

JAPAN

Law and Practice

Contributed by:

Shigeyoshi Ezaki, Vassili Moussis, Yoshiharu Usuki and
Takeshi Ishida

Anderson Mori & Tomotsune



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Anderson Mori & Tomotsune has one of the leading international antitrust and competition practices in Japan. The team comprises a number of highly specialised attorneys who are experienced in representing clients before all the major antitrust authorities, including the Japan Fair Trade Commission, the US Department of Justice and Federal Trade Commission, the EC, China's Ministry of Commerce and National Development and Reform Commission, the Competition and Consumer Commission of Singa-

pore, and the Competition Commission of India. The firm has advised on many of the past few decades' highest-profile, most complex international cartel investigations and merger control transactions. Anderson Mori & Tomotsune regularly co-operates with top competition firms and practitioners worldwide and is frequently called upon to help formulate and implement global antitrust strategies and ensure speedy merger control clearances.

Authors



Shigeyoshi Ezaki is a partner in the competition/antitrust practice at Anderson Mori & Tomotsune. He has contributed to several industry publications and is a member of the Daini

Tokyo Bar Association and the Inter-Pacific Bar Association. Shigeyoshi is also an executive director of the Competition Law Forum and a councillor at the Asia Competition Association.



Vassili Moussis is a partner in the competition/antitrust practice at Anderson Mori & Tomotsune (AMT). Vassili has practised competition law for more than 20 years in London,

Brussels and Tokyo, where he has been based since 2009. He studied law in Belgium and the UK and is qualified as an England and Wales solicitor as well as registered with the Japanese Bar. Vassili also worked at the EC's Directorate General for Competition for one year. At AMT, his practice focuses on all aspects of competition law, including representing clients in numerous international cartel investigations and follow-on civil litigation cases.

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Anderson Mori & Tomotsune



Yoshiharu Usuki is a partner in the competition/antitrust practice at Anderson Mori & Tomotsune. He has extensive experience of defending clients involved in international cartel

investigations – in particular, before the Japan Fair Trade Commission and other foreign competition authorities such as the US Department of Justice and the EC – as well as an in-depth knowledge of recent trends in cartel investigation practices in Japan and elsewhere. After obtaining his law degree in Japan, Yoshiharu spent time in the UK, where he earned an LLM in competition law and worked in a major UK law firm’s competition department for one year as a foreign lawyer.



Takeshi Ishida is a Japanese-qualified partner at Anderson Mori & Tomotsune, where he specialises in a wide range of competition law matters. During his tenure as a deputy director

at the Japan Fair Trade Commission’s Investigation Bureau, Takeshi was a lead case-handler in various infringement cases (eg, cartels, bid riggings and unfair unilateral conducts), in which he conducted dawn raids more than a dozen times. He was also in charge of interrogations and represented the Japan Fair Trade Commission before the Tokyo District Court and at administrative hearings.

Anderson Mori & Tomotsune

Otemachi Park Building
1-1-1 Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan

Tel: +81 3 6775 1000
Email: vm@amt-law.com
Web: www.amt-law.com/en/

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1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

In Japan, the Anti-Monopoly Act (AMA) governs cartel behaviour or effects.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Japan Fair Trade Commission (JFTC) is the sole competition agency in charge of the AMA's enforcement. The JFTC is responsible for conducting investigations into suspected cartel cases and, if it finds that such activities have taken place, is authorised to issue cease-and-desist orders and impose administrative fines through surcharge payment orders.

With regard to criminal enforcement, the Public Prosecutor's Office is in charge of prosecution. Even so, the Public Prosecutor's Office can only indict parties for criminal offences after the JFTC submits a criminal accusation to the office under Article 96 of the AMA. Both companies and individuals can be subject to criminal liability for participation in a cartel. Please refer to **4.4 Sanctions and Penalties Available in Criminal Proceedings** for further details.

As regards civil liability, the primary form of sanctions issued by the JFTC in administrative proceedings is a cease-and-desist order and a surcharge payment order, pursuant to Article 7 and 7(2) of the AMA. Please refer to **4.5 Sanctions and Penalties Available in Civil Proceedings** for further details. In addition, there are no civil judgment awards in Japan.

1.3 Private Challenges of Cartel Behaviour/Effects

Please refer to **5.1 Private Right of Action**.

1.4 Definition of "Cartel Conduct"

Cartels are regulated as an "unreasonable restraint of trade", which is prohibited under Article 3 of the AMA. The term "unreasonable restraint of trade" is defined in Article 2, paragraph 6 of the AMA as "business activities, by which any enterprise – by contract, agreement or any other means irrespective of its name – in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices or to limit production, technology, products, facilities or counterparties, thereby causing – contrary to the public interest – a substantial restraint of competition in any particular field of trade".

