

Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

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Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: [shutterstock.com/g/anmalkov](https://www.shutterstock.com/g/anmalkov)

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Research Ltd
ISBN: 978-1-83862-735-5

Printed and distributed
by Encompass Print
Solutions

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Japan

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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?

Recently, the Japan Fair Trade Commission (JFTC) has turned its attention to enforcement against international cartels, imposing very high fine payments on contravening companies. For example, in the capacitors case – the 2016 international cartel case involving manufacturers of aluminium and tantalum electrolytic capacitor products – 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.

In addition to international matters, the JFTC has aggressively pursued domestic enforcement in recent years. In July 2019, in the biggest Japanese antitrust penalty on record, the JFTC issued fine orders totalling ¥39.9 billion against eight road-building companies in relation to price-fixing cartels for asphalt mixtures. Subsequently, in September 2019, the JFTC levied another fine order for a total amount of ¥25.7 billion against beverage can makers relating to price-fixing cartels.

Additionally, the JFTC has recently been focusing on enforcement in the digital economy sector because of the recent surge of economic activity in this area. In particular, it has published a series of reports, including the Report Regarding Trade Practices on Digital Platforms in 2019 and a report in 2021 focusing on e-commerce, mobile applications and digital advertisements. These reports do not particularly focus on cartels, but they clarify the preferred approaches towards competition policy in the digital 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. In recent years, almost all cartel or bid-rigging cases in 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



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Vassili Moussis



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“The JFTC has recently been focusing on enforcement in the digital economy sector.”

past fiscal year, JFTC statistics indicate that the number of leniency applications was 73, compared to 72 the previous fiscal year. With a total of 1,310 applications as at March 2020, 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 fine and criminal indictment or merely a partial reduction.

It is notable, therefore, that the leniency policy was amended at the end of 2020. Under the new policy, there is no limitation to the number of leniency applicants. While the first applicant is granted full immunity under the new policy, as before, the second applicant can only obtain a reduction in fine of between 20% and 60%, depending on the extent of cooperation with the JFTC – instead of the fixed 50% under the previous system. The third, fourth and fifth applicants are also eligible for a reduction in fine, but the reduction will vary from 10% to 50% 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. These changes further align the Japanese leniency regime with those of other major competition authorities, such as the European Commission's leniency programme. Under the new policy, regulators and leniency applicants are expected to interact more closely than before to facilitate the investigation.

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

Once initiated, the JFTC's investigations still 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 and to exchange information about 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 application, as this will determine the immunity or the fine reduction percentage granted for cooperation. A recent trend we have observed is potential applicants becoming 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, therefore once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.

Also important is the fact that as at February 2021 there is no concept of attorney-client privilege in Japan, in contrast to many common law jurisdictions. This means that, during a JFTC investigation, documents held by a client containing attorney-client communications or any documents held by in-house legal staff (including the results of internal investigations) can be obtained by the JFTC in a dawn raid and

“The JFTC’s new leniency policy only came into effect at the end of 2020.”

used for the purposes of the investigation – except when the JFTC decides that documents meet certain requirements under the Determination Procedure introduced at the end of 2020. Moreover, while the internal leniency programme proves to be effective (whereby employees who disclose cartel activities within a certain number of days receive immunity from punishment at company level), 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 with 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, as mentioned earlier, the JFTC’s new leniency policy only came into effect at the end of 2020. Following the passage of an amendment bill, the JFTC announced that it was also preparing regulations and guidelines to introduce a

