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Japan: Evolving JFTC cartel regulation continues to target unreasonable restraint of trade

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Evolving legislation and enforcement tactics continue to transform the landscape, as highlighted by recent amendments to China's Anti-monopoly Law and an uptick in private antitrust cases in Japan; meanwhile, the Korea Fair Trade Commission has updated its Guidelines on Merger Filing to expedite the review process.

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Japan: Evolving JFTC cartel regulation continues to target unreasonable restraint of trade

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IN SUMMARY

This article provides a comprehensive overview of cartel regulation in Japan, including the 2019 amendment to the Anti-Monopoly Act.

DISCUSSION POINTS

- Overview of cartel regulation in Japan – cease-and-desist orders, payment orders for surcharge and criminal sanctions
 - Leniency Programme and Reduction System for Cooperation in Investigation
 - Practical issues of leniency
 - International cooperation
 - Private enforcement
-

REFERENCED IN THIS ARTICLE

- Anti-Monopoly Act
-

INTRODUCTION

Cartels are prohibited in Japan as an 'unreasonable restraint of trade', stipulated in article 3 of Act No. 54 of 1947, as amended, otherwise known as the Anti-Monopoly Act (AMA).^[1] Although the AMA does not include any particular provisions about extraterritorial applicability, the position of the Japan Fair Trade Commission (JFTC) and the generally accepted view in Japan is that, even if alleged violators have no physical presence in Japan, the AMA could be applied to conduct occurring outside Japan provided that such conduct results in certain substantial effects on Japanese markets. The Supreme Court of Japan confirmed this in 2017.

Though we have not seen a formal enforcement action taken by the JFTC against international cartels since 2018 (HDD suspension part case), historically, the JFTC has been consistently vigorous in its investigation of international cartels and, through the amendment to the AMA introduced in 2002, the JFTC is able to service its orders against foreign companies by way of service by publication in cases where service through diplomatic routes proved to be unfeasible. Service by publication is a method of service in which an order is deemed to be served to the recipient after a certain period from the date the JFTC posts the order on the board in front of the JFTC office. Accordingly, if the JFTC intends to issue a reporting order to a foreign company, eventually, it is able to exercise its investigative power by simply making a service by publication against such a foreign company (although it is customary for the JFTC to first request that the foreign company appoint an attorney in Japan and then serve the reporting order and other proceedings through the attorney).

The AMA explicitly requires substantial restraint of competition in the relevant market as an element to establish the illegality of cartels. Therefore, cartels are not illegal per se in Japan. However, naked cartels (ie, hardcore cartels) – such as price cartels, quantity cartels and share cartels – are considered to have tendencies to generally restrain competition, and efficiency and other non-competition grounds will rarely justify the necessity of naked cartels.

In most cases, the JFTC has no difficulty in proving that naked cartels cause a substantial restraint of competition in the market. As such, it would be fair to say that the JFTC enforces AMA cartel violations as vigorously as competition authorities in other jurisdictions of per se illegality do. The JFTC seems to maintain such a position in relation to cartels concerning the labour and employment area as well. A study group report issued in 2018 and the JFTC guidelines issued subsequently in 2019 suggested that agreements on wages and no poach agreements in principle violate the AMA; however, for no poach agreements, the JFTC also noted that it may allow justification, for example, in a case of a professional sports league where there is need to collect costs for training and also the need to maintain attractiveness of the league. We have yet to see actual cases with respect to how this would be actually implemented in practice.

Under the AMA, the unreasonable restraint of trade is subject to administrative and criminal sanctions. In relation to administrative sanctions, cease-and-desist orders and payment orders for surcharge are available.

ADMINISTRATIVE SANCTIONS

Cease-and-desist Orders

The JFTC may issue a cease-and-desist order pursuant to article 49, paragraph 1 of the AMA. A cease-and-desist order is an order to take measures necessary to eliminate the violation or to ensure that the violation is eliminated. Actions that can be ordered by a cease-and-desist order vary widely. In many cases, the JFTC may order the addressed company to:

- confirm that the violation has ceased;
- notify consumers or users that it will perform business based on its own voluntary judgement, after taking corrective measures; and
- report to the JFTC after taking such corrective measures.

