

# JAPAN

## Law and Practice

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**Anderson Mori & Tomotsune (AMT)** 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 Singapore and the Competition Commission of India. The firm has advised on many of the highest-profile, most complex international cartel investigations and merger control transactions over the past few decades. It 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.

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## 1. Cartels Law and Regulation

### 1.1 Legal Bases

The Anti-Monopoly Act (the “AMA”) governs cartel behaviour or effects in Japan.

### 1.2 Regulatory/Enforcement Agencies and Penalties

The Japan Fair Trade Commission (the “JFTC”) is solely responsible for enforcing the AMA and for conducting investigations into suspected cartel cases. If the JFTC finds that these activities have taken place, it is authorised to issue cease-and-desist orders and impose administrative fines through surcharge payment orders.

In terms of criminal enforcement, the Public Prosecutor’s Office is in charge of prosecution. However, it can only indict parties for criminal offences after the JFTC submits a criminal accusation to the office under Article 96 of the AMA. Companies and individuals can both be criminally liable for participating in a cartel. Please refer to **5.4 Sanctions and Penalties in Criminal Proceedings** for further details.

When it comes to civil liability, the primary form of sanctions issued by the JFTC in administrative proceedings are cease-and-desist orders and surcharge payment orders in line with Articles 7 and 7-2 of the AMA. Please refer to **5.5 History of Criminal Sanctions** for further details.

There are no civil judgment awards in Japan.

### 1.3 Private Enforcement

Please refer to **6.1 Private Rights of Action**.

### 1.4 “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 (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. For example, the AMA does not apply to certain conduct 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, in line with the [Guidelines Concerning the Activities of Trade Associations Under the AMA](#) (see **1.9 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 antitrust theory as “*cartels*” can be applied to bid rigging.

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## Exemptions

Specific Japanese laws permit certain exemptions from the application of the AMA when it comes to cartel conduct. For example, under the Japanese Aviation Law, aviation companies can build an alliance with other companies in specific circumstances. Joint conduct by insurance companies operating in the aviation or nuclear industries is similarly exempt from the application of the AMA under specific 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 7-2 of the AMA. The limitation period for issuing a surcharge payment order is also seven years from the end of the implementation period according to Article 7-8, paragraph 6 of the AMA.

## 1.6 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, which involved a price-fixing cartel on television cathode-ray tubes taking place outside Japan.

The Supreme Court held that Japanese antitrust law will still apply even if the cartel infringement took place outside Japan, provided the cartel has had an anti-competitive effect in the Japanese market (for example, where the cartel is targeted at transactions with Japanese-based companies).

## 1.7 Principles of Comity

As a matter of law, the AMA does not contain any provision regarding principles of comity and there has not been a precedent that explicitly mentions the application of principles of comity in relation to the enforcement of the AMA. However, in practice, 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. However, this consideration is subject to each authority's discretion in line with principles of comity.

## 1.8 Enforcement Priorities

There are a limited number of cartel enforcement cases in Japan each year. The number of bid rigging and price-fixing cases has been roughly the same in recent years. The JFTC mainly seems to focus on domestic cartels and it is widely believed that many of the cartel investigations are commenced based on factual evidence submitted through the leniency programme.

## 1.9 Guides Published by Governmental Authorities

Some guidelines are not specific to cartels but nonetheless deal with certain issues relating to cartels. For 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](#).

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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.

In terms of enforcement, the JFTC has published guidelines that aim to increase understanding of its enforcement activities and policies, such as the [Overview of Administrative Investigation Procedures for Alleged Antitrust Cases](#) of December 2015 (see **2.1 Initial Investigation**).

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

## 2. Early Stages of Cartel Enforcement

### 2.1 Initial Investigation

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

It is also worth noting that the JFTC published the [Overview of Administrative Investigation Pro-](#)

[cedures for Alleged Antitrust Cases](#) in December 2015 (see **1.9 Guides Published by Governmental Authorities**). These Guidelines 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/Search Warrants

It is common for the JFTC to conduct on-site inspections of offices (known as “*dawn raids*”). The legal basis for these on-site inspections is contained in Article 47 (1), item 4 of the AMA. Any refusal, obstruction or avoidance of the inspection without justifiable reasons will be subject to sanctions in line with 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 during the on-site inspection, but 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 this will affect the smooth running 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 the JFTC will therefore 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



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under Article 47 (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 the search necessary to investigate the alleged violation.

