



The Legal 500 Country Comparative Guides

Japan: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Japan.

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1. What is the relevant legislative framework?

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947, 'AMA') is the comprehensive act on competition in Japan. Regardless of the title of AMA, 'private monopolization' which is close to Section 2 of the Sherman Act of the US is rarely enforced. The core parts of AMA are (a) 'unreasonable restraint of trade' which regulates horizontal restraint, (b) merger regulation and (c) 'unfair trade practices' together with vertical restraint and abuse of superior bargaining position.

Unreasonable restraint of trade is defined as 'such 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.' (Article 2 (6) of AMA) Unreasonable restraint of trade includes cartelization, price fixing, bid rigging and market allocation, but does not include resale price maintenance which is stipulated as one of unfair trade practices.

Unreasonable restraint of trade may cause (a) cease and desist order by Japan Fair Trade Commission ('JFTC') (Article 7 of AMA), (b) surcharge payment order by JFTC (Article 7-2 of AMA), (c) potential criminal sanction on individuals and/or a company through an indictment by a public prosecutor (Article 89 and 95 of AMA) and (d) civil actions by private parties or local governments (Article 25 of AMA and general torts claim under the Civil Code Article 709).

There are some industry-specific and small-enterprise exemptions. For example, in transportation sector such as maritime industry, small partnerships sector such as agricultural cooperatives, are exempted from cartel regulation under strict conditions. However, these exemptions are very narrow and difficult to apply wherein sometimes the companies misunderstand the exemption and are thereby sanctioned by JFTC.

2. To establish an infringement, does there need to have been an effect on the market?

Yes. Unreasonable restraint of trade requires a substantial restraint of competition in any particular field of trade (the so-called relevant market). This is almost the same language as that of merger regulation. There is no per se illegal concept in Japan.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Yes. In December 12, 2017, the Supreme Court of Japan ruled that agreements made outside Japan can be subject to surcharge payment order in the case when the agreement infringes free economic competition in Japan. Please note that surcharge will be calculated only according to domestic sales regardless of the conclusion above.

4. Which authorities can investigate cartels?

There are two investigate authorities, JFTC and public prosecutor's office. JFTC conducts administrative investigation and issues administrative orders including cease and desist order and/or surcharge payment order. In the case JFTC files an accusation with the Prosecutor General, the special investigative squad of the Tokyo District Public Prosecutors Office considers whether they will file for a criminal indictment. JFTC is the primary investigation authority in Japan because JFTC rarely files an accusation and the public prosecutors cannot indict suspects without an accusation by JFTC.

5. What are the key steps in a cartel investigation?

JFTC officials conduct administrative investigation in the form of a dawn raid. They order to submit documents and materials and produce documents or information with sanction of non-compliance fine. JFTC officials will take the original document but they will allow copies to be made of the original document in order to avoid obstacles in business and they will wait for the copying process to finish. After that, JFTC requests additional document submission and conducts voluntary interview of employees and directors. JFTC can order interview with sanction of non-compliance fine but JFTC always requests voluntary cooperation. JFTC continues the investigation until JFTC is satisfied. Therefore, interview might be conducted multiple times especially in the case when the person disagrees with JFTC's argument.

An attorney cannot attend the interview. In addition, JFTC personnel prepare a statement draft and request the interviewee to sign the document. Sometimes such drafts do not precisely reflect the contents of the interview and include a broad confession. The interviewee might reject to sign, but JFTC can continue to interview. JFTC tends to obtain a comprehensive statement of confession and does not easily give up on the signature from the interviewee because the court system traditionally emphasizes importance on confession. Therefore, investigation sometimes takes a year or more.

JFTC will have a formal hearing date before issuing a cease and desist order and/or a surcharge payment order. Parties can review and copy the relevant evidence submitted by JFTC and submit a counter-argument brief.

Though criminal procedures are very rare in Japan, JFTC has power to gather documents and materials in the case JFTC considers that JFTC should file an accusation. If necessary, JFTC can obtain search and seizure warrants from a court for the process of criminal investigation. After filing an accusation, JFTC must hand over the retained objects and/or materials to the public prosecutor's office. In the case of public prosecutor's office commencing a criminal investigation, generally prosecutors conduct their own hearing from suspects and third-party witnesses and make their statement. Prosecutors also prepare a draft statement and request the interviewee to sign on it. The statement of prosecutors has a special treatment as an exception of hearsay rule under some circumstance. Public prosecutors conduct criminal investigation with search warrants, and they can arrest suspects with an arrest warrant.

Criminal suspects have privilege against self-incrimination.

