

Market
Intelligence

CARTELS
2019

Global interview panel led by Hengeler Mueller

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

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

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

Overall, however, it is important to note that the level of cartel enforcement has slowed down in the past few years, with the JFTC only issuing formal orders in nine cases for the 2016 fiscal year and 11 cases for the 2017 fiscal year, compared to 20 formal orders in the 2012 fiscal year alone. Of the 11 administrative formal orders issued by the JFTC in the 2017 fiscal year, one was a cartel case and the remaining 10 were bid-rigging cases. Three of the latter concerned public procurement, which reflects the JFTC's continued attention on an area that it has been traditionally concerned about in the domestic economy.

2 | What do recent investigations in your jurisdiction teach us?

Since its introduction in January 2006, the leniency programme has become a key driver of cartel enforcement in Japan. In fact, in the majority of instances, investigations are initiated by a leniency application. For the 2017 fiscal year, all 11 cases for which administrative formal orders were issued by the JFTC were initiated this way. Despite initial doubts, few can now contest the importance of the programme as a key investigative tool for cartel enforcement in Japan.

Notwithstanding the slowdown in the level of cartel enforcement in recent years, there continues to be a strong uptake of the leniency programme. For the past fiscal year, JFTC statistics indicate that the number of leniency applications was



103, compared to 124 the previous fiscal year. With a total of 1,165 applications as of March 2017, the leniency system has been praised as a huge success.

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

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

“Leniency applications have become a matter of corporate compliance in recent years.”

The leniency policy will be amended by the end of 2020, provided that the amendment bill passes in the 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 per cent, depending on the extent of cooperation with the JFTC, instead of the fixed 50 per cent in the current system. The third, fourth and fifth applicants will be also eligible for a reduction in surcharge, but the reduction will vary from 10 to 50 per cent according to the extent of cooperation with the JFTC. The sixth or later applicants will be also eligible for a reduction, depending on the extent of their cooperation with the JFTC. Such changes would further align the Japanese leniency regime with the ones of other major competition authorities such as the European Commission's leniency programme.

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

Once initiated, the JFTC's investigations typically involve dawn raids, extensive interviews of the relevant employees and information requests to the relevant

companies. For international cartel cases, the JFTC will typically liaise closely with its foreign counterparts to coordinate dawn raids as well as to exchange information as to the ongoing investigations.

3 | How is the leniency system developing, and which factors should clients consider before applying for leniency?

Under the current leniency system, potential applicants should be attentive to the timing of the leniency applications, as this will determine the immunity or the amount of percentage reduction granted for cooperation. Such timing is particularly critical in Japan as the JFTC will only grant leniency treatment to a maximum of five companies (in addition to the fact that the JFTC has no discretion in determining the order of leniency applications or the percentage reduction in surcharge). A recent trend we have observed is that potential applicants have become quicker at deciding whether to cooperate with a JFTC investigation, including through applying for leniency. A key reason for this accelerated decision-making is that applying for leniency is now considered to be part of a company's culture of corporate compliance in Japan so that once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.

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 a JFTC dawn raid and used for the purpose of the investigation. Moreover, although the internal leniency programme (whereby employees who disclose cartel activities within a certain number of days receive immunity from punishment at company level) proves to be effective, the report of this internal disclosure can also be seized. Accordingly, as a practical matter, we usually encourage clients to maintain any records of attorney-client communications, legal memoranda and results of investigations with the outside legal counsel firm rather than the in-house legal department, wherever possible.

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

However, as mentioned above, the JFTC's leniency policy will be amended by the end of 2020 provided the amendment bill passes in the Parliament this year. 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, for example, cartels and bid-rigging, by regulations or guidelines pursuant to article 76 of the Antimonopoly Act. 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 the new flexible surcharge system working more efficiently.

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

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

Moreover, 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 Antimonopoly Act came into effect on 30 December 2018 when the modified version called of the Trans Pacific Partnership Agreement (TPP) known as 'TPP 11' came into effect.

The JFTC's chairman, Kazuyuki Sugimoto, has said that he considers that the commitment procedure would enable the swift resolution of cases and serve as an effective enforcement tool. Such commitment system, however, does not apply to cases relating to certain types of unreasonable restraint of trade, namely, hardcore cartels, and there is no similar commitment system-like settlement applying to



cartels in Japan at this time. There may be scope to argue that a similar commitment system, effectively granting more discretion to the JFTC, should be introduced in relation to cartels.

5 | Tell us about the authority's most important decisions over the year. What made them so significant?