The investigators are also entitled to seize any materials 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 or local servers. However, during criminal investigations, actual devices will be seized.

Interviews with officers or employees responsible for the alleged violation usually take place during dawn raids. In practice, these 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 (1) of the AMA. The 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 provided to them 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 the 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 Evidence

Once the JFTC's investigation starts, the company and the employees being investigated are under 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 these obligations may result in sanctions such as:

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

In addition to the obligations under the AMA, spoliation of evidence that is relevant to the cartel conduct of others, including the company they belong to, may be considered to constitute spoliation of evidence under Article 104 of the Criminal Code.

## 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. However, lawyers,



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are not typically 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.

The JFTC does not typically raise the issue of whether individuals should obtain separate legal counsel from their employers. It is worth noting that separate legal counsel for individuals might be necessary in a criminal investigation 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. This internal 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 therefore the amount by which the administrative fine can be reduced under the leniency programme (see **3.1 Leniency**).

## 2.5 Obtaining Evidence/Testimony

Documentary evidence is usually first obtained by the JFTC at the alleged companies' offices during the course of "*dawn raids*". It then subsequently asks the companies to submit the relevant documents from time to time and also delivers "*Reporting Order*" in a timely manner so as to secure precise information on the alleged violation to enable it to prepare the issuing of a

cease-and-desist order and surcharge payment order.

It is widely believed that a large portion of the investigations against cartels by the JFTC are triggered by information submitted through leniency applications.

## 2.6 Attorney-Client and Other Privileges

Unlike 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 a company under investigation 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 in them.

In these circumstances, JFTC officers will order the documents be submitted, seal them and place them 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 documents 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

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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 only applied to administrative investigations into violations 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.

## 2.7 Non-Cooperation

Initial requests for information by the JFTC are not usually refused by individuals and companies. This is because they are deemed to be obliged to co-operate 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/Search Warrants).

## 2.8 Protection of Confidential/Proprietary Information

As mentioned in 2.2 Dawn Raids/Search Warrants, the JFTC investigators are entitled to review and seize any materials they reasonably consider to be necessary for their investigation under Article 47 of the AMA. Any documents containing confidential or proprietary information can therefore also be obtained by the investigators. As well as considering documents of third parties, these documents could 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 line with Article 39 of the AMA.

## 2.9 Arguments Against Enforcement Actions

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

# 3. Leniency, Immunity and Whistle-Blower Regimes

## 3.1 Leniency

A leniency regime has been in place in Japan since 2006. Under the current regime, 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.

However, 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 position of the companies in the order of leniency and determines the amount of reduction offered to them. Group filing is available subject to certain conditions.

## Applying for Leniency

If the first-through-the-door whistle-blowing 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

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7-4, paragraph 1 of the AMA). The leniency measures available to subsequent applicants for leniency 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 surcharge reduction 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 surcharge reduction, but the reduction will vary from 10% to 50% depending on the extent of co-operation with the JFTC. The sixth or later applicants will also be eligible for a surcharge reduction 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 surcharge reduction of 10% to 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 this category will obtain a surcharge reduction 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 surcharge reduction).

### 3.2 Amnesty/Immunity

The AMA does not provide a formal amnesty regime. There is therefore no applicable amnesty regime (including an amnesty plus regime) 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, which were then 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.

### 3.3 Whistle-Blowers

The AMA does not provide for a whistle-blower regime. However, current and former employees and officers at a company who report a violation by the company that is subject to criminal sanctions are protected by the Whistleblower Protection Act. For example, dismissal and other disadvantageous treatments against them due to the report are prohibited under the AMA.

The JFTC also encourages companies to introduce an internal leniency programme so as an employee who engages in cartel conduct but then blows the whistle on cartel conduct that took place in their company may be exempt from disciplinary action. This is aimed at facilitating the detection of cartels.

## 4. Procedural Framework for Cartel Enforcement

### 4.1 Obtaining Evidence From Employees

Although the JFTC usually seeks any documents from the company being investigated, investigators sometimes ask current and former 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).

