

Market
Intelligence

CARTELS 2022

Global interview panel led by Hengeler Mueller

LEXOLOGY

Getting the Deal Through

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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?

In recent times, the Japan Fair Trade Commission (JFTC) has turned its attention to enforcement against international cartels, imposing very high surcharge payments on 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.

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

Additionally, the JFTC has recently been focusing on enforcement in the digital economy sector due to a 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 preferable 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.

While there continues to be a strong uptake of the leniency programme with a total number of 1,343 applications since 2006 (as of March 2021), the leniency



Shigeyoshi Ezaki



Vassili Moussis



Takeshi Ishida

“The leniency programme has become a key driver of cartel enforcement in Japan.”

system has been praised as a huge success. The covid-19 pandemic has, however, significantly slowed down the number of leniency applications. For the past fiscal year, JFTC statistics indicate that the number of leniency applications was 33, compared to 73 the previous fiscal year.

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 is no '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 and criminal indictment or a partial reduction only.

In this regard, it is important to note 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 surcharge between 20 and 60 per cent, depending on the extent of cooperation with the JFTC, instead of the fixed 50 per cent under the previous system. The third, fourth and fifth applicants are 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 further align the Japanese leniency regime with the ones 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 in order to facilitate the investigation. As at January 2022, there has been no publicly announced case where the JFTC applied the new leniency programme.

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. 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

“Once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.”

that once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.

It is also important to note that, in contrast to many common law jurisdictions, there is no concept of attorney–client privilege in Japan as of February 2021. This means that during a JFTC investigation, documents held by a client containing attorney–client communications or any documents (including the results of internal investigations) held by in-house legal staff can be obtained by the JFTC dawn raid and used for the purpose of the investigation except when the JFTC decides that these documents meet certain requirements under the Determination Procedure (described below) that was introduced at the end of 2020. Moreover, while 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, as mentioned above, the JFTC's leniency policy came into effect at the end of 2020. Following the passage of the amendment bill, the JFTC announced that it was also preparing regulations and guidelines to introduce a new system called the 'Determination Procedure'. This system enables certain documents to be protected in administrative investigations regarding unreasonable restraints of trade (such as cartels, bid rigging, etc) pursuant to 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 an alleged company 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 the documents 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 against unreasonable restraints of trade, resulting in a more efficient surcharge system. It is worth noting, however, that such protection under the Determination Procedure is severely limited and does not amount to the introduction of a form of attorney-client privilege as found in certain common law jurisdictions. For those reasons, it is fair to say that there is no concept of attorney-client privilege in Japan as of February 2021.

4 | What means exist in your jurisdiction to speed up or streamline the authority's decision-making?

The JFTC is expected to complete its investigations within a reasonable time period. 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, a plea bargaining and a commitment system were introduced in 2018. As regards plea bargaining, the Criminal Procedure Law was amended in 2016, and



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a plea bargaining applying to certain type 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 such persons agree with the conditions made by the prosecutor and their attorney's consent is given. With respect to the introduction of a commitment system, the amendment to the AMA came into effect on 30 December 2018 when the modified version of the Trans-Pacific Partnership Agreement (TPP) known as 'TPP 11' came into effect. Ten months after the introduction of a commitment system in the Japanese antitrust law, the JFTC first applied a commitment system to Rakuten Travel. Rakuten Inc, which operates an online travel agency known as Rakuten Travel, allegedly unfairly restricted the businesses of accommodation operators by including most-favoured-nation clauses relating to the prices and number of rooms into 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 eight cases resolved under the commitment procedures as of January 2022. The swift resolution of cases through such procedures ultimately benefits both the alleged parties and the JFTC, as it saves time and effort that should otherwise be invested into investigations. The parties are inevitably required to admit the alleged facts through a board decision and to notify stakeholders of such decision. From our experience, these requirements could be a potential downside of using the commitment procedures and also an important factor to be considered when deciding whether to use these procedures.