There have also been cases where the addressed company was ordered to implement a compliance programme, including:

- preparing a code of conduct regarding compliance with the AMA;
- conducting regular training sessions for sales staff regarding compliance with the AMA; and
- having the legal department conduct audits regularly (eg, the Hard Disk Drive Suspension Assemblies price cartel case, JFTC cease-and-desist order, 9 February 2018).

In another case, the addressed company was ordered to transfer certain employees to different positions (eg, the Asphalt Mixture price cartel case, JFTC cease-and-desist order, 30 July 2019).

The statute of limitations for the JFTC to issue a cease-and-desist order is seven years. The statute of limitations starts from the date on which the company discontinues the violation.

PAYMENT ORDER FOR SURCHARGE

The JFTC must order a payment of surcharge when it finds an unreasonable restraint of trade that relates to consideration (article 7-2, paragraph 1 of the AMA). The basic amount of the

surcharge is calculated by multiplying the amount of sales of the relevant products during the period in which the unreasonable restraint of trade was implemented by the surcharge calculation rate of 10 per cent. In addition, some instances where the company is deemed to have obtained unjust gains due to the infringement would also be taken into consideration regarding the basis of calculation after the 2019 amendment to the AMA.

The maximum period subject to the surcharge is 10 years (or more, if the infringement continues after the JFTC commences its investigation), which was extended from three years in 2019.

The 2019 amendment further allowed the JFTC to estimate the amounts of the basis of calculation listed above if the company does not provide materials that should form the basis for the calculation (article 7-2, paragraph 3 of the AMA).

The calculation rate for the surcharge will be increased to 150 per cent of the original rate if the relevant company, its 100 per cent subsidiary, or a business that it has acquired by merger, corporate split or business transfer has been subject to a payment order for surcharge resulting from unreasonable restraint of trade or private monopolisation within the past 10 years. In addition, the calculation rate for the surcharge will also be increased to 150 per cent of the original rate if the company played a major role in an unreasonable restraint of trade, required or requested other companies to obstruct the JFTC's investigation, or required or requested other companies not to apply for leniency (including the Reduction System for Cooperation in Investigation). If a company falls under the definition of both of the above cases, the calculation rate of surcharge will be doubled.

If certain requirements are satisfied, a company that has not committed any particular violation but that acquires a business that has committed a violation by merger, corporate split or business transfer can still be subject to a payment order for surcharge.

The statute of limitations for a payment order for surcharge is seven years.

CRIMINAL SANCTIONS

Criminal sanctions are available for unreasonable restraint of trade. If an employee or officer of a company commits an unreasonable restraint of trade, the company may be punished by a fine of up to ¥500 million. Any individual who commits an unreasonable restraint of trade may be punished by imprisonment with labour for up to five years or a fine of up to ¥5 million, or both.

A criminal penalty may be imposed only after the JFTC files a criminal accusation with the Prosecutor-General and only the JFTC is entitled to file such criminal accusations (article 96, paragraph 1 of the AMA). In practice, the JFTC determines whether to file criminal accusations after consulting with the Public Prosecutors' Office at the Accusation Council.

Criminal sanctions are generally imposed only on very serious offences, and as such are not very often brought (typically fewer than one case per year). According to a JFTC policy statement, the JFTC will only file criminal accusations against serious cartels that widely affect people's lives, repeat offenders or offenders that refuse to abide by the JFTC's administrative orders.

LENIENCY

The leniency system was introduced in 2005. Table 1 shows the number of applications for leniency for each fiscal year since 2005.

Table 1: Number Of Applications For Leniency For Each Fiscal Year Following 2005 Amendment

Fiscal year	No. of leniency applications
4 January 2006 to 31 March 2006	26
1 April 2006 to 31 March 2007	79
1 April 2007 to 31 March 2008	74
1 April 2008 to 31 March 2009	85
1 April 2009 to 31 March 2010	85
1 April 2010 to 31 March 2011	131
1 April 2011 to 31 March 2012	143
1 April 2012 to 31 March 2013	102
1 April 2013 to 31 March 2014	50
1 April 2014 to 31 March 2015	61
1 April 2015 to 31 March 2016	102
1 April 2016 to 31 March 2017	124
1 April 2017 to 31 March 2018	103
1 April 2018 to 31 March 2019	72
1 April 2019 to 31 March 2020	73
1 April 2020 to 31 March 2021	33
1 April 2021 to 31 March 2022	52
1 April 2022 to 31 March 2023	22
Total	1,417