### 4.2 Obtaining Documentary Evidence From Subject/Target Companies

The JFTC usually contacts the legal department of the company when it asks it to voluntarily submit additional materials that the JFTC considers necessary to prove the allegations in the course

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of the investigation. A compulsory procedure (eg, an “*Order of Submission*”) is also available under Article 47 (1), item 3 of the AMA if the companies do not co-operate with the request.

However, this compulsory procedure does not mean that the JFTC has the authority to exercise a direct physical power to seize documentary evidence. Instead it means that failing to comply with the Order of Submission may be subject to criminal sanctions and in that sense the Order of Submission is considered to be compulsory. There is no difference between the company being investigated and a third party with regard to the JFTC’s request for documentary information.

### 4.3 Obtaining Evidence From Entities Outside the Jurisdiction

While the JFTC can do so, it will not usually investigate companies or individuals located outside Japan. However, as a matter of law, some technical issues could arise in terms of how the JFTC delivers an Order of Submission to companies or individuals outside the jurisdiction in line with Articles 70-6 and 70-7 of the AMA and Article 108 of the Civil Procedure Law).

In practice, where a server containing relevant data is located overseas, the JFTC sometimes requests companies located in Japan to produce data contained in that server as long as the companies have access to it from Japan. While the JFTC cannot force them to produce certain data under the AMA, many companies which have filed a leniency application and are therefore obliged to co-operate with the JFTC are likely to submit the data voluntarily.

### 4.4 Domestic Inter-Agency Co-Operation

The JFTC always co-operates with the Public Prosecutor’s Office in 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 submitted to the Public Prosecutor’s Office. Accordingly, it is common 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, the JFTC will also occasionally co-operate with other agencies or ministries in Japan. For example, the JFTC will co-operate with the Ministry of Land, Infrastructure, Transport and Tourism in antitrust cases involving the transport sector. In these 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 them.

### 4.5 International Inter-Agency Co-Operation

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, this international co-operation is rather limited.

The AMA incorporates provisions allowing the JFTC to exchange information with competition authorities in different jurisdictions. The JFTC actively works with other major competition authorities on specific cases, including through the exchange of information with its foreign counterparts. It is entitled to share “*information that is deemed helpful and necessary for the execution performance of the foreign competition authority’s duties*” with foreign competition

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authorities where the 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 those in the EU, the USA 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. During the course of administrative (as opposed to criminal) procedures, JFTC officials cannot therefore exchange information (for example, business secrets of the companies under investigation) without prior permission or waivers to do so from the companies in question. However, when examining leniency applications, it is understood that the JFTC exchanges confidential information (including the contents of the applications) with foreign competition authorities but only after obtaining a waiver to do so from the applicant.

## 4.6 Issuing Criminal Indictments

As mentioned in 4.4 Domestic Inter-Agency Co-Operation, criminal actions can only be brought against companies (or their officers and employees) by the JFTC after filing a criminal 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 comply with 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. For 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 the 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. The Public Prosecutor's Office is responsible for proving facts that constitute cartel conduct before the court and the court is the ultimate finder of facts. 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.

## 4.7 Issuing Civil Complaints

Administrative trials are discussed here and private actions are covered in 6.1 Private Rights of Action. The JFTC issues a cease-and-desist order and/or a surcharge payment order under Articles 7 and 7-2 of the AMA when it proves a cartel activity allegation. The process for a cease-and-desist order or a surcharge payment order was amended as of 1 April 2015, as part of

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a wider move towards increasing the transparency of administrative procedures.

Before 2015, if a company wanted to challenge a cease-and-desist order and/or a surcharge payment order, it had to file an appeal before the JFTC first. 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 its nullification 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 was 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 and Articles 3 and 14 (1) of the Administrative Case Litigation Act). Although the relevant laws do not explicitly stipulate who has the burden of proof, it is generally believed that the JFTC bears the burden of proof with regard to facts that relate to the legality of the order.

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 support the JFTC's prospective orders and to present their opinion in the hearings.

