THE CARTELS AND LENIENCY REVIEW

SEVENTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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Chapter 15

JAPAN

Hideto Ishida and Yuhki Tanaka[1]

I ENFORCEMENT POLICIES AND GUIDANCE

Since the 1990s, the Japan Fair Trade Commission (JFTC), the principal enforcement agency of the Antimonopoly Act, has given top priority to enforcement against cartels. The JFTC's policy of continuing strong and high-impact cartel enforcement has been publicly reiterated and approximately 10 cartel cases are cracked down on every year.

Under the Antimonopoly Act, cartels are prohibited if they cause substantial restraint of competition in the relevant market. This means that cartels are not illegal *per se* in the strict sense. However, cartels are generally considered to have a strong tendency to substantially restrain competition and the JFTC therefore usually has no difficulty in proving that cartels cause such a restraining effect in the relevant market. In this sense, cartels are generally treated as being almost illegal *per se* in Japan.

The most significant sanction against cartels in Japan is administrative surcharges. An attempt by the JFTC to enhance effective cartel enforcement has resulted in several amendments to the legal system of administrative surcharges, including an increase in surcharge rate (e.g., from 6 to 10 per cent in 2005). Most notably, the introduction of the leniency programme on administrative surcharges in 2005 has drastically changed the landscape of cartel enforcement in Japan. There have been 1,165 leniency applications up to 2017 (103 in 2017 alone) and the cartel cases recently cracked down on by the JFTC have generally been triggered by leniency applications. In March 2014, an administrative surcharge of ¥13.1 billion was imposed on a certain shipping company in the *Car Shipping* case, the highest administrative surcharge ever imposed against one company. This cartel case was triggered by leniency applications.

It can therefore be seen that the JFTC enforces the Antimonopoly Act against cartel violations as vigorously as other major competition authorities in, for example, the United States and the European Union.

II COOPERATION WITH OTHER JURISDICTIONS

i Information sharing with other competition authorities

The JFTC has entered into bilateral cooperation agreements on competition law enforcement with the competition authorities of the United States, the European Union and Canada. Under these agreements, information sharing on competition law enforcement can be

1 Hideto Ishida and Yuhki Tanaka are partners at Anderson Mōri & Tomotsune.

conducted between the JFTC and the competition authorities of these countries. Even without such formal cooperation agreements, the JFTC is entitled to conduct information sharing under certain conditions, as set out in the Antimonopoly Act.

In fact, the JFTC has cooperated with other competition authorities in several international cartel investigations, including the *Artificial Graphite Electrode* case, the *Modifier* case, the *TFT-LCD Flat Panel* case, the *Marine Hose* case, the *Cathode Ray Tube for Television* case, the *Power Cable* case, the *Auto Parts* case, the *Car Shipping* case and the *HDD suspension* case.

However, the JFTC has declared that it will never provide other competition authorities with any documents or materials submitted under the leniency programme without a waiver of confidentiality by the leniency applicant. Of course, a waiver is not a condition for leniency being granted. Furthermore, the JFTC usually does not disclose documents and materials obtained from non-public sources (such as those seized during dawn raids) to other competition authorities.

ii Extradition

Japan has entered into bilateral extradition treaties with the United States and Korea. Under these treaties, the Japanese government has an obligation to extradite non-Japanese citizens who have committed cartel violations at the request of the Korean and US governments, while it has discretion regarding whether to extradite Japanese citizens involved in cartel violations. If extradition requests are made by governments other than those of the United States and Korea, Japan may extradite both Japanese and non-Japanese citizens involved in cartels at its discretion. In practice, however, it is unlikely that Japan will extradite Japanese citizens who have been involved in cartels at the request of foreign governments, including the United States and Korea. As criminal sanctions are rarely used in cartel cases, and especially against foreign cartel participants, it is also unlikely that the government will request foreign governments to extradite Japanese or non-Japanese citizens involved in cartels.

iii Extraterritorial discovery

No discovery system exists under Japanese law domestically or internationally; therefore, neither the Japanese courts nor the government will conduct discovery in foreign countries.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritorial application

There is no provision addressing extraterritorial application under the Antimonopoly Act.

The JFTC's position and the generally accepted view in Japan is that the Antimonopoly Act would be applicable to any conduct outside Japan as long as the conduct entails certain effects on the Japanese markets.

