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The International Comparative Legal Guide to: Cartels & Leniency 2011

A practical cross-border insight
into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

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.

1.2 What are the specific substantive provisions for the cartel prohibition?

Under the Antimonopoly Law, a cartel (e.g., price-fixing, production limitation, and/or market, customer allocation and bid-riggings) is prohibited as an unreasonable restraint of trade, i.e., an agreement or understanding among competitors to eliminate or restrict competition among them that substantially restrains competition in a particular field of trade (Article 3, Latter Part). While the Antimonopoly Law does not explicitly limit the scope of the conduct in violation of the Antimonopoly Law to the conduct among competitors, the Tokyo High Court, in its March 9, 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.

Although Article 3, Latter Part of the Antimonopoly Law, prohibits only conduct that substantially restrains competition in the relevant market, if an agreement among competitors that have certain market power in the relevant market is found to exist, it seems that the Fair Trade Commission of Japan (the “JFTC”) has enforced the Antimonopoly Law as if the Antimonopoly Law prescribes that such cartels are illegal *per se*.

1.3 Who enforces the cartel prohibition?

The 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 the JFTC’s decisions being subject to

judicial review. The JFTC consists of a chairman and four commissioners. The General-Secretariat (*Jimu-Sokyoku*), headed by the Secretary-General (*Jimu-Socho*), is attached to the JFTC for the operation of its business, and it consists of the Secretariat (*Kanbo*), the Investigation Bureau (*Shinsa-kyoku*), and the Economic Affairs Bureau (*Keizai Torihiki-kyoku*) (including the Trade Practices Department (*Torihiki-bu*)). In general, the Investigation Bureau (*Shinsa-kyoku*) is in charge of investigations, and, if an administrative hearing procedure is commenced, the Hearing Examiners (*Shinpan-kan*) preside over the administrative hearing procedures (*).

(*) The bill of amendment to the Antimonopoly Law, which abolishes the administrative proceedings presided by the JFTC is under the review by the National Diet. If such an amendment becomes effective, the judicial court has a power to review the JFTC’s decision as a decision issued as one of the administrative agencies.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

When the JFTC believes it can find an alleged violation of the Antimonopoly Law to be an unreasonable restraint of trade by any means (e.g., a complaint by a third party, information from an employee of the suspected corporation, and/or application under the leniency programme), the JFTC first conducts a feasibility study for the investigation, and then the JFTC determines (a) to conduct either an administrative investigation or the compulsory measures for criminal offences under the Antimonopoly Law or (b) not to further proceed the investigation.

If the JFTC, as a result of the compulsory investigation for criminal offences, determined that the alleged conduct constitutes a cartel and the 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 and/or individuals through the criminal procedures under the applicable laws in the same way for other criminal cases.

If the JFTC conducts the administrative investigation and issues a cease and desist order and/or payment order of the administrative surcharge, the defendant corporation that has an objection against such JFTC’s administrative orders may initiate the administrative hearing procedures. See notes (*) in question 1.3. The Administrative Hearing Rules sets two years as the target period to complete the procedures in order to efficiently proceed with the administrative procedures.

1.5 Are there any sector-specific offences or exemptions?

No requirements for a conduct by an entrepreneur in a particular industry to constitute an unreasonable restraint of trade are set out under the Antimonopoly Law or other relevant regulations.

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

1.6 Is cartel conduct outside Japan covered by the prohibition?

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.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes	Yes*
Carry out an unannounced search of residential premises	No explicit authorisation	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes*
■ Right to retain original documents	Yes	Yes*
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No explicit authorisation	Yes

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

1. Compulsory Measures for Criminal Offences

The JFTC may inspect, search and/or seize materials in accordance

with the warrant issued by a court judge under the Antimonopoly Law as the compulsory measures for criminal offences. The JFTC may not arrest an individual.

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

2. Administrative Investigation by the JFTC

(1) The JFTC is empowered to take actions in order to conduct the necessary investigation of a case, as a compulsory one, such as: (i) to 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; (ii) to order experts to appear and to give expert testimony; (iii) to order persons to submit account books, documents and other material and to retain these materials; and (iv) to enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of the business operation and property, account books, documents, and other material.

