

Cartels

Enforcement, Appeals & Damages Actions

2023

11th Edition

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Japan

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Overview of the law and enforcement regime relating to cartels

In Japan, Article 3 of the Antimonopoly Act prohibits ‘unreasonable restraints of trade’. An unreasonable restraint of trade is defined in Article 2(6) as ‘such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restricts or conducts 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’. Under Article 3, cartels (i.e., agreements with competitors concerning price fixing, production restraints, markets or customer allocation, etc.) are prohibited in principle.

Administrative penalties may be ordered against companies that engage in cartel activities. With respect to such penalties, the Japan Fair Trade Commission (JFTC) can investigate cartels based on the administrative investigation procedure. After the investigation, the JFTC decides whether to issue a cease-and-desist order and/or administrative surcharge (penalty) payment order to the company.

To establish an infringement, the JFTC must prove the following elements: (i) joint action with mutual restraint (namely an agreement, either express or implied); (ii) substantial restraint of competition in a relevant market; and (iii) the action is contrary to the public interest. Thus, an anti-competitive effect in the relevant market must be proved to establish an infringement. However, practically, an anti-competitive agreement between parties that have a combined market share of over 50% of the relevant market is assumed to have caused a substantial restriction of competition in that market. In other words, such agreement conducted by such parties is practically deemed illegal *per se*.

Criminal penalties may be imposed against a company and/or its officers and/or employees that engaged in cartel activities. If prosecuted by a Public Prosecutor – upon the JFTC’s accusation – and convicted by a court, a company may receive a criminal fine and individuals may be imprisoned for up to five years and/or receive a criminal fine.

Overview of administrative investigative powers in Japan

To clarify whether the Antimonopoly Act is violated or not and to issue an order to take necessary measures to eliminate such violations, the JFTC is authorised to investigate companies and take indirect, compulsory measures such as on-site inspections (namely dawn raids), document production orders, orders to appear and to be interrogated, and reporting orders under Article 47 of the Antimonopoly Act. In addition, the JFTC conducts investigations by means of interviews and requests to report based on voluntary cooperation from companies.

The JFTC has the power to enter a business office of a company involved in an alleged cartel or other necessary sites to inspect the conditions of its business operation, and its property, books, documents, and other materials (on-site inspection). Further, the JFTC has the power to order the person who holds the books, documents and other materials to submit such materials and the right to retain them at the JFTC.

Interviews are classified into voluntary interviews and interrogations based on authority with indirect enforcement. The JFTC usually uses voluntary interviews, which are conducted through the voluntary cooperation of the testifying parties.

The JFTC has the power to order companies involved in an alleged cartel to report information necessary for a case investigation (reporting order).

An on-site inspection and other dispositions under Article 47 of the Antimonopoly Act are indirectly enforceable. If the company refuses to accept the investigation, the JFTC is not able to directly or physically exercise its power to conduct the investigation, but a company that refuses to accept the investigation without justifiable reasons may be subject to punishment.

Overview of cartel enforcement activity during the last 12 months

From March 2022 to March 16, 2023, the JFTC has issued cease-and-desist orders and surcharge payment orders in the following five cases:

- (i) bid rigging for data printing services ordered by the Japan Pension Service (the total surcharge payment amount: approximately JPY 1.7 billion);
- (ii) bid rigging for pharmaceuticals ordered by the Japan Community Health Care Organization (the total surcharge payment amount: approximately JPY 423.8 million);
- (iii) bid rigging for personal computers and managed local area network servers for schools ordered by Hiroshima Prefecture and the City of Hiroshima (the total surcharge payment amount: approximately JPY 56.8 million);
- (iv) bid rigging for office work in hospitals ordered by hospitals located in Aichi and Gifu Prefectures (the total surcharge payment amount: approximately JPY 121.3 million); and
- (v) price fixing for specific types of steel butt-welding pipe fittings (the total surcharge payment amount: approximately JPY 149.6 million).

Also, the JFTC has filed a criminal accusation with the Prosecutor General against six companies and seven individuals for bid rigging concerning the outsourcing contracts for the planning of test events and the managing of test events and main events in the Tokyo 2020 Olympic and Paralympic Games.