Joint Actions

Joint actions between rivals do not necessarily amount to a breach of the AMA. By way of an example, the AMA does not apply to certain conducts by a partnership (including a federation of partnerships) that complies with certain requirements stipulated in Article 22 of the AMA. This provision is aimed at facilitating mutual support to small-scale enterprises and consumers. In another instance, per the Guidelines Concerning the Activities of Trade Associations Under the Anti-Monopoly Act (see 6.2 Guides Published by Governmental Authorities), competitors are allowed jointly to collect historic prices for commoditised goods through a trade association and offer general information on the market to its members as well as consumers.

Price Fixing

It is generally accepted in Japan that price fixing, output restrictions, agreements on product characteristics and other forms of competitive activity among competitors are referred to as "cartels". Bid rigging, meanwhile, traditionally falls into another category of "unreasonable restraint of trade" – even though almost the same anti-

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trust theory as “cartels” can be applied to bid rigging.

Exemptions

Certain Japanese laws permit some exemptions from the application of the AMA when it comes to cartel conduct. Pursuant to the Japanese Aviation Law, for example, aviation companies can build an alliance with others in certain circumstances. Joint conduct by insurance companies operating in the aviation or nuclear industries is similarly exempt from the application of the AMA under certain conditions specified by the Insurance Business Act.

1.5 Limitation Periods

The JFTC’s ability to issue a cease-and-desist order for infringements of the AMA is subject to a limitation period of seven years from the end of the infringement action under Article 7, paragraph 2 of the AMA. The limitation period for issuing a surcharge payment order is also seven years from the end of the period of the implementation, according to Article 7(8), paragraph 6 of the AMA.

1.6 Extent of Jurisdiction

It is generally understood that the AMA can apply to any firm or individual – even those with no physical presence in Japan – if the conduct in which they engage has substantial anti-competitive effects on the Japanese market. This principle was confirmed by the Supreme Court of Japan in the Samsung SDI (Malaysia) Bhd case of 2017, in which a price-fixing cartel on television cathode-ray tubes took place outside Japan.

The Supreme Court held that Japanese antitrust law would still apply even if the cartel infringement took place outside Japan, provided the cartel has caused competitive restraint in the

Japanese market – for example, where such a cartel is targeted at transactions with companies based in Japan.

1.7 Principles of Comity

As a matter of law, the AMA does not stipulate any provision regarding principles of comity – nor has there been a precedent that explicitly mentions the application of principles of comity in relation to the enforcement of the AMA. In practice, however, principles based on the concept of comity are embedded in bilateral agreements between the Japanese government and other governments (including governments in the EU, the US and Canada).

The bilateral agreements normally require both parties to pay consideration to the other party if their enforcement could have an impact on the other party’s jurisdiction. Such consideration is – per the principles of comity – subject to each authority’s discretion, nevertheless.

1.8 COVID-19

The COVID-19 pandemic did not lead to any significant changes in the JFTC’s enforcement of the AMA. Please note, however, that the JFTC has not been able to conduct the same number of dawn raids as it did prior to the COVID-19 pandemic.

1.9 Changes in the Regulatory Environment Affecting Competition Regulation

There have been no changes in the JFTC’s policy or practices concerning cartel enforcement, as the regulatory environment remains stable and unchanged – albeit perhaps with an heightened focus on domestic cases.

Even though the JFTC seems to be taking an increasingly concerted approach – together with

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competition authorities in other jurisdictions – to scrutinising digital sectors in respect of unilateral conducts and merger filings, this does not appear to have had a significant impact on cartel enforcement.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

The JFTC typically initiates an investigation by conducting dawn raids. Thereafter, the JFTC tends to request and conduct interviews with the persons it has identified as being the most involved in the conduct under investigation. Interviews cover a wide range of matters, including market knowledge concerning to the alleged practices, and occasionally the JFTC will request the submission of materials. If materials are not submitted voluntarily, the JFTC investigator may issue a formal request in the form of a “Reporting Order”.

It is also worth noting that the JFTC published Overview of Administrative Investigation Procedures for Alleged Antitrust Cases in December 2015 (see **6.2 Guides Published by Governmental Authorities**). These guidelines on the JFTC’s administrative inspections outline how the investigation is conducted, including the initial investigatory steps taken by investigators. The guidelines were amended in December 2020 to add that the person being interviewed by the JFTC is allowed to take a memo, on the spot, after the interview.

2.2 Dawn Raids

It is common for the JFTC to conduct on-site inspections (known as “dawn raids”) of offices. The legal basis of such on-site inspection is Article 47, paragraph 1, item 4 of the AMA. Any

refusal, obstruction or avoidance of the inspection without justifiable reasons will be subject to sanctions pursuant to Article 94 of the AMA. Firms and employees are therefore deemed obligated to accept and co-operate with the inspection, even though the JFTC is not entitled to directly or physically exercise its power to conduct the inspection.

Employees and other staff are generally allowed to continue their ordinary business at the site being investigated – although they are required to provide any materials and explanations requested by the investigators and at least one officer or employee must be present at the venue until the end of the on-site inspection (even late at night). In addition, outside counsel may be present at the on-site inspection unless such presence affects the smooth implementation of the investigation. It should nonetheless be noted that there is no requirement to wait for the arrival of outside counsel before initiating the investigation and, as such, the JFTC will typically not wait.