The remaining issue is how to enforce against alleged foreign cartel participants who have no physical presence in Japan. In light of international comity, it is unlikely that the JFTC will exercise its investigative powers against foreign cartel participants, although it can do so through service by publication. Rather, it is customary for the JFTC first to request a foreign cartel participant to voluntarily appoint a lawyer in Japan, and then serve

the reporting order to that lawyer. Moreover, the necessity of extraterritorial enforcement has been decreasing because of the leniency programme under which foreign applicants will voluntarily provide evidence located outside Japan.

In this context, it should be noted that parent companies would never be liable automatically for their subsidiaries' actions under the Antimonopoly Act. Furthermore, parent companies would not be held liable for their subsidiaries' actions merely because they have exercised control over the subsidiaries' businesses. This is true even where parent companies hold 100 per cent of the shares in their subsidiaries. Parent companies are held liable in the event that they themselves have engaged in at least part of the cartel actions.

ii Cartel exemptions

In the past, cartel exemptions were set forth under a variety of laws, but most of these laws have been abolished because of the JFTC's hard-line policies against cartels. The surviving cartel exemptions include those under:

a the Marine Transportation Act;
b the Road Transportation Act;
c the Civil Aeronautics Act;
d the Insurance Business Act;
e the Agricultural Cooperatives Act; and
f the Small and Medium-Sized Enterprise Cooperatives Act.

IV LENIENCY PROGRAMMES

i Characteristics of the Japanese leniency programme

As described in Section I, the most significant sanction against cartels in Japan is administrative surcharges; thus, the Japanese leniency programme provides immunity from administrative surcharges according to the order of application.

Note that under the Japanese leniency programme, unlike in the European Union, the JFTC does not have such broad discretion to apply and adjust the terms of immunity. This feature results mainly from:

a a fixed number of eligible applicants (a maximum of five companies);
b fixed reduction rates according to the application order (100, 50 or 30 per cent);
c a marker system for all applicants (not only for the first applicant); and
d substantially, no requirement to provide added-value evidence (even for subsequent applicants).

However, the JFTC appears to be trying to adjust the immunity terms under the leniency programme by exercising its practical discretion in delineating the scope of leniency and of the sales amounts subject to surcharge calculation, as described in Section IV.iii.

ii Leniency applications before a dawn raid

Before a dawn raid, the first applicant to come forward is fully exempted from administrative surcharges. The second applicant is granted a 50 per cent reduction of administrative surcharges, while the third, fourth and fifth are each granted a 30 per cent reduction.

Under the leniency programme, the leniency applicant must identify facts of the cartel in detail and submit relevant evidence in accordance with the prescribed procedures.

More specifically, parties applying for leniency prior to a dawn raid must first submit to the JFTC an application form (Form 1) by fax. Form 1 requires only an outline of the cartel, such as the relevant product, the type of cartel conduct (e.g., price-fixing, bid rigging or market allocation) and the duration of the violation, without the need to attach any evidence. All applicants, not only the first applicant, who submit Form 1 are granted marker status, and subsequent applicants essentially cannot leapfrog preceding applicants, unless the preceding applicant fails to secure leniency status, provides false information or refuses to cooperate in investigations conducted by the JFTC. Those considering making a leniency application can anonymously confirm the marker order to be granted with the JFTC. Note that in a practical sense, the leniency applicant will have to admit the facts of the cartel but not have to admit the illegality of the cartel in its leniency application document. The illegality of a cartel will be determined by the JFTC.

To secure leniency status (which is conditional on continuing cooperation), applicants must submit Form 2 and thereby provide more detailed information, within a period to be designated by the JFTC. The JFTC generally designates a two-week period to secure leniency status, but may grant a longer period (e.g., one or two months) in cases of complex cartels or foreign applicants, taking into account the difficulties in communicating internationally and the time necessary for translation (any leniency application forms and evidence to be attached must be written in Japanese). Form 2 requires information on the identities of other cartel participants, and the names and titles of individual employees of the applicant and other cartel participants who are involved in the cartel. Form 2 also requires evidence of the relevant cartel to be attached; this may include the minutes or notes of meetings at which the collusion was discussed and formed, or written statements prepared by employees involved in the cartel. Under the leniency programme, the fourth and fifth applicants are required to provide evidence that represents added value for the JFTC, but in practice this requirement can be easily fulfilled by written statements from employees, including concrete descriptions of events.