#### 4.8 The Role of Experts

To date, economists and other experts have not usually played a key role in cartel cases in Japan. This is because so-called "*hardcore*" cartels (eg, price cartels, quantity cartels and market-shar-

ing cartels) are treated as illegal *per se* in Japan and so the JFTC does not have much difficulty in proving infringement of the AMA.

#### 4.9 Possibility of Multiple Proceedings

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 for a cease-and-desist order and a surcharge payment order to be issued. In these cases, the same or related facts concerning the cartel may be dealt with in different proceedings.

Where appropriate, the court can decide to combine multiple hearings *ex officio* or upon request from the Public Prosecutor, the defendant or the defence counsel under Article 313 (1) of the Code of Criminal Procedure. However, the court will separate the hearings when it is necessary to protect the defendant's rights, including when defendants have different defence policies from each other.

This generally applies to administrative trials challenging the JFTC's orders. Evidence obtained in one proceeding cannot be used in other proceedings unless it is requested for an investigation to take place in another proceeding.

### 5. Sanctions and Remedies in Criminal Cartel Enforcement

#### 5.1 Imposition of Sanctions/Fines

The JFTC does not have the authority to impose criminal sanctions directly. Cartel violators could be indicted by the Public Prosecutor's Office, following the filing by the JFTC of a criminal accusation with the Public Prosecutor's Office. Crimi-



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nal sanctions are then imposed by the court, as explained in 4.6 Issuing Criminal Indictments.

On the other hand, in practice, administrative sanctions are the primary enforcement tool of the AMA, rather than criminal ones, and the JFTC has the authority to impose administrative 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 being investigated with the opportunity to present their opinions in line with 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.

However, it should be noted that the JFTC has a certain amount of discretion on how much surcharge it could impose on offenders based on the extent of their co-operation with the JFTC in the investigation according to the leniency policy.

## 5.2 Plea Bargaining/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 these persons agree with the conditions specified by the prosecutor and their attorney’s consent is given.

In terms of 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 (the “*TPP 11*”). However, this commitment system 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.

## 5.3 Effect of Liability Being Established

Following a Supreme Court decision in November 1975, a decision by the JFTC does not have any legally binding effect on the civil courts. As a result, any contract that does not comply 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 barred from bidding on contracts for several months if any bid rigging is found.

In addition, it is written into the agreement that infringers must pay a certain amount of damages (eg, 10% of the value of the contract) as a penalty in this type of event.

## 5.4 Sanctions and Penalties in Criminal Proceedings

As mentioned in 1.2 Regulatory/Enforcement Agencies and Penalties, companies and indi-



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viduals 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 (1), item 1 of the AMA while 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.

## 5.5 History of Criminal Sanctions

Please refer to 5.4 Sanctions and Penalties in Criminal Proceedings for details of criminal sanctions. No Japanese citizens have been extradited to another jurisdiction for a cartel offence, but reportedly to date, more than 40 employees involved in cartel conduct have been jailed in the United States as part of a plea bargain.

Meanwhile, as mentioned in 1.2 Public Regulatory/Enforcement Agencies and Penalties, the primary forms of sanctions issued by the JFTC in administrative proceedings are a cease-and-desist order and a surcharge payment order in line with 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 line with Article 7 of the AMA. Necessary measures vary widely according to each case. However, the JFTC 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, it 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 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), these sales figures are also subject to the calculation for the amount of the surcharge against its parent company.

Additionally, if the violator obtains financial benefits from an accomplice (in return for making the accomplice win the bid, for example), these benefits are taken into account when calculating the violator's surcharge. If the company is *"repeat offender"* or took a leading role, the surcharge

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amount can be increased by up to 50% under Article 7-3 (1) and (2) of the AMA. If the company is both “repeat offender” and took a leading role, the total surcharge amount can then be doubled under Article 7-3, paragraph 3 of the AMA.

The JFTC does not have discretion to increase the surcharge amount 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 co-operation. As regards this reduction rule, the JFTC published Guidelines to the Reduction System for Co-operation in Investigation in December 2020. The Guidelines aim to improve the predictability and transparency of the JFTC’s assessment of the level of co-operation offered by the leniency applicant.