There is no limitation to the scope of the inspection or to the sort of documents that can be inspected and retained by the investigators under Article 47, paragraph 1, items 3 and 4 of the AMA. The investigators may therefore inspect any place within the business, including the legal department, provided they reasonably consider such a search necessary to investigate the alleged violation.

The investigators are also entitled to seize any materials that they reasonably think are relevant to the alleged conduct. In order to avoid interfering with business operations, investigators conducting administrative inspections tend to obtain electronic information by means of copying it from PCs instead of confiscating laptops

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or local servers. During criminal investigations, however, actual devices will be seized.

Interviews with officers or employees responsible for the alleged violation usually take place during dawn raids. In practice, such interviews are normally conducted on a voluntary basis. Accordingly, using the reference materials for companies regarding administrative investigation procedures for alleged antitrust cases, investigators should first explain to the interviewees that the interview is conducted on a voluntary basis and then obtain their consent prior to starting the interview.

It is worth bearing in mind that, if interviewees do not co-operate with a voluntary interview, an interrogation procedure could be ordered under Article 47, paragraph 1 of the AMA. Such interrogation is conducted by issuing an order to the officers or employees of the company being investigated. Any testifying persons who make a false statement or fail to make a statement during the interrogation procedure could be subject to punishment under Article 94 of the AMA.

After the dawn raids, companies under investigation may ask the JFTC to allow them to make copies of documents furnished to the agency by submitting a request form with an order for submission of materials to the relevant division of the JFTC. During dawn raids, investigators may also use their discretion to grant a company's request to make copies of documents seized by them, provided that:

- the investigators determine that such documents are necessary for the daily business of the company being investigated; and
- making copies of the documents will not affect the smooth implementation of the on-site inspection.

2.3 Spoliation of Information

The firm and the employees being investigated have an obligation not to refuse, obstruct or evade the JFTC's inspection. Spoliation of potentially relevant information may constitute a violation of the AMA. Any breach of such obligations may result in sanctions such as:

- one year's imprisonment or fines of up to JPY3 million for individual violators pursuant to Article 94 of the AMA; or
- fines of up to JPY200 million for an employer of an individual violator pursuant to Article 95 of the AMA.

2.4 Role of Counsel

Officers or employees subject to an interview or interrogation have the right to speak to counsel before or after the interview. Lawyers, however, are typically not allowed to be present at the interview or interrogation unless investigators determine that lawyers or third persons should be present to, for example, assist with translation in order to ensure the smooth implementation of an interview with a foreign national.

Typically, the JFTC does not raise the issue of whether individuals should obtain separate counsel from their employers. It is worth noting that separate counsel for individuals might be necessary in a criminal investigation case where companies and individuals could both be subject to criminal punishment and there are potential conflicts of interest.

The principal initial steps that defence counsel should undertake during the preliminary phase of the investigation include intensive interviews with the relevant employees and an extensive review of the relevant documents in order to expeditiously identify whether the alleged infringement actually took place. Such internal

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investigation is indispensable when it comes to securing immunity based on the JFTC's leniency programme – given that, in Japan, the timing of the initial leniency application plays a crucial role in determining the order of the leniency applications and thus the amount by which the administrative fine can be reduced under the leniency programme (see **2.11 Leniency and/or Immunity Regime**).

2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

Documentary evidence is usually first obtained by the JFTC at the alleged companies' offices during the course of dawn raids. The agency subsequently asks the companies to submit the relevant documents from time to time and also delivers a "Reporting Order" in a timely manner so as to secure precise information on the alleged violation in preparation for issuing a cease-and-desist order and surcharge payment order.

In Japan, it is widely believed that a large part of the investigations against cartels by the JFTC are triggered by information submitted through leniency applications.

2.6 Obligation to Produce Documents/ Evidence Located in Other Jurisdictions

As mentioned in **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**, the JFTC first tries to obtain the relevant documents through dawn raids. Following the dawn raid, the agency usually requests that the companies produce other relevant materials that the investigators could not seize during the on-site inspection. Such requests cover electronic information located on a local or host computer or in the cloud, even if such information is located in another jurisdiction.

Companies are obliged to comply with such requests under Article 47 of the AMA. Thus, the JFTC's request for information does not make a distinction based on whether the targeted information is located in Japan or another jurisdiction. However, it is unusual for the JFTC to actively pursue documents or other information that are neither located in Japan nor easily accessible from Japan.

2.7 Attorney-Client Privilege

It is important to note that, in contrast to many common-law jurisdictions, "attorney-client privilege" is limited in Japan. This limited attorney-client privilege was introduced by way of the JFTC regulations and guidelines in December 2020. The rationale behind introducing this limited attorney-client privilege is that protecting communications between companies and outside attorneys qualified in Japan concerning investigations against unreasonable restraints of trade will result in a more efficient surcharge system. Communications from in-house counsel do not normally benefit from this limited type of attorney-client privilege.