Please note that the Antimonopoly Law has no explicit provisions to allow the JFTC to conduct a dawn raid at an individual residence while the term "any other necessary place" may include the residence.

The Antimonopoly Law provides criminal penalties of imprisonment up to not more than one year or a fine of up to 3 million yen for any individual who refuses, obstructs or evades inspection as provided in the Antimonopoly Law. A corporation is also subject to a fine of up to 3 million yen.

The JFTC may also conduct investigations on a voluntary basis.

(2) The JFTC usually conducts a dawn raid, a compulsory investigation, in a cartel case. Having said that, a dawn raid requires the consent of the manager for the JFTC to enter the premises on behalf of the corporation. 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 originals of documents and materials held at the offices of companies that are seized during a dawn raid by either an order or a request to which an investigated corporation responds on a voluntarily basis. Note that Rules on Administrative Investigations provides that the persons who are ordered to submit the materials are entitled to make photocopies of such materials unless the investigation is impeded.

It is usual for the JFTC to question employees with regard to the subject matter of the investigation, at the same time as the dawn raids and, in addition, after the completion of the review of materials and/or collection of information. The questioning is usually conducted by the JFTC on a voluntary basis with the consent of an applicable individual.

Further, the JFTC usually issues a report order requesting certain information and document production during the process of the administrative investigation, while the JFTC also sometimes requests the information and/or documents to be submitted on a voluntary basis.

2.3 Are there general surveillance powers (e.g. bugging)?

No. The JFTC's power to conduct surveillance is limited to those provided under the Antimonopoly Law. See question 2.2 above.

2.4 Are there any other significant powers of investigation?

No. See question 2.2 above.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Investigators of the JFTC authorised by the Antimonopoly Law carry out the searches. If the conduct also constitutes criminal offences under the Criminal Code, the police agency and/or public prosecutors may conduct their own investigation in accordance with the Criminal Procedure Law at the same time. The JFTC usually does not wait for the arrival of legal advisors, in particular, the outside counsels.

2.6 Is in-house legal advice protected by the rules of privilege?

Under the Antimonopoly Law or any other relevant Japanese law such as the Criminal Procedure Law or the Civil Procedure Law, there is no attorney-client privilege, and the correspondence between outside/in-house counsels and clients or advice from outside/in-house counsels to clients are not exempt from the scrutiny of the JFTC upon the occurrence of a dawn raid by the JFTC (note though that lawyers licensed in Japan are required and will refuse to disclose the confidential information of their clients). Furthermore, the JFTC is not prohibited from asking an interviewee questions about advice received from outside/in-house counsels. Moreover, while some licensed lawyers have become in-house counsel of companies, unlike the situation in the United States, many members of a company's legal department in Japan who perform the role of in-house counsel are not licensed lawyers, and they are not able to refuse the disclosure under the laws applicable to the licensed lawyers.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

There are no other material limitations of the investigatory powers. Note that a legally interested person such as the plaintiff may review and reproduce case records of the administrative proceedings by the JFTC. Further, the JFTC has the policy that the JFTC will provide plaintiffs with access to certain investigation records which the JFTC collects during its investigation, through the 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, attorney-client privileged documents protected in other jurisdictions may be filed for judicial review in Japan.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Antimonopoly Law provides criminal penalties of imprisonment up to not more than one year or a fine of up to 3 million yen or less for any individual/corporation who/which refuses, obstructs or evades inspection as provided in the

Antimonopoly Law. The sanction may be imposed on the investigated companies with the suspicion of the cartels. It is usual for the companies being suspected to cooperate the investigation, and do not see any material changes in the JFTC's approach with regard to the obstruction of investigation.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

1. Criminal Sanctions

For an unreasonable restraint of trade, the Antimonopoly Law stipulates the criminal penalties, including a fine of 500 million yen or less for a corporation. No data regarding the imposed criminal fines is available.