The leniency system was significantly amended by the 2019 amendment to the AMA. The 2019 amendment introduced a new system (the Reduction System for Cooperation in Investigation) where the reduction rate would be determined according to the degree of the company's cooperation to the JFTC's investigation in addition to the existing Leniency Programme where the reduction rate for leniency applicants were determined solely based on the order of the application and the reduction rate was provided as a fixed rate. With the addition of the new system, the reduction rates of the original Leniency Programme were lowered. Further, the amended Leniency Programme removed the limits to the number of applicants that may qualify for the reduction.

Table 2: Reduction Rate After 2019 Amendment Came Into Effect In 2020[2]

Date of application	Order of application for	Reduction rate according to	Reduction rate according to	Total reduction rate

	Leniency Programme	order of application (Leniency Programme)	degree of cooperation (Reduction System for Cooperation in Investigation)	
Before investigation start date	1st	100%	N/A	100%
	2nd	20%	+ up to 40%	Up to 60%
	3rd–5th	10%		Up to 50%
	6th and after in order	5%		Up to 45%
After investigation start date	1st–3rd [*]	10%	+ up to 20%	Up to 30%
	4th and after in order	5%		Up to 25%
* They can acquire the reduction rate on condition that the total number of applicants (the applicants who apply before the investigation start date are included) is five or less.				

LENIENCY PROGRAMME

Under the AMA's Leniency Programme, the first company that reports its involvement in a cartel violation to the JFTC before a dawn raid is entitled to full exemption from administrative surcharges (article 7-4, paragraph 1 of the AMA). The second company to report before a dawn raid is entitled to a 20 per cent reduction of administrative surcharges; the third, fourth and fifth companies to report before a dawn raid are each entitled to a 10 per cent reduction; and the sixth company and after to report before a dawn raid are entitled to a 5 per cent reduction (article 7-4, paragraph 2 of the AMA). Even after a dawn raid, all companies that turn themselves in are entitled to a 10 per cent reduction of administrative surcharges provided that they are the fifth or earlier among both companies that self-reported before the dawn raid and companies that self-reported after the dawn raid, and are the third or earlier among companies that self-reported after the dawn raid. Any other companies that turn themselves in are entitled to a 5 per cent reduction (article 7-4, paragraph 3 of the AMA). An overview of the reduction rates under the Leniency Programme is described in Table 2. Application for leniency after a dawn raid is permitted only within 20 business days of the dawn raid.

Leniency applications must be filed by using a form prepared by the JFTC (Form 1). Leniency applicants who submit Form 1 are granted the status of 'marker' and other applicants are prevented from leapfrogging such applicants. To obtain definitive leniency status (conditional on continuing cooperation), such applicants must provide further detailed information by submitting a second form (Form 2) within the period thereafter designated by the JFTC. The JFTC generally designates two weeks for this period, but may grant a

longer period for foreign applicants, in consideration of the difficulties in communicating internationally and the time necessary for translation.

Leniency applicants after a dawn raid must submit a separate form (Form 3) that requires the same extent of comprehensive information as Form 2. However, in practice, the JFTC will accept a Form 3 submission with less comprehensive information accompanying submissions and allow the leniency applicant to supplement the information within 20 business days of the dawn raid. The definitive leniency status of an applicant after a dawn raid is also conditional on its continuing cooperation with the JFTC. All leniency application forms must be submitted in Japanese.

As mentioned above, the definitive leniency status of a leniency applicant is conditional upon its continuing cooperation with the JFTC; the leniency applicant must cooperate until a cease-and-desist order or a surcharge payment order is issued (or until the JFTC issues a notice that it will not issue such orders, in the case of the first applicant). Failure to submit reports and materials when required by the JFTC, or submission of false reports or materials, will disqualify the applicants from receiving leniency.

