

Cartel Regulation

The application of competition regulation
in 48 jurisdictions worldwide

2013

Contributing editor: D Martin Low QC



Published by *Getting the Deal Through*
in association with:

Anastasios Antoniou LLC
Arzinger
Barger Prekop sro
bpv Hügel Rechtsanwälte OG
C&C Partners, Chitale & Chitale
Capital Legal Services LLC
Clayton Utz
Corpus Legal Practitioners
De Brauw Blackstone Westbroek NV
De Gaulle Fleurance & Associés
DLA Piper Norway DA
Drew & Napier LLC
ELIG, Attorneys-at-Law
Elvinger, Hoss & Prussen
Epstein, Chomsky, Osnat & Co Law Offices
Fuchs Cohana Rebolou & Associés
Grimaldi Studio Legale
Grinberg, Cordovil e Barros Advogados
Hansberry Competition
Havel, Holásek & Partners
Hengeler Mueller
King & Wood Mallesons
Larreátegui, Meythaler & Zambrano Abogados
Latham & Watkins LLP
Lenz & Staehelin
M & P Bernitsas Law Offices
Mannheimer Swartling
Marques Mendes & Associados
Mason Hayes & Curran
McMillan LLP
Meredith Connell
Motieka & Audzevičius
Nagashima Ohno & Tsunematsu
Nestor Nestor Diculescu Kingston Petersen
Nortons Inc
Odvetniki Šelih & partnerji, op, doo
Posse Herrera Ruiz
Quevedo Abogados
Rizkiyana & Iswanto Antitrust and Corporate Lawyers
Roschier Attorneys, Ltd
Russell McVeagh
Schönherr Hetényi Ügyvédi Iroda
SimmonsCooper Partners
Slaughter and May
Valdes Abascal Abogados SC
White & Case LLP
Yoon & Yang LLC
Zaid Ibrahim & Co

Cartel Regulation 2013

Contributing editor

D Martin Low QC
McMillan LLP

Business development managers

Alan Lee
George Ingledew
Robyn Horsefield
Dan White

Marketing manager

Rachel Nurse

Marketing assistants

Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Administrative assistants

Parween Bains
Sophie Hickey

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@
gettingthedealthrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Gerges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Caroline Rawson

Subeditor

Anna Andreoli

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Cartel Regulation 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

© Law Business Research Ltd 2011
No photocopying: copyright licences
do not apply.

ISSN 1473-3420

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2012, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