2. Administrative Sanctions - JFTC Enforcement

(1) If a violation of the Antimonopoly Law is supported by evidence obtained in the course of an investigation, 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 period for the JFTC to issue cease and desist orders is five years under the Antimonopoly Law. The cease and desist order is effective upon the service thereof to the recipient of the cease and desist order and such recipient is obligated to comply with the cease and desist order in question even if the recipient initiates the administrative hearing procedures, unless the enforcement of such order is particularly suspended by the decision of the judicial court or the JFTC.

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

The amount of the surcharge is calculated as the following percentage of the total sales of the product/services concerned for the period of the given cartel up to three years from the date such conduct ceased.

The rate of the administrative surcharge was increased as follows:

- (a) Principle
 - (i) Manufacturers, etc.: 10%.
 - (ii) Retailers: 3%.
 - (iii) Wholesalers: 2%.
- (b) Medium & small-sized corporations
 - (i) Manufacturers, etc.: 4%.
 - (ii) Retailers: 1.2%.
 - (iii) Wholesalers: 1%.

An administrative surcharge at the rate of 150% of the respective administrative surcharge rate set out above is imposed on those entrepreneurs, in general, who have repeated conduct in violation of the Antimonopoly Law and who were subject to an administrative surcharge payment order within the last 10 years. On the other hand, the administrative surcharge will be decreased by 20% of the respective administrative surcharge rate set out above on those entrepreneurs who withdraw from the cartels, in certain circumstances.

The Antimonopoly Law provides an adjustment system in which if both the administrative surcharge and criminal fines are imposed on the same entrepreneurs based on the same conduct, the amount of the administrative surcharge shall be calculated by deducting 50% of the amount of the criminal fine.

The Antimonopoly Law provides that the administrative surcharge rates are increased by 50% (i.e., to 15% of the sales of the given products) for those who have played a leading role in cartels (e.g., those who originate the illegal scheme, who request other firms to participate in the illegal scheme or desist others from the avoidance of the infringement and/or those who continuously set prices or allocate trade partners in response to a conspirator's request).

The amount of the administrative surcharge imposed on the companies in 2009 FY was approximately 36 billion yen in total, and the highest amount for one company in 2009 FY was approximately 340 million yen.

3.2 What are the sanctions for individuals?

For an unreasonable restraint of trade, the Antimonopoly Law stipulates servitude (i.e., labour in a prison) of five years or less and/or a fine of 5 million yen or less for an individual (e.g., an employee in charge of a cartel).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. The Antimonopoly Law does not allow such decrease of the amount in the payment of administrative surcharges.

3.4 What are the applicable limitation periods?

The applicable limitation period is five years from the time when the conduct ceased. Moreover, the Antimonopoly Law allows the JFTC to issue an administrative payment order against those entrepreneurs who succeed the offender's business by means of a company split, business transfer, etc., for which the Antimonopoly Law had no explicit provisions except for mergers (i.e., amalgamation under the Corporate Law) before the 2010 Amendment.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The company may pay the legal costs. 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.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

To our knowledge, no discussion has been made. Although it seems possible in theory under the Japanese law, it should be examined on a case-by-case basis.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

As soon as the corporation identifies the alleged facts in detail and obtains the evidence therefor, the suspected corporation may be

determined to qualify as the leniency applicant. The first applicant must approach the JFTC before the JFTC has commenced a dawn raid in order to obtain total immunity.

The Antimonopoly Law allows five leniency applicants.

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

- (A) 1st applicant filed *before* initiation of investigation: Total immunity;
- (B) 2nd applicant filed *before* initiation of investigation: 50% deducted;
- (C) 3rd applicant through 5th applicant filed *before* initiation of investigation: 30% deducted; and
- (D) any applicant filed *after* initiation of investigation: 30% deducted.

If there is a parent-subsidiary relationship or any other affiliation among the investigated companies, a joint application system for those entrepreneurs affiliated with each other and implicated in the same infringement has become available to such group companies under the current Antimonopoly Law.

The administrative surcharge for a 'first-in' is totally exempt. The JFTC made a public announcement that the JFTC will not file a criminal accusation for 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, it practically means that the officer or employee of the first applicant is exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law. The suspension of transactions which is customarily ordered by the relevant public offices (e.g., the ministries and local governments) with which the suspected corporation has transactions may be shortened. Having said that, civil liability cannot be released.

