

Cartel Regulation

Contributing editor
A Neil Campbell



2019

GETTING THE
DEAL THROUGH 

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Contributing editor
A Neil Campbell
McMillan LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Preface

Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2018

Japan

Eriko Watanabe and Koki Yanagisawa

Nagashima Ohno & Tsunematsu

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

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 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 Law Concerning Exclusion and Prevention of Public Bid Rigging and Actions against Involved Officers provide the measures that the Fair Trade Commission of Japan (JFTC) may take against the activities of government officers involved in public bid rigging.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

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, while the Public Prosecutors' Office is in charge of criminal procedures after the JFTC files an accusation.

The JFTC is the investigator and prosecutor with regard to offences under the Antimonopoly Law. The JFTC consists of a chair 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 issuance of orders under the Antimonopoly Law.

3 Changes

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

No fundamental legislative amendment to the substantive law under the Antimonopoly Law or changes in the JFTC's enforcement thereunder with regard to cartels have been made since 2011, unlike those made in recent years to strengthen the power of the JFTC.

Having said that, amendment to the Antimonopoly Law abolishing the JFTC's administrative proceedings became effective as of 1 April 2015. Under the current Antimonopoly Law, JFTC orders are directly subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedure laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The substantial evidence rule which is applicable to actions for quashing JFTC decisions before the Tokyo High Court and in which the court is bound by the JFTC's findings was abolished. Namely, the Tokyo District Court is not bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence

rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws. See question 16 regarding the current system with regard to the appeal process of JFTC orders.

Furthermore, the commitment procedure, the system to resolve alleged violations of Antimonopoly Law voluntarily by consent of a defendant company, will be introduced pursuant to the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws, which will become effective as of the date when the Trans-Pacific Partnership agreement will come into force in Japan. Under the commitment procedure, an entrepreneur that receives a notice from the JFTC regarding alleged violation of the Antimonopoly Law may devise a plan to take necessary measures to cease such an alleged violation and file a petition for approval of such plan with the JFTC, and if such plan is approved, the JFTC determines not to render a cease-and-desist order and administrative surcharge payment order against the petitioner. However, such commitment procedure will not apply to cartel conducts.

4 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 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 a 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 prohibited under the Antimonopoly Law. Agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels. Note that joint activities, collaboration or alliance among competitors that have pro-competitive effects (and therefore should be subject to the rule of reason analysis) are also reviewed under the latter part of article 3 of the Antimonopoly Law.

While 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 defendant companies.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There is no industry-specific conduct that constitutes an unreasonable restraint of trade (cartels) under the Antimonopoly Law.

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. 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.

The JFTC made public its understanding that unless the Antimonopoly Law or individual laws contain a relevant provision for exemption from the Antimonopoly Law, the Antimonopoly Law may be applied to any form of conduct that meets the conditions that would establish it as a violation of the Antimonopoly Law, even if it arose as a result of an approval, a recommendation, an instruction or administrative guidance by government agencies.

6 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. The trade association is also subject to the prohibition under the Antimonopoly Law.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

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 such activities are carried out. Therefore, the JFTC may have jurisdiction over cartel cases involving the Japanese market. With regard to the procedures to be followed under the Antimonopoly Law, the JFTC may use the public service for its inquiries or orders to defendant corporations outside Japan that do not have a presence in Japan. The provisions therefore indicate that the JFTC has jurisdiction over the conduct of such corporations outside Japan that have no presence (eg, a subsidiary, business office or agent) in Japan.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The application of the Antimonopoly Law is exempted for an export cartel among exporters filed with the relevant ministries under the Export and Import Transaction Law, if it does not involve unfair trade practices.

Investigations

9 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 it will conduct an investigation and, if it determines to investigate, whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Antimonopoly Law as part of the compulsory investigation of 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 where there is an entrepreneur or industry that is repeatedly violating the Antimonopoly Law or an entrepreneur that 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, during the conduct of an 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 (ie, production orders); and
- enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of business operation and property, account books, documents and other material (ie, dawn raid).

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 of a corporation, 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 a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct the dawn raid.

The JFTC removes originals of 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 voluntary 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 doing 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 as the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of a review of materials and collection of information from other persons, to request such persons to 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 a 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. Corporation can also be subject to a fine of up to ¥3 million.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? 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 Anticompetitive 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 various countries, such as Chile, Malaysia, Mexico, the Philippines, Singapore and Thailand.

The JFTC has concluded memoranda on cooperation with competition authorities such as the Philippines (August 2013), Vietnam (August 2013), Brazil (April 2014) and Korea (July 2014).

The JFTC may exchange information with other competition authorities to some extent. See question 12.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your 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.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

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, it files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Antimonopoly Law will be imposed on the corporation and individuals through the criminal procedures under the applicable laws in the same manner as for other criminal cases.

