GCR INSIGHT

ASIA-PACIFIC
ANTITRUST REVIEW 2021

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For further information please contact Natalie.Clarke@lbresearch.com

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Global Competition Review is a leading source of news and insight on national and cross-border competition law and practice, with a readership that includes top international lawyers, corporate counsel, academics, economists and government agencies. GCR delivers daily news, surveys and features for its subscribers, enabling them to stay apprised of the most important developments in competition law worldwide.

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This annual review expands each year, especially as the Asia-Pacific region gains even more importance in the global antitrust landscape. It has some of the world's most developed enforcers – in South Korea and Japan, for example – but it also has some of the world's newest competition regimes, including in Malaysia and Hong Kong.

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Japan: Cartels

Hideto Ishida and Atsushi Yamada
Anderson Mōri & Tomotsune

In summary

This chapter provides a comprehensive overview of cartel regulation in Japan, including the recent amendment to the Anti-Monopoly Act in 2019.

Discussion points

- Overview of cartel regulation in Japan – cease-and-desist orders, payment orders for surcharge and criminal sanctions;
- the Leniency Programme and the Reduction System for Cooperation in Investigation;
- practical Issues of leniency;
- international cooperation; and
- private enforcement.

Referenced in this article

- Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 14 April 1947) (the Anti-Monopoly Act) (www.jftc.go.jp/en/legislation_gls/amended_ama09/20122501.pdf).

Cartel regulation in Japan

Cartels are prohibited in Japan as an 'unreasonable restraint of trade', stipulated under the second half of article 3 of Act No. 54 of 1947, as amended, otherwise known as the Anti-Monopoly Act (AMA). Although the AMA does not include any particular provisions about extraterritorial applicability, it is generally understood to be applicable to international cartels. The position of the Japan Fair Trade Commission (JFTC), and the generally accepted view in Japan, is that even if alleged violators have no physical presence in Japan, the AMA could be applied to conduct occurring outside Japan as long as such conduct results in certain substantial effects on Japanese markets, and the Supreme Court of Japan confirmed this in 2017.

The JFTC has been consistently vigorous in its investigation of international cartels, and with the amendment to the AMA introduced in 2002, the JFTC is now able to service its orders against foreign companies by way of service by publication. Service by publication is a method of service in which an order is deemed to be served to the recipient after a certain period from the date the JFTC posts the order on the board in front of the JFTC office. Accordingly, if the JFTC intends to issue a reporting order to a foreign company, it is now able to exercise its investigative power by simply making a service by publication against such foreign company (although it is customary for the JFTC to first request that the foreign company appoint an attorney in Japan and then serve the reporting order and other proceedings through such attorney).

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

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

Cease-and-desist order

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

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

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

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

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

The statute of limitations for the JFTC to issue a cease-and-desist order is seven years. The statute of limitations starts from the date on which the company discontinues the violation.

Payment order for surcharge

The JFTC must order a payment of surcharge when it finds an unreasonable restraint of trade that relates to consideration (article 7-2, paragraph 1 of the AMA). The amount of surcharge is basically calculated by multiplying the amount of sales of the relevant products during the period in which the unreasonable restraint of trade was implemented by the surcharge calculation rate of 10 per cent.

In 2019, the AMA was amended to enable the JFTC to calculate and impose an appropriate amount of surcharges taking into consideration the even more complicating economic environments. Under the amendment, the maximum period subject to the surcharge was extended from three years to 10 years (or more, if the infringement continues after the JFTC commences its investigation). Also, with respect to the basis of calculation, new provisions were introduced to cover certain cases where the company is deemed to have obtained unjust gains due to the infringement such as:

- the amount of sales of the relevant products of certain companies that belong to the same group as the violators and that did not participate in the infringement but received the instructions or information from the violators (article 7-2, paragraph 1, items 1 and 2 of the AMA);
- the amount of consideration for the business closely related to products subject to cartels, more specifically, providing products that are necessary for the supply of the products subject to the cartel (eg, subcontract), on the condition not supplying products subject to the cartel (article 7-2, paragraph 1, item 3 of the AMA); and
- the financial gains as a reward for not supplying the products subject to cartels (in this case, the whole amount of the financial gains would be the surcharge amount, and this would be added to the surcharge amount calculated using the surcharge calculation rate, if any) (article 7-2, paragraph 1, item 4 of the AMA.)