The JFTC also accepts oral leniency applications if the JFTC deems there are special circumstances that make this type of application necessary. It is the JFTC's policy never to disclose leniency materials in its possession upon the request of private plaintiffs or court orders, regardless of whether such requests are made in Japan or foreign jurisdictions. According to the JFTC, by reporting orally and retaining no written copies of leniency application forms, leniency applicants should be able to avoid being subject to discovery obligations in relation to copies of leniency application forms.

The effect of the Leniency Programme is to fully or partially exempt successful applicants from the payment of administrative surcharges and, technically, the Leniency Programme has no relevance to criminal sanctions under the AMA. However, the JFTC has expressed its position in its policy statement regarding its criminal accusations, stating that the JFTC will not bring criminal accusations against the first applicant before a dawn raid. It is at the JFTC's discretion whether leniency applicants other than the first applicant before a dawn raid are subject to criminal sanctions.

Prior to 1 June 2016, only the names of applicants that have made a request for publication were made public. However, currently, names of all leniency applicants are made public at the time of issuing the surcharge payment order.

Reduction System For Cooperation In Investigation

The 2019 amendment to the AMA introduced a new system for reduction of administrative surcharges (Reduction System for Cooperation in the Investigation, article 7-5 of the AMA). Under this new system, a company that has applied for leniency – excluding the company that first applied (before a dawn raid) – may request a conference with the JFTC to discuss potential additional reduction rates, taking into consideration the extent of the company's cooperation, and enter into an agreement with the JFTC to that effect. Under this system, companies that applied for leniency before a dawn raid may qualify for up to an additional 40 per cent reduction rate and companies that applied for leniency after a dawn raid may qualify for up to an additional 20 per cent reduction rate.

Leniency applicants that wish to use this new system must file a form (Form 4) with the JFTC within 10 business days of the date the company received a written notice from the JFTC

confirming receipt of the submission of reports and materials required for the application for leniency.

At the conference, the company is to explain the content of its intended cooperation, including the submission of reports and materials it intends to make pursuant to the potential agreement with the JFTC, and, in response, the JFTC is to present the additional reduction rate. With respect to the intended cooperation, the company must commit to respond to any additional requests from the JFTC regarding submission of reports and materials and allow inspections.

In the agreement, the JFTC will either specify a certain reduction rate or identify a range of the reduction rate within the statutory maximum rate (40 per cent for leniency applicants before the dawn raid and 20 per cent for leniency applicants after the dawn raid), taking into consideration to what extent the cooperation is likely to contribute to revealing the truth of the case.

With respect to the evaluation of to what extent the cooperation contributes to revealing the truth of the case, the JFTC will consider three factors, namely, whether the reports and materials submitted:

- are specific and detailed;
- comprehensively cover items that would contribute to revealing the truth of the case such as items relating to the relevant product, manner of cartel conduct, participants, period, status of implementation of the violation, any other items concerning the violation, figures that form the basis of calculating the surcharge amount and surcharge rate; and
- can be established based on the materials submitted by the company.

Further details are provided for in the guidelines issued by the JFTC (the Guidelines to Reduction System for Cooperation in Investigation).

Table 3: Reduction Rates According To The Degree Of Contribution To Revealing The Truth Of The Case^[3]

Before investigation start date	After investigation start date	Degree of contribution
40%	20%	High (satisfying all factors)
20%	10%	Medium (satisfying two factors)
10%	5%	Low (satisfying one factor)

Once the company and the JFTC conclude an agreement, the company shall perform the cooperation stipulated in the agreement by the date provided for in the agreement. If the company fails to perform by the agreed date, it would no longer be eligible for any reduction of the administrative surcharge (article 7-6, paragraph 6, item 7 of the AMA).

DETERMINATION PROCEDURE

In Japan, there is no concept of attorney–client privilege. While the possibility of introducing attorney–client privilege was discussed during the deliberation of the amendments to the administrative surcharge system, the 2019 amendment to the AMA fell short of introducing

attorney–client privilege. Instead, the JFTC established a new procedure (the determination procedure) in its investigation rules. Under the determination procedure, if the JFTC issued a submission order for documents or other objects, typically during a dawn raid, the JFTC shall return such items recording the contents of the confidential communications between the attorney and the company without the JFTC officials engaged in the investigation of the relevant case having access to the contents, provided that certain conditions are confirmed pursuant to procedures set out in the Rules on Investigations by the Fair Trade Commission.