Global Overview <i>Martin M Toto</i> White & Case LLP	3
Argentina <i>Viviana Guadagni</i> Quevedo Abogados	6
Australia <i>Michael Corrigan and Mihkel Wilding</i> Clayton Utz	11
Austria <i>Astrid Ablasser-Neuhuber and Florian Neumayr</i> bpv Hügel Rechtsanwälte OG	19
Belgium <i>Bruno Lebrun</i> De Gaulle Fleurance & Associés	25
Brazil <i>Mauro Grinberg, Leonor Cordovil and Carlos Barros</i> Grinberg, Cordovil e Barros Advogados	31
Canada <i>D Martin Low QC, Mark Opashinov and Casey W Halladay</i> McMillan LLP	37
China <i>Susan Ning and Ding Liang</i> King & Wood Mallesons	45
Colombia <i>Jorge A de los Ríos Quiñones</i> Posse Herrera Ruiz	52
Cyprus <i>Anastasios A Antoniou and Rafaella Michaelidou</i> Anastasios Antoniou LLC	58
Czech Republic <i>Robert Neruda and Robert Nešpůrek</i> Havel, Holásek & Partners	64
Ecuador <i>José Meythaler Baquero</i> Larreátegui, Meythaler & Zambrano Abogados	70
European Union <i>John Boyce and Anna Lyle-Smythe</i> Slaughter and May <i>Hans-Jörg Niemeyer and Hannah Ehlers</i> Hengeler Mueller	75
Finland <i>Christian Wik and Ami Paanajärvi</i> Roschier Attorneys, Ltd	87
France <i>Frédéric Fuchs and Sébastien Dominguez</i> Fuchs Cohana Reboul & Associés	94
Germany <i>Thorsten Mäger and Alf-Henrik Bischke</i> Hengeler Mueller	105
Greece <i>Angela Nissyrios</i> M & P Bernitsas Law Offices	112
Hungary <i>Anna Turi</i> Schönherr Hetényi Ügyvédi Iroda	123
India <i>Suchitra Chitale</i> C&C Partners, Chitale & Chitale	130
Indonesia <i>HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Edwin Aditya Rachman</i> Rizkiyana & Iswanto Antitrust and Corporate Lawyers	135
Ireland <i>Tony Burke, Niall Collins and Anne-Marie Jenkinson</i> Mason Hayes & Curran	140
Israel <i>Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai</i> Epstein, Chomsky, Osnat & Co Law Offices	147
Italy <i>Rino Caiazza</i> Grimaldi Studio Legale	155
Japan <i>Eriko Watanabe</i> Nagashima Ohno & Tsunematsu	164
Korea <i>Hoil Yoon and Sinsung (Sean) Yun</i> Yoon & Yang LLC	170
Lithuania <i>Emil Radzihovsky, Giedrius Kolesnikovas and Beata Kozubovska</i> Motieka & Audzevičius	176
Luxembourg <i>Léon Gloden and Céline Marchand</i> Elvinger, Hoss & Prussen	185
Malaysia <i>Sharon Tan Suyin</i> Zaid Ibrahim & Co	191
Mexico <i>Rafael Valdés-Abascal and José Ángel Santiago-Ábrego</i> Valdes Abascal Abogados SC	197
Netherlands <i>Jolling K de Pree and Stefan Molin</i> De Brauw Blackstone Westbroek NV	203
New Zealand <i>Sarah Keene</i> Russell McVeagh <i>Ben Hamlin</i> Meredith Connell	216
Nigeria <i>Babatunde Irukera and Ikem Isiekwena</i> SimmonsCooper Partners	228
Norway <i>Kjetil Johansen</i> DLA Piper Norway DA	233
Poland <i>Dorothy Hansberry-Bieguńska</i> Hansberry Competition	239
Portugal <i>Mário Marques Mendes and Pedro Vilarinho Pires</i> Marques Mendes & Associados	246
Romania <i>Georgeta Harapcea and Marius Stefana</i> Nestor Nestor Diculescu Kingston Petersen	255
Russia <i>Vladislav Zabrodin and Irina Akimova</i> Capital Legal Services LLC	262
Singapore <i>Lim Chong Kin and Ng Ee-Kia</i> Drew & Napier LLC	267
Slovakia <i>Adrián Barger, Soňa Princová and Matúš L'ahký</i> Barger Prekop sro	274
Slovenia <i>Nataša Pipan Nahtigal and Tjaša Lahovnik</i> Odvetniki Šelih & partnerji, op, doo	281
South Africa <i>John Oxenham and Maria Celaya</i> Nortons Inc	288
Spain <i>Javier Ruiz Calzado and Héctor Armengod</i> Latham & Watkins LLP	296
Sweden <i>Tommy Pettersson, Johan Carle and Stefan Perván</i> Lindeborg Mannheimer Swartling	303
Switzerland <i>Marcel Meinhardt, Benoît Merkt and Astrid Waser</i> Lenz & Staehelin	312
Turkey <i>Gönenç Gürkaynak and K Korhan Yıldırım</i> ELIG, Attorneys-at-Law	320
Ukraine <i>Sergiy Shklyar</i> Arzinger	327
United Kingdom <i>Lisa Wright and Christopher Graf</i> Slaughter and May	334
United States <i>Martin M Toto</i> White & Case LLP	348
Zambia <i>Sydney Chisenga</i> Corpus Legal Practitioners	356
Quick Reference Tables	360

Japan

Eriko Watanabe

Nagashima Ohno & Tsunematsu

Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law), as amended from time to time, is the legislation that prohibits the cartels. In addition to the prohibition under the Antimonopoly Law of Japan, collusion in a public bid is subject to penalty under the Criminal Code.

