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# Cartels

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Anderson Mori & Tomotsune

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## Law and Practice

Contributed by Anderson Mori & Tomotsune

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**Anderson Mori & Tomotsune** has a leading international antitrust and competition practice in Japan. The team consists of a number of highly specialised attorneys who have wide-ranging experience representing clients before all the major antitrust authorities, including the Japan Fair Trade Commission (JFTC), the US Department of Justice and Federal Trade Commission, the EC, China's Ministry of Commerce and National Development and Reform Commission, the Competition and Consumer Commission of Singapore, and the Competition Commission of India. AMT has advised on many of the highest-profile interna-

tional cartel investigations and merger control transactions over the past decades. The firm regularly works in close co-operation with top competition firms and practitioners from around the world, and is frequently called upon to help formulate and implement global antitrust strategies but also to ensure speedy merger control clearances. Towards that end, the firm's Japanese attorneys work closely with its native English-speaking lawyers to provide advice at a level that matches the quality AMT's clients are accustomed to receiving in their home jurisdictions.

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## 1. Basic Legal Framework

### 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

In Japan, the Anti-Monopoly Act (AMA) governs cartel behaviour or effects.

### 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Japan Fair Trade Commission (JFTC) is the sole competition agency in charge of the AMA's enforcement. The JFTC is responsible for conducting investigations into suspected cartel cases and is authorised both to issue cease-and-desist orders when it finds that such activities have taken place and to impose administrative fines through surcharge payment orders. With respect to criminal enforcement, the Public Prosecutor's Office is in charge of prosecution. Even in such cases, however, the Public Prosecutor's Office may indict parties for criminal offences only after the JFTC submits a criminal accusation to the office under Article 96 of the AMA.

Companies and individuals can be subject to criminal liability for participation in a cartel. Firms can face a fine of up to JPY500 million for cartel violations under Article 95, Paragraph 1, Item 1 of the AMA and individuals can face a maximum of five years' imprisonment or a fine of up to JPY5 million under Article 89 of the AMA. With respect to civil liability, the primary form of sanctions issued by the JFTC in administrative proceedings is a cease-and-desist order and a surcharge payment order, pursuant to Articles 7 and 7-2 of the AMA. In addition, there are no civil judgment awards in Japan.

### 1.3 Private Challenges of Cartel Behaviour/Effects

Companies or consumers who have suffered from damages can challenge cartel behaviour or effects in the form of damage lawsuits. They are entitled to file claims for civil damages against companies that participated in cartels. The action is based on the tort law (Article 709 of the Civil Code and Article 25 of the AMA) or a claim for unjust enrichment (Article 703 of the Civil Code).

### 1.4 Definition of 'Cartel Conduct'

Cartels are regulated as an "unreasonable restraint of trade", which are prohibited under Article 3 of the AMA. The term "unreasonable restraint of trade" is defined in Article 2, Paragraph 6 of the AMA as "business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restricts or conducts their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade".

Joint actions between rivals do not necessarily amount to a breach of the AMA. For example, the AMA shall not apply

to certain conducts by a partnership (including a federation of partnerships) that complies with certain requirements stipulated at Article 22 of the AMA. This provision is aimed at facilitating mutual support to small-scale enterprises and consumers. In another instance, under the Guidelines concerning the Activities of Trade Associations, competitors are allowed jointly to collect historical prices for commoditised goods through a trade association and offer general information on the market to consumers and their members.

It is generally accepted in Japan that price-fixing, output restrictions, agreements on product characteristics and other forms of competitive activity among competitors are referred to as 'cartels'. Bid-rigging, meanwhile, traditionally falls into another category of "unreasonable restraint of trade", although almost the same antitrust theory as 'cartels' can be applied to bid-rigging.

There are some exemptions from the application of the AMA regarding cartel conduct under the relevant Japanese laws. For example, aviation companies can build an alliance with others under certain conditions pursuant to the Japanese Aviation Law. Other examples include joint conduct by insurance companies on aviation or nuclear business that can also be exempted from the application of the AMA under certain conditions pursuant to the Insurance Business Act.

### 1.5 Limitation Periods

The JFTC's ability to issue a cease-and-desist order for infringements of the AMA is subject to a limitation period of five years from the end of the infringement action under Article 7, Paragraph 2 of the AMA. The limitation period for issuing a surcharge payment order is also five years from the end of the period of the implementation in accordance with Article 7, Paragraph 27 of the AMA.

Please note, however, that the limitation period mentioned above will be changed to seven years from the end of the period of the implementation provided the amendment bill will be passed by Parliament this year.