Together with the extension of the maximum period subject to the surcharge from three years to 10 years (or more, in certain circumstances), the AMA was amended to allow the JFTC to estimate the amounts of the basis of calculation listed above, if the company does not provide materials that should form the basis for the calculation (article 7-2, paragraph 3, of the AMA).

The calculation rate for the surcharge will be increased to 150 per cent of the original rate if the relevant company, its 100 per cent subsidiary or a business that it has acquired by merger, corporate split or business transfer has been subject to a payment order for surcharge resulting from unreasonable restraint of trade or private monopolisation within the past 10 years. In addition, the calculation rate for the surcharge will also be increased to 150 per cent of the original rate if the company played a major role in an unreasonable restraint of trade, required or requested other companies to obstruct the JFTC's investigation, or required or requested other companies not to apply for leniency (including the Reduction System for Cooperation in Investigation). If a company falls under both of the above cases, the calculation rate of surcharge will be doubled.

If certain requirements are satisfied, a company that has not committed any particular violation, but that acquires a business that has committed a violation by merger, corporate split or business transfer, can still be subject to a payment order for surcharge.

The statute of limitations for a payment order for surcharge is seven years.

Criminal sanctions

Criminal sanctions are available for unreasonable restraint of trade. If an employee or officer of a company commits an unreasonable restraint of trade, the company may be punished by a fine of up to ¥500 million. Any individual who commits an unreasonable restraint of trade may be punished by imprisonment with labour for up to five years, a fine of up to ¥5 million, or both.

A criminal penalty may be imposed only after an accusation is filed by the JFTC and only the JFTC is entitled to file such accusations (article 96, paragraph 1 of the AMA). In practice, the JFTC determines whether to file accusations after consulting with the Public Prosecutors' Office at the Accusation Council.

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

Leniency

The leniency system was introduced by an amendment to the AMA in 2005, together with the reform of the surcharge system. Because the surcharge calculation rate was increased by the 2005 amendment to the AMA, the number of leniency applications increased rapidly. However, after 2012, the number of applications varies by year. Table 1 shows the number of applications for leniency for each fiscal year following the 2005 amendment.

Table 1: Number of applications for leniency for each fiscal year following the 2005 amendment

Fiscal year	No. of leniency applications
4 January 2006 to 31 March 2006	26
1 April 2006 to 31 March 2007	79
1 April 2007 to 31 March 2008	74
1 April 2008 to 31 March 2009	85

Fiscal year	No. of leniency applications
1 April 2009 to 31 March 2010	85
1 April 2010 to 31 March 2011	131
1 April 2011 to 31 March 2012	143
1 April 2012 to 31 March 2013	102
1 April 2013 to 31 March 2014	50
1 April 2014 to 31 March 2015	61
1 April 2015 to 31 March 2016	102
1 April 2016 to 31 March 2017	124
1 April 2017 to 31 March 2018	103
1 April 2018 to 31 March 2019	72
1 April 2019 to 31 March 2020	73
Total	**1310**

The leniency system was significantly amended by the 2019 amendment to the AMA, with the aim to increase incentives for parties to cooperate in with JFTC's investigations and to allow the JFTC to impose an appropriate amount of surcharge according to the nature and extent of the violation. Prior to the amendment, under the Leniency Programme, the reduction rate for leniency applicants were determined solely based on the order of the application and the reduction rate was a fixed rate. However, the 2019 amendment introduced a new system (the Reduction System for Cooperation in Investigation) where the reduction rate would be determined according to the degree of the company's cooperation to the JFTC's investigation (ie, the value of proof which the enterprise submits voluntarily) in addition to the existing Leniency Programme. With the addition of the new system, although the reduction according to the order of application provided for by the original Leniency Programme still remains, the reduction rates thereof were lowered. Further the amended Leniency Programme removed the limits to the number of applicants that may qualify for the reduction.

Table 2: Reduction rate after the 2019 amendment came into effect in 2020

The date of application	The order of application for the Leniency Programme	Reduction rate according to the order of application (Leniency Programme)	Reduction rate according to the degree of cooperation (Reduction System for Cooperation in Investigation)	Total reduction rate
Before the investigation start date	1st	100%	N/A	100%
	2nd	20%	+ up to 40%	Up to 60%
	3rd–5th	10%		Up to 50%
	6th and after in order	5%		Up to 45%
After the investigation start date	Up to 3*	10%	+ up to 20%	Up to 30%
	Other than the above	5%		Up to 25%

* They can acquire the reduction rate on condition that the total number of applicants (the applicants who apply before the Investigation Start Date are included) is five or less.