The Fair Trade Commission of Japan (JFTC) is the sole enforcement agency established by the Antimonopoly Law (in contrast to the United States, there is no enforcement agency in Japan that shares the power and responsibility to enforce the Antimonopoly Law with the JFTC). The JFTC is the investigator, prosecutor, and judge of the administrative proceeding that is set forth under the Antimonopoly Law, with its decisions being subject to judicial review. The JFTC consists of a chairman and four commissioners. The General-Secretariat, headed by the secretary-general, is attached to the JFTC for the operation of its business, and consists of the Secretariat, the Investigation Bureau and the Economic Affairs Bureau (including the Trade Practices Department). In general, the Investigation Bureau is in charge of investigations and, if an administrative proceeding is commenced, the hearing examiners preside over the administrative proceedings. (While the bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC was under review by the National Diet, the last session of National Diet was closed without reaching the conclusion. No plan for the amendment is publicly available.)

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

No fundamental legislative amendment to the Antimonopoly Law nor changes in the enforcement thereof, with regard to the cartels, have been made in 2011, unlike those made in recent years to strengthen the power of the JFTC.

Moreover, while the bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC was under review by the National Diet, the last session of National Diet was closed without reaching the conclusion. No plan for the amendment is publicly available.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Under the Antimonopoly Law, an agreement or understanding among competitors to eliminate or restrict competition among them, and that substantially restrains competition in a particular field of trade, is prohibited as an unreasonable restraint of trade (article 3, latter part). While the Antimonopoly Law does not explicitly limit the scope of conduct in violation of the Antimonopoly Law as an unreasonable restraint of trade to that among competitors, the Tokyo High Court, in its 9 March 1953 decision, held that only restrictions among competitors constitute an unreasonable restraint of trade. Unreasonable restraint of trade by a trade association is also prohibited under article 8, paragraph 1, item 1 of the Antimonopoly Law.

Cartels and bid rigging are typical examples of an unreasonable restraint of trade. Agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels.

Although the latter part of article 3 of the Antimonopoly Law prohibits only conduct that substantially restrains competition in the relevant market, the JFTC seems to have enforced the Antimonopoly Law as though the law prescribes that such cartels are illegal per se, and the JFTC has not accepted the arguments of the defendant companies.

4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

Certain activities by small businesses, such as cooperatives qualified under the applicable laws, are exempted from the application of the Antimonopoly Law under article 24 thereof, while certain other joint activities among competitors are exempted from the application of the Antimonopoly Law by the provisions of other individual business laws over particular industries (such as the Road Traffic Act, the Maritime Traffic Act, the Insurances Act and the Air Aviation Act). In the foreign trade area, certain export cartels that meet the requirements provided in the Export and Import Act are also permitted to some extent.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Antimonopoly Law applies to the conduct of 'entrepreneurs', which includes both corporations and individuals.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

The Antimonopoly Law contains no provision expressly setting forth the JFTC's jurisdiction. However, the JFTC considers that it has jurisdiction over conduct that has an 'effect' on the Japanese market, irrespective of where those activities are carried out. Therefore, in summary, the JFTC may have jurisdiction over cartel cases involving the Japanese market. With regard to the procedures to be taken under the Antimonopoly Law, the JFTC may use the public service of its inquiries or orders to the defendant corporations outside Japan without a presence in Japan. The provisions therefor indicate that the JFTC has jurisdiction over the conduct of such corporations outside Japan that has no presence (eg, a subsidiary, business office or agent) in Japan.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

When the JFTC discovers an alleged violation of the Antimonopoly Law in the form of an unreasonable restraint of trade by any means (such as through a complaint by a third party, information from an employee of the suspected corporation or an application under the leniency programme), the JFTC first conducts a feasibility study for the investigation, and then determines whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law.

While there are as yet no statistics available with regard to the usual time period for compulsory measures for criminal offences, the JFTC made public that the average time period for an administrative investigation, which resulted in an issuance of orders not only for cartels but also for all types of conduct in violation of the Antimonopoly Law by the JFTC in the 2011 financial year, was approximately 15 months.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

Compulsory measures for criminal offences

The JFTC may inspect, search and seize materials in accordance with the warrant issued by a court judge under the amended Antimonopoly Law as part of the compulsory measures for criminal offences.

The JFTC has made public that it will initiate a criminal investigation under the Antimonopoly Law where there is a considerable reason to suspect a malicious and material violation of the Antimonopoly Law, including cases involving price fixing, restriction of supply, market division and bid rigging, or an entrepreneur or industry of repeatedly violating the Antimonopoly Law, or that an entrepreneur is not complying with a cease-and-desist order and it is difficult to correct such conduct using the JFTC's administrative measures under the Antimonopoly Law. Where, as the result of the investigation, the JFTC is convinced that a criminal offence has taken place it will file a criminal accusation with the Public Prosecutors' Office.