### 1.6 Extent of Jurisdiction

It is generally understood that the AMA can apply to any firm or individual as long as the conduct in which they engage has substantial anti-competitive effects on the Japanese market, even if the said firm or individual has no physical presence in Japan. This principle was confirmed by the Supreme Court of Japan in the Samsung SDI (Malaysia) Bhd. case of 2017. In this case, a price-fixing cartel on television cathode-ray tubes (CRTs) took place outside Japan. The Supreme Court held that, even if the cartel infringement took place outside Japan, as long as the cartel has caused a competitive restraint to the Japanese market (for instance, where such a cartel is targeted at transactions with companies based in Japan), Japanese antitrust law would be applicable.

## 1.7 Principles of Comity

As a matter of law, the AMA does not stipulate any provision regarding principles of comity and there has been no precedent explicitly mentioning the application of principles of comity in relation to the enforcement of the AMA. In practice, however, principles based on the concept of comity are embedded in bilateral agreements between the Japanese government and other governments, such as the EU, the USA and Canada. The bilateral agreements normally request both parties to make consideration to the other party when their enforcement may have an impact on the other party's jurisdiction. Such consideration based on principles of comity is, nevertheless, subject to each authority's discretion.

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

Regarding the initial investigatory steps, the JFTC typically initiates an investigation by conducting dawn raids. Thereafter, the common practice is for the JFTC to request and conduct interviews with the persons it has identified as being the most involved in the conduct being investigated. Interviews cover a wide range of matters, including market knowledge as to the alleged practices, and occasionally the JFTC will request the submission of materials on a voluntary basis or based on a formal request in the form of a 'Reporting Order' issued by the JFTC investigator. It is also worth noting that the JFTC published guidelines on its administrative investigation, 'Overview of Administrative Investigation Procedures for Alleged Antitrust Cases', in December 2015. The guidelines outline how the investigation is conducted, including the initial investigatory steps taken by investigators.

### 2.2 Dawn Raids

It is common that the JFTC conducts on-site inspection, known as 'dawn raids', into offices of companies. The legal basis of such on-site inspection is Article 47, Paragraph 1, Item 4 of the AMA. Any refusal, obstruction or avoidance of the inspection without justifiable reasons should be subject to sanctions pursuant to Article 94 of the AMA. In that sense, while the JFTC is not entitled to exercise its power to conduct the inspection directly or physically, firms and employees are deemed to be obliged to accept and cooperate with the inspection. The general practice is that the investigators may allow employees and other staff on the site being investigated to continue their ordinary business except that at least one officer or employee is required to be present at the venue until the end of the on-site inspection, even late at night, and are required to provide any materials and explanations requested by the investigating officers. In addition, outside counsel can be present at the on-site inspection unless their presence affects the smooth implementation of the investigation. It should, however, be noted that there is

no requirement to wait for the arrival of outside counsel to initiate the investigation and the JFTC will typically not wait.

### 2.3 Restrictions on Dawn Raids

There is no limitation to the scope of the inspection or to the sort of documents that can be inspected and retained by the investigators under Article 47, Paragraph 1, Items 3 and 4 of the AMA. Therefore, the investigators may inspect any place within the business, including the legal department, as long as they reasonably consider the search to be necessary for investigating the alleged violation. The investigators may also be entitled to seize any materials, including in electronic format, that they reasonably think are relevant to the alleged conduct. In practice, in the case of an administrative inspection, the investigators have the tendency to obtain such electronic information by means of copying it from PCs, instead of confiscating laptops or local servers, to avoid interfering with business operations. This is not the case, however, for criminal investigations, where actual devices will be seized.

### 2.4 Spoliation of Information

The firm and the employees that are being investigated have an obligation not to refuse, obstruct or evade the JFTC's inspection. Spoliation of potentially relevant information may constitute a violation of the AMA. Any breach of such obligations may result in sanctions, such as a one-year term of imprisonment or fines up to JPY3 million pursuant to Article 94 of the AMA.

### 2.5 Procedure of Dawn Raids

It is usual that interviews of officers or employees responsible for the alleged violation take place during dawn raids. In practice, such interviews are normally conducted on a voluntary basis. Accordingly, the investigators should first explain to the interviewees that this interview is conducted on a voluntary basis by using a reference material for companies regarding the JFTC's administrative investigation procedures for alleged antitrust cases and they will need to obtain their consent prior to starting the interview. It is worth bearing in mind that if interviewees do not co-operate with a voluntary interview, an interrogation procedure could be ordered under Article 47, Paragraph 1 of the AMA. Such interrogation is conducted by issuing an order to the officers or employees. Testifying persons who make a false statement or fail to make a statement during the interrogation procedure could be subject to punishment under Article 94 of the AMA.

After dawn raids, companies under investigation may request the JFTC to allow them to make copies of documents furnished to the agency by submitting a request form with an order for submission of materials to the relevant division of the JFTC. During dawn raids, on the other hand, the investigators may also grant a request, at their discretion, from the companies to make copies of documents seized by them, provided that the investigators determine that such



documents are necessary for their daily business and provided that making copies of the documents will not affect the smooth implementation of the on-site inspection.