This limited attorney-client privilege will only be available in certain circumstances. When an accused company receives a submission order for certain documents from the JFTC officers during a dawn raid, the company can claim that the documents are not subject to the order because attorney-client communications are contained therein.

Under these circumstances, 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 is independent from the Investigation Bureau. The Determination Officers will then decide whether the doc-

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uments at issue satisfy the conditions for the attorney-client privilege provided under the new regulations or guidelines. If the conditions are satisfied, the documents will not be used by the JFTC for its investigation and will be promptly returned to the company.

It should be noted that this limited “attorney-client privilege” is applied only to administrative investigations into violation cases involving unreasonable restraint of trade and does not apply in criminal investigations.

The privilege against self-incrimination is only available in criminal investigations into cartel conduct. This privilege cannot be invoked in administrative investigations.

2.8 Non-cooperation With Enforcement Agencies

Initial requests for information by the JFTC are not usually refused by individuals and firms. This is because they are deemed to be obliged to cooperate with the investigators and any refusal, obstruction or evasion of the inspection without justifiable reasons is therefore subject to sanctions provided under Article 94 of the AMA (see 2.2 Dawn Raids).

2.9 Protection of Confidential/Proprietary Information

As mentioned in 2.2 Dawn Raids, the JFTC investigators are entitled to review and seize any materials that they reasonably consider to be necessary for their investigation under Article 47 of the AMA. Therefore, any documents containing confidential or proprietary information can also be obtained by the investigators. As well as considering documents of third parties, such documents could also be subject to inspection and seizure if they are located at the place targeted by the investigation. Confidentiality will be

guaranteed by the government officials’ confidentiality obligations in accordance with Article 39 of the AMA.

2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Defence counsel for the target of a cartel investigation tends to raise legal and factual arguments by making submissions to the relevant division at the JFTC during the investigation. Defence counsel also has an opportunity to present arguments at a hearing procedure (introduced in April 2015) before the JFTC finalises its decision.

2.11 Leniency and/or Immunity Regime

A leniency regime has been in place in Japan since 2006. Under the current policy, there is no limitation to the number of leniency applicants that may obtain an exemption from (or a reduction of) surcharges – regardless of whether they apply before or after the commencement of an investigation (the “Investigation Start Date”), which is often the date of a dawn raid. Please note, however, that once the JFTC has initiated an investigation, applications for leniency should be filed within 20 business days after the Investigation Start Date. Applications for leniency are filed by sending the relevant forms via email. It is the order in which these emails are received that dictates the companies’ positions in the order of leniency and, as such, determines the amount of reduction offered to them. Group filing is available subject to certain conditions.

Applying for Leniency

If the first-in-the-door whistleblowing company applies for leniency prior to the Investigation Start Date, then it is eligible for a 100% exemption from any surcharges that might otherwise be levied against it (according to Article 7(4), paragraph 1 of the AMA). The leniency measures available to subsequent applicants for leniency

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depend on whether the company files its application with the JFTC before or after the Investigation Start Date.

Before the Investigation Start Date, the second applicant will obtain a reduction in surcharge of 20% to 60%, depending on the extent of co-operation with the JFTC. The third, fourth and fifth applicants will also be eligible for a reduction in surcharge, but the reduction will vary from 10% to 50% according to the extent of co-operation with the JFTC. The sixth or later applicants will also be eligible for a reduction in the surcharge of 5% to 45%, depending on the extent of their co-operation with the JFTC.

After the Investigation Start Date, up to three leniency applicants will obtain a reduction in surcharge of 10% and 30%, depending on the extent of their co-operation with the JFTC – provided that the number of applicants in total (including those who applied before the Investigation Start Date) is five or fewer. The leniency applicants following the applicants indicated in the above-mentioned category will obtain a reduction in surcharge of between 5% and 25%, depending on the extent of their co-operation with the JFTC. (There is no limit to the number of applicants that can apply for this level of reduction in a surcharge.)

2.12 Amnesty Regime

The AMA does not provide any amnesty; therefore, there is no amnesty regime (including an amnesty plus regime) applicable in Japan. However, it is noteworthy that the JFTC published [The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations](#) in October 2005 (revised in October 2009). The guidelines regarding criminal enforcement confirm that the JFTC's policy is not to bring

criminal actions against the first leniency applicant and its co-operating officers or employees.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly From Employees

Although the JFTC usually seeks any documents from the accused company, investigators sometimes ask the employees suspected of cartel activity to submit any materials – even personal belongings such as notebooks, planners and mobile phones – in their possession at the time (eg, during an interview).

3.2 Obtaining Documentary Information From the Target Company

The JFTC usually contacts the legal department of the company when it asks the companies to voluntarily submit additional materials that the agency considers necessary to prove the allegations in the course of the investigation. A compulsory procedure (eg, an “Order of Submission”) is also available under Article 47, paragraph 3 of the AMA if the companies do not co-operate with such request. There is no difference between the targeted company and third party with regard to the JFTC's request for documentary information.