Administrative investigation by the JFTC

The JFTC may, on a compulsory basis, if necessary to conduct the investigation of a case:

- order persons involved in a case or any other relevant person to appear at a designated time and place to testify or to produce documentary evidence;

- order experts to appear and give expert testimony;
- order persons to submit account books, documents or other material and retain these materials; and
- enter any place of business of persons involved in a case and any other necessary place to inspect its conditions of business operation and property, account books, documents, and other material.

The JFTC may also conduct investigations on a voluntary basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid-rigging case. Having said that, a dawn raid requires the consent and presence of the manager, who may approve the JFTC's entry onto the premises on behalf of the corporation, with regard to entry onto the premises of the suspected company for the dawn raid. The presence of an attorney, including in-house counsel, is not a legal requirement to lawfully or validly conduct the dawn raid.

The JFTC takes the originals of the documents and materials held at the offices of companies during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntarily basis. Note that the Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of such materials unless to do so would impede the investigation.

It is usual for the JFTC to question employees with regard to the subject matter of the investigation at the same time of the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of review of materials and collection of information from other persons, to request such persons respond to questions. The questioning is usually conducted by the JFTC on a voluntary basis with the consent of an individual to be questioned.

Further, the JFTC usually issues a report order requesting certain information such as the types of product and the sales thereof and production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that information, documents or both be submitted on a voluntary basis.

The Antimonopoly law provides the criminal penalties, ie, imprisonment for up to one year or a fine of up to ¥3 million for any individual that refuses, obstructs or evades inspection as provided in the Antimonopoly Law. The corporation is also subject to a fine of up to ¥3 million.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

Yes. The legal basis of the cooperation is as follows.

In 1999, Japan and the US signed an Agreement Concerning Co-operation on Anti-competitive Activities, providing for coordination and cooperation with respect to antitrust enforcement activities. Under the agreement, the competition authorities of each country are mutually bound to give notification of enforcement activities that may affect the other's interests.

Japan also entered into similar agreements with the European Commission in 2003 and Canada in 2005.

Moreover, Japan signed economic partnership agreements with Singapore in 2002, Mexico in 2004, the Philippines and Malaysia in 2006, and Thailand and Chile in 2007. Moreover, Japan signed an economic partnership agreement (EPA) with Singapore (ie, Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership) in 2002 and Mexico (ie, Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership) in 2004, respectively. Since then a number of EPAs executed with eleven countries, including Singapore,

Mexico and ASEAN, have become effective.

The JFTC may exchange the information with other competition authorities to some extent. See question 10 below.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

Although the JFTC seems to have made no public announcement with regard to the scope and degree of the information actually exchanged pursuant to the above agreements with other competition authorities for particular cases involving cartels, there have been cases in which the competition authorities have apparently coordinated their investigations of conduct on a global basis.

The Antimonopoly Law stipulates that the JFTC may provide information to foreign competition authorities, excluding cases where 'proper enforcement' of the Antimonopoly Law 'may be disturbed or when interests of the country may be violated', although it is also stipulated that the JFTC must confirm that the confidentiality of information is firmly secured in foreign countries receiving information from the JFTC to the same degree as confidentiality is secured in Japan, and that measures must be taken to ensure that such information will not be used in criminal procedures overseas.

11 Adjudication

How is a cartel matter adjudicated?

If the JFTC, as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Antimonopoly Law and that criminal sanctions are appropriate, the JFTC files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Antimonopoly Law will be imposed on a corporation or individuals, or both, through the criminal procedures under the applicable laws in the same way as for other criminal cases.

If the JFTC conducts an administrative investigation and issues a cease-and-desist order or a payment order of the administrative surcharge, or both, a defendant corporation that has an objection against such administrative orders may initiate administrative proceedings. The Rules concerning the JFTC's administrative hearing proceedings set two years as the target period to complete the procedures to proceed with the administrative procedures efficiently.

While the bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC was under review by the National Diet, the last session of National Diet was closed without reaching the conclusion. No plan for the amendment is publicly available. If such an amendment becomes effective, the judicial court will have a power to review the JFTC's decision.

12 Appeal process

What is the appeal process?