### **2.6 Role of Counsel**

Officers or employees subject to an interview or interrogation have a right to speak to counsel before or after the interview. Lawyers, however, are typically not allowed to be present at the interview or interrogation except in very limited circumstances where the investigators determine that lawyers or third persons should be present. This would be the case, for example, in the case of interviews of foreign nationals where lawyers or third persons could assist with translation tasks, so as to ensure the smooth implementation of the interview.

### **2.7 Requirement to Obtain Separate Counsel**

Typically, the JFTC does not raise the issue of whether individuals should obtain a separate counsel from their employers. It is, nonetheless, noteworthy that separate counsel for individuals might be necessary in a criminal investigation case where companies and individuals could be subject to criminal punishment and there are potential conflicts between them.

### **2.8 Initial Steps Taken by Defence Counsel**

The principal initial steps that defence counsel should undertake during the initial phase of an investigation is to conduct an internal investigation based on intensive interviews of the relevant employees and extensive review of the relevant documents to identify expeditiously whether the alleged infringement actually took place. Such internal investigation should be indispensable for securing immunity based on the JFTC's leniency programme because the timing of the initial leniency application is crucial in Japan to decide the order of the leniency application and the amount of the reduction in the administrative fine that can be granted under the leniency programme.

### **2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**

It is common that the JFTC first obtains documentary evidence at the alleged companies' offices in the course of dawn raids. The agency subsequently requests the companies to submit the relevant documents from time to time and delivers a 'Reporting Order' in a timely manner to secure precise information on the alleged violation in preparation for issuing a cease-and-desist order, and surcharge payment order.

### **2.10 Procedure for Obtaining Other Types of Information**

It is widely believed in Japan that a large part of the investigations against cartels by the JFTC are triggered by information submitted through leniency applications.

### **2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions**

The JFTC first seems to try to obtain the relevant documents through dawn raids. After the dawn raid, the agency usually requests the companies to produce other relevant materials that the investigators could not seize during the on-site inspection. Such requests cover electronic information that is located on a local computer or a host computer or in the cloud, even if such information is located in another jurisdiction. Companies are obliged to follow such a request under Article 47 of the AMA. Thus, there is no distinction in the JFTC's request for information based on whether the targeted information is located in Japan or another jurisdiction. It should be noted, however, that usually the JFTC does not actively pursue documents or other information that is not located in Japan, or that is not easily accessible from Japan.

### **2.12 Attorney-client Privilege**

It is important to note that, in contrast to many common law jurisdictions, there is no concept of attorney-client privilege in Japan as of April 2019. 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.

However, an amendment bill to introduce a new flexible surcharge system and overhaul the leniency policy was submitted to the Parliament last March and is expected to pass during an ordinary session of the Parliament this year. The new system is supposed to come into effect by the end of 2020. Following the submission of the amendment bill, the JFTC announced that, once the bill passes, it will introduce attorney-client privilege in relation to investigations against unreasonable restraints of trade – eg, cartels, bid-rigging, etc – by regulations or guidelines pursuant to Article 76 of the AMA. The details of the newly introduced attorney-client privilege are under discussion, but the rationale behind the introduction of privilege is to protect communications between companies and outside attorneys in connection with investigations against unreasonable restraints of trade, resulting in making the new flexible surcharge system work more efficiently.

### **2.13 Other Relevant Privileges**

The privilege against self-incrimination is only available in a criminal investigation of cartel conduct as opposed to an administrative investigation where such privilege cannot be invoked.

### **2.14 Non-co-operation with Enforcement Agencies**

It is not common that the initial requests for information by the JFTC are resisted by individuals and firms. This is because they are deemed to be obliged to co-operate with the investigators and any refusal, obstruction or evasion of

the inspection without justifiable reasons should be subject to sanctions provided under Article 94 of the AMA.

### **2.15 Protection of Confidential/Proprietary Information**

The JFTC investigators are entitled to review and seize any materials that they reasonably consider to be necessary for their investigation under Article 47 of the AMA. Therefore, any documents containing confidential or proprietary information can also be obtained by the investigators. As well as considering documents of third parties, such documents could be subject to inspection and seizure as long as they are located at the place targeted by the investigation. Confidentiality will in any case be guaranteed under the government officials' confidentiality obligations in accordance with Article 39 of the AMA.

### **2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement**

It is common that defence counsel for the target of a cartel investigation raise legal and factual arguments by making submissions to the relevant division at the JFTC during the investigation. Defence counsel also has an opportunity to present arguments at a hearing procedure (introduced in April 2015) before the JFTC finalises its decision.