Source: JFTC website

Leniency Programme

Under the AMA, the first company that reports its involvement in a cartel violation to the JFTC before a dawn raid is entitled to full exemption from administrative surcharges (article 7-4, paragraph 1 of the AMA). The second company to report before a dawn raid is entitled to a 20 per cent reduction of administrative surcharges, the third, fourth and fifth companies to report before a dawn raid are each entitled to a 10 per cent reduction, and the sixth company and after to report before a dawn raid is entitled to a 5 per cent reduction (article 7-4, paragraph 2 of the AMA). Even after a dawn raid, all companies that turn themselves in are entitled to a 10 per cent reduction of administrative surcharges as long as they are the fifth or earlier among both companies that self-reported before the dawn raid and companies that self-reported after the dawn raid, and the third or earlier among companies that self-reported after the dawn raid, and any other companies that turn themselves in are entitled to a 5 per cent reduction (article 7-4, paragraph 3 of the AMA). An overview of the reduction rates under the Leniency Programme is described in Table 2. Application for leniency after a dawn raid is permitted only within 20 business days after the dawn raid. In practice, five of the available positions for leniency often become occupied on the same day as the raid or by the next day at the latest.

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

The applicant before a dawn raid must first submit Form 1 to the JFTC by email. Form 1 requires the provision of certain limited information:

- an outline of the violation, such as a general description of the relevant product;
- the manner of cartel conduct (eg, price-fixing, bid-rigging or market allocation); and
- the period over which the violation took place.

Applicants who submit Form 1 are granted the status of 'marker' and other applicants are prevented from leapfrogging such applicants. To obtain definitive leniency status (conditional on continuing cooperation, see below), those applicants must provide further detailed information by submitting a Form 2 within the period thereafter designated by the JFTC. The JFTC generally designates two weeks as the period to submit Form 2, but may grant a longer period for foreign applicants, in consideration of the difficulties in communicating internationally and the time necessary for translation. The information required in Form 2 is more detailed, requiring, for example:

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

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

Leniency applicants after a dawn raid must submit a Form 3 to the JFTC. Form 3 requires the same extent of comprehensive information as Form 2. However, as a matter of practice, the JFTC will accept a Form 3 with less comprehensive information accompanying submissions and allow

the leniency applicant to supplement the information within 20 business days after the dawn raid. The definitive leniency status of an applicant after a dawn raid is also conditional on its continuing cooperation with the JFTC. All leniency application forms must be submitted in Japanese.

As mentioned above, the definitive leniency status of a leniency applicant is conditional upon its continuing cooperation with the JFTC; the leniency applicant must cooperate until a cease-and-desist order or a surcharge payment order is issued (or until the JFTC issues a notice that it will not issue such orders, in the case of the first applicant). It is generally understood that leniency applicants have a duty to cooperate with JFTC investigations in the sense that the JFTC can require applicants to submit additional reports and materials, and that failure to do so, or submission of false reports or materials, will disqualify the applicants from receiving leniency. However, in practice, since the AMA does not require leniency applicants to proactively submit all information regarding the violation, the extent of required cooperation may not be as extensive as in some other jurisdictions.

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

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

There was one minor change to the leniency programme in 2016. After 1 June 2016, the names of all leniency applicants will be made public at the time of the issuing of the surcharge payment order, whereas under the previous practice only the names of applicants that have made a request for publication were made public.

Reduction System for Cooperation in Investigation

As mentioned above, the 2019 amendment to the AMA introduced a new system (Reduction System for Cooperation in the Investigation, article 7-5 of the AMA). Under this new system, a company that has applied for leniency (excluding the company that first applied (before a dawn raid)), may

request a conference with the JFTC to discuss potential additional reduction rates taking into consideration the extent of the company's cooperation, and enter into an agreement with the JFTC to that effect. Under this new system, companies that applied for leniency before a dawn raid may qualify for up to an additional 40 per cent reduction rate, and companies that applied for leniency after a dawn raid may qualify up to an additional 20 per cent reduction rate.

Leniency applicants that wish to use this new system must file a Form 4 with the JFTC within 10 business days from the date the company has received a written notice from the JFTC confirming receipt of the submission of reports and materials required for the application for leniency. Form 4 simply indicates that the company is applying for a conference with the JFTC to discuss items required for the application of the Reduction System for Cooperation of Investigation.