## 5.6 Relevance of Effective Compliance Programmes

For criminal sanctions, courts, as opposed to the JFTC, have discretion to decide the amount of criminal fines imposed on a company when calculating the surcharge amount under the AMA. An “effective compliance programme” that is primarily put in place to prevent the violation from recurring after the company found a violation could be considered as an extenuating circumstance by the court when it decides the amount of criminal fines.

As noted in 5.5 History of Criminal Sanctions, the JFTC does not have any discretion when it comes to the amount of surcharges imposed on cartel participants. An effective compliance programme is therefore not taken into account when imposing administrative fines on companies that participate in cartels. The JFTC instead seems keen to determine whether the companies being investigated performed an effective compliance

programme throughout the entire investigation. Accordingly, the fact that these companies put an effective compliance programme in place could affect the decision as to whether they would be required to conduct additional compliance efforts as part of the cease-and-desist order.

## 5.7 Mandatory Consumer Redress

There is no mandatory consumer redress system under the AMA. Victims of cartels therefore need to take legal action, including private litigation such as a damage claim, against the companies involved in the cartels if they want redress.

## 5.8 Judicial Review or Appeal

As mentioned in 4.7 Issuing Civil Complaints, 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 had to file an appeal before the JFTC first. 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.

However, there was 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 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.

In practice, it is quite rare that a court overturns all of the JFTC’s decision. That said, there have

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been a few cases where the JFTC's decisions are partially overturned by a court, such as to reduce the surcharge amount.

## 5.9 Timeline of Cartel Enforcement Process

There is no statutory timeframe for a cartel enforcement investigation and proceeding. Although the report is old, the JFTC's official report published in 2013 showed that the average length of proceedings for cases that ended with legal actions by the JFTC was approximately 14 months. However, there has been a recent trend of investigations lasting even longer, especially with complex cases being investigated for 18 months or more.

## 6. Civil Litigation

### 6.1 Private Rights 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 cartel. 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.

### 6.2 Collective Action

Unlike some other jurisdictions, it is relatively rare for a company or consumer who has suffered from cartel conduct to bring a damage claim directly to the courts. They are more likely to choose the route of reaching a settlement with the cartel violators, although settlement like this 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 significantly in the near future.

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

### 6.3 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.

### 6.4 Evidence Obtained From Governmental Investigations/Proceedings

Private actions such as damage claims and injunctions are handled in civil proceedings in Japan. The process applied for private actions is therefore the same as for other types of civil litigation in line with the Civil Litigation Act. Evidence from governmental investigations or proceedings is admissible subject to the government officials' confidentiality obligations in line with regulations under the Civil Litigation Act.

In this respect, the notice concerning the materials that have to be provided in damage claims under the AMA are issued by the JFTC secretary general. The notice sets out the policy on how the JFTC responds to a request for these materials to be submitted to courts and victims.

### 6.5 Frequency of Completion of Litigation

Most civil litigation cases, including damages lawsuits relating to cartels, are likely to end in settlement. This is partly because it usually takes

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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.

With respect to the discovery process, the Civil Litigation Act provides that a court may order the other party to submit documents upon a petition by a claimant or defendant. Documents subject to the order are limited to those listed in Article 220, items 1 to 4 of the Civil Litigation Act.

However, in civil proceedings where a claimant seeks an injunction against cartel activity, a court may issue an order for the necessary documents proving the cartel activity in question be submitted without the limitations imposed by the Civil Litigation Act.

## 6.6 Attorneys' Fees

There is no law in Japan regulating attorneys' fees, including advance payment and success fees. However, the attorneys' ethics rules provide that attorneys should charge clients fair and reasonable fees. 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.

## 6.7 Costs/Fees

Each party should in principle be liable for their own attorneys' fees in civil proceedings in Japan. Only a small part of the fees will usually be awarded, even if a claimant wins a damage lawsuit and seeks compensation for its attorneys' fees. Accordingly, unsuccessful claimants will 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 the counterclaim was admitted).

## 6.8 Judicial Review or Appeal

Claimants seeking compensation from cartel violators are entitled to file a lawsuit with the civil affairs division of the district courts and, if they are not satisfied with the decisions of these 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).