### **2.17 Leniency, Immunity and/or Amnesty Regime**

The leniency policy has been applicable in Japan since 2006. Under the policy, up to five companies in total may obtain an exemption from, or a reduction of, surcharges. The maximum of five companies includes those who apply before and after the commencement of an investigation (the Investigation Start Date), which is often the date of a dawn raid. Applications for leniency are usually filed by sending the relevant forms via facsimile and it is the order in which these facsimiles are received that dictates the companies' positions in the order of leniency (ie, this determines the amount of reduction offered to them). Group filing is available, subject to certain conditions.

If the first-in-the-door whistle-blowing company applies for leniency prior to the Investigation Start Date then they are eligible for a 100% exemption from any surcharges that might otherwise be levied against them according to Article 7-2, Paragraph 10 of the AMA. The leniency measures available to subsequent applicants for leniency depend on whether the company files its application with the JFTC before or after the Investigation Start Date. If the company applies for leniency prior to the Investigation Start Date then the second-in-the-door company is eligible for a 50% reduction in any surcharges levied against it under Article 7-2, Paragraph 11 of the AMA. A further three companies are able to qualify for a 30% reduction in surcharges under Article 7-2, Paragraph 11 of the AMA. However, in the case of the fourth and fifth applicants, the companies must submit reports and provide materials that the JFTC was otherwise unaware of to obtain the reduction.

Companies may also apply for leniency during a period of up to 20 days after the Investigation Start Date. If the company applies for leniency after the Investigation Start Date, the applicant is able to receive only a 30% reduction in surcharges pursuant to Article 7-2, Paragraph 12 of the AMA, provided that in order to obtain the reduction the applicant(s) must submit reports and provide materials that the JFTC was otherwise unaware of. This 30% reduction is fixed for all applicants filing after the Investigation Start Date, regardless of the order of their applications. Furthermore, only a maximum of three applicants will be accepted after the Investigation Start Date. This quota is still subject to the overall maximum of five applicants (which cannot be exceeded), but imposes an additional limit as only three applicants can be accepted after the Investigation Start Date regardless of whether any applications were made prior to that date.

Please note that the leniency policy will be amended by the end of 2020 provided the amendment bill passes in Parliament this year. Under the new policy, there will be no limitation to the number of leniency applicants. The second applicant will obtain a reduction in surcharge of 20 to 60%, depending on the extent of co-operation with the JFTC, instead of the fixed 50% in the current system. The third, fourth and fifth applicants will also be eligible for a reduction in surcharge, but the reduction will vary from 10 to 50% according to the extent of co-operation with the JFTC. The sixth or later applicants will also be eligible for a reduction, depending on the extent of their co-operation with the JFTC. Such changes would further align the Japanese leniency regime with the ones of other major competition authorities, such as the EC.

## **3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds**

### **3.1 Obtaining Information Directly from Employees**

While the JFTC usually seeks any documents from the alleged company, it is also common that the investigators sometimes ask the employees suspected of cartel activity to submit any materials held by them, even personal belongings, such as notebooks, planners and mobile phone at the time, for example, of an interview.

### **3.2 Obtaining Documentary Information from Target Company**

The JFTC usually contacts the legal department of the alleged company when it asks the companies to submit additional materials on a voluntary basis that the agency considers to be necessary for determining the allegations in the course of the investigation. A compulsory procedure, such as an 'Order of Submission', is also available under Article 47, Paragraph 3 of the AMA in case the companies do not co-operate with



such request. There is no difference between the targeted company and third party in relation to the JFTC's request for documentary information.

### 3.3 Obtaining Information from Entities Located Outside this Jurisdiction

Although the JFTC will not usually investigate companies or individuals located outside Japan, it can do so. As a matter of law, however, some technical issues could arise in terms of how the JFTC should deliver an Order of Submission to companies or individuals outside the jurisdiction (Articles 70-6, 70-7 of the AMA; Article 108 of the Civil Procedure Law).

### 3.4 Inter-Agency Co-operation/Co-ordination

The JFTC always co-operates with the Public Prosecutor's Office in connection with criminal cases because criminal actions can only be brought against companies or their officers or employees by the JFTC after filing a criminal accusation with the Public Prosecutor's Office. Accordingly, it is common that a few prosecutors are seconded to the JFTC for the purpose of close communication and effective enforcement. In this regard, the JFTC and the Public Prosecutor's Office jointly conduct dawn raids in the event that they seek to impose criminal penalties against the companies who have participated in a cartel.

The JFTC will also occasionally co-operate with other agencies or Ministries in Japan depending on the case at hand (for example, with the Ministry of Land, Infrastructure, Transport and Tourism in antitrust cases involving the transport sector). In such cases, the JFTC will not exchange confidential information of the parties being investigated with those agencies or Ministries unless prior approval has been obtained from such parties.