The administrative surcharge is reduced by 50% for the "second-in". However, there is no exemption from the criminal and civil liability for second-in.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Leniency Rules make anonymous prior consultation available. An entrepreneur will be informed of the expected order (i.e., the marker) of the leniency application, if it will report to the JFTC to request an application of a leniency programme. The leniency applicant is required to file the relevant form with the JFTC by facsimile in order to prevent the JFTC from receiving more than one written report at the same time. The products/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 of the submission of the materials. The applicant will be required to submit the 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 entrepreneur who submitted the initial report by facsimile earlier than other entrepreneurs to request the application of a leniency programme.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

See the answer to question 4.2.

4.4 To what extent will a leniency application be treated confidentially and for how long?

While the Antimonopoly Law provides the confidential obligation under the Antimonopoly Law for the JFTC officials in general, there are no specific provisions with regard to the confidentiality for the leniency applicants under the Antimonopoly Law. However, the JFTC made a public announcement that although the JFTC 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 the names and the order public so that the applicants may request to shorten the period for the suspension of the transactions with the relevant ministries and/or local governments.

The documents filed with the JFTC upon the leniency applicant may be subject to discovery in US litigation, and the JFTC allows an application with an oral explanation in certain circumstances, while the application itself must be filed in written format. However, it can be difficult to proceed with the entire process of the leniency application with no written materials.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The leniency will not be granted if: (a) any of the application documents or materials contain false information; (b) the applicant fails to cooperate with the JFTC which cooperation may be requested by the JFTC throughout the investigation (e.g., request to submit a report or additional materials), or submits a false report or erroneous materials; or (c) the applicant has forced other cartel participants to engage in the given cartel or has prevented cartel participants from leaving the cartel.

There is no time period for ceasing the obligation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No. Although an applicant may file a leniency application for any conduct in violation of the Antimonopoly Law as a cartel, it is not considered as a "leniency plus" policy and it has no effects on any cartels other than that for which such leniency application is filed.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Article 45, Paragraph 1 of the Antimonopoly Law provides that any person may report a possible infringement of the Antimonopoly Law to the JFTC and request that necessary action to be taken. An employee may file a report with regard to the violation of the Antimonopoly Law under this Article. Moreover, the Whistle-blowers Act provides that no employer may unfavourably deal with such individual and retaliation is prohibited.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

No, there are no settlement procedures such as those in the EU, or plea bargaining procedures such as those in the US.

7 Appeal Process

7.1 What is the appeal process?

1. Criminal case

If the JFTC, as a result of the compulsory investigation for criminal offences, determined that the alleged conduct constitutes a cartel and the 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 an individual and a corporation through the criminal procedures under the applicable laws in the same way for other criminal cases. The appeals for criminal cases are the same as those for other criminal offences.

2. Administrative case

If the JFTC conducts the administrative investigation and issues a cease and desist order and/or payment order of the administrative surcharge, the defendant corporation that has an objection against such JFTC's administrative orders may initiate the administrative hearing procedures under the current Antimonopoly Law. If the entrepreneur files a request for administrative hearing procedures, the JFTC may issue a decision (i.e., dismissal of the complaint, or reversal or amendment to the order) after completion of the hearing procedures. (**)

A defendant corporation may seek to quash a decision rendered through the administrative hearing procedures presided by the JFTC by bringing an action against the JFTC in the Tokyo High Court. In an action to quash a JFTC decision, the Tokyo High 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 (i) the JFTC previously refused to accept the evidence without a justifiable reason, or (ii) the party was not able to introduce the evidence at the JFTC 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. (**)

(**) The bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC is under the review by the National Diet. If the bill of amendment passes the National Diet, the decision by the JFTC will be subject to the review by judicial counts under the applicable administrative procedures laws. Namely, restrictions on the court with regard to the fact findings and restriction on defendant companies with regard to the submission of new evidence, as described above, will be also abolished. Under the amended Antimonopoly Law, the Tokyo District Court will have an exclusive jurisdiction.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. Unless otherwise the company obtains the decision to suspend

the payment by the judicial courts or the JFTC through separate procedures, the company must pay the ordered administrative surcharge.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes. The cross-examination of witnesses is made in the same way as in other types of administration proceedings and litigations.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

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 (e.g., a customer) who suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on provisions of strict liability under Article 25 of the Antimonopoly Law or on the more general tort law provisions of the Japanese Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or counter-claim under the provisions of Article 25 (i.e., 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 no compensation for punitive damages / triple damages is allowed.