Key issues in relation to enforcement policy

Many of the cases that have been investigated in recent years are in areas closely related to the daily lives of citizens, such as electric power and medical care. Additionally, the JFTC is now investigating possible cartels in several industries, including the survey business in Kochi Prefecture and the school catering business in Nagoya city. As such, the JFTC also investigates products familiar to consumers.

In addition, Japan has declared its goal of reducing greenhouse gas emissions, and many Japanese companies have been promoting attempts to build a ‘Green Society’. Since it is expected that business initiatives toward a ‘Green Society’ will become active and concrete soon, the JFTC is now working to establish guidelines that clarify antitrust issues, including cartels, with respect to the activities of business to build a ‘Green Society’. Since the JFTC has already published the draft of the guideline and its English translation,¹ it is expected that the English translation will also be published when the guideline is established.

Key issues in relation to investigation and decision-making procedures

COVID-19 pandemic impact

The JFTC usually conducts dawn raids and interviews in its investigations of cartel cases. However, due to the spread of the COVID-19 pandemic, the JFTC has been significantly restricted in its investigative activities, including dawn raids and interviews. In addition, the JFTC typically investigates cartel cases after receiving leniency applications. However, the number of leniency applications dropped significantly during the period of the spread of the COVID-19 pandemic. As a result of these factors, the number of cases in which the JFTC has issued cease-and-desist orders for cartels in recent years has been small, with only three cases in FY2021.

Recently, the impact of the spread of the COVID-19 pandemic has calmed down, and the JFTC has resumed its investigations, including vigorous dawn raids and interviews. In addition, the number of leniency applications has also slightly recovered. Therefore, the number of cases in which the JFTC issues cease-and-desist orders for cartels is expected to increase in the future.

Attorney-client privilege

In 2020, the Antimonopoly Act introduced a so-called attorney-client privilege that was not previously recognised in Japan for the purpose of facilitating leniency cooperation. In particular, it created a system that will prevent investigators from accessing documents and data that contain confidential communications between a company and an outside attorney about legal advice regarding alleged cartels if certain strict conditions are met pursuant to the prescribed procedure (the ‘Privileged Treatment’). The JFTC’s guideline on the Privileged Treatment says that the attorney-client privilege will not attach to interview memos themselves. Also, the Privileged Treatment is designed to cover only the JFTC’s administrative cartel investigations and not criminal cartel investigations. As such, the scope of the Privileged Treatment is significantly narrower than that granted in the United States.

Outside attorneys need to be qualified in Japan, which means that foreign attorneys are not included in the scope of ‘outside attorneys’. Nevertheless, although communications between foreign attorneys and the company are not subject to the Privileged Treatment, the JFTC’s guideline indicates that the JFTC shall not issue a submission order with respect to material recording confidential communications between the company and its foreign attorney about legal advice relating to issues under foreign competition laws regarding the cartel, unless such material contains primary source materials or fact-finding materials, or is otherwise considered necessary for the JFTC investigation of the relevant case. The JFTC’s actions on this matter will be the focus of much attention in the future.

Leniency/amnesty regime

If a company is the first applicant to submit reports and materials regarding the facts of a cartel to the JFTC before the JFTC starts its investigation, it will obtain full immunity.

Subsequent applicants who apply for leniency before the JFTC starts its investigation will obtain a reduction of their surcharge as follows: (a) the second applicant will receive a reduction of 20%; (b) the third to fifth applicants will receive reductions of 10%; and (c) the sixth or later applicants will receive reductions of 5%. They may obtain an additional reduction of up to 40% (for example, the second applicant may obtain a total 60% reduction) according to the degree of their contribution to revealing the facts of the case.

After the JFTC starts its investigation, leniency applicants can obtain a reduction of their surcharge as follows: (a) up to three applicants (and up to five applicants including applicants who apply for leniency before the start of the JFTC's investigation) will receive a reduction of 10%; and (b) the other applicants will receive a reduction of 5%. They may obtain an additional reduction of up to 20% according to the degree of their contribution to revealing the facts of the case.

As to criminal sanctions, the JFTC, which has the exclusive right to file a criminal accusation against companies and individuals for violations of the Antimonopoly Act, has stated that it will not file a criminal accusation against the first-in applicant who submits reports and materials before the JFTC starts its investigation. In addition, officers and employees of such company can also avoid such criminal accusation.

