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Japan: Cartels

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Cartel regulation in Japan

Cartels are prohibited in Japan as an 'unreasonable restraint of trade', stipulated under the second half of article 3 of the Law No. 54 of 1947, as amended (the Anti-Monopoly Act (AMA)). Although the AMA does not include any particular provisions about extraterritorial applicability, it is generally understood that the AMA is applicable to international cartels. The position of the Japan Fair Trade Commission (JFTC) and the generally accepted view in Japan is that, even if alleged violators have no physical presence in Japan, the AMA is interpreted to apply to conduct occurring outside of Japan as long as such conduct results in certain substantial effects on Japanese markets.

The JFTC has been consistently vigorous in its investigation of international cartels, and as of an amendment to the AMA introduced in 2002, is now able to issue service by publication against foreign companies. Accordingly, if the JFTC intends to issue a reporting order to a foreign company, it is now able to exercise its investigative power by simply making a service by publication against such foreign company (although it is customary for the JFTC to first request that the foreign company appoint an attorney in Japan and then serve the reporting order and other proceedings through such attorney).

The AMA explicitly requires 'substantial restraint of competition' in the relevant market as an element to establish the illegality of cartels, and thus cartels are not exactly illegal per se in Japan. However, naked cartels – such as price cartels, quantity cartels and share cartels – are considered to have tendencies to generally restrain competition and efficiency and other non-competition grounds will rarely justify the necessity of naked cartels. In this sense, it is fair to say that naked cartels are treated practically as per se illegal in Japan. In most cases, the JFTC has no difficulty in proving that naked cartels cause a 'substantial restraint of competition' in the market. As such, it would be fair to say that the JFTC enforces AMA cartel violations as vigorously as competition authorities in other jurisdictions of per se illegality do.

Under the AMA, unreasonable restraint of trade is subject to administrative sanctions and criminal sanctions. In relation to administrative sanctions, (i) cease-and-desist orders and (ii) payment orders for surcharges are available.

Cease and desist order

The JFTC may issue a cease-and-desist order pursuant to article 49, paragraph 1 of the AMA. A cease-and-desist order is an order to take 'measures necessary to eliminate the violation or to ensure that the violation is eliminated'. The actions that can be ordered by a cease-and-desist order vary widely. In many cases, the JFTC may ask the addressed company:

- to confirm that the violation has ceased;
- to notify consumers/users that it will perform business based on their own voluntary judgement, after taking corrective measures; and
- to report to the JFTC after taking such corrective measures.

There have also been cases where the addressed company was ordered to implement a compliance programme, eg:

- to prepare a code of conduct regarding compliance with the AMA;
- to conduct regular training sessions for sales staff regarding compliance with the AMA; and
- to have the legal department conduct audits regularly (Okayama City Junior High School, school excursion price cartel case, JFTC cease-and-desist order, 10 July 2009).

In another case, the addressed company was ordered to transfer certain employees to different positions (bridge construction bid-rigging case, JFTC recommendation decision, 18 November 2005).

In addition to the above, pursuant to an amendment to the AMA in 2009, the statute of limitations for the JFTC to issue a cease-and-desist order was extended from three years to five years. The statute of limitations starts from the date on which the company discontinues the violation.

Payment order for surcharge

The JFTC must order a payment of surcharge when it finds an unreasonable restraint of trade which relates to consideration (article 7-2, paragraph 1 of the AMA). The amount of surcharge is calculated by multiplying the amount of sales of the relevant products or services during the period in which the unreasonable restraint of trade was implemented (the maximum period is three years) by the surcharge calculation rate of the industry as described in the table below.

The calculation rate for the surcharge will be increased to 150 per cent of the original rate if the relevant company has been subject to a payment order for surcharge due to unreasonable restraint of trade or private monopolisation within the past 10 years. In addition, the calculation rate for the surcharge will also be increased to 150 per cent of the original rate if the company played a major role in an Unreasonable Restraint of Trade. If a company falls under both of the above cases, the calculation rate of surcharge will be doubled.