new system known as the Determination Procedure. This system enables certain documents to be protected in administrative investigations regarding unreasonable restraints of trade (such as cartels and bid-rigging) under article 76 of the Antimonopoly Act (AMA). Last August, the JFTC revealed the details of the procedures for the introduction of a limited type of protection from disclosure for certain types of documents. When a company subject to accusation receives a submission order for certain documents from the JFTC officers during dawn raids, the company will be entitled to claim that the documents should not be subject to the order because the documents contain attorney–client communications. In that case, the JFTC officers will order the submission of the documents, seal the documents and place them under the control of the Determination Officers at the Secretariat of the JFTC, which are independent from the Investigation Bureau. The Determination Officers will then determine whether the documents at issue satisfy the conditions provided under the new regulations and guidelines. If the conditions are satisfied, the documents would be promptly returned to the company. The rationale behind the introduction of this limited form of protection from disclosure is to protect communications between companies and outside attorneys in connection with investigations into unreasonable restraints of trade, which should result in a more efficient fining system. However, the protection under the Determination Procedure is severely limited and does not amount to the introduction of a form of attorney–client privilege such as that found in certain common law jurisdictions. For those reasons, it is fair to say that currently there is still no concept of attorney–client privilege in Japan.

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

The JFTC is expected to complete its investigations within a reasonable time. Nevertheless, we have recently seen a trend of investigations lasting longer than one year, with more complex cases being investigated for 18 months or more.

Moreover, plea-bargaining and a commitment system were introduced in 2018. As regards plea-bargaining, the Criminal Procedure Law was amended in 2016 and plea-bargaining for certain types of crimes, including cartels, 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 the persons concerned agree with the conditions made by the prosecutor and their attorney's consent is given. The amendment to the AMA with respect to the introduction of a commitment system came into effect on 30 December 2018, when the modified

version of the Trans-Pacific Partnership Agreement known as TPP11 came into effect. Ten months after its introduction to Japanese antitrust law, the commitment system was first applied by the JFTC to Rakuten Travel. Rakuten Inc, which operates an online travel agency known as Rakuten Travel, allegedly restricted unfairly the businesses of accommodation operators by including most-favoured-nation clauses relating to the prices and number of rooms in contracts between Rakuten Inc and the accommodation operators seeking to place their information on the Rakuten Travel website. The JFTC approved a commitment plan presented by Rakuten Inc and completed its investigation against the company without finding a violation. There have been a total of six cases resolved under the commitment procedures as at February 2021. The swift resolution of cases through these procedures ultimately benefits both the accused parties and the JFTC, as it saves time and effort that could otherwise be committed to investigations. The parties are inevitably required to admit the alleged facts through a board decision and to notify stakeholders of the decision. From our experience, these requirements could be a potential downside of using the commitment system and also an important factor to be considered in the first instance when deciding whether to use the system.

The former chairman of the JFTC, Kazuyuki Sugimoto, said that he believes the commitment procedure would enable the swift resolution of cases and serve as an effective enforcement tool. Nevertheless, the commitment system does not apply to cases of certain types of unreasonable restraint of trade (ie, hard core cartels) and there is currently no similar commitment system for cartels in Japan. There may be scope to argue that a similar commitment system, effectively granting more discretion to the JFTC, should be introduced for cartels.

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

In July 2019, the JFTC fined eight road-building companies approximately ¥39.9 billion, the biggest Japanese antitrust fine on record, for fixing the price of asphalt mixtures. The JFTC also issued cease-and-desist orders against the eight companies: Maeda Road Construction, which received the largest fine (even after a 30% leniency discount) of ¥12.8 billion, Taisei Rotec, Kajima Road, Obayashi Road, Nippon Road, Seikitokyu Kogyo, Gaeart, and Toa Road. A ninth company, Nippo, was also involved in the price cartel but received full immunity as the first applicant in the leniency programme. The record-breaking fines were levied because the companies accounted for a combined 70% share of Japan's ¥300 billion asphalt mixture market and they were engaged in a price cartel in every region and for all sales from as early as March 2011 until January 2015. Asphalt mixtures were widely used in roads,



airports and parks, including in the rehabilitation of roads in the northern part of Japan damaged by the earthquake in March 2011. Notably, the JFTC was reportedly prepared to impose fines of approximately ¥60 billion on the companies because of a 50% increase in sanctions for repeat infringers under the AMA, but ultimately, the JFTC issued a reduced fine order. It is widely understood that the reduction resulted from the amendment to the AMA. Under the new AMA, a company may be exempt from the increased fines for recidivism if the company ceased its additional illegal conduct before imposition of the initial fine. While the majority of the amended AMA had entered into force by the end of 2020, a few parts of the amended AMA, including provisions for recidivism, had become effective earlier, in July 2019. Accordingly, the companies that engaged in cartel conduct were exempt from the higher fines because they had ceased the price-fixing of asphalt mixtures before receiving an administrative order over a bid-rigging case relating to the post-earthquake construction work.