### 3.5 Co-operation with Foreign Enforcement Agencies

The JFTC usually co-operates with enforcement agencies in foreign jurisdictions in international cartel cases. However, having regard to the fact that most of the cases the JFTC is dealing with are domestic cartel or bid-rigging cases, such international co-operation is rather limited.

The AMA incorporates provisions allowing the JFTC to exchange information with competition authorities in different jurisdictions. The JFTC works actively with other major competition authorities on specific cases, including through the exchange of information with its foreign counterparts, and is entitled to share with foreign competition authorities "information that is deemed helpful and necessary for the execution performance of the foreign competition authority's duties" where such duties are equivalent to those of the JFTC under Article 43-2 of the AMA. In addition, the JFTC has entered into bilateral co-operation agreements with various competition authorities, including the USA, the EU and Canada, as well as the Philippines, Vietnam, Brazil, South

Korea, Australia, China, Kenya and Mongolia. These bilateral agreements are mainly focused on general co-operation between the agencies, such as the exchange of information.

Disclosure of confidential investigative information and evidence is a violation of government officials' confidentiality obligations and is subject to criminal sanctions under Article 39 of the AMA. Therefore, during the course of administrative (as opposed to criminal) procedures, JFTC officials cannot exchange information that includes business secrets of the companies under investigation without prior permission or waivers to do so from the companies in question. In examining leniency applications, however, it is understood that the JFTC exchanges confidential information with foreign competition authorities, including the contents of leniency applications, but only after obtaining a waiver to do so from the applicant.

### 3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

Criminal actions can only be brought against companies or their officers or employees by the JFTC after filing a criminal accusation with the Public Prosecutor's Office. The JFTC states that it will actively seek criminal penalties in respect of (i) serious cases of unreasonable restraint of trade (including cartels) that are considered to have a widespread influence on people's livings and (ii) cases involving firms or industries that it deems 'repeat offenders' or that do not abide by enforcement measures previously imposed, and where it therefore considers that administrative sanctions are not sufficient to fulfil the purpose of the AMA. In practice, the JFTC appears to have decided in most cases whether it is going to deal with a cartel at issue as an administrative case or a criminal case at the initial stage. For example, companies faced with dawn raids can identify whether the allegation could be dealt with in administrative or criminal proceedings through the notifications delivered by the investigator at the on-site inspection.

After the JFTC has filed a criminal accusation with the Public Prosecutor's Office, and normally very soon after such filing, the Public Prosecutor's Office can file an indictment for cartels with the Tokyo District Court or other district courts under Articles 84-3, 84-4 and 89 of the AMA. As with other criminal trials, a defendant has a right to access evidence on which the Prosecutor's Office relies in terms of the allegation after the indictment, while there is no guarantee that a defendant can access potentially relevant information held by third parties.

### 3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

Administrative trials are discussed here, while private actions are covered in **5. Private Civil Litigation Involving Alleged Cartels**. The JFTC issues a cease-and-desist order and/or a surcharge payment order under Articles 7 and 7-2

of the AMA when it determines an allegation for cartels. The process for a cease-and-desist order or a surcharge payment order was amended as of 1 April 2015 as part of a wider move towards increasing the transparency of administrative procedures.

Prior to 2015, if a company wanted to challenge a cease-and-desist order and/or a surcharge payment order, it first had to file an appeal before the JFTC itself. The JFTC would then open an administrative hearing procedure to determine the legality of the order. Only if the company was still unsatisfied with the decision could it then file a petition for the nullification of the decisions before the Tokyo High Court.

Under the current system, which applies to all cases where a prior notice of a cease-and-desist order and/or of a surcharge payment order is issued after 1 April 2015, 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 (Article 85, Item 1 of the AMA; Articles 3 and 14, Paragraph 1 of the Administrative Case Litigation Act). Additionally, the legislative reform provided for a procedure for hearings prior to the issuing of the JFTC's order, with a greater emphasis on due process. In the hearings, the defendant has an opportunity to review and obtain copies of all evidence that supports the prospective JFTC's orders and present the defendant's opinion in the hearings.

### **3.8 Enforcement Against Multiple Parties**

The JFTC issues a cease and desist order and/or a surcharge payment order to each of the parties involved in cartels without trials. Trials may be held in situations where each of the parties who received an order files a suit with the district court to have the order nullified. Given the past cases, including cases under the old JFTC hearing system, many trials were rendered in a consolidated manner for efficiency reasons and to avoid conflicting outcomes.

### **3.9 Burden of Proof**

The Public Prosecutor's Office bears the burden of proof in criminal trials on cartel cases, while in administrative trials the JFTC's officers have the burden of proof. As is the case with other criminal trials, allegations should be proven beyond a reasonable doubt and the standard of proof in criminal trials is considered to be higher than that in administrative trials.

### **3.10 Finders of Fact**

Since administrative trials and criminal trials on cartel cases are presided by judges in courts, they are responsible for finding the fact and applying the AMA or the Criminal Act to those facts in the cartel trials.