Applicants who have obtained leniency status will be definitively granted immunity if they continue to cooperate with the JFTC until the JFTC issues a cease-and-desist order or a surcharge payment order (or until the JFTC notifies the first applicant that it will not issue either a cease-and-desist order or a surcharge payment order). Under this duty to continue to cooperate with the JFTC, leniency applicants may be required by the JFTC to submit additional reports and materials, and failure to submit the required reports and materials, or submitting false ones, will disqualify applicants from receiving immunity. In practice, leniency applicants, especially the first applicant, will be subject to a barrage of questions from the JFTC during the first several months after submitting a Form 2.

iii Leniency applications after a dawn raid

Even after a dawn raid, leniency applicants are granted the same 30 per cent reduction of administrative surcharges if both the following requirements are met: (1) they are the fifth or earlier of all applicants either before or after a dawn raid; and (2) they are also the third or earlier of all applicants only after a dawn raid.

Under the leniency programme, this leniency is available for 20 business days after the dawn raid. In practice, however, most seats for leniency are occupied on the same day as the dawn raid, or by the following day at the latest.

Applicants who apply after a dawn raid must submit a Form 3 to the JFTC. Form 3 seemingly requires detailed information and evidence to the same extent as Form 2 (the

follow-up report form to be used before the dawn raid). However, this does not mean that Form 3 cannot be submitted to the JFTC until the internal investigation is sufficiently complete for the whole form to be filled in; a Form 3 accompanied by less comprehensive information and without attached evidence is enough to secure the marker. Form 3 must be completed with more detailed information and evidence within 20 business days of the dawn raid to secure leniency status. As with a leniency application before a dawn raid, this leniency status is conditional on continuing cooperation with the JFTC. Under the leniency programme, any applicants after the dawn raid must also provide evidence that represents added value for the JFTC, but in practice this requirement can be fulfilled easily, as described above.

As in other major competition regimes, a dawn raid will trigger a leniency race in Japan. The leniency programme does not provide for a leniency-plus system under which penalties for already detected cartels would be considerably reduced by the fact that the cartel participants under investigation have reported another undetected cartel to the competition authority. In international cartel cases, however, similar systems in other major competition regimes will trigger a leniency race extending to other related products, even in Japan. A leniency race is accelerated by the JFTC's formalistic and rigid view in delineating the scope of leniency. Recently, the JFTC has become more and more inclined to grant leniency status within only a very narrow scope. For example, a leniency applicant may be granted leniency status for only one product and not for another related product. Naturally, leniency applicants want the scope of leniency to be as broad as possible, because they do not want to find themselves in a position where they have obtained full immunity on one product but have had full fines imposed in relation to another. However, as previously mentioned, the JFTC seems to adopt a very formalistic view in delineating the scope of leniency, sometimes even on a customer-by-customer basis if there are customers who have purchased large amounts. Of course, even in such cases, companies filing a leniency application regarding one customer may file another application regarding another customer when they discover cartels against that customer; however, the second application may not be eligible for the same protection as the original application if other applicants file for leniency in between times. In this way, the race for leniency has accelerated more and more, even in Japan.

iv Group filing for leniency

When the leniency programme was first introduced, all applicants were required to file a leniency application individually and separately from the other applicants, even those who were part of group companies. This was true even in international cartels in which several multinational group companies engaged in the same cartel or cartels. This meant that group companies had to make their leniency applications as individual companies, potentially leading to one company receiving full immunity, while the others received some reduction or no reduction at all.

Not surprisingly, this separate application system came under heavy criticism from leniency users. This resulted in an amendment to the leniency programme in 2009 to allow a single joint application by certain group companies. This single joint application enables all group companies named as applicants to be granted the same leniency status. As a result, if a single joint application is filed by a group company first, before a dawn raid, all the group companies listed in the application will be granted full immunity from administrative surcharges.

