



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2013

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A practical cross-border insight into cartels and leniency

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Japan

Nagashima Ohno & Tsunematsu

Eriko Watanabe



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 the 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 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, 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 proceeding is commenced, the Hearing Examiners (*Shinpan-kan*) preside over the administrative hearing procedures (*).

(*)While the bill of amendment to the Antimonopoly Law, which abolishes the administrative proceedings presided by the JFTC, was under review by the National Diet, the National Diet was closed without any conclusion. No plan for the amendment was publicly disclosed.

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 whether to (a) conduct either an administrative investigation or the compulsory measures for criminal offences under the Antimonopoly Law, or (b) not to further proceed with 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 note (*) 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 22 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	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; or (ii) an entrepreneur or industry that repeatedly violates the Antimonopoly Law, or an 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 of up to not more than one year or a fine of up to three 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 three 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. A dawn raid requires the consent of the manager on behalf of the corporation to be raided; i.e., for the JFTC to enter the premises, unlike the investigation for criminal offences. 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 are authorised by the Antimonopoly Law to carry out the searches. If the conduct also constitutes a criminal offence 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 attendance of legal counsel is not required for the administrative investigation by the JFTC and the JFTC usually does not wait for the arrival of legal advisors, in particular, the outside counsel.

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 counsel and clients or advice from outside/in-house counsel to clients is not exempt from the scrutiny of the JFTC's investigation regardless of whether the investigation is for a criminal offence or not, while licensed lawyers in Japan are required and will usually 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 counsel. Moreover, while some in-house counsel of companies are licensed lawyers, 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.

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 receive photocopies of the 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 of up to not more than one year or a fine of up to three 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 with the investigation, and there have been no material changes in the JFTC's approach with regard to the obstruction of an 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 statistics regarding the imposed criminal fines are 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 an act and to take any other measures necessary to eliminate such an 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 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 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 ten years. The increased rate of the administrative surcharge rates by 50% is imposed, if a corporation, for example, planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law. 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 ten years, the administrative surcharge shall be calculated at a rate double the applicable surcharge.

On the other hand, the administrative surcharge rate is decreased by 20% of the respective administrative surcharge rate set out above on those entrepreneurs, in principle, if the duration of such conduct in violation of the Antimonopoly Law is less than two years and such conduct has ceased more than one month before the JFTC initiates an investigation.

The amount of the administrative surcharge imposed on the companies in 2010 FY was approximately 72.1 billion Yen in total, and the highest amount for one company in 2010 FY was approximately 462 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 five 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.

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, that 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 therefore, 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 for 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 prior consultation available anonymous. If a leniency applicant files an application using Form 1 by facsimile, the JFTC informs of the expected order (i.e., the marker) of the leniency application and deadline of the submission of the materials/evidence. The leniency applicant is required to file the Form 1 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 1 upon submission thereof. The applicant will be required to submit the materials before the designated deadline using Form 2 and the evidence to show the illegal conduct for which the leniency application was filed. If the JFTC so determines, certain parts of the material may be provided to the JFTC orally. However, it is essential to submit the evidence. 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. (See question 4.1 above.)

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. However, the application itself must be filed in written format with the material/evidence, and it is 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 be taken. An officer/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, determines that the alleged conduct constitutes a cartel and the criminal sanctions are appropriate, the JFTC files a criminal accusation with the Public Prosecutors' Office. 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 Antimonopoly Law. If the defendant corporation files a request for administrative proceedings, the JFTC itself makes a decision (i.e., dismissal of the complaint, or reversal or amendment to the order) after completion of the proceedings. (**)

A defendant corporation may seek to quash a decision rendered through the administrative proceedings 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's administrative 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 was under the review by the National Diet. If the bill of amendment could pass the National Diet, the decision by the JFTC would have been subject to the review by judicial counts under the applicable administrative procedures laws. However, the National Diet was closed without conclusion, and no plan for the amendment is publicly available.

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

No. Unless 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 may, without delay, 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 damages action to be filed in accordance with Article 25 of the Antimonopoly Law is three years after the date on which the cease and desist order or administrative surcharge order becomes irrevocable (i.e., an appeal therefore 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 three 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 a "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 bill of amendment to the Antimonopoly Law that abolishes the administrative proceedings presided by the JFTC was under the review by the National Diet. However, the National Diet was closed without conclusion, and no plan for the amendment is publicly available. (See questions 1.3 and 7.1.)

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

The JFTC seems to have conducted investigations cooperating with foreign competition authorities in 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 (EPA) 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. Since then a number of EPA have been executed with eleven countries, including Singapore, Mexico and ASEAN, and are effective as of today.

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- "Regulation on Setting Technology Standards under The Antimonopoly Law of Japan" Washington University Global Studies Law Review (2002).
 - "Japan: Reform of the Enforcement Regime of the Antimonopoly Law (2006)" Concurrences (2006).
 - Global Competition Review (2007) Cartel Regulation 2008 (Japan).
 - Defense Strategies for International Cartel Cases - A Japan Perspective" ABA International Cartel Workshop (2004, 2006, and 2008).
 - "Defense Strategies for International Cartel Cases - A Japan Perspective" ABA Fall Meeting (2011).
 - "Anti-Cartel Enforcement in Japan and Proposed Amendment to the Antimonopoly Law in 2008" ABA International Competition Conference (2008).
 - "Merger Control Worldwide" (Japan part) Cambridge University Press (2008).
 - "Anti-Cartel Enforcement Worldwide" (Japan part) Cambridge University Press (2008).
 - "Merger Control Worldwide" (Japan part) Cambridge University Press (2010).
 - "Doing Business in Japan - Competition Law" Matthew Bender (2010).

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