At the conference, the company is to explain the content of its intended cooperation, including the submission of reports and materials it intends to make pursuant to the potential agreement with the JFTC and, in response, the JFTC is to present the additional reduction rate. With respect to the intended cooperation, the company must commit to respond to any additional requests from the JFTC regarding submission of reports and materials and allowing inspections.

In the agreement, the JFTC will either specify a certain reduction rate or identify a range of the reduction rate. In the case of specifying a certain reduction rate, the JFTC will provide a specified rate within the statutory maximum rate (40 per cent for leniency applicants before the dawn raid and 20 per cent for leniency applicants after the dawn raid) taking into consideration the extent the information the company has at the time of the agreement, including the reports and materials submitted through the Leniency Programme, is likely to contribute to revealing the truth of the case. In the case of identifying a range, the JFTC will provide a range within the statutory maximum rate according to the extent the reports and materials submitted through the Leniency Programme and the reports and submissions that are to be submitted through the Reduction System for Cooperation in Investigation are likely to contribute to revealing the truth of the case. If a range is identified, the actual reduction rate will be determined by the JFTC taking into consideration the information that the company has acquired after the agreement as well. The AMA provides that the JFTC may request the latter type of reduction rather than the former type if the company is likely to ascertain new facts or materials that would contribute to revealing the truth of the case after the agreement but a certain period would be necessary for the submission of such new facts or materials. In this regard, facts or materials that were ascertained when responding to requests for reporting and submission from the JFTC may also be taken into consideration. Further, given that the latter case (ie, identifying a range) allows for taking into consideration the content of cooperation throughout the investigation period, and thus likely to be more favourable to the company, the JFTC has indicated that it would usually request the company to enter into an agreement that includes a range of the reduction rate.

With respect to the evaluation of to what extent the cooperation contributes to revealing the truth of the case, the JFTC will consider three factors, namely, whether the submission of reports and materials are: (i) specific and detailed; (ii) comprehensively cover items that would contribute to revealing the truth of the case such as items relating to the relevant product, manner of cartel conduct, participants, period, status of implementation of the violation, any other items concerning the violation, figures that form the basis of calculating the surcharge amount and

surcharge rate; and (iii) can be established based on the reports and materials submitted by the company. Further details, such as examples of items that may be considered as items that would contribute to revealing the truth of the case and the reduction rate that the JFTC is likely to apply based on the consideration of the three factors above, (See Table 3) are provided for in the guidelines issued by the JFTC (the Guidelines to Reduction System for Cooperation in Investigation).

Table 3: Reduction rates according to the degree of contribution to revealing the truth of the case

Before the investigation start date	After the investigation start date	Degree of contribution to revealing the truth of the case
40%	20%	High (satisfying all factors)
20%	10%	Medium (satisfying two factors)
10%	5%	Low (satisfying one factor)

Source: JFTC website

Whether to enter into an agreement will be decided by independent judgements of the JFTC and the company. Given that the company may provide explanations regarding its potential cooperation and submissions during the conference with the JFTC, and that the JFTC may keep records, if the company and the JFTC did not reach an agreement, the JFTC is prohibited from using any documents that contain such explanation as evidence in its investigation of the case (article 7-5, paragraph 7 of the AMA).

Once the company and the JFTC conclude an agreement, the company shall perform the cooperation stipulated in the agreement by the date provided for in the agreement. If the company fails to perform by the agreed date, it would no longer be eligible for any reduction of the administrative surcharge (article 7-6, paragraph 6, item 7 of the AMA).

Determination procedure

In Japan, there is no concept of attorney–client privilege. While the possibility of introducing attorney–client privilege was also discussed during the deliberation of the amendments to the administrative surcharge system, the 2019 amendment of the AMA fell short of introducing attorney–client privilege. Instead, the JFTC established a new procedure called the 'determination procedure' in its investigation rules. Under the determination procedure, if the JFTC ordered submission of documents or other objects, typically during a dawn raid, the JFTC shall return those recording the contents of the confidential communications between the attorney and the company without the JFTC officials engaged in the investigation of the relevant case having access to the contents, provided that certain conditions are confirmed pursuant to procedures set out in the Rules on Investigations by the Fair Trade Commission.