The former chair of the JFTC, Kazuyuki Sugimoto, said that he considers that the commitment procedure would enable the swift resolution of cases and serve as an effective enforcement tool. This commitment system, nevertheless, does not apply to cases concerning certain types of unreasonable restraint of trade, that is 'hardcore' cartels, and there is currently no similar commitment system applying to cartels in Japan. There may be scope to argue that a similar commitment system, granting effectively 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 2020, the JFTC issued cease-and-desist orders and surcharge orders against four companies: Obayashi Corporation, Kajima Corporation, Taisei Corporation and Shimizu Corporation, all of which are leading general constructors in Japan and most of which are affiliate companies of the above-mentioned bid rigging violators. The orders against these four general constructors followed the criminal complaint by the JFTC with Japan 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.

In December 2020, the JFTC filed a criminal complaint with the Japan public prosecutors against three major domestic pharmaceutical wholesalers, namely Alfresa, Toho and Suzuken, and seven individuals employed by these wholesale companies. On the same day the public prosecutors indicted these three companies and seven individuals before the Tokyo District Court. The criminal accusation is that, in relation to public tenders in 2016 and 2018 conducted by the Japan Community Healthcare Organization (JCHO) to order certain pharmaceutical drugs to be used at 57 hospitals and long-term care facilities run by it nationwide, the seven individuals employed by these wholesale companies were suspected of having conspired with each other in connection with bidding and price negotiations on drug

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

supply contracts ordered by the JCHO and repeatedly colluded to predetermine the winning bidders. On 30 June 2021, the Tokyo District Court found all the accused parties guilty and imposed a ¥250 million fine on each company. It also sentenced two former officials of those companies to a two-year prison term (suspended for three years) and five former officials to 18-month prison terms (suspended for three years). It should be noted that there was another major domestic pharmaceutical wholesaler who also engaged in the bid rigging, but that wholesaler was immune from the criminal complaint by the JFTC because it was reportedly the first leniency applicant in this case.

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.

As of the end of the 2020 fiscal year, there were 10 pending cases under the new appellate system by the Tokyo District Court.

During the past year, there was a notable uptick in the number of challenges to the JFTC's decisions in the courts, although this activity relates mainly to unilateral conduct. In 2011, the JFTC issued a cease-and-desist order and imposed a fine of ¥222 million against Sanyo Marunaka, a supermarket chain based in western Japan, for alleged abuse of superior bargaining position in its dealing with suppliers. The company has appealed to the higher courts seeking to cancel the order after the JFTC upheld its decision at the administrative hearing requested by the company. In December 2021, the Tokyo High Court overturned the JFTC decision by ruling that the JFTC had made a procedural error by not including the list of suppliers who were subjected to the supermarket chain's alleged abuse of superior bargaining position in its original orders. Following the court ruling, the JFTC cancelled the cease-and-desist order and the payment order.



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 local government) where, generally, there is a stipulation in the contract providing that 10 to 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 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 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, 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 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 of the Determination Procedure, which is a limited form of protection from disclosure for certain types of documents, 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?

Although the JFTC's enforcement is currently rather passive due to the covid-19 pandemic, we anticipate the introduction of a 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 surcharge is calculated based on the

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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), and the duration could even be longer than 10 years if the infringements continue after the JFTC's dawn raids. The difference in the surcharge calculation rate depending on the type of the relevant party's business (eg, a retailer or wholesaler) will be abolished, and the rate will be fixed at 10 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 surcharges 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 hard for evidence, particularly for value-add evidence (which is a requirement in some jurisdictions such as the EU). The JFTC is also likely to impose higher surcharges for cartel conduct, which in turn is likely to have a greater deterrent effect for cartel activities in the future. Should the JFTC further 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.

10 | How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

Cartel enforcement by the JFTC has 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 of covid-19 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 state of emergency. Other ongoing investigations also seem stagnant due to the difficulties of interviewing people involved in cartel activities. As at January 2022, no findings of cartel infringements were officially announced by the JFTC during fiscal year 2021, which is unprecedented in recent cartel enforcement by the JFTC.

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

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