In March 2010, the Cabinet Office published a Bill for the amendment of the AMA with the aim of abolishing the current administrative hearing procedure in favour of a judicial appeal procedure. The Bill has not yet been passed by the Diet but it is scheduled for debate during the 2012 session.

The outline of the Bill includes the following proposed changes: (i) repeal of the JFTC's administrative hearing procedure for appeals of JFTC orders, to be replaced by an administrative procedure to give target companies an opportunity to submit their opinion to the JFTC prior to the issuance of orders; and (ii) the introduction of a system in which addressees of the JFTC's orders can appeal to the Tokyo District Court, then to the Tokyo High Court, and finally to the Supreme Court, thereby allowing them the right to appeal at three different stages.

In that bill, it is also explicitly stated that the JFTC will make an assessment of its investigative procedures with a view to strengthening and securing companies' "rights of defence" within one year of the promulgation of the amended AMA and take any necessary measures.

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Mr. Moussis studied law in Belgium (*Licence en droit*, 1994) and in the UK and holds an LLM (1995) as well as a PhD (2003) from University College London on comparative EU and Japanese competition law. He also worked for a year at the European Commission’s Directorate General for Competition as an administrative trainee (1996).

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