# 7. Trends in Cartel Enforcement

## 7.1 Information Sharing as a Cartel Offence

Information sharing does not itself necessarily constitute a cartel conduct under the AMA. However, where there is any collusion between competitors who hold a majority of market shares on price fixing or bid rigging through an exchange of competitively sensitive information and the collusion is likely to substantially restrain fair competition in the market, it will constitute a cartel under the AMA and the competitors will be held liable for the violation of the AMA.

## 7.2 Use of AI and Algorithms

In its *"Generative AI and Competition"* discussion paper dated 2 October 2024, the JFTC pointed out that in some cases the use of generative AI can lead to co-operative pricing. It also pointed out that it can stimulate price competition through price research and pricing function.

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However, the discussion paper did not raise a specific concern about the use of generative AI. The JFTC requested information and opinions from a diverse audience to enable it to analyse the market further and present its views from the competition policy perspective, as necessary.

### 7.3 Monopolisation as a Cartel Offence

Under the AMA, if a company holding a dominant position in a market controls and restricts business activities of other companies by directing price, supply quantity and customers of their business, the act may constitute a violation of the AMA. This is because “*private monopoly*” and “*unreasonable restraint of trade*”, which prohibits a cartel conduct under the AMA, share the same objective of prohibiting acts which may substantially restrict competition in the market.

### 7.4 Focus on Certain Industries/Sectors

The JFTC has frequently stated that it keeps a close eye on any anti-competitive behaviour in the market related to digital platform businesses. It has actually taken unilateral enforcement action against violations. However, when it comes to cartel enforcement, it has not shown interest in any specific industries or sectors.

### 7.5 Use of Messaging Applications and Chat Platforms

As explained in 1.8 Enforcement Priorities, most cartel investigations are triggered by companies submitting factual evidence in pursuit of leniency. Companies usually continue to co-operate with the JFTC during its investigation. Loss of evidence is therefore not a typical issue and the JFTC has not published any guidance regarding the preservation of transient communications.

### 7.6 “No Poach” and Labour Market Allocation Conduct

Although the AMA does not apply to matters regulated under the labour laws, issues such as “*no poach*” agreements and labour market allocations can raise a competition concern under the AMA. Despite publishing a study report related to these issues a few years ago and expressing an interest in the issues raised, the JFTC has not actively been investigating them.

### 7.7 Leniency v Ex Officio Investigations

The JFTC publishes a statistical report regarding its enforcement of violations of the AMA annually. According to these reports the number of leniency applications from companies sharply decreased during the COVID-19 pandemic from 2020 to 2022.

Ex officio investigations are not very common as companies being investigated usually co-operate with the JFTC by submitting factual evidence with the objective of obtaining leniency.

### 7.8 Domestic v International Investigations

As described in 1.8 Enforcement Priorities, most of the cartels investigated by the JFTC are domestic cartels.

### 7.9 Environmental, Social and Governance (ESG) Cartels

In April 2024, the JFTC revised the [Guidelines Concerning the Activities of Enterprises, etc. Toward the Realisation of a Green Society Under the Antimonopoly Act](#), which were originally published in March 2023. It amended the Guidelines after consulting with enterprises and reviewing comments from the public.

The Guidelines specify three review frameworks for the JFTC in terms of joint activities

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of enterprises, depending on the nature of the conduct. The first is acts that are not expected to have any anti-competitive effects. These do not pose problems under the AMA. The second is if a joint activity only causes anti-competitive effects. In principle, these pose problems under the AMA and will not be able to be justified on green purposes alone. These types of conduct include acts that restrain any important means of competition such as prices, acts that restrain entry of new enterprises and acts that exclude any incumbents from markets.

The third is a joint activity that has both anti-competitive and pro-competitive effects. Whether the activity poses a problem under the AMA needs to be assessed by comprehensive consideration of both effects taking the activity's purpose and adequacy of the means employed

for it (eg, whether there are any less restrictive alternatives) into consideration.

The Guidelines highlight specific factors to be considered for each type of joint activity and provide several example cases enterprises can refer to.

## 7.10 Crisis Cartels

There is no public information on a cartel case which has been conducted or affected by post-COVID-19 pandemic inflationary or supply chain issues. No difference in the JFTC's investigation procedures pre-pandemic and post-pandemic has been seen, other than perhaps a reduction in the number of dawn raids during that period.