The determination procedure is only applicable to confidential communications between the company and its attorney that: (i) satisfy the statutory requirements discussed below; and (ii) pertains to legal opinions concerning acts alleged to be in violation of the AMA (Specified Communication) to which the Leniency Programme is applicable (ie, acts falling within unreasonable restraint of trade such as cartels and bid-rigging. However, this procedure is only applicable to the administrative procedure that satisfies the statutory requirements discussed below). For such communication to qualify for the treatment under this procedure, requirements regarding

indication (labelling); place of storage; and scope of persons who know the contents, as set out in the JFTC investigation rules must be met as well, and also the company must promptly submit a written request for the application of this procedure to the JFTC official at the time of the submission order, which is typically issued on the day of the dawn raid. Further, the company must submit a log within two weeks of the day the submission order was issued, unless there are special circumstances.

The JFTC investigator that receives the request shall, after confirming the indication and situation concerning storage, place the object in an envelope and seal it, and then issue the submission order. The object would then be transferred to the Determination Officer designated by the JFTC for each case who would then within two weeks of the issuance of the submission order, confirm the description of the application, the submission of the log and the appropriate storage; and within another six weeks, confirm whether the contents of the communication qualify as Specified Communication and whether there are any documents that are outside the scope of the treatment under this procedure. Once the above are confirmed, the determination officer shall place the object in an envelope and seal it, and then notify the company for immediate return. However, objects that do not satisfy the confirmation shall be transferred to the JFTC investigator.

Practical issues of leniency

Scope of leniency

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

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

Group filing for leniency

Under the Japanese Leniency Programme, when more than one company within the same group is engaged in cartel violations, it is possible for those group companies to file a single joint application (article 7-4, paragraph 4 of the AMA), in which case the leniency status is granted to all group companies named as applicants on the application form. It is also possible for group companies to file separate applications individually (article 7-4, paragraphs 1–3 of the AMA), but in such cases, each company will be granted leniency status based solely on its own application. Given the nature of this system, companies understandably usually prefer to apply for a single joint application over multiple individual applications in order to share a higher leniency status.

In practice, however, there are cases where an applicant is not sure which companies within its group were engaged in the violation. This is often the case for multinational corporations. Of course, it is possible to file additional leniency applications with respect to group companies that are found at a later stage to have been engaged in the violation. However, such additional applications will not be considered to have been made retroactively at the time of the original application and thus will not be granted the same leniency status as was granted to the original application. For example, if a company files a leniency application and is the first company to file, but later finds that one of its subsidiaries was also engaged in the violation, the parent company and the subsidiary can jointly file another application at the time of discovery of the subsidiary's involvement; however, if another company that is a competitor of both the parent company and the subsidiary is the second company to file an application after the parent company's original application and before the joint application by the parent company and the subsidiary, the subsidiary will not be granted the leniency status of the first company to file but will only be granted the status of the third filing company. This can be a serious problem because only the first company is granted full immunity from fines, while the third company is granted a 10 per cent reduction of the fine based on the Leniency Programme, and together with additional reduction under the Reduction System for Cooperation in Investigation at most a total of 50 per cent reduction.

Another issue relating to group filing is how the concept of a 'group' is defined under the AMA. That is, for the purpose of the Leniency Programme, a company is considered to be a parent company of another company when that parent directly or indirectly owns more than 50 per cent of the voting rights in that other company (the subsidiary), and a group can only consist of a parent and its subsidiaries (article 7-4, paragraph 4 of the AMA). According to this definition of a 'group', for example, a joint venture that is equally owned by two joint venture partners is not considered a subsidiary of either partner. Therefore, that joint venture cannot file a leniency application jointly with either of the partners.

JFTC's large backlog of leniency applications

Table 4 shows the number of cases of bid-rigging and price cartels for which the JFTC took legislative action and, among those, the number of cases and the number of companies for which leniency was applied.

Table 4: Number of cases of bid-rigging and price cartels for which the w took legislative action and, among those, the number of cases and the number of companies for which leniency was applied

Fiscal year	No. of cases of bid-rigging and price cartels for which legislative action has been taken	No. of cases in which application of the leniency system was publicly released	No. of companies for which application of the leniency system was publicly released
4 January 2006 to 31 March 2006	17	0	0
1 April 2006 to 31 March 2007	9	6	16
1 April 2007 to 31 March 2008	30	16	37
1 April 2008 to 31 March 2009	11	8	21
1 April 2009 to 31 March 2010	22	21	50
1 April 2010 to 31 March 2011	10	7	10
1 April 2011 to 31 March 2012	17	9	27
1 April 2012 to 31 March 2013	20	19	41
1 April 2013 to 31 March 2014	17	12	33
1 April 2014 to 31 March 2015	7	4	10
1 April 2015 to 31 March 2016	7	7	19
1 April 2016 to 31 March 2017	9	9	28
1 April 2017 to 31 March 2018	11	11	35
1 April 2018 to 31 March 2019	7	7	21
1 April 2019 to 31 March 2020	9	9	26
Total	**203**	**145**	**374**