On the other hand, the calculation rate for the surcharge will be reduced by 20 per cent if:

- a company ceases its violation one month before the JFTC commences an investigation;
- the company does not fall under any of the cases for which the rate of the surcharge is increased; and
- the period for which the company has been in violation is less than two years.

Such aggravation or mitigation of the calculation rate for the surcharge is determined in accordance with the rate described in the following table:

Calculation rate for surcharge

	General	Mitigated	Aggravated	If several aggravated requirements are satisfied
General	10%	8%	15%	20%
Retailers	3%	2.4%	4.5%	6%
Wholesalers	2%	1.6%	3%	4%

In addition to the above, if a company is categorised as a retailer or wholesaler, the calculation rate for the surcharge is reduced to some extent.

If certain requirements are satisfied, a company which has itself not committed any particular violation but that acquires a business which has committed a violation by merger, corporate split or business transfer, can still be subject to a payment order for surcharge. The statute of limitations for a payment order for surcharge is five years.

Criminal sanctions

Criminal sanctions are available for unreasonable restraint of trade. Any company an employee or officer of which commits an unreasonable restraint of trade may be punished by a fine of not more than ¥500 million. Any individual who commits an unreasonable restraint of trade may be punished by imprisonment with labour for not more than five years, a fine of not more than ¥5 million, or both.

A criminal penalty may be imposed only after an allegation is filed by the JFTC and only the JFTC is entitled to file such allegations (article 96, paragraph 1 of the AMA). In practice, the JFTC determines whether or not to file allegations after consulting with the Public Prosecutors' Office at the Accusation Council.

Criminal sanctions are generally imposed only on very serious offences and as such are not very often brought, typically less than one case per year. According to a JFTC policy statement regarding criminal accusations, the JFTC will only file criminal allegations against serious cartels that widely affect people's lives, or repeated offenders or offenders refusing to abide by the JFTC's administrative orders (ie, where administrative measures are not effective).

Leniency

The leniency system was introduced by an amendment to the AMA in 2005 together with the reform of the surcharge system. Because the surcharge calculation rate was increased by the 2005 amendment to the AMA, the number of leniency applications is increasing steadily. Below is the number of applications for leniency for each fiscal year following the 2005 amendment.

Fiscal year	Number of leniency applications
4 January 2006 – 31 March 2006	26
1 April 2006 – 31 March 2007	79
1 April 2007 – 31 March 2008	74
1 April 2008 – 31 March 2009	85
1 April 2009 – 31 March 2010	85
1 April 2010 – 31 March 2011	131
1 April 2011 – 31 March 2012	143
1 April 2012– 31 March 2013	102
Total	725

Under the AMA, the first company that reports to the JFTC its involvement in cartel violation before a dawn raid is entitled to full exemption from administrative surcharges (article 7-2, paragraph 10 of the AMA). The second company to report before a dawn raid is entitled to a 50 per cent reduction of administrative surcharges, and the third, fourth and fifth companies to report before a dawn raid are each entitled to a 30 per cent reduction (article 7-2, paragraph 11 of the AMA). Even after a dawn raid, all companies that turn themselves in are entitled to a 30 per cent reduction of administrative surcharges so long as they are (i) the fifth or earlier among both companies that self reported before the dawn raid and companies that self reported after the dawn raid and (ii) the third or earlier among companies that self reported after the dawn raid (article 7-2, paragraph 12 of the AMA). Application for leniency after a dawn raid is permitted only within 20 business days after the dawn raid. In actual practice, all seats for leniency often become occupied on the same day as the raid, or by the next day at the latest.

Leniency applicants must be filed by using a form prepared by the JFTC. Form 1 is for applicants before a dawn raid, which shall be supplemented by Form 2, and Form 3 is for applicants after a dawn raid.