If a company identifies possible cartel conduct internally before the JFTC starts its investigation or a company was investigated by the JFTC, the company should consider whether to apply for leniency. In deciding whether to make a leniency application in Japan, the company should consider, among other things, the potential defence for such conduct, the extent of a possible surcharge/fine and other damages (including civil damage claims), and the merits of leniency. Such considerations should be based on various factors such as the content of the conduct, the scale of the relevant market, the number of the companies involved in the cartel, whether the companies have recently faced other investigations by antitrust authorities, the statute of limitations, the sales volume, and whether the said conduct constitutes an international case.

Administrative settlement of cases

There is no administrative settlement procedure for cartels in Japan. Japan introduced the Commitment Procedures into the JFTC procedures in December 2018, but the JFTC has made it clear that hard-core cartels are not subject to the Commitment Procedures.

Third-party complaints

Anyone may lodge a complaint to the JFTC in writing, orally or online if they suspect a violation of the Antimonopoly Act (including a cartel). There are no formal requirements for the complaint, but they are encouraged to provide the JFTC with their identifying information (name, address, telephone number, email address), alleged violator's identifying information (name, company address, its representative's name), and the concrete facts concerning the possible violation.

Also, a national or local government agency may report a possible violation of the Antimonopoly Act (including a cartel) to the JFTC if they suspect it.

Civil penalties and sanctions

The JFTC shall impose administrative surcharges on violators. The amount of the administrative surcharge shall be calculated based on the following factors, under the 2019 amendments to the Antimonopoly Act, which fully came into force on December 25, 2020:

- (i) the base amount;
- (ii) the surcharge calculation rate (X%);
- (iii) collusion benefits; and
- (iv) the leniency reduction amount.

The method of calculation is X% of the base amount, plus collusion benefits, minus the leniency reduction amount.

The base amount is the volume of commerce affected by the cartel for the duration of the violation. In a case of a sellers' cartel, such volume shall be the amount of sales of targeted goods or services sold by the violator's group (consisting of the violator and/or certain of its subsidiaries) plus (if any) consideration for businesses closely related to the targeted goods or services (such as subcontract payment for targeted goods that a violator receives from another violator in return for letting another violator win a bid tender for the targeted goods). The duration of the violation may stretch back for a maximum of 10 years from the investigation start date.

The surcharge calculation rate is 10% in principle. It shall increase to 15% when (a) a violator has received a surcharge payment order, etc., during the past 10 years, or (b) a violator performed a leading role in the cartel, and it shall also increase to 20% when a violator meets both requirements (a) and (b). On the other hand, if a violator is a small or medium-sized company, any of the surcharge calculation rates as stated above shall be reduced to 40% of the rate, respectively.

The collusion benefits are, for example, the payment received from another violator in return for agreeing not to sell targeted goods to allocated customers.

Violators are suspended for a certain period of time from biddings conducted by the national and local government if they receive an order from the JFTC.

Right of appeal against civil liability and penalties

The cease-and-desist order and surcharge payment order issued by the JFTC may be appealed to the Tokyo District Court on the grounds of factual and/or legal errors within six months from the date when the plaintiffs became aware that the orders have been issued. The judgment of the Tokyo District Court may also be appealed to the Tokyo High Court on the same grounds, but the judgment of the Tokyo High Court may be appealed to the Supreme Court of Japan only on the grounds of legal errors.

Further, the appeal to the Tokyo District Court does not stay the cease-and-desist order and surcharge payment order. There is a procedure to seek a decision by the court to stay the orders, but the requirements for the decision are very strict and it is unlikely that such decision will be made. Therefore, even if the company appeals, the company receiving the orders is required to comply with such orders.

Criminal sanctions

As explained below, both the JFTC and the Public Prosecutor can launch a criminal cartel investigation. The criminal investigation is conducted against a company as well as its officers and employees.

The JFTC can use the criminal investigation procedure under the Antimonopoly Act. As a result of the investigation, if the JFTC believes that it is appropriate to impose criminal penalties, it will file an accusation with the Prosecutor General. The JFTC has published the criteria for proactively filing an accusation with the Prosecutor General, according to which, (i) vicious and serious cartels and other violation cases that are considered to have widespread influence on people's lives, and (ii) cases involving parties who are repeat offenders or who do not abide by the cease-and-desist order, for which the administrative penalties by the JFTC are not appropriate to achieve the purpose of the Antimonopoly Act, may be subject to active filing. In recent years, the JFTC has filed with the Prosecutor General at a rate of about one case every few years.