A defendant corporation may seek to quash a decision rendered through administrative proceedings presided by the JFTC hearing examiners by bringing an action against the JFTC in the Tokyo High Court. In an action to quash a decision, the Court is bound by the JFTC's findings of fact, as long as they are supported by substantial evidence. A party may present new evidence only if the JFTC previously refused to accept the evidence without a justifiable reason or the party was not able to introduce the evidence at the hearing and such inability was not due to gross negligence. A JFTC decision is subject to cancellation if the facts on which it is based are

not supported by substantial evidence or if the decision is contrary to the Japanese Constitution or other laws.

While the bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC would make and the JFTC's decision and orders become subject to the review by judicial counts under the applicable administrative procedures laws, the last session of National Diet was closed without reaching conclusion. No plan for the amendment is publicly available.

13 Burden of proof

With which party is the burden of proof?

The burden of proof lies with the JFTC.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

For an unreasonable restraint of trade, the Antimonopoly Law stipulates criminal penalties including a fine of up to ¥500 million for a corporation and servitude (labour in a prison) for up to five years, and a fine of up to ¥5 million or both for an individual (such as an employee in charge of a cartel).

Although criminal penalties have been continuously imposed from the 1990s, ever since the price-fixing case involving the petroleum business in 1984, the number of criminal cases has been small. (See question 8 with regard to the JFTC's policy of a criminal accusation.)

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Administrative sanctions – JFTC enforcement

If a violation of the Antimonopoly Law is supported by evidence, the JFTC may order the entrepreneur that committed the violation to cease and desist from such act and to take any other measures necessary to eliminate such act. The statutory limitation for the JFTC to issue cease-and-desist orders is five years after the conduct ceased. The cease-and-desist order is effective upon the service thereof to its recipient and such recipient must comply with its terms, even if the recipient initiates administrative proceedings, unless the enforcement of such order is specifically suspended by the decision of the court or the JFTC.

The JFTC is required to order payment of an 'administrative surcharge' by entrepreneurs who are found to have participated in an unreasonable restraint of trade that directly affects prices or that consequently affects prices by curtailing the volume of supply (price fixing or cartels on supply, market share or customers that affect prices).

The amount of the surcharge is calculated as the following percentage of the sales of the products or services that are subject to the cartels for the period of the cartel concerned up to three years from the date such conduct ceased.

The rate of administrative surcharge under the Antimonopoly Law is as follows:

Principle

- Manufacturers, etc: 10 per cent
- Retailers: 3 per cent
- Wholesalers: 2 per cent

Medium and small-sized corporations

- Manufacturers, etc: 4 per cent
- Retailers: 1.2 per cent
- Wholesalers: 1 per cent

An administrative surcharge at the rate of 150 per cent of the respective rate set out above on those entrepreneurs, in general, that have repeated conduct in violation of the Antimonopoly Law and that have been subject to an administrative surcharge payment order within the past 10 years. On the other hand, the administrative surcharge rate shall be decreased by 20 per cent in certain circumstances (such as withdrawal from the cartel at an early stage).

An adjustment will be made through the system which, if both an administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates is increased by 50 per cent if a corporation (i) planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law, (ii) requested another corporation to act in violation of the Antimonopoly Law or (iii) prevented other corporations from ceasing such conduct. Further, if the corporation that played a leading role in the conduct constituting an unreasonable restraint of trade is a corporation that has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the amended Antimonopoly Law provides that the administrative surcharge be calculated at a rate double the applicable surcharge.

Private actions – private enforcement

Although ‘private enforcement’ of the Antimonopoly Law through civil damage suits by private plaintiffs is not as common in Japan as it is in the United States, a party (such as a competitor or a customer) that suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on the provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or counterclaim under the provisions of article 25 (strict liability) has been filed, the court is required, without delay, to request the opinion of the JFTC regarding the amount of damages caused by such violations.

Note that a legally interested person such as a plaintiff may review and reproduce the case records of the administrative proceedings by the JFTC. Further, the JFTC made a public announcement in 1991 that it will provide plaintiffs with access to certain investigation records which the JFTC collects during its investigation through a request by the court if a damage suit is filed in the court, except for certain information such as trade secrets and privacy information. Through these procedures, documents protected by attorney–client privilege in other jurisdictions may be filed for judicial review in Japan.