In December 2017, the Supreme Court rejected Samsung SDI (Malaysia) Bhd's appeal against the JFTC's decision to issue a cease-and-desist order in relation to a pricing cartel concerning television cathode ray tubes (CRTs). Samsung SDI argued, inter alia, against the JFTC's ability to apply the Antimonopoly Act to foreign companies that produced and sold products overseas. The CRTs were sold to Japanese manufacturing subsidiaries outside Japan and the price-fixing agreement also took place outside Japan. However, the Supreme Court held that even if the cartel agreement took place outside Japan, so long as the cartel has caused a competitive restraint to the Japanese market, Japanese antitrust law would be applicable. The Supreme Court listed various factors to determine a competitive restraint to



the Japanese market. In particular, it pointed out that although the Japanese TV manufacturers purchased CRTs through their manufacturing subsidiaries outside Japan, the Japanese manufacturers controlled these entities by giving instructions regarding important purchase conditions. The Supreme Court also pointed that direct negotiations took place between the Japanese TV manufacturers and the cartel participants on the condition that the CRTs would be purchased by their manufacturing subsidiaries. As compared to the High Court's judgment that defined the scope of 'user' (entities on the demand side) perhaps too broadly, the Supreme Court did not mention the concept of user and focused instead on a detailed review of the facts. The judgment also held that even if the delivery of the products covered by the cartel took place outside Japan, the turnover of those products could still be included as the basis for calculating surcharges. The Supreme Court's judgment is noteworthy as it relates to the first case in which the JFTC ordered surcharges against foreign companies, and it confirms such an extraterritorial application of the Antimonopoly Act by the JFTC.

6 | What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

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

Notably, the first case heard under this new hearing procedure took place in October 2015, involving 11 companies that had participated in bidding for snow-melting equipment works for the Hokuriku Shinkansen (bullet train) ordered by the Japan Railway Construction, transportation and Technology Agency. Under the new hearing procedure, the JFTC provided the 11 companies written notice of the contents of the proposed orders and gave them opportunities to view and copy the evidence forming the basis for the orders and to submit their opinions and evidence to the JFTC. If there was any dissatisfaction with an order, a party could appeal within six months from such knowledge or within a year from the date of the JFTC cease-and-desist order to the Tokyo District Court.

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

7 | How is private cartel enforcement developing in your jurisdiction?

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

However, the large number of cartel enforcement cases is concentrated in the construction industry for the procurement of public works (typically for the local government) where, generally, there is a stipulation in the contract providing that 10–20 per cent of the contract price is recoverable if the company is involved in illegal activities. Accordingly, given the existence of contractual protection and out-of-court

“Driven by recent shareholder derivative actions, there has been an increased uptake of the leniency system based on the recent focus on corporate compliance.”

settlement in the vast majority of cartel cases as well as the historically low levels of damages claims, we expect that private cartel enforcement will continue to be relatively limited in Japan.

8 | What developments do you see in antitrust compliance?

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

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

where the information exchange was intended to monitor price restrictions or gives a common indication of current or future prices.

Based on our experience, one of the greatest challenges for clients in antitrust compliance is the social aspects of the Japanese business environment. In Japan, social gatherings and greetings between key industry players are commonplace and traditionally considered to be an indispensable part of the business culture. Business associations also provide opportunities for competing businesses to engage in discussion. Given the comparatively high frequency of interaction between competitors in Japan, there is increased potential for the regulator to draw inferences of agreed price increases from extraneous outside events. This is especially the case where the conduct in question potentially affects competition in territories outside Japan and in particular in jurisdictions that take a much stricter view on exchange of information between competitors (eg, the EU).

The traditional lack of dedicated antitrust specialists in legal in-house teams in Japan could also pose potential challenges to antitrust compliance. However, the potential introduction of attorney–client privilege in Japan could make the antitrust compliance work more effectively.

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

As mentioned above, 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. We anticipate that the introduction of a new system will bring significant implications for clients. 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 10 years (ie, up to seven years longer than currently). The difference in the surcharge calculation rate depending on the relevant party's type of business, for example, a retailer or wholesaler, will be abolished, and the rate will be fixed at 10 per cent 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.

In addition, the introduction of a level of discretion would enable the JFTC to take into account various factors in determining the amount of the fine and the level of reduction to be granted to leniency applicants, including, for example, the degree of cooperation and additional value of evidence provided by a leniency application. Once this policy is implemented, we expect clients to compete increasingly harder

for evidence, particularly value-adding evidence (which is a requirement in some jurisdictions such as the EU). The JFTC is also likely to impose higher fines for cartel conduct, which in turn is likely to have a greater deterrent effect for cartel activities in the future. Should the JFTC align the basic tenets of its leniency system with that of other major jurisdictions such as the EU and the US, it would also mean that the current discrepancy between the test applied by enforcers in Japan and other jurisdictions would make it easier and more cost-effective for leniency applicants in international cartel cases to obtain leniency in multiple jurisdictions by essentially relying on a single set of corporate statements and supporting evidence.

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

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The Inside Track

What was the most interesting case you worked on recently?

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

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

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

We think that it is imperative that the JFTC be given some degree of discretion in the surcharge payment system. The high transparency and predictability of the current system (owing to statutorily fixed surcharge rates) can, in certain cases, result in less economic incentive for companies to cooperate with the JFTC and undermine the intended deterrent effect of competition rules.

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

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