In December 2020, the JFTC issued cease-and-desist orders and fine orders against four companies: Obayashi Corporation, Kajima Corporation, Taisei Corporation and Shimizu Corporation, all of which are leading general construction

“Private cartel enforcement remains relatively rare in Japan, partly owing to Japanese companies’ historic aversion to using the court system for damages claims.”

companies in Japan and most of which are affiliate companies of the violators in the asphalt price-fixing cartel case discussed. The orders against these four general constructors followed the indictment lodged by the JFTC with Japan's public prosecutors in March 2018. It was alleged that these companies were involved in bid-rigging in connection with the construction of the new terminal stations for the Chuo Shinkansen (maglev train) ordered by Central Japan Railway Company.

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?

Following 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, whereby 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 fine payment orders are 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, in the 2019 fiscal year, there were five judgments by the Tokyo District Court under the new appellate system.

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, it is relevant to note that 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 there is generally a stipulation in the contract that 10% to 20% 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 settlement in the vast majority of cartel cases, as well as the historically low levels of damages claims, we expect private cartel enforcement to remain 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 and based on the recent focus on corporate compliance, there has been an increased uptake of the leniency system. 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 concerns 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 aspect of the Japanese business environment. In Japan,

social gatherings and greetings between key industry participants 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 as to 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. At the moment, it is too early to say whether the introduction in Japan of the Determination Procedure (a limited form of protection from disclosure for certain types of documents) could make antitrust compliance work more effectively.

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

We anticipate that the introduction of the new system will bring significant implications for clients. According to the amended AMA, for example, the duration of the violation for which the amount of the fine is calculated based on the relevant party's sales figures in respect of the product or service in question will be extended to a maximum of 10 years (ie, up to seven years longer than the current term), and the duration could even be longer than 10 years if the infringements continue after the JFTC's dawn raids. The difference in the fine calculation rate according to the type of the relevant party's business (ie, a retailer or wholesaler) will be abolished and the rate will be fixed at 10% of the sales figures in respect of the product or service in question. The reduction in fine for 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 fines 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. As a result, we expect clients to compete increasingly harder for evidence, particularly for 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 on cartel activities in the future. Should the JFTC further align the basic tenets of its leniency system with those of other major jurisdictions, such as the EU and the US, it would also eliminate

the current discrepancy between the tests applied by enforcers in Japan and in other jurisdictions, and 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.

10 | Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors have they been they applied?

The JFTC has not adopted any covid-19 antitrust measures to date. However, investigations by the JFTC have obviously been affected by the covid-19 pandemic since April 2020, when the Japanese government declared a state of emergency in response to the rapid increase in infections in Japan. While the JFTC usually conducts a dawn raid every one to two months, it did not undertake any new investigations by dawn raids during the first state of emergency. Other ongoing investigations also seem stagnant because of the difficulties of interviewing people involved in cartel activities.

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The Inside Track

What was the most interesting case you worked on recently?

When it comes to cartel investigations, 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?

The amended AMA gives the JFTC some degree of discretion in the fine payment system. We expect that with this discretion the JFTC will have more flexibility to create incentives for companies to cooperate with it, which should ultimately culminate in more sophisticated cartel enforcement in Japan, as well as a more harmonised environment for international cartel enforcement. However, although the Determination Procedure newly introduced into the AMA offers limited protection from disclosure for certain types of documents, the degree and scope of protection for attorney–client communications is still severely limited compared with that in other jurisdictions, which may hinder cartel enforcement in Japan and is not in line with international best practice. It is therefore hoped that the JFTC will further strengthen due process rules in its investigations, including by allowing outside counsel to play an increased role during the all-important interview process.

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Covid-19 response

Judicial review

Private enforcement developments

Internal compliance reviews