3.3 Obtaining Information From Entities Located Outside This Jurisdiction

Although the JFTC will not usually investigate companies or individuals located outside Japan, it can do so. As a matter of law, however, some technical issues could arise in terms of how the JFTC delivers an “Order of Submission” to companies or individuals outside the jurisdiction

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(Articles 70(6)—70(7) of the AMA and Article 108 of the Civil Procedure Law).

3.4 Inter-agency Co-operation/Co-ordination

The JFTC always co-operates with the Public Prosecutor's Office in relation to criminal cases. This is because criminal actions can only be brought against companies (or their officers and employees) by the JFTC after a criminal accusation has been with the Public Prosecutor's Office. Accordingly, it is commonplace for a few prosecutors to be seconded to the JFTC for the purpose of close communication and effective enforcement. In this respect, the JFTC and the Public Prosecutor's Office jointly conduct dawn raids if they seek to impose criminal penalties against the companies that have participated in a cartel.

Depending on the case at hand, the JFTC will also occasionally co-operate with other agencies or Ministries in Japan – for example, with the Ministry of Land, Infrastructure, Transport and Tourism in antitrust cases involving the transport sector. In such cases, the JFTC will not exchange the confidential information of parties being investigated with those agencies or Ministries unless prior approval has been obtained from such parties.

3.5 Co-operation With Foreign Enforcement Agencies

The JFTC usually co-operates with enforcement agencies in foreign jurisdictions in international cartel cases. However, in light of the fact that most cases the JFTC deals with are domestic cartel or bid-rigging cases, such international co-operation is rather limited.

The AMA incorporates provisions allowing the JFTC to exchange information with competition

authorities in different jurisdictions. The JFTC works actively with other major competition authorities on specific cases, including through the exchange of information with its foreign counterparts, and is entitled to share with foreign competition authorities “information that is deemed helpful and necessary for the execution performance of the foreign competition authority's duties” where such duties are equivalent to those of the JFTC under Article 43(2) of the AMA. In addition, the JFTC has entered into bilateral co-operation agreements with various competition authorities, including the USA, the EU and Canada, as well as the Philippines, Vietnam, Brazil, Korea, Australia, China, Kenya and Mongolia. These bilateral agreements are mainly focused on general co-operation between the agencies, such as the exchange of information.

Disclosure of confidential investigative information and evidence is a violation of government officials' confidentiality obligations and is subject to criminal sanctions under Article 39 of the AMA. Therefore, during the course of administrative (as opposed to criminal) procedures, JFTC officials cannot exchange information – for example, business secrets of the companies under investigation – without prior permission or waivers to do so from the companies in question. When examining leniency applications, however, it is understood that the JFTC exchanges confidential information (including the contents of such applications) with foreign competition authorities but only after obtaining a waiver to do so from the applicant.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

As mentioned in 3.4 *Inter-agency Co-operation/Co-ordination*, criminal actions can only be brought against companies (or their officers and employees) by the JFTC after filing a criminal

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accusation with the Public Prosecutor's Office. The JFTC states that it will actively seek criminal penalties if it believes that administrative sanctions are not sufficient to fulfil the purpose of the AMA in certain cases, including:

- serious cases of unreasonable restraint of trade (including cartel conduct) considered likely to have a widespread influence on people's living; and
- cases involving firms or industries that the JFTC deems "repeat offenders" or that do not abide by enforcement measures previously imposed.

In practice, the JFTC generally tends to decide at the initial stage whether it is going to deal with the cartel in question as an administrative or criminal case. By way of an example, companies faced with dawn raids can identify whether the allegation is likely to be dealt with via administrative or criminal proceedings through the notifications delivered by the investigator at the on-site inspection.

Once the JFTC has filed a criminal accusation with the Public Prosecutor's Office, and normally very soon after such filing, the Public Prosecutor's Office can file an indictment for cartels with the Tokyo District Court or other district courts under Articles 84(3), 84(4) and 89 of the AMA. As with other criminal trials, following the indictment, a defendant has the right to access evidence upon which the Prosecutor's Office relies in terms of the allegation – although there is no guarantee that a defendant can access potentially relevant information held by third parties.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

Administrative trials are discussed here, whereas private actions are covered in **5.1 Private Right of Action**. The JFTC issues a cease-and-desist order and/or a surcharge payment order under Article 7 and 7(2) of the AMA when it proves an allegation of cartel activity. The process for a cease-and-desist order or a surcharge payment order was amended as of 1 April 2015, as part of a wider move towards increasing the transparency of administrative procedures.

Prior to 2015, if a company wanted to challenge a cease-and-desist order and/or a surcharge payment order, it first had to file an appeal before the JFTC. The JFTC would then open an administrative hearing procedure to determine the legality of the order. Only if the company was still unsatisfied with the decision could it then file a petition for the nullification of the decisions before the Tokyo High Court.

Under the current system, which applies to all cases where prior notice of a cease-and-desist order and/or of a surcharge payment order is issued after 1 April 2015, 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 (Article 85, item 1 of the AMA; Article 3 and Article 14, paragraph 1 of the Administrative Case Litigation Act). The legislative reform also provided for a procedure for hearings prior to the issuance of the JFTC's order, thereby placing a greater emphasis on due process. In the hearings, the defendant has an opportunity to review and obtain copies of all evidence that supports the JFTC's prospective orders and to present their opinion in the hearings.