Therefore, key steps for a lawyer is to advise the interviewee to carefully review the statement and not to sign the statement in JFTC and in front of the public prosecutors if the interviewee disagrees with the content because it will be a very strong evidence against the interviewee himself/herself and the company.

6. What are the key investigative powers that are available to the relevant authorities?

See above

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

In Japan, there is no attorney-client privilege. Therefore, communications with legal department or lawyers can be seized by JFTC. This situation has been criticized internationally and JFTC has announced to introduce a privilege system this year as a rule of JFTC investigation. The expected system is that documents created by the legal counsel cannot be used for investigation, but detailed conditions are not yet decided.

According to JFTC's announcement, communication between a client and a foreign lawyer will be also protected when such communication includes legal consultation for an international cartel which is related to an investigation in Japan. JFTC also announced that communicating with an in-house counsel post the discovery of violation can be protected when the in-house counsel can work with obvious independence from the employer and not under instruction and supervision of the employer.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

AMA grants full immunity from surcharges to the first applicant. To obtain full immunity, the first applicant must commit a violation, submit reports and materials to JFTC before JFTC initiates a forced administrative/criminal investigation.

A formal application is required. First, the applicant should fax a document called Form 1 to a specific FAX number to determine its ranking. This Form 1 is very short. Then, the applicant must promptly conduct internal investigations and interviews, and submit Form 2 with full evidence and detailed explanation of conduct related to cartelization. If this Form 2 is submitted by the start of the investigation and by the notified deadline by JFTC, the first applicant who submitted Form 1 will get full immunity.

A single company group can jointly file to obtain the first applicant position.

AMA revision will be effective in the latter part of 2020, but this structure of first applicant remains the same.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

The second applicant who applies and submits Form 2 before the investigation begins can obtain surcharge reduction of 50%. The third, the fourth or the fifth applicant may obtain reduction of 30% if they apply and submit Form 2 before the investigation begins. After JFTC commences the investigation, up to 3 applicants can file for leniency by submitting Form 3 for 30% reduction.

However, this system will drastically change in late 2020 due to amendment of AMA. The basic reduction rate of the second applicant who files for leniency before investigation, becomes 20%, the rate of the third, fourth and fifth applicant who files for leniency before investigation, becomes 10%. The sixth or later applicant who file for leniency before investigation will have a 5% basic reduction. In addition, applicants can also obtain additional up to 40% reduction based on the extent of cooperation. Also, applicant who files after investigation can may obtain 10% (first three applicant) or 5% basic reduction and up to 20% reduction based on cooperation. JFTC expects that the amendment will provide strong incentive to cooperation in order to obtain a more favourable reduction. JFTC will establish guidelines for calculating reduction due to cooperation to avoid any arbitrary operation. However, practitioners are worried about lack of transparency.

Also, surcharge amount will increase by AMA amendment. Current duration period used for the calculation of surcharge is limited to up to 3 years. It will be extended to 10 years. In addition, surcharge rates for retail business and wholesale business operators will be abolished and 10% will be applicable regardless of business types.

10. Are markers available and, if so, in what circumstances?

Yes. When the applicant files Form 1 to JFTC, JFTC notifies about the tentative ranking. After the applicants complete Form No.2 which includes details of the violation and evidence related to the cartelization conduct by the notified deadline, the ranking is fixed.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

JFTC may argue that Form 2 or 3 report is not enough. The leniency applicants need to provide additional reports and information to JFTC and a failure to comply with these requests may result in losing the position. However, according to JFTC's argument, applicants always lose incentive to cooperate after they file Form 2 or 3 because reduction rate is fixed under AMA.

JFTC expects that it will change due to amendment of AMA because other than the first applicant, other applicants must fully cooperate with JFTC to obtain a more favourable reduction. The new system is not yet effective, hence we must carefully monitor how JFTC will operate the new system.

JFTC's leniency rule requires applicants to permanently keep the application confidential. Therefore, a listed company sometimes faces difficulty when a stock exchange or a shareholder demands explanation of the leniency application.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Yes. JFTC announced that as one of the practices of JFTC, it will not pursue criminal accusations against the first applicant and its directors/employee. They do not distinguish between current and former directors/employees.

13. Is there an 'amnesty plus' programme?

No.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

There is no settlement procedure in Japan. If the government decides to give up enforcement after litigation commences, it will simply drop the case or not appeal to a higher court. When the government abandons the execution, it does not give orders and does not appeal the unfavorable judgment.