If you compare the number of companies for which application of the leniency system was publicly released with the number of leniency applications in Table 1, the number of companies in Table 4 is significantly lower. Based on this and our experience, it can be said that substantial numbers of leniency applications have never led to investigations by the JFTC. In other words, the JFTC is likely to have a large backlog of leniency applications. Under the Japanese Leniency Programme, leniency applicants are required to cease cartel conduct before dawn raids, but in reality, most applicants choose to voluntarily cease cartel conduct immediately after their application unless

the JFTC designates otherwise. When an applicant voluntarily ceases the violation but the JFTC does not investigate the violation, only that leniency applicant loses supra-competitive profits earned through the cartel, and other co-conspirators in the same cartel can continue to earn illegal supra-competitive profits by virtue of their cartel activities, even for years after. Although morally questionable, this situation places the leniency applicant in a dilemma since leniency applicants are not allowed to disclose to third parties that they filed a leniency application without a justifiable reason and, as a result, this dilemma may reduce incentives of corporations to apply for leniency.

International cooperation

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

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

Private enforcement

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

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

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

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

Hideto Ishida
Anderson Mōri & Tomotsune

Hideto Ishida counsels a variety of domestic and foreign multinational companies in Japanese antitrust and international competition matters, including those relating to mergers and acquisitions, joint ventures, distribution agreements, licence agreements and other cooperation agreements. He also represents many companies involved in investigations before the JFTC and other foreign competition authorities for price cartels, bid-rigging and similar serious alleged violations such as *Vitamin*, *Graphite Electrode*, *GIS*, *Marine Hose*, *Air Fare*, *LCD*, *Autoparts*, *Maritime*, *Libor*, *Tibor* and *FX* international cartels. He served for seven years as the first attorney appointed as a special investigator with the JFTC, and thus has a keen sense of the actual and practical application of antitrust and distribution regulations to companies doing business in Japan.

Atsushi Yamada
Anderson Mōri & Tomotsune

Atsushi Yamada has extensive experience in litigation and general corporate matters. A former judge for the Tokyo District Court, as well as other courts, his practice covers a wide range of commercial litigation, with a focus on antitrust, international competition and employment law. His antitrust practice ranges from advice relating to investigation by competition authorities (including application for amnesty and leniency) and representation in courts and tribunals challenging decisions made by agencies, to follow-on civil litigation and merger filings. He also provides general antitrust advice relating to setting up businesses, drafting contracts and addressing issues at the intersection with IP, and assists in preparing compliance manuals and conducting compliance trainings. His clients include major companies in various industries, such as information technology, pharmaceuticals, manufacturing, construction, transportation, financial institutions and trading houses.

Anderson Mōri & Tomotsune

Anderson Mōri & Tomotsune (AMT) is among the largest and most diversified law firms in Japan, offering full corporate services. Our flexible operational structure enables us to provide our corporate clients with effective and time-sensitive solutions to legal issues of any kind. We are pleased to serve Japanese companies, as well as foreign companies doing business in Japan. In response to the increasingly complex and varied legal needs of our clients, we have grown significantly, augmenting both the breadth and depth of expertise of our practice.

AMT has one of the leading international antitrust and competition practices in Japan and has advised on many of the highest-profile, most complex international cartel investigations and merger control transactions. We continuously work together with top competition practitioners around the world and are well accustomed to coordinating with lawyers from international firms in formulating and implementing global competition strategies. To that end, our Japanese attorneys work closely together with our native English-speaking lawyers to provide advice and assistance at a level that matches the quality our clients are accustomed to receiving in their home jurisdictions.

Our competition practice is highly ranked, having earned a Band 1 ranking from *Chambers Asia-Pacific* for 12 consecutive years (from 2010 to 2021). Nine AMT lawyers in this practice area were nominated to the list of recognised competition lawyers in *Who's Who Legal: Competition 2020*.

Otemachi Park Building,
1-1-1 Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1000
Fax: +81 3 6775 2288

www.amt-law.com

Hideto Ishida
hideto.ishida@amt-law.com

Atsushi Yamada
atsushi.yamada@amt-law.com

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