The applicant before a dawn raid must first submit Form 1 to the JFTC by facsimile. Form 1 requires the provision of certain limited information, ie, only an outline of the violation, such as a general description of the relevant product, the manner of cartel conduct (for example, price fixing, bid rigging or market allocation), and the period over which the violation took place. Applicants who submit Form 1 are granted the status of a 'marker' and other applicants are prevented from leapfrogging such applicants. In order to obtain definitive leniency status (conditional on continuing cooperation, see below), those applicants must provide further detailed information by submitting a Form 2 within the period thereafter designated by the JFTC. The JFTC generally designates two weeks as the period to submit Form 2, but may grant a longer period in cases of foreign applicants in consideration of the difficulties in communicating internationally and the time necessary for translation. The information required in Form 2 is more detailed, requiring for example:

- the identities of co-conspirators;
- the names and titles of employees of the applicant who were involved in cartel violations; and
- the names and titles of employees of co-conspirators who were involved in cartel violations.

Form 2 also requires materials supporting the existence of cartel violations. Such materials may include the minutes of meetings where the conspiracy was discussed, personal organisers showing the dates of such meetings or affidavits by employees involved in the violations.

Leniency applicants after a dawn raid must submit a Form 3 to the JFTC. Form 3 requires the same extent of comprehensive information as Form 2. However, as a matter of practice, the JFTC will accept a Form 3 with less comprehensive information accompanying submissions, and allow the leniency applicant to supplement such Form 3 within 20 business days after the dawn raid. The definitive leniency status of an applicant after a dawn raid is also conditional on its continuing cooperation with the JFTC. All leniency application forms must be submitted in Japanese.

As mentioned above, the definitive leniency status of an leniency applicant is conditional upon its continuing cooperation with the JFTC, ie, the leniency applicant must continue to cooperate with the JFTC until a cease-and-desist order or a surcharge payment

order is issued (or until the JFTC issues a notice that it will not issue such orders in cases of the first applicant). It is generally understood that leniency applicants have duties to cooperate with JFTC investigations, in the sense that the JFTC can require leniency applicants to submit additional reports and materials, and failure to do so or submission of false reports or materials will disqualify the applicants from receiving leniency. However, in practice, since the AMA does not require leniency applicants to proactively submit all information regarding the violation, the extent of required cooperation may not be as extensive as in some other jurisdictions.

The JFTC also accepts oral leniency applications. It is the JFTC's policy never to disclose leniency materials in its possession upon the request of private plaintiffs or court orders regardless of whether such requests are made in Japan or in foreign jurisdictions. If leniency applicants have a copy of a written leniency application form at their premises, however, that copy may be subject to discovery because the voluntary submission of documents to the JFTC may be deemed as a 'waiver' by the applicant of privilege by the US courts. According to the JFTC, by reporting orally and retaining no written copies of leniency application forms, leniency applicants can avoid being subject to discovery obligations in relation to copies of leniency applications forms.

The effect of the leniency programme stipulated by the AMA is only to fully or partially exempt successful applicants from the payment of administrative surcharges, and the leniency programme has no relevance to criminal sanctions under the AMA. However, the JFTC has expressed its position in its policy statement regarding its criminal accusations, that the JFTC will not bring criminal allegations against the first applicant before a dawn raid. According to the policy statement, the employees and officers of the first applicant before a dawn raid will not be criminally accused, as long as they are deemed to have cooperated with the JFTC's investigations to the same extent as their employer. In this sense, the first leniency applicant is effectively exempted from criminal sanctions as well. It is up to the JFTC's discretion whether leniency applicants other than the first applicant before a dawn raid are subject to criminal sanctions.

Practical issues of leniency

Scope of leniency

Naturally, leniency applicants benefit the most from having the coverage of leniency status as broad as possible. However, it should be noted that, as compared to when leniency was first introduced in 2005, the JFTC is now becoming more and more inclined to grant leniency status to only an increasingly narrow scope of products, geographical areas or customers. For example, if an application was made with regard to a group of similar products as one product but the JFTC finds a cartel violation with regard to only one product, the JFTC may grant leniency status only with respect to the product and may not grant the same status with respect to different but related products. The JFTC appears to take a very formalistic and rigid view to delineation of the scope of leniency, and will sometimes even grant leniency only on a customer-by-customer basis if such customers purchased large amounts of the relevant products. In such cases of customer-by-customer delineation, there may be more than one 'first applicant' with full immunity from surcharge payment and immunity may be restricted to sales from one customer only.