Two features of the single joint application system should be noted: how the group is defined and in what cases such an application is allowed. For the purpose of the leniency programme, a company is considered a parent company of another company when the parent directly or indirectly owns more than 50 per cent of voting rights in the other company (a subsidiary) and the group consists of the parent and its subsidiaries. According to this definition of a group, for example, a joint venture equally owned by two joint venture partners is not considered a subsidiary of either partner. Therefore, neither partner can file a leniency application with the joint venture. Moreover, a single joint application is allowed only where the joint applicants have been within the same group during the entire period (for a maximum period of five years) of the relevant cartels, or one of the joint applicants in the same group has assumed all the cartel violations of the other joint applicants. This latter feature is intended to deter cartel participants from misusing the single joint application system, but has been criticised by leniency users for being awkward to use.

This single joint application system can cause confusion if an applicant is unsure which corporate entities within its group were engaged in the relevant cartels, which sometimes occurs in practice, and particularly in multinationals. Of course, additional leniency applications can be filed by group companies found at a later stage to have been engaged in the relevant cartels, but these additional applications will not be considered to have been made at the time of the original application, and thus will not be granted the same leniency status as that granted to the original application. For example, if Company A files a leniency application as first-in but later finds that one of its group companies, Company B, also engaged in the relevant cartels, Companies A and B can jointly file another application upon discovery of Company B's involvement. However, if another company, Company C, which is a competitor of Companies A and B, files an application as second-in after Company A's original application but before the joint application by Companies A and B, then Company B will not be granted the leniency status of first-in, and will only be granted the status of third-in. This conclusion leads to considerable differences, since the first-in is granted full immunity, while the third-in is granted only a 30 per cent reduction.

v Discovery issues

Under Japanese law, there are no discovery procedures similar to those in the United States. In international cartel cases, however, discovery issues would inevitably arise in the context of leniency applications even in Japan, especially if such cartel cases are relevant to the United States.

The JFTC's policy regarding discovery requests regarding leniency applications is that it will not disclose leniency applications (including any attached evidence) in its possession in response to any requests from private plaintiffs or courts, either in Japan or in foreign jurisdictions.

However, if a leniency applicant has a copy of its written leniency application (including its written evidence), that copy, whether privileged or not, may be subject to discovery. This is because a voluntary submission of privileged documents to third parties, even to public authorities like the JFTC, may be deemed by the US courts as a waiver of privilege by the applicant.

To prevent a discovery issue (i.e., the involuntary disclosure of leniency documents from applicants to foreign plaintiffs, particularly US plaintiffs), the JFTC allows applicants to make oral leniency applications to a reasonable extent. More specifically, a substantial part of Form 2 (the follow-up report form to be used before a dawn raid) and Form 3 (the report

form to be used after a dawn raid) can be reported orally to the JFTC, and thereby no copies with detailed facts remain with the applicant. Consultation with, and confirmation by, the JFTC on eligibility to make an oral leniency application must precede any submission of a leniency form containing some blanks to be completed orally.

vi Conflict of interests issues

As the race for leniency, especially after a dawn raid, accelerates and extends to other related products, it is becoming widely accepted that the same counsel should not represent two or more leniency applicants in the same cartel case, because representation for one company may conflict with the interests of another.

Unlike the procedure in the United States, it is usual in Japan for the same counsel to represent both the company and its employees. This is partly because most cartel cases are subject only to administrative sanctions, none of which, including surcharge payment orders, are addressed to individual employees. For the same reason, no leniency programme is available in Japan for individuals.

vii Scope of the leniency effect

Under the Antimonopoly Act, the effect of the leniency programme extends only to administrative surcharges and not to criminal or civil sanctions.

According to the JFTC's policy statement, however, it will never make a criminal accusation against the first applicant before a dawn raid, or its employees, as long as the employees cooperate with the JFTC's investigations. As the Ministry of Justice also made an official statement in the Diet that it will honour the JFTC's judgment of making no criminal accusation, this means, in practice, that the first leniency applicant before a dawn raid and its employees are effectively also exempt from criminal sanctions. It is at the JFTC's discretion whether other leniency applicants are criminally sanctioned. In June 2012, the JFTC made a criminal accusation against three companies and seven individuals (employees of the three companies) in the Bearings cartel case. The first leniency applicant and its employees were not subject to this criminal accusation, and two of the three accused companies filed leniency applications after the dawn raid.

Regarding civil sanctions, private actions are not common in Japan. For further details, see Section VII.

V PENALTIES

Under the Antimonopoly Act, cartel violations are subject to administrative or criminal sanctions, or both, but in practice sanctions are typically administrative.

i Administrative sanctions

Administrative sanctions for violations typically consist of administrative surcharges and cease-and-desist orders.