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3.8 Enforcement Against Multiple Parties

The JFTC issues a cease-and-desist order and/or a surcharge payment order to each of the parties involved in cartels without trials. Trials may be held if each of the parties that received an order files a suit with the district court in order to have the order nullified. Given past cases, including cases under the old JFTC hearing system, many trials were rendered in a consolidated manner for efficiency reasons as well as to avoid conflicting outcomes.

3.9 Burden of Proof

The Public Prosecutor's Office bears the burden of proof in criminal trials on cartel cases, whereas the JFTC's officers have the burden of proof in administrative trials. As is the case with other criminal trials, allegations should be proven beyond a reasonable doubt and the standard of proof in criminal trials is considered higher than that in administrative trials.

3.10 Finders of Fact

Given that administrative trials and criminal trials involving cartel cases are both presided over by judges in court, judges are responsible for finding the facts and applying the AMA or the Criminal Act to those facts in cartel trials.

3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

Cartel cases that the JFTC considers very serious offences are likely to be dealt with both in criminal and administrative proceedings. Evidence collected in criminal proceedings can be used as the basis of administrative sanction (ie, a cease-and-desist order and a surcharge payment order). However, evidence retained in administrative proceedings should not be used for criminal accusation in accordance with Article 47, paragraph 4 of the AMA.

in administrative proceedings, evidence can be gathered without a warrant issued by courts and there is no privilege against self-incrimination. As such, criminal trials should only deal with evidence gathered in criminal proceedings so that a criminal defendant can be guaranteed rights provided under the Constitution.

3.12 Rules of Evidence

Criminal trial rules take a strict attitude towards admissible evidence by, for example, excluding any evidence obtained by illegal means and any hearsay evidence. However, in theory at least, such evidence is not necessarily excluded in administrative trials.

3.13 Role of Experts

Economists and other experts have not normally played a key role in cartel cases thus far in Japan. This is because so-called hardcore cartels (eg, price cartels, quantity cartels and market-sharing cartels) are treated as illegal per se in Japan and, as such, the JFTC does not have much difficulty proving infringement of the AMA – even without the help of economists or other experts.

3.14 Recognition of Privileges

There are certain privileges recognised in Japanese trials in accordance with the Constitution, the Administrative Case Litigation Act, the Civil Procedure Law and the Criminal Procedure Law. Owing to the privilege against self-incrimination (Article 38 of the Constitution and Article 311 of the Criminal Procedure Law), for example, defendants in criminal trials have the right to remain silent. The refusal to testify is another privilege.

Pursuant to Article 7 of the Administrative Case Litigation Act, Articles 196-197 of the Civil Procedure Law, and Articles 146-147 and Article

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149 of the Criminal Procedure Law, a witness is entitled to refuse to answer questions relating to:

- matters that are subject to criminal prosecution or conviction; or
- matters that the witness has learned in the course of their professional duties and which should be kept secret.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

In cartel cases where the JFTC has filed a criminal accusation with the Public Prosecutor's Office, it is common – following an indictment – for an investigation to be initiated into the same cartel infringement in administrative proceedings in order to issue a cease-and-desist order and a surcharge payment order. In such cases, the same or related facts concerning the cartel may be dealt with in different proceedings.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

The JFTC has the authority to impose sanctions, including a cease-and-desist order and a surcharge payment order, on cartel violators directly. However, under the current system introduced in April 2015, the JFTC can only issue these orders after holding hearings that provide the parties under investigation with the opportunity to present their opinions pursuant to Article 49 of the AMA. Another limitation on a surcharge payment order is that the JFTC does not have any discretion regarding whether it should order a surcharge payment order and how much surcharge it should impose on offenders.

Where the JFTC finds that there has been a cartel (ie, an unreasonable restraint of trade) and a

certain amount of turnover in connection with the cartel, the JFTC must order the payment of a surcharge. The amount of the surcharge is also automatically calculated based on a statutory formula under the AMA.

It should be noted, however, that the JFTC has a certain amount of discretion as to how much surcharge it could impose on offenders based on the extent of their co-operation with the JFTC in the investigations.

4.2 Procedure for Plea Bargaining or Settlement

Both a plea-bargaining procedure and a commitment system were introduced in 2018. The Criminal Procedure Law was amended in 2016 and plea bargaining in the case of certain types of crimes, including cartel conduct, came into force on 1 June 2018 as a result. 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.

As regards the introduction of a commitment system, the amendment to the AMA came into effect on 30 December 2018, along with the modified version of the Trans-Pacific Partnership Agreement ("TPP 11"). This commitment system, nevertheless, does not apply to cases relating to certain types of unreasonable restraint of trade (ie, "hardcore" cartels) and Japan does not currently have a commitment system like settlement when it comes to cartels.