Civil action for an injunction under article 26 of the Antimonopoly Law is not available for the unreasonable restraint of trade.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

When the JFTC finds an alleged violation of the Antimonopoly Law to be an unreasonable restraint of trade by any means (for example, a complaint by a third party, information from an employee of the suspected corporation or application under the leniency programme,

or both), the JFTC first conducts a feasibility study for the investigation, and then determines whether to conduct either administrative investigation or the compulsory measures for criminal offences under the Antimonopoly Law. Both administrative surcharge and criminal penalties can be imposed on the same entrepreneur based on the same conduct. If both the administrative surcharge and criminal fines are imposed on the same entrepreneurs based on the same conduct, the amount of administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine. The JFTC made a public announcement that it will not file a criminal accusation against the corporation and an officer or employee of the ‘first in’ who is cooperative. Because the JFTC has exclusive rights to file a criminal accusation with regard to the violation of the Antimonopoly Law and the Public Prosecutors’ Office is highly likely to respect such decision by the JFTC, in practice the ‘first-in’ corporation and the officer or employee thereof is exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

Having said that, civil actions may be brought by a plaintiff to the court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Yes, private damage claims are available, although neither triple damages nor class actions are available in Japan. See question 15 for private damage claims.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

Under the Criminal Code, it is a basic principle that an individual who committed a crime is subject to the criminal sanctions, and in addition, a corporation which is related to such crime is subject to the criminal penalty. It is also applicable to the conduct punishable under the Antimonopoly Law. Individuals are subject to imprisonment of up to five years or a fine up to ¥5 million, or both. There are no sentencing guidelines for either a corporation or an individual.

Administrative investigation cases

According to its public announcements of the JFTC, in the 2011 financial year, the JFTC conducted comprehensive and rigorous investigations into cases involving bid rigging and price fixing, and issued orders to companies in violation of the Antimonopoly Law for unreasonable restraint of trade. Namely, legal actions were taken in 17 cases (ie, cease-and-desist orders and administrative surcharge payment orders; where both a cease-and-desist order and an administrative surcharge payment order were issued with respect to a single case, it was counted as one case) and the amount of administrative surcharge payment orders regarding bid rigging and cartel cases was approximately ¥40 billion. The number of applications for the leniency programme was 143; among those, public announcements concerning the application of the leniency programme were made with respect to nine cases and 27 entrepreneurs.

Criminal investigation cases

According to its public announcements, the number of cases in which JFTC filed criminal accusations against corporations was zero in the 2010 financial year.

Sentencing**19 Sentencing guidelines**

Do sentencing guidelines exist?

No.

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Not applicable.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

A leniency programme is provided under the Antimonopoly Law.

If an entrepreneur committing an unreasonable restraint of trade voluntarily and independently reports the existence of a cartel and provides related materials to the JFTC, and ceases such violation before the initiation of an investigation, immunity from or a reduction in the administrative surcharge payment shall be applied to such entrepreneurs as follows:

- first applicant filed before the initiation of an investigation – total immunity;
- second applicant filed before the initiation of an investigation – 50 per cent deducted;
- third applicant filed before the initiation of an investigation – 30 per cent deducted; and
- any applicant filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five; up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are fewer than five before the dawn raid. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

See question 21.

23 First in

What is the importance of being 'first in' to cooperate?

The corporation first-in is totally exempt from the administrative surcharge. The JFTC made a public announcement that it will not file a criminal accusation against the first-in corporation an officer or employee thereof to cooperate. Because the JFTC has the exclusive right to file a criminal accusation with regard to the violation of the Antimonopoly Law, and the Public Prosecutors' Office is highly likely to respect such a decision by the JFTC; in practice, this means that the first-in corporation and the officer or employee thereof is exempted from criminal sanctions. The suspension of transactions, which is customarily ordered by the relevant public offices (such as the ministries and local government authorities) with which the suspected corporation has business may be shortened. Having said that, the corporation cannot be discharged of civil liability.