The amount of an administrative surcharge is calculated by multiplying the number of sales of the relevant products during the entire period of the violation (for a maximum of three years) by 10 per cent. For a retailer, the 10 per cent multiplier is reduced to 3 per cent, and for a wholesaler, to 2 per cent. These multipliers are further reduced by about half for small companies. The amount of an administrative surcharge must be calculated strictly in accordance with the formula set out in the Antimonopoly Act. This means that, theoretically,

the JFTC cannot adjust the amount, either upwards or downwards, at its discretion. Unlike within the European Union, the extent of cooperation with the JFTC's investigations is not supposed to affect the amount of administrative surcharge either upwards or downwards. In practice, however, the JFTC has some practical discretion to impose a charge on one product but not others, or to impose a charge on a violation during a certain period but not during another period, thereby effectively adjusting the amount of the administrative surcharge to some extent.

Regarding cease-and-desist orders, the alleged cartel participants are usually required by the order to explicitly abandon or confirm the abandonment of the relevant cartel violations by their board resolutions. Such board resolutions would seem to admit the fact that the participants did take part in the alleged cartel violations, thereby triggering civil litigation concerns. There is no settlement procedure available in Japan for cartel violations.

Individuals are not subject to any administrative sanctions (including administrative surcharges).

ii Criminal sanctions

Criminal sanctions are imposed only for very serious offences and thus not very often – generally no more than one case per year, if any.

Criminal prosecution is carried out by public prosecutors, not by the JFTC. In practice, a prosecution will not commence without a criminal accusation by the JFTC. According to the JFTC's policy statement, it will make criminal accusations against serious cartels with a wide impact, or against repeat offenders, *inter alia*.

Individuals may be sentenced to imprisonment for up to five years or fined up to ¥5 million, or both. In practice, however, prison terms are generally between six and 18 months, unexceptionally with probation, which means that no individual has actually been sent to prison to date. Companies may be fined up to ¥500 million. There is no plea bargaining system in Japan.

Foreign companies, including their employees, have never been subject to criminal procedures for their cartel violations in Japan. It is widely accepted that the JFTC is unlikely to seek criminal sanctions against foreign companies even in the future, particularly if they have no physical presence in Japan. This view is inferred partly from the fact that in the criminal context, the government once submitted to a US court an *amicus curiae* brief opposing the extraterritorial application of the Sherman Act against a Japanese company on the grounds of international comity.

VI 'DAY ONE' RESPONSE

A dawn raid by the JFTC is generally carried out in the early morning on a weekday, and targets various sites of all the cartel participants (including their headquarters and branch offices) almost at the same time.

The departments that are mainly targeted by the JFTC are sales, marketing, accounting and legal. Executives' private offices may also be targeted. Theoretically, it is possible for the JFTC to raid private residences, but in practice this rarely happens. In exceptional circumstances, the JFTC may conduct a second raid on a previously raided site.

A company facing a JFTC dawn raid should first check the summary of the alleged cartel violations as written in the notice of alleged violations. The notice is delivered by a JFTC official to the company at the beginning of the dawn raid. In particular, the scope of the relevant products, geographical area and customers should be checked.

The number of JFTC officials to visit each site will vary, depending mainly on how large the targeted site is. The JFTC officials have the authority to inspect desks, cabinets, laptops and any other items in the raided sites, but are not allowed to search individuals. The main purpose of the inspection is to seize relevant documents and materials, including electronic data. As these inspections are conducted without a judicial search warrant, the JFTC's officials cannot use physical force to execute these administrative inspections. However, if a company refuses to allow the JFTC inspection to take place, the company may be fined up to ¥3 million, and any employee refusing to allow the inspection to take place may be sentenced to imprisonment for up to one year and fined up to ¥3 million.

After collecting relevant documents and materials, the JFTC issues a submission order to seize those documents and materials. Under Japanese law, there is no concept of privilege and thus a company cannot, in principle, refuse to submit documents and materials otherwise protected as privilege under US or EU law. The submission order, with a list attached of the documents and materials to be seized, is delivered to the company at the site, but the list is quite simple and contains only general descriptions of the documents and materials to be seized. Although the JFTC officials will seize the originals of any documents and materials, the JFTC generally allows the company to make copies of some of them, unless this unduly delays the inspection.