Please note that a new so-called 'plea-bargaining' system was introduced on June 1, 2018. However, this is not an actual plea-bargaining system because suspects will negotiate with the public prosecutor and disclose other person's crime to reduce the suspects' criminal liability such as reduction of sentence. Therefore, even if suspects admit guilt, they will not be promised a reduced sentence. There are two published cases and one of them is Mr. Carlos Ghosn's case. This is an agreement between a defence attorney and the public prosecutor and court approval is no required.

15. What are the key pros and cons for a party that is considering entering into settlement?

There is no settlement procedure in Japan.

16. What is the nature and extent of any cooperation with other investigating

authorities, including from other jurisdictions?

JFTC has bilateral agreements for cooperation with other jurisdictions' competition regulatory authorities including the US, the EU, Canada, China and Australia.

It is said that JFTC only provides information to other authorities but does not provide actual evidence such as statements. However, Japanese practitioners have their doubts because they have observed that other competition regulatory authorities have knowledge about the exact language of the statements.

17. What are the potential civil and criminal sanctions if cartel activity is established?

Civil: Actual, single damage

Administrative: The rate of surcharge payment order is usually 10% of affected domestic sales for up to three years. There is an exception of a rate of 3% applicable to retail business operators and a rate of 2% applicable to wholesale business operators. There is also a small-company exception and the basic rate is 4%. In addition, repeat offenders or a leader of the cartel will be subject to 50% increase. In case a leader is also a repeat offender, it will be subject to 100% increase.

Criminal: individual - maximum 5 years imprisonment or 5-million-yen criminal fine, company - maximum 500-million-yen criminal fine. Please note that there is no person who has actually gone to prison. The court always grants suspension of execution of the sentence to individuals.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

Japan has a fixed formula to calculate surcharges and when the applicant successfully submits Form 2 or Form 3 documents with enough explanation and evidence, then JFTC cannot take into account other factors such as cooperation or hostile attitude. However, as discussed in 3.2 above, after the amended AMA becomes effective this 2020, JFTC can consider cooperation in deciding additional surcharge reduction.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

No.

20. Are private actions and/or class actions available for infringement of the cartel

rules?

A plaintiff can seek actual, single damage against the infringer. There are no double or treble damages claim and class action system in Japan. Also, a plaintiff must bear the attorney fee even if it wins the lawsuit.

21. What type of damages can be recovered by claimants and how are they quantified?

Please see above. Only actual, single damages claim is available in Japan. In addition, a plaintiff must prove the damages amount wherein it is difficult to calculate the exact amount. Therefore, when local governments make an agreement with a private party through bidding, which typically faces the risk of cartelization or bid-rigging, the governments insert a liquidated damages amount clause for cartels (such as 10% of total price in the case of cartelization). In addition, a general tort claim can also seek reasonable attorney fee of around 5-10% of the final amount of the judgement. Please note that this amount does not depend on the actual attorney fee that has been incurred.

22. On what grounds can a decision of the relevant authority be appealed?

A party who is issued a cease and desist order and/or surcharge payment order by JFTC can appeal to the Tokyo District Court. A party can allege any ground to deny the order including fact findings, interpretation of law, procedural problem, amount of surcharge etc.

For criminal case, this is a formal criminal procedure. Public prosecutors indict at district court, and a party not satisfied with the verdict can appeal to high court. In Japan, public prosecutors can also appeal for overturning of the acquittal verdict of district court.

23. What is the process for filing an appeal?

A party files an appeal to the Tokyo District Court within 6 months from the date on which it received JFTC's order. For a criminal case, a defeated party can file an appeal to the higher court within 14 days from the date of verdict.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

Recently, the 4 largest construction companies in Japan were caught in the rigging of construction of stations of a linear motor train, and a criminal complaint was filed through criminal procedure which is very rare in Japan. What's amazing here is that all four companies and two individuals have been indicted, including the company that appears to be the first leniency applicant. According to news report, administrative investigation was conducted immediately after the first applicant filed Form 1 and the first applicant was not able to submit Form 2 before investigation started. If it is the case, JFTC can arbitrarily crush first applicant's criminal immunity, so this is very problematic. Due to strict confidential duty

of applicants, we cannot know what exactly happened.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

In the last few years, cartels have only been caught in domestic cases. The compensation for the road construction case was of the largest amount in AMA history, totaling around 40 billion yen which was ordered in July 30, 2019. Surcharge payment order against canned beverage companies was also large, around 25 billion yen in total. Recently, however, JFTC has been focused on mighty IT companies, but it hasn't been that successful. Also, these IT companies are not direct competitors, so they are not subject to unreasonable restraint of trade.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

As discussed, 3.2 above, amended AMA will be effective in late 2020 which will change the leniency system. JFTC will also introduce attorney-client privilege.