The Public Prosecutor also can investigate cartels under the Code of Criminal Procedure. Since an accusation by the JFTC is required in order to prosecute a company and/or its officers and/or employees for cartel activities in violation of the Antimonopoly Act, in practice, the JFTC and Public Prosecutor jointly investigate cartels for criminal prosecution. They may conduct dawn raids, searches, or seizures to investigate cartels for criminal penalties, with the authority of a search warrant issued in advance by a judge.

After the joint investigation, the JFTC may file a criminal accusation with the Prosecutor General against the companies and individuals that engaged in cartel activity. If prosecuted by a Public Prosecutor upon such accusation and convicted by a court, a company may receive a criminal fine of not more than JPY 500 million (approximately USD 3.7 million), and individuals may be imprisoned for up to five years and/or receive a criminal fine of JPY 5 million (approximately USD 37,000). So far, all individuals who have been sentenced to imprisonment because of cartel activities have so far been given suspended sentences. Thus, as of March 2023, no individuals have actually been imprisoned for cartel activities.

A criminal conviction does not preclude the JFTC from issuing an administrative order. In practice, the JFTC usually issues an administrative order to the company after the criminal convictions have been made. The amount of the surcharge is calculated after deducting an amount equal to one-half of the amount of the criminal fine.

Cooperation with other antitrust agencies

Japan maintains Antimonopoly Cooperation Agreements with European Communities, the United States and Canada. The JFTC has reached inter-agency cooperation memorandums/arrangements with 11 foreign authorities, including the Competition Commission of India, the State Administration for Market Regulation of the People's Republic of China, and the Competition Commission of Singapore.²

In case of international cases, the JFTC usually asks a leniency applicant whether it will provide a waiver so that the JFTC can share the information provided by it with the other authorities. The JFTC sometimes coordinates the investigation with the other authorities so that it can conduct a dawn raid on the same day as the other authorities do.

Cross-border issues

In the case where a cartel is formed outside of Japan, but when the competitive function of Japan is going to be impaired by the cartel, the Japanese Antimonopoly Act can apply to such overseas cartel.

On December 12, 2017, in the *Cathode Ray Tubes* cartel case, the Supreme Court of Japan stated as follows: 'The Antimonopoly Act does not have specific provisions on whether and how the Act applies to an act conducted outside of Japan. However, considering the fact that the purpose of the same Act is to promote the democratic and wholesome development of the national economy, as well as to secure the interests of general consumers, by promoting fair and free competition (Article 1) and other facts, it is adequate to construe that even in the case of a cartel agreed upon outside of Japan, if the cartel infringes on the order of the free-competition economy in Japan, the same Act allows its provisions on a cease and desist order and surcharge payment order to apply' and 'it can be held that even if a price cartel (unreasonable restraint of trade) as in this case is agreed upon outside of Japan, in the case where Japan is included in the market, the competitive function of which is going to be impaired by the price cartel (e.g., in the case where such cartel restrains competition in which a person in Japan is a counterparty), such cartel infringes on the order of the free-competition economy in Japan'.³

Developments in private enforcement of antitrust laws

Anyone who has directly or indirectly suffered from anti-competitive agreements, such as cartels and bid riggings, can bring a lawsuit to recover their damages under Article 709 of the Civil Code or Article 25 of the Antimonopoly Act.

However, it is often challenging for such persons to prove such anti-competitive agreements and/or their damages (specifically indirect damages), given the limited discovery system in Japan. Additionally, the class action system introduced in Japan in December 2013 only allows certain qualified consumer organisations to bring a lawsuit against companies on behalf of consumers that have directly transacted with such companies to recover their actual damages, which means that this system is not available for indirect consumers. Also, there is no punitive damages system in Japan.

As such, private enforcement of the Antimonopoly Act has not been active, except where a national government or local government that purchased the targeted goods or services from violators through a bid brings a lawsuit for recovery of their actual damages based on, among other things, a penalty clause in the purchasing agreement, following cease-and-desist orders and/or surcharge payment orders issued by the JFTC.

Reform proposals

Reform proposals are not applicable in Japan.

* * *

Endnotes

1. <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118EN3.pdf>.
2. https://www.jftc.go.jp/en/int_relations/agreements.html.
3. https://www.courts.go.jp/app/hanrei_en/detail?id=1557.

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