8.2 Do your procedural rules allow for class-action or representative claims?

There are no procedural rules that allow for class-action or representative claims with regard to the cartels under the Antimonopoly Law.

8.3 What are the applicable limitation periods?

1. The statutory limitation period for a damage actions to be filed in accordance with the Antimonopoly Law is 3 years after the date on which the cease and desist order or administrative surcharge order becomes irrevocable (i.e., an appeal therefor has not been filed, in principle, within 60 days after the service thereof).
2. The statutory limitation of a damage suit under the general tort law (i.e., civil code) is 3 years after a person becomes aware of the damages and the person who caused such damages and 20 years after the cease of conduct.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

To our knowledge, we do not have "passing on" defence with regard to the civil damage claims with regard to the cartels under the Antimonopoly Law.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rule is the same as those applicable to civil actions.

Namely, either a plaintiff or defendant who loses the case is usually ordered to bear the cost for the given litigation.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To our knowledge, there have been some successful civil damage claims filed by plaintiffs (e.g., the representatives of residents who live in the local government entity that incurred the damages) with regard to bid-rigging cases involving public bids. The number of civil litigations with regard to the violation of the Antimonopoly Law is small.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The amendment to the Antimonopoly Law which became effective as of January 1, 2010 (the "2010 Amendment") includes, among other things, the important items for further amendments to the Antimonopoly Law in relation to the JFTC's cartel enforcement, such as (a) an extension of the statute of limitations for administrative order from the current three-year period to five years (maximum period between the termination date of infringement and issuance of such order), (b) an increase of administrative surcharge rates imposed on entrepreneurs that have played a leading role in concerned cartels, bid-riggings, etc., (c) a review of a leniency programme to extend the framework in which, regarding cartels or bid-riggings, the JFTC reduces administrative surcharge rates to entrepreneurs that have provided the JFTC with facts other than those the JFTC has already found out, and (d) treatment of affiliated companies with regard to a leniency application as one group.

In addition, the bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC is under the review by the National Diet. If the bill of amendment passes the National Diet, the decision by the JFTC will be subject to the review by judicial counts under the applicable administrative procedures laws. Namely, restrictions on the court with regard to the fact findings and restriction on defendant companies with regard to the submission of new evidence, as described above, will be also abolished. Under the amended Antimonopoly Law, the Tokyo District Court will have an exclusive jurisdiction.

9.2 Please mention any other issues of particular interest in Japan not covered by the above.

The JFTC seems to have conducted investigations in accordance with a cooperation with foreign competition authorities in only a few international cartel cases.

Japan and the United States signed the Agreement Between the Government of Japan and the Government of United States of America Concerning Cooperation on Anticompetitive Activities providing for coordination and cooperation with respect to antitrust enforcement activities in 1999. Under the agreement, the competition authorities of each country are mutually bound to notify the enforcement activities that may affect the interests of the other.

Japan has also entered similar agreements with the European Commission in 2003 (i.e., Agreement Between the Government of

Japan and the European Community Concerning Cooperation on Anticompetitive Activities) and Canada in 2005 (i.e., Agreement Between the Government of Japan and the Government of Canada Concerning Cooperation on Anticompetitive Activities), respectively.

Moreover, Japan signed an economic partnership agreement with Singapore (i.e., Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership) in 2002 and Mexico (i.e., Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership) in 2004, respectively.

The 2010 Amendment introduced provisions that stipulate conditions for exchange of information with foreign competition authorities, such as reciprocity, assurance of confidentiality, prohibition of information use for inappropriate purposes, and restrictions on use of information for criminal procedures.

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