### **3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings**

Cartel cases that the JFTC considers to be very serious offences are likely to be dealt with in criminal and administrative proceedings. In such a case, evidence collected in criminal proceedings can be used as the basis of administrative sanctions – ie, a cease-and-desist order and a surcharge payment order – while evidence retained in administrative proceedings should not be based for criminal accusation in accordance with Article 47, Paragraph 4 of the AMA. Given the fact that in administrative proceedings evidence could be gathered without a warrant issued by courts and there is no privilege against self-incrimination, criminal trials should deal with only evidence gathered in criminal proceedings so that a criminal defendant should be guaranteed rights provided under the Constitution.

### **3.12 Rules of Evidence**

Criminal trial rules take a strict attitude towards admissible evidence – for example, by excluding any evidence obtained by illegal means and any hearsay evidence – while, in theory at least, such evidence is not necessarily excluded in administrative trials.

### **3.13 Role of Experts**

So far in Japan, economists and other experts have not normally had a key role to play in cartel cases because so-called hard-core cartels – such as a price cartel, a quantity cartel and a market-sharing cartel – is virtually treated as per se illegal in Japan and the JFTC does not have much difficulty proving such infringement of the AMA even without the help of economists or other experts.

### **3.14 Recognition of Privileges**

There are certain privileges recognised in Japanese trials in accordance with the Constitution, the Administrative Case Litigation Act, the Civil Procedure Law and the Criminal Procedure Law. For example, defendants in criminal trials have a right to remain silent due to the privilege against self-incrimination (Article 38 of the Constitution and Article 311 of the Criminal Procedure Law). Another privilege is refusal to testify. A witness is entitled to refuse to answer questions that relate to matters that are subject to criminal prosecution or conviction, or that the witness has learned in the course of its professional duties and that should be kept secret (Article 7 of the Administrative Case Litigation Act; Articles 196 and 197 of the Civil Procedure Law; and Articles 146, 147 and 149 of the Criminal Procedure Law).

### **3.15 Possibility for Multiple Proceedings Involving the Same Facts**

In a situation where the JFTC has filed a criminal accusation against a cartel case with the Public Prosecutor's Office, it is common, after such an indictment, that it also starts investigating against the same cartel infringement in administrative proceedings to issue a cease-and-desist order and a

surcharge payment order. In such a case, the same or related facts on the cartel may be dealt with in different proceedings.

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

The JFTC has authority to impose sanctions, including a cease-and-desist order and a surcharge payment order, on cartel violators directly. It should be noted, however, that under the current system introduced in April 2015, the JFTC can issue these orders only after it holds hearings that provide the parties being investigated with opportunities to present their opinions pursuant to Article 49 of the AMA. Another limitation to a surcharge payment order is that the JFTC does not have any discretion as to whether it should order a surcharge payment order and how much surcharge it should impose on offenders. Where the JFTC finds that there has been a cartel – ie, an unreasonable restraint of trade and certain amount of turnover in connection with the cartel – the JFTC must order the payment of a surcharge and the amount of the surcharge is also automatically calculated based on a statutory formula under the AMA.

Please note, however, that the JFTC will have discretion as to how much surcharge it could impose on offenders, taking account of the extent of their co-operation with the JFTC in the investigations if the amendment bill to change the surcharge system passes in 2019.

### 4.2 Procedure for Plea Bargaining or Settlement

A plea bargaining and a commitment system were introduced in 2018. As regards plea bargaining, the Criminal Procedure Law was amended in 2016 and a plea bargaining applying to certain type of crimes, including a cartel, came into force on 1 June 2018. According to the amendment to the Criminal Procedure Law, if an officer or employee presents evidence and testimony against other offenders in a cartel case, prosecutors may agree not to indict the officer or employee, provided that such persons agree with the conditions made by the prosecutor and their attorney's consent is given. With respect to the introduction of a commitment system, the amendment to the AMA came into effect on 30 December 2018 when the modified version called the Trans Pacific Partnership Agreement (TPP) known as TPP 11 came into effect. Such commitment system, nevertheless, does not apply to cases relating to certain types of unreasonable restraint of trade – ie, 'hard-core' cartels – and there is no similar commitment system like settlement applying to cartels in Japan at this time.

### 4.3 Collateral Effects of Establishing Liability/Responsibility

As a matter of law, the decision by the JFTC does not have any legal binding effect on the civil courts according to the

Supreme Court decision in November 1975. The verdict indicates that the fact that any contract is not in compliance with the AMA does not necessarily mean that such a contract is deemed to be void. It is, however, generally accepted in Japan that where local public agencies go through bidding processes, it is laid down in the agreement between the local public agencies and the parties awarded the contract that if any bid-rigging is found, the infringers would be suspended for bidding on contracts for several months. In addition, it is also written in the agreement that they would have to pay a certain amount of damages (eg, 10%) of the amount of the contract as a penalty in such an event.