Even in such cases, it is still possible for a company that files a leniency application regarding one customer to file another application regarding another customer at the time when they discover cartel violations against that other customer. However, such second application may not be eligible for the same protection as the original application since investigation and preparation of a leniency application for the other customer usually takes some time and other applicants may file for leniency in the interim. This practice provides companies with less incentive to file a leniency application, and is in conflict with the original spirit of the leniency programme.

Group filing for leniency

Under the Japanese leniency programme, when more than one company within the same group is engaged in cartel violations, it is possible for those group companies to file a single joint application (article 7-2, paragraph 13 of the AMA), in which case the leniency status is granted to all group companies named as applicants on the application form. It is also possible for group companies to file separate applications individually (article 7-2, paragraphs 10–12 of the AMA), but in such cases, each company will be granted leniency status based solely on its own application. Given the nature of this system, companies understandably usually prefer to apply for a single joint application over multiple individual applications in order to share a higher leniency status.

In practice, however, there are cases where an applicant is not sure which companies within its group were engaged in the violation. This is often the case for multinational corporations. Of course, it is possible to file additional leniency applications with respect to group companies that are found at a later stage to have been engaged in the violation. It should be noted, however, that such additional applications will not be considered to have been made retroactively at the time of the original application, and thus will not be granted the same leniency status as was granted to the original application. For example, if a company files a leniency application and is the first company to file but later finds that one of its subsidiaries was also engaged in the violation, the parent company and the subsidiary can jointly file another application at the time of discovery of the subsidiary's involvement; however, if another company, that is a competitor of the parent company and the subsidiary, is the second company to file an application after the parent company's original application and before the joint application by the parent company and the subsidiary, then the subsidiary will not be granted the leniency status of the first company to file but will only be granted the status of the third filing company. This can be a serious problem because only the first company is granted full immunity from fines, while the third company is granted only a 30 per cent reduction of the fine.

Another issue relating to group filing is how the concept of a 'group' is defined under the AMA. That is, for the purpose of the leniency programme, a company is considered as a parent company of another company when that parent directly or indirectly owns more than 50 per cent of the voting rights in that other company (the subsidiary), and a 'group' can only consist of a parent and its subsidiaries (article 7-2, paragraph 13 of the AMA). According to this definition of a 'group', for example, a joint venture that is equally owned by two joint venture partners is not considered a subsidiary of either partner. Therefore, that joint venture cannot file a leniency application jointly with either of the partners.

JFTC's large backlog of leniency applications

The below table shows the number of cases of bid rigging and price cartels etc, for which the JFTC took legislative action and, among those, the number of cases and the number of companies for which leniency was applied.

Fiscal year	Number of cases of bid rigging and price cartels, etc, for which legislative action has been taken	Number of cases in which application of the leniency system was publicly released	Number of companies for which application of the leniency system was publicly released
1 April 2005 – 31 March 2006	17	0	0
1 April 2006 – 31 March 2007	9	6	16
1 April 2007 – 31 March 2008	30	16	37
1 April 2008 – 31 March 2009	11	8	21
1 April 2009 – 31 March 2010	22	21	50
1 April 2010 – 31 March 2011	10	7	10
1 April 2011 – 31 March 2012	17	9	27
1 April 2012 – 31 March 2013	20	19	41
Total	136	86	202