The JFTC officials may conduct interviews at the raid site with employees who they believe were involved in the relevant cartel violations, or even remove those employees to the JFTC's offices for interview. Although these interviews are voluntary, the JFTC does not allow a lawyer to attend, neither does it provide any copies of the employees' signed written statements. However, translators are usually allowed to attend.

Dawn raids and any following on-site inspections are generally completed on the same day, but may continue one additional day. If the company does not recognise the fact of the alleged cartel violations at the beginning of the raid, it is critically important to consider submitting a leniency application after the dawn raid (Form 3). As described in Section IV, most leniency seats become occupied on the same day as the dawn raid, or at the latest by the next day. This means that there is not enough time for a company considering a leniency application to wait for the JFTC's on-site inspections to be completed. Thus, even during the on-site inspections, the company considering a leniency application must ask the JFTC to temporarily release key employees and documents in order for it to decide whether to submit Form 3. It is also essential to make as many copies of seized documents and materials at the raided site as practically possible, because these copies will be needed to complete Form 3 in a timely manner.

VII PRIVATE ENFORCEMENT

Parties that have suffered because of cartel violations may claim damages against the cartel participants at civil courts based on general civil tort law, the Antimonopoly Act, or both. Damages claims based on the Antimonopoly Act have two features: they can be made only after the JFTC's cease-and-desist order or surcharge payment order has become final and non-appealable, and the defendants (i.e., the cartel participants) cannot argue that they had

no intention to commit the relevant cartel violation, or were negligent in doing so. Indirect purchasers are also eligible for both types of damages claim, although they may encounter some difficulties in proving the amount of their own damages.

Despite this legal framework, private actions (including derivative lawsuits) are not very common in Japan. This is partly because no US-style drivers for private actions (e.g., discovery procedures or punitive damages) are available in Japan. In other words, private actions that are self-sustained, without drivers, have the potential to be active. In fact, national and local governments have recently become quite active in claiming liquidated damages against bid rigging participants. In bid rigging cases, the number of victims is limited, and the amount of damages suffered by each victim is relatively large and easy to be proven by liquidated damages. This trend has extended particularly to private corporations that have suffered from cartels, such as those in the *Auto Parts* case.

VIII CURRENT DEVELOPMENTS

i New class action system

A new class action system was enacted in December 2013 and came into force on 1 October 2016. Before it was introduced, there was no special procedure through which a group of individual victims could collectively recover damages. As part of a series to facilitate the protection of consumers, the government enacted legislation to introduce a new class action system. This aims to enable consumers to recover damages in a simpler and more timely manner than under the previous system.

As the new class action system is being developed solely for protecting consumers, there are three notable limitations in the context of cartel violations: those who may file a class action are limited to specified consumer organisations; claims that can be brought under such a class action must be those related to consumer contracts (those concluded by and between consumers and companies), including a tort claim related to consumer contracts; and no judgment under such a class action will be binding on any consumers who do not participate in the procedure. These limitations are expected to make this new class action system considerably different from the US class action system. However, there is a possibility that the Japanese courts and legislators may partially remove these limitations or widen the scope of new class actions by broader interpretation or law amendments.

At any rate, the new class action system has increased the risk of private actions against cartel participants, and thus careful monitoring of developments in this area is needed.

ii JFTC hearing procedures abolished

After some obstacles and detours, the JFTC's hearing procedures (i.e., *quasi*-court procedures presided over by the JFTC) with respect to the JFTC's orders (including a cease-and-desist order and a surcharge payment order) was finally abolished on 1 April 2015. Thereafter, any cases with respect to such orders will be handled by the Tokyo District Court as the first instance.

Such abolishment aims to secure and improve the due process of the JFTC's antimonopoly enforcement, but its impact, in practice, has not been clear.

Appendix 1

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Hideto Ishida advises 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 Japan Fair Trade Commission (JFTC) and other foreign competition authorities for price cartels, bid rigging and similar serious alleged violations, such as the international *Vitamins*, *Graphite Electrodes*, *GIS*, *Marine Hose*, *Air Fares*, *LCD*, *Auto Parts*, *Maritime*, *Libor* and *FX* cartels. He served for seven years as the first lawyer appointed as a special investigator with the JFTC, and thus has a keen sense of the practical application of antitrust and distribution regulations to companies doing business in Japan.

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