### 4.4 Sanctions and Penalties Available in Criminal Proceedings

Companies and individuals can be subject to criminal liability for participation in a cartel. Firms can face a fine of up to JPY500 million for cartel violations under Article 95, Paragraph 1, Item 1 of the AMA and individuals can face a maximum of five years' imprisonment or a fine of up to JPY5 million under Article 89 of the AMA. However, provided that the sentence is for three years or less, the court may issue a suspended sentence rather than an actual custodial sentence. In practice, no individual has to date served a custodial sentence for cartel violations in Japan.

### 4.5 Sanctions and Penalties Available in Civil Proceedings

The primary form of sanctions issued by the JFTC in administrative proceedings are a cease and desist order and a surcharge payment order, pursuant to Articles 7 and 7-2 of the AMA.

A cease and desist order is issued to take "measures necessary to eliminate the violation or to ensure that the violation is eliminated" in accordance with Article 7 of the AMA. Such necessary measures vary widely according to each case. The JFTC, however, often asks the targeted company:

- to acknowledge that the violation has ceased;
- to inform consumers or users that it will perform business based on its own judgment, after adopting corrective actions;
- to report to the JFTC after taking such corrective actions;
- to prepare a code of conduct concerning compliance with the AMA;
- to undertake regular training sessions for sales staff regarding compliance with the AMA; and
- to have the legal department conduct regular audits.

Where the JFTC finds that there has been an unreasonable restraint of trade that relates to some form of consideration, the JFTC must order the payment of a surcharge under Article 7-2 of the AMA. The amount of the surcharge is calculated by applying the relevant party's sales figures in respect of the product or service in question for the duration of the violation (up to a maximum of three years) by the applicable

surcharge calculation rate. The applicable surcharge calculation rates are set out in Article 7-2 of the AMA, and depend on the size of the business and whether the enterprise is a retailer or wholesaler. The JFTC currently has no discretion to increase or reduce the amount of the surcharge as a result of the level of co-operation provided by the company in question. However, the ratio can be increased upwards or downwards based on certain factors. If the company withdrew from the conduct more than a month prior to the dawn raids and the period of the implementation of the conduct was less than two years, the surcharge ratio can be reduced by up to 20% under Article 7-2, Paragraph 6 of the AMA. If the company is a repeat offender or did take a leading role, the surcharge ratio can be increased by up to 50% under Article 7-2, Paragraphs 7 and 8 of the AMA. If the company is both a repeat offender and took a leading role then the total ratio of the surcharge can be doubled under Article 7-2, Paragraph 9 of the AMA.

While the current surcharge system is delineated in the above as of April 2019, such system is subject to change due to the amendment of the AMA that should come into force by the end of 2020. According to the amendment bill, for example, the duration of the violation for which the amount of the surcharge is calculated based on the relevant party's sales figures in respect of the product or service in question will be up to a maximum of ten years (ie, up to seven years longer than currently). The difference in the surcharge calculation rate depending on the type of the relevant party's business – eg, a retailer or wholesaler – will be abolished and the rate will be fixed at 10% of the sales figures in respect of the product or service in question. The reduction in surcharge due to early withdrawal from the conduct in question will also be abolished.

A cease-and-desist order is not addressed to individuals and administrative fines are also not applicable to individuals such as officers or employees of corporations, although these orders do apply to individuals who are self-employed and running a business, under Articles 7 and 7-2 of the AMA.

#### **4.6 Relevance of 'Effective Compliance Programmes'**

As noted above, the JFTC does not have any discretion on the amount of surcharges imposed on cartel participants. An 'effective compliance programme', therefore, is not considered as a factor in imposing administrative fines on them. In contrast, the JFTC seems to be keen to determine whether the alleged companies perform an effective compliance programme during the entire investigation. Accordingly, the fact that such companies put in place an effective compliance programme could affect the decision as to whether they would be required to conduct additional compliance efforts as part of the cease-and-desist order.

#### **4.7 Mandatory Consumer Redress**

There is no system regarding mandatory consumer redress in the AMA. Therefore, victims of cartels need to take legal action against the companies involved in the cartels if they want redress from them.

#### **4.8 Available Forms of Judicial Review or Appeal**

Appeals against 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. Until 1 April 2015, if a company wanted to challenge a cease-and-desist order and/or an order imposing a fine issued by the JFTC, it first had to file an appeal before the JFTC itself, which would then open an internal hearing procedure to determine the legality of the order. If the company was still not satisfied with the decision, it could then file a petition for the annulment of the decision before the Tokyo High Court. There was, however, a rule to the effect that findings of facts made by the JFTC through the hearing procedure would, if established based on substantial evidence, be binding upon the appeal court. Under the current system, this substantial evidence rule has been abolished. Furthermore, any evidence that the company wishes to present can be offered to the Tokyo District Court, including new evidence.