The determination procedure is only applicable to confidential communications between the company and its attorney that satisfy the statutory requirements discussed below and pertain to legal opinions concerning acts alleged to be in violation of the AMA to which the Leniency Programme is applicable (ie, acts that constitute unreasonable restraint of trade, such as cartels and bid rigging – however, this procedure is only applicable to the administrative procedure that satisfies the statutory requirements discussed below). For such communication (specified communication) to qualify for treatment under this procedure, requirements regarding indication (labelling), place of storage and scope of persons who know the contents (as set out in the JFTC investigation rules) must be met as well, and the company must promptly submit a written request for the application of this procedure to the JFTC official at the time of the submission order, which is typically issued on the day of the dawn raid. Further, the company must submit a log within two weeks of the day that the submission order was issued unless there are special circumstances.

The JFTC investigator who receives the request shall, after confirming the indication and situation concerning storage, place the object in an envelope and seal it, then issue the submission order. The object would then be transferred to the determination officer designated by the JFTC for each case who would then, within two weeks of the issuance of the submission order, confirm the description of the application, the submission of the log and the appropriate storage. Within another six weeks, the determination officer would confirm whether the contents of the communication qualify as specified communication and whether there are any documents that are outside the scope of treatment under this procedure. Once the above are confirmed, the determination officer shall place the object in an envelope and seal it, then notify the company for immediate return. However, objects that do not satisfy the requirements above shall be transferred to the JFTC investigator.

PRACTICAL LENIENCY ISSUES

Scope

Naturally, leniency applicants benefit the most from having the coverage of leniency status be as broad as possible. However, compared with when leniency was first introduced in 2005, the JFTC is becoming more inclined to grant leniency status to only an increasingly narrow scope of products, geographical areas or customers. For example, if an application was made regarding a group of similar products that are viewed as a broader product in the application, but the JFTC finds a cartel violation with regard to only one product, the JFTC may grant leniency status only with respect to that product and may not grant the same status with respect to the other different but related products. The JFTC appears to take a very formalistic and rigid view regarding delineation of the scope of leniency, and will sometimes only grant leniency on a customer-by-customer basis if such customers purchased large amounts of the relevant products. In such cases of customer-by-customer delineation, there may be more than one first applicant with full immunity from surcharge payment and immunity may be restricted to sales from one customer only.

GROUP FILING

Under the Leniency Programme, when more than one company within the same group is engaged in cartel violations, it is possible for those group companies to file a single joint application (article 7-4, paragraph 4 of the AMA), in which case the leniency status is granted to all group companies named as applicants on the application form. It is also possible for group companies to file separate applications individually (article 7-4, paragraphs 1–3 of the AMA) but, in such cases, each company will be granted leniency status based solely on its own application.

In practice, however, there are cases where an applicant is not sure which companies within its group were engaged in the violation. This is often the case for multinational corporations. Of course, it is possible to file additional leniency applications with respect to group companies that are found at a later stage to have been engaged in the violation. However, such additional applications will not be considered to have been made retroactively at the time of the original application and thus will not be granted the same leniency status as was granted to the original application.

Another issue relating to group filing is how the concept of a 'group' is defined under the AMA. For the purposes of the Leniency Programme, a company is considered to be a parent company of another company when that parent directly or indirectly owns more than 50 per cent of the voting rights in that other company (the subsidiary), and a group can only consist of a parent and its subsidiaries (article 7-4, paragraph 4 of the AMA). For example, according to this definition of a group, a joint venture that is equally owned by two joint venture partners is not considered a subsidiary of either partner. Therefore, that joint venture cannot file a leniency application jointly with either of the partners.

BACKLOG OF APPLICATIONS

Table 4 shows the number of cases of bid-rigging and price cartels for which the JFTC took legislative action and, among those, the number of cases and the number of companies for which leniency was applied.