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4.3 Collateral Effects of Establishing Liability/Responsibility

As a matter of law, the decision by the JFTC does not have any legally binding effect on the civil courts, pursuant to a Supreme Court decision in November 1975. The verdict indicates that any contract that is not in compliance with the AMA is not necessarily deemed to be void. It is generally accepted in Japan that, where local public agencies go through bidding processes, the agreement between local public agencies and the parties awarded the contract sets out that the infringers will be suspended from bidding on contracts for several months if any bid rigging is found. In addition, it is written in the agreement that infringers must pay a certain amount of damages (eg, 10% of the worth of the contract) as a penalty in such an event.

4.4 Sanctions and Penalties Available in Criminal Proceedings

As mentioned in 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards, companies and individuals are both subject to criminal liability for participation in a cartel. Firms can face a fine of up to JPY500 million for cartel violations under Article 95, Paragraph 1, item 1 of the AMA, and individuals can face a maximum of five years' imprisonment or a fine of up to JPY5 million under Article 89 of the AMA. However, if the sentence is for three years or less, the court may issue a suspended sentence rather than an actual custodial sentence. In practice, no individual has actually served a custodial sentence for cartel violations in Japan.

4.5 Sanctions and Penalties Available in Civil Proceedings

As mentioned in 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards, the primary form of sanctions issued by the JFTC in administrative proceedings are

a cease-and-desist order and a surcharge payment order, pursuant to Articles 7 and 7(2) of the AMA.

A cease-and-desist order is issued to take “measures necessary to eliminate the violation or ensure that the violation is eliminated” in accordance with Article 7 of the AMA. Necessary measures vary widely according to each case. The JFTC, however, often asks the targeted company to:

- acknowledge that the violation has ceased;
- inform consumers or users that it will perform business based on its own judgement after adopting corrective actions;
- report to the JFTC after taking corrective actions;
- prepare a code of conduct concerning compliance with the AMA;
- undertake regular training sessions for sales staff regarding compliance with the AMA; and
- ensure the legal department conducts audits regularly.

A cease-and-desist order is not addressed to individuals unless they are self-employed and running a business under Articles 7 and 7(2) of the AMA. Administrative fines are also not applicable to individuals such as officers or employees of corporations.

Calculation of Surcharges

Where the JFTC finds that there has been an unreasonable restraint of trade that relates to some form of consideration, the JFTC must order the payment of a surcharge under Article 7(2) of the AMA. The amount of the surcharge is calculated by applying the surcharge calculation rate (10%) to the relevant party's sales figures in respect of the product or service in question for the duration of the violation (up to a maximum of

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ten years). In addition, if a wholly owned subsidiary of the relevant party has not been involved in the violation but provided the product or service in question in response to instructions by the relevant party (ie, its parent company), such sales figures are also subject to the calculation for the amount of the surcharge against its parent company.

Moreover, if the violator obtains financial benefits from an accomplice (in return for making the accomplice win the bid, for example), such benefits are taken into account when calculating the violator's surcharge. If the company is a repeat offender or took a leading role, the surcharge ratio can be increased by up to 50% under Article 7(3), paragraph 1 and 2 of the AMA. If the company is both a repeat offender and took a leading role, then the total ratio of the surcharge can be doubled under Article 7(3), paragraph 3 of the AMA.

The JFTC does not have the discretion to increase the amount of the surcharge as a result of the level of co-operation provided by the company in question. However, the JFTC has limited discretion to reduce the amount of the surcharge for leniency applicants, depending on the level of their co-operation. As regards this reduction rule, the JFTC published Guidelines to the Reduction System for Co-operation in Investigation in December 2020. These guidelines aim to improve the predictability and transparency of the JFTC's assessment of the level of co-operation offered by the leniency applicant.

4.6 Relevance of “Effective Compliance Programmes”

As noted in 4.5 **Sanctions and Penalties Available in Civil Proceedings** (Calculation of Surcharges), the JFTC does not have any discretion when it comes to the amount of surcharges

imposed on cartel participants. An “effective compliance programme”, therefore, is not taken into account when imposing administrative fines on companies that participate in cartels. In contrast, the JFTC seems keen to determine whether the accused companies performed an “effective compliance programme” throughout the entire investigation. Accordingly, the fact that such companies put in place an “effective compliance programme” could affect the decision as to whether they would be required to conduct additional compliance efforts as part of the cease-and-desist order.

4.7 Mandatory Consumer Redress

There is no system regarding mandatory consumer redress in the AMA. Therefore, victims of cartels need to take legal action against the companies involved in the cartels if they want redress from them.

4.8 Available Forms of Judicial Review or Appeal

As mentioned in 3.7 **Procedure for Issuing Complaints/Indictments in Civil Cases**, appeals against the JFTC's cease-and-desist orders and surcharge payment orders are heard by the commercial affairs division of the Tokyo District Court. Until 1 April 2015, if a company wanted to challenge a cease-and-desist order and/or an order imposing a fine issued by the JFTC, it first had to file an appeal before the JFTC. The JFTC would then open an internal hearing procedure to determine the legality of the order. If the company was still not satisfied with the decision, it could then file a petition for the annulment of the decision before the Tokyo High Court.