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

The administrative surcharge is reduced by 50 per cent. While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' may be exempted from or have the administrative surcharge reduced by 100 per cent if it applies as first in for leniency for another cartel case. There is no exemption from criminal and civil liability for the second in.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

As soon as the corporation identifies the alleged facts and obtains the evidence so that the suspected corporation may be determined to qualify as a leniency applicant (see question 27). The first applicant must approach the JFTC before it has conducted a dawn raid to obtain total immunity.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

While the Antimonopoly Law sets forth the confidentiality obligation for JFTC officials in general, there are no specific provisions with regard to confidentiality for leniency applicants under the Antimonopoly Law. The JFTC made a public announcement that although it will not disclose applications, including the names of the applicants and its order for a leniency application, if the applicants so desire, the JFTC will make public both the names and the order enabling the applicants to request a shortening of the period for suspension of the transactions with the relevant ministries, local government authorities or both (see question 23).

The documents filed with the JFTC upon the leniency application may be subject to discovery in US litigation, and the JFTC allows applications with an oral explanation in certain circumstances, while an application must be filed with a written form (see question 31). However, it can be difficult to go through the entire process of the leniency application with no written materials.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

Leniency will not be granted if any of the application documents or materials contain false information; the applicant fails to cooperate with the JFTC when requested throughout the investigation (such as requests to submit reports or additional materials), or submits false reports or erroneous materials; or the applicant has forced other cartel participants to engage in the given cartel or has prevented cartel participants from leaving it.

Note that the applicant must keep the fact that it has applied for leniency confidential.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

No.

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

Basically, the administrative surcharge that is exempted or reduced is imposed on a corporate defendant. See question 23 with regard to criminal sanctions for an employee of the 'first in'. The Antimonopoly Law does not distinguish the former employees from the current employees. The JFTC, however, usually investigate the current employees of defendant corporations.

Update and trends

We do not see any material changes in cartel enforcement since 2010, while the JFTC seems to continuously put the priority of its investigation on price-fixing and bid-rigging cases.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

If the applicant files a leniency application and takes the necessary steps provided under the Antimonopoly Law and the applicable rules, it is still possible for the JFTC not to grant leniency in certain cases (see question 27).

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

The Leniency Rules make anonymous prior consultation available. A corporation contact with the JFTC for the leniency will be informed of the expected order (the marker) of the leniency application if it reports to the JFTC to apply for the leniency programme. The leniency applicant is required to file the relevant form with the JFTC by facsimile to prevent the JFTC from receiving more than one written report at the same time. The products or services that are subject to the violation and the types of conduct in violation of the Antimonopoly Law are required to be set forth in the form. The JFTC will inform the applicant of the priority of the first party (marker) and the deadline for submission of evidence/materials. The applicant will be required to submit the evidence/materials before the designated deadline using another form. If the JFTC so determines, certain parts of the material may be provided to the JFTC orally. Before an investigation begins, the JFTC will give priority to the corporation who submitted the initial report to request application of the leniency programme by facsimile earlier than other entrepreneurs.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

We have no ongoing policy discussions that are publicly available with regard to the leniency programme.

Defending a case**33 Representation**

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Yes. Unless there is a conflict of interest or differences in the defence strategy, the attorney that represents the corporation may represent the employee. However, in practice, if the individual's conduct becomes subject to a criminal sanction, an independent attorney should represent such individual.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Yes, unless a conflict of interest exists. However, once the leniency programme was introduced by the 2006 Amendment, it seems that multiple representation of suspected companies should be avoided.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

Yes. However, the payment of legal fees and expenses in order to defend such payment to the employee may trigger the liability of the management of the corporation under the shareholders' derivative suits unless such payment is for the purpose and effect of mitigating the company's liability. A company may not bear the penalties.

36 Getting the fine down

What is the optimal way in which to get the fine down?

The JFTC has no discretion to reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (as the leniency programme). Therefore, to reduce the amount of the administrative surcharge, the suspected corporation must cease the cartel conduct as soon as it is found and produce evidence to show that the corporation ceased such conduct before the investigation, and if possible, file an application for the leniency programme as the first in.

NAGASHIMA OHNO & TSUNEMATSU**Eriko Watanabe****eriko_watanabe@noandt.com**

Kioicho Building, 3-12, Kioicho
Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3288 7000
Fax: +81 3 5213 7800
www.noandt.com

GETTING THE DEAL THROUGH®

Annual volumes published on:

Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property & Antitrust
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Patents
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax on Inbound Investment
Telecoms and Media
Trade & Customs
Trademarks
Vertical Agreements



For more information or to purchase books, please visit:
www.GettingTheDealThrough.com



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association