Table 4: Bid-rigging And Price Cartels From 2006 To 2023

Fiscal year	No. of cases of bid - rigging and price cartels for which legislative action has been taken	No. of cases in which application of the leniency system was publicly released	No. of companies for which application of the leniency system was publicly released
4 January 2006 to 31 March 2006	17	0	0
1 April 2006 to 31 March 2007	9	6	16
1 April 2007 to 31 March 2008	30	16	37
1 April 2008 to 31 March 2009	11	8	21
	22	21	50

1 April 2009 to 31 March 2010			
1 April 2010 to 31 March 2011	10	7	10
1 April 2011 to 31 March 2012	17	9	27
1 April 2012 to 31 March 2013	20	19	41
1 April 2013 to 31 March 2014	17	12	33
1 April 2014 to 31 March 2015	7	4	10
1 April 2015 to 31 March 2016	7	7	19
1 April 2016 to 31 March 2017	9	9	28
1 April 2017 to 31 March 2018	11	11	35
1 April 2018 to 31 March 2019	7	7	21
1 April 2019 to 31 March 2020	9	9	26
1 April 2020 to 31 March 2021	8	8	17
1 April 2021 to 31 March 2022	3	3	10
1 April 2022 to 31 March 2023	8	8	22
Total	222	164	423

Based on the information in Tables 1 and 4 and our experience, it can be said that substantial numbers of leniency applications have never led to investigations by the JFTC. In other words, the JFTC is likely to have a large backlog of leniency applications, and this remains the same even with the recent decrease in the number of leniency applications. Under the Leniency Programme, leniency applicants are required to cease cartel conduct before dawn raids but, in reality, most applicants choose to voluntarily cease cartel conduct immediately after their application unless the JFTC designates otherwise. When an applicant voluntarily ceases the violation but the JFTC does not investigate the violation, only that leniency applicant loses supra-competitive profits earned through the cartel and other co-conspirators in the same cartel can continue to earn illegal supra-competitive profits by virtue of their cartel activities, even for years after the fact. Although morally questionable, this situation presents the leniency applicant with a dilemma since leniency applicants

are not allowed to disclose to third parties that they filed a leniency application without a justifiable reason. As a result, this dilemma may impact the incentive for corporations to apply for leniency.

INTERNATIONAL COOPERATION

The JFTC has entered into international cooperation agreements on enforcement of competition law with Canada, the European Union and the United States. Prior to such formal cooperation agreements, however, the JFTC has proactively cooperated with competition authorities in various jurisdictions.

The main part of the JFTC's cooperation with other competition authorities is information exchange. The JFTC exchanges information by email and telephone, and discusses the progress of investigation subject to confidentiality (article 39 of the AMA). When necessary and appropriate, the JFTC may require leniency applicants to submit a waiver of confidentiality that permits the JFTC to disclose information in its possession to other specific competition authorities (however, the submission of a waiver is not a condition for a grant of leniency). As a matter of practice, the JFTC does not disclose evidence that it obtains from non-public sources (such as documents seized at dawn raids or witness statements) to other competition authorities.

PRIVATE ENFORCEMENT

It is possible for companies or consumers that have suffered damage to file claims for civil damages against companies that committed an unreasonable restraint of trade. This can be achieved via a claim for damages based on the joint tort theory (articles 709 and 719 of the Civil Code, and article 25 of the AMA) or a claim for unjust enrichment (article 703 of the Civil Code).

A consumer claiming for damages resulting from the unreasonable restraint of trade is required to establish the difference between the product price that increased because of the unreasonable restraint of trade and the price that would have been set without unreasonable restraint of trade (the assumed price). In many cases, however, proving the assumed price is difficult. In addition, there is no treble-damages compensation requirement under the AMA. Because of this, such civil litigation is not common in Japan.

Because of the difficulty in proving damage, if the local public agency or independent administrative institution goes through a bidding procedure, it is often provided for in the agreement that the bidder pay a certain amount of damages (eg, 10 per cent) or penalty if any bid rigging or other misconduct is subsequently found (liquidated damages).

If a director of a company intentionally allows an unreasonable restraint of trade or negligently overlooks it by not paying reasonable attention, the shareholders may file a derivative action against such a director for damage incurred to the company. To establish the director's responsibility, the wilful misconduct or negligence of the director must be proved. Unless proved, the director's liability will be denied.

Endnotes

[\[1\]](#) The AMA is accessible via the JFTC's website.

[\[2\]](#) This information is accessible via the JFTC's website.

^[3] This information is accessible via the JFTC's website.

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