There was, however, a rule to the effect that facts established by the JFTC through the hearing procedure would – if based on substantial evidence – be binding upon the appeal court. Under

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the current system, this substantial evidence rule has been abolished. Furthermore, any evidence that the company wishes to present can be offered to the Tokyo District Court, including new evidence.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

Companies or consumers who have suffered damages in connection with cartel behaviour are entitled to file claims for civil damages against companies that participated in the cartels. The claims are based on tort law (Article 709 of the Civil Code and Article 25 of the AMA) or a claim for unjust enrichment (Article 703 of the Civil Code). Meanwhile, no relief or compensation is applicable to governmental proceedings in connection with cartels.

5.2 Collective Action

In contrast to some other jurisdictions, it is relatively rare for a company or consumer who has suffered from cartel conduct to bring a damage claim to the courts directly. They are more likely to choose the route of reaching a settlement with the cartelists, although such settlement is still relatively uncommon in Japan. In addition, there are no “class actions” in Japan. It is fair to say that, given the existence of contractual protection and out-of-court settlement in most cartel cases, the historically low levels of damage claims in Japan will not change radically in the near future.

Under Consumer Contract Law, a qualified consumer organisation has the standing to file a damage claim on behalf of consumers or victims. To date, however, such collective action system has rarely been used in Japan.

5.3 Indirect Purchasers and “Passing-On” Defences

The “passing-on” defence has so far not been used to any significant extent in private actions in Japan.

5.4 Admissibility of Evidence Obtained From Governmental Investigations/ Proceedings

Private actions such as damage claims and injunctions are handled in civil proceedings in Japan. Accordingly, the process applied for such private actions is also the same as other types of civil litigations in accordance with the Civil Litigation Act. Evidence from governmental investigations or proceedings is admissible subject to the government officials’ confidentiality obligations in accordance with regulations under the Civil Litigation Act. In this respect, the notice concerning provision of materials on damage claims in connection with the AMA issued by the JFTC secretary general sets out the policy on how the JFTC responds to a request for submission of such materials from courts and victims.

5.5 Frequency of Completion of Litigation

Most civil litigation cases, including damages lawsuits relating to cartels, are likely to end in settlement. This is partially because it usually takes a long time (normally more than a few years) from the inception of the claim to resolution in civil proceedings. Judges appear to prefer settlement rather than issuing decisions, so they tend to encourage both parties to make a court-approved settlement.

5.6 Compensation of Legal Representatives

There is no law in Japan to regulate attorneys’ fees, including advance payment and success fees. However, the attorneys’ ethics rules pro-

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vide that attorneys should indicate fair and reasonable fees to clients. The amount of attorneys' fees is, therefore, determined by an agreement between attorneys and their clients. The amount of deposits and success fees depends on the agreement but is often calculated based on a certain ratio of the amount of a damage claim set by the agreement.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

In principle, each party should be liable for their own attorneys' fees in civil proceedings in Japan. Even if a claimant wins a damage lawsuit and seeks compensation for its attorneys' fees, only a small part of such fees will usually be awarded. Accordingly, unsuccessful claimants would not have to bear the defendants' legal fees unless the defendants also filed a counterclaim for their legal fees against the claimants in the same trial (and such counterclaim is admitted).

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

Claimants seeking compensation from cartelists are entitled to file a lawsuit with the civil affairs division of district courts and, if they are not satisfied with the decisions of such district courts, they may also appeal to the High Court with jurisdiction over the district court delivering the decision. An appeal to the Supreme Court may be allowed under the Civil Litigation Act in very limited circumstances – for example, where the decision of the High Court might be inconsistent with the Constitution or court precedents.

6. Supplementary Information

6.1 Other Pertinent Information

Private litigation has remained relatively limited in Japan so far. This trend is expected to continue unless there is some major legislative change.

6.2 Guides Published by Governmental Authorities

Some guidelines are not specific to cartels but deal with certain issues relating to cartels nonetheless. By way of example, as trade associations in Japan are often considered to be liable for facilitating cartel conduct among their members, the JFTC has published several guidelines for the prevention of anti-competitive conduct, such as the [Guidelines Concerning the Activities of Trade Associations Under the AMA](#). Joint research and development between rivals also has the potential to bring about cartel conduct. In light of this, the JFTC published the [Guidelines Concerning Joint Research and Development Under the AMA](#) in an attempt to prohibit the exchange of sensitive information between competitors, as this might lead to cartels.

As regards enforcement, the JFTC has published guidelines that aim to increase understanding of its enforcement activities and policies. By way of an example, in December 2015 the JFTC published guidelines on its administrative investigation, [Overview of Administrative Investigation Procedures for Alleged Antitrust Cases](#) (revised in December 2020).

In March 2023, the JFTC published [Guidelines Concerning the Activities of Enterprises, etc. Toward the Realisation of a Green Society Under the Antimonopoly Act](#), which refers to potential cartel activities in connection with green activities.