If you compare the number of companies for which application of the leniency system was publicly release in the above table with the number of leniency applications in Section II above, the number of companies in the table above is significantly lower. Based on this and our experience, it can be said that substantial numbers of leniency applications have never led to an actual investigation by the JFTC. In other words, the JFTC is likely to have a large 'backlog' of leniency applications. Under the Japanese leniency programme, leniency applicants are required to cease cartel conduct before dawn raids, but in reality most applicants choose to voluntarily cease cartel conduct immediately after their application, unless the JFTC designates otherwise. When an applicant voluntarily ceases the violation but the JFTC does not investigate the violation, only that leniency applicant loses supra-competitive profits earned through the cartel, and other co-conspirators in the same cartel can continue to earn illegal supra-competitive profits by virtue of their cartel activities, even for years after. Although morally questionable, this situation places the leniency applicant in a dilemma, since leniency applicants are not allowed to disclose to third parties that they filed a leniency application without a justifiable reason, and as a result this dilemma may reduce incentives of corporations to apply for leniency.

International cooperation

The JFTC has entered into international cooperation agreements on enforcement of competition law with the United States, the European Community and Canada. Even prior to such formal cooperation agreements however, the JFTC has been proactively cooperating with competition authorities in various jurisdictions.

The main part of JFTC's cooperation with other competition authorities is information exchange. The JFTC exchanges information, we believe, by e-mails and telephone conversations, and discusses the progress of investigation subject to confidentiality (article 39 of the AMA). When necessary and appropriate, the JFTC may require leniency applicants to submit a 'waiver' of confidentiality that permits the JFTC to disclose information in its hands to other specific competition authorities (note, however, that the submission of a waiver is not a condition of a grant of leniency). However, as a matter of practice, the JFTC does not disclose evidence that it obtains from non-public sources (such as documents seized at dawn raid or witness statements) to other competition authorities.

Private enforcement

It is possible for companies or consumers who have suffered damage to file claims for civil damages against companies which committed an unreasonable restraint of trade. This can be achieved via claim for damages based on the joint tort theory (article 709 and article 719 of the Civil Code and article 25 of the AMA) or a claim for unjust enrichment (article 703 of the Civil Code).

A consumer claiming for damages due to the unreasonable restraint of trade is required to establish the difference between the product price increased due to the unreasonable restraint of trade and the price which would have been set without such unreasonable restraint of trade (assumed price). In many cases, however, proving the assumed price is difficult. In addition, there is no treble damage compensation requirement under the AMA. Because of this, such civil litigation is not so common in Japan.

Because of the difficulty in proving damage, in cases where the local public agency or independent administrative institution goes through a bidding procedure, it is often provided for in the agreement that the bidder pay a certain amount of damages (eg, 10 per cent) or penalty if any bid rigging or other misconduct is subsequently found (liquidated damages).

If a director of a company intentionally allows an unreasonable restraint of trade or negligently overlooks it by not paying reasonable attention, the shareholders may file derivative action against such director for damages incurred to the company. In order to establish the director's responsibility, the willful misconduct or negligence of the director must be proved. Unless proved, the director's liability will be denied.

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Hideto Ishida counsels a variety of domestic and foreign multinational companies in Japanese antitrust and competition matters, including those relating to mergers and acquisitions, joint ventures, distribution agreements, licence agreements and other cooperation agreements. He also represents many companies involved in investigations before the JFTC and other foreign competition authorities for price cartels, bid rigging and similar serious alleged violations such as vitamin, graphite electrode, GIS, marine hose, air fare and LCD international cartels. He served for seven years as the first attorney appointed as a special investigator with the JFTC and thus has a keen sense of the actual and practical application of antitrust and distribution regulations to companies doing business in Japan.

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Etsuko Hara is a partner at Anderson Mōri & Tomotsune with broad experience in the area of antitrust, corporate transactions, mergers and acquisitions, and general corporate. In the area of antitrust, she is experienced in international cases, including assisting clients on cartel investigations by the JFTC and foreign competition authorities, merger filing in various countries, and cross-border distribution/licence agreements. She is a graduate of Columbia Law School (LLM) and The University of Tokyo (LLB, 1998). She was admitted as a lawyer in Japan in 2001 and in New York in 2007.

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AM&T has one of the leading international antitrust and competition practices in Japan.

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