## **5. Private Civil Litigation Involving Alleged Cartels**

#### **5.1 Private Right of Action**

Companies or consumers who have suffered damages in connection with cartel behaviour are entitled to file claims for civil damages against companies that participated in the cartels. The claims are based on tort law (Article 709 of the Civil Code and Article 25 of the AMA) or a claim for unjust enrichment (Article 703 of the Civil Code). Meanwhile, there is no relief or compensation applicable to governmental proceedings in connection with cartels.

#### **5.2 Collective Action**

In contrast to some other jurisdictions, it is relatively rare that a company or consumer who has suffered from cartel conduct would bring a damage claim to the courts directly. They are more likely to choose the route of reaching a settlement with the cartelists, although such settlement is still relatively uncommon in Japan. In addition, there are no 'class actions' in Japan. It is fair to say that, given the existence of contractual protection and out-of-court settlement in most cartel cases, the historically low levels of damages claims in Japan will not change radically in the near future. Under Consumer Contract Law, a qualified consumer organisation has standing to file a damage claim on behalf of consumers or victims. To date, however, such a collective action system has rarely been used in Japan.



### 5.3 Indirect Purchasers and ‘Passing-on’ Defences

The ‘passing-on’ defence has so far not been used to any significant extent in private actions in Japan.

### 5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

Private actions, such as damage claims and injunctions, are handled in civil proceedings in Japan. Accordingly, the process applied for such private actions is the same as other types of civil litigations in accordance with the Civil Litigation Act. Evidence from governmental investigations or proceedings is admissible subject to the government officials’ confidentiality obligations in accordance with regulations under the Civil Litigation Act

### 5.5 Frequency of Completion of Litigation

Most civil litigation cases, including damages lawsuits relating to cartels, are likely to end in settlement. This is partially because it usually takes a long time, normally a few years, from inception of the claim to resolution in civil proceedings and judges appear to prefer settlement rather than issuing decisions so they tend to encourage both parties to make a court-approved settlement.

### 5.6 Compensation of Legal Representatives

There is no law in Japan to regulate attorneys’ fees, including advance payment and success fees, although the attorneys’ ethics rules provide that attorneys should indicate fair and reasonable fees to clients. The amount of attorneys’ fees is, therefore, determined by an agreement between attorneys and their clients. The amount of deposits and success fees depends on the agreement, but any such amount is often set to be calculated based on a certain ratio of the amount of a damage claim by the agreement.

### 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

In principle, each party should be liable for their own attorneys’ fees in civil proceedings in Japan. Even if a claimant wins a damage lawsuit and seeks compensation for its attorneys’ fees, it is usual that only a small part of such fees will

be awarded. Accordingly, unsuccessful claimants would not have to bear the defendants’ legal fees, unless the defendants also file a counterclaim for their legal fees against the claimants in the same trial and that counterclaim is admitted.

### 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

Claimants seeking compensation from cartelists are entitled to file a lawsuit with civil affairs of district courts and if they are not satisfied with the decisions of the district courts, they are also eligible to appeal to the High Court having jurisdiction over the district court delivering the decision. Under very restricted circumstances – for example, where the decision of the High Court might be inconsistent with the Constitution or court precedents – an appeal to the Supreme Court could be allowed under the Civil Litigation Act.

## 6. Supplementary Information

### 6.1 Other Pertinent Information

Private litigation has remained relatively limited in Japan so far and such trend is expected to continue, subject to some major legislative change.

### 6.2 Guides Published by Governmental Authorities

There are guidelines that are not specific to cartels but deal with certain issues relating to cartels. For example, as it is considered that trade associations in Japan are often liable to facilitate cartel conduct among their members, the JFTC has published several guidelines for the prevention of anti-competitive conduct, such as the ‘Guidelines concerning the Activities of Trade Associations under the AMA’<sup>1</sup>. Joint R&D between rivals also has the potential to bring about cartel conduct and in that regard the JFTC published the ‘Guidelines concerning Joint Research and Development under the AMA’<sup>2</sup> to prohibit the competitors from exchanging sensitive information that might lead to cartels. With respect to enforcement, the JFTC has published guidelines that are useful for understanding its enforcement activities and policies. For example, the JFTC published in December 2015 the guidelines on its administrative investigation, ‘Overview of Administrative Investigation Procedures for Alleged Antitrust Cases’<sup>3</sup>. It is also noteworthy that the JFTC published in October 2005 (revised in October 2009) the guidelines regarding criminal enforcement, ‘The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations’<sup>4</sup>, in which it confirms that the JFTC’s policy is not to bring criminal actions against the first leniency applicant and its co-operating officers or employees.

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#### Footnotes

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