If the JFTC conducts an administrative investigation and issues a cease-and-desist order or a payment order for the administrative surcharge, or both, a defendant corporation that has an objection against such administrative orders may file a complaint, within six months after the service of the order, with the Tokyo District Court to quash such JFTC order, and the Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court and then to the Supreme Court. It is an issue whether the JFTC, having issued an order, has standing (ie, to file an action to quash its own order). In judicial proceedings to quash JFTC orders, the JFTC or a plaintiff must prove that the alleged facts are 'highly probable'.

Prior to the amendment to the Antimonopoly Law which became effective as of 1 April 2015, complaints to quash JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC and the decisions rendered through the administrative proceedings can be appealed to the Tokyo High Court and then to the Supreme Court. JFTC orders, the relevant advance notice of which was rendered prior to 1 April 2015, shall still be subject to the administrative proceedings of JFTC pursuant to the Antimonopoly Law before the amendment.

Complaints to quash JFTC orders are examined by a panel of three or five court judges.

Under the proceedings before the aforementioned 2015 amendment, the Antimonopoly Law adopted the 'substantial evidence rule' in which the judicial court is bound by the JFTC's findings of fact made through the administrative proceedings as long as they are supported by substantial evidence and a defendant company may not submit new evidence to the judicial court proceedings in principle. Since the substantial evidence rule was abolished by the amendment, the judicial court shall not be bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings.

An appeal against a judgment rendered by the Tokyo High Court to the Supreme Court can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In a criminal case, the criminal procedures for a cartel are same as those for other crimes, and the burden of proof lies with the public prosecutors, who must prove the fact that constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), or civil proceedings involving claims for injunctions or damages, or both, a relatively relaxed standard of proof will apply. In these proceedings, the party with the burden of proof must prove that the alleged facts are 'highly probable'.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. Indirect or circumstantial evidence is considered to be sufficient to prove the cartel.

16 Appeal process

What is the appeal process?

See question 13.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

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, 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. In February 2016, the JFTC filed a criminal accusation on bid rigging concerning the construction to restore roads after the East Earthquake. In March 2018, the JFTC filed a criminal accusation on bid rigging among Japanese major construction companies concerning the construction of a maglev railway between Tokyo and Nagoya.

The JFTC made public its reasons for filing an accusation in the given case, which included the effects of the given cartel on the national economy and knowledge of the participants to the bid rigging and to the violation of the Antimonopoly Law. To our knowledge, the judicial court, regarding individuals, has decided on suspended sentences where decisions involved imprisonment. We do not have statistics for sentences regarding criminal cases involving cartel cases.

18 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 a decision of the court or the JFTC.

The JFTC is required to order payment of an administrative surcharge by entrepreneurs 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 administrative 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:

Principal

- Manufacturers, etc: 10 per cent;
- retailers: 3 per cent; and
- wholesalers: 2 per cent.

Small and medium-sized corporations

- Manufacturers, etc: 4 per cent;
- retailers: 1.2 per cent; and
- wholesalers: 1 per cent.

An administrative surcharge at a rate of 150 per cent of the respective rate set out above is imposed 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 that, 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 planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law; requested another corporation to act in violation of the Antimonopoly Law; or 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 that of the applicable surcharge.

The number of defendant companies to which the JFTC has imposed administrative surcharge orders was 128 in the 2014 fiscal year, 31 in the 2015 fiscal year, 32 in the 2016 fiscal year and 32 in the 2017 fiscal year. The total amount of administrative surcharge paid in each year was approximately ¥17 billion, ¥8.5 billion, ¥9.1 billion and ¥1.9 billion respectively.

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 a 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 administrative proceedings by the JFTC and those of the judicial court proceedings where the validity of JFTC's orders are challenged by entrepreneurs. Further, the JFTC made a public announcement in 1991 that it will provide plaintiffs with access to certain investigation records that 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 produced during judicial review in Japan.

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

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

No sentencing guidelines are publicly available for Antimonopoly Law violations or for other crimes. The criminal penalties (servitude and fines) seem to be determined based on the scale or effects, the time period and maliciousness of the conduct in violation of the Antimonopoly Law, similar to other criminal cases involving the violation of economic illegal conduct.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Each government agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, the business of many corporations subject to investigation by the JFTC on the suspension of a cartel, or to which the JFTC's orders were rendered, was suspended, and such corporations were restricted from participating in bids presided over by the government agencies. The time period for the suspension seems to differ for the government agencies.

21 Parallel proceedings

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 (eg, 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 an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law. Both an 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 entrepreneur based on the same conduct, the amount of the 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 are 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.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damage claims are available, although no triple damages are available in Japan. Namely, a party (eg, 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 Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (ie, 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 or triple damages is allowed. An indirect purchaser may file an action. However, the damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff alleging the defendant's violation of the Antimonopoly Law bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- damages;
- the causal relationship between the damages and the violation; and
- the negligence or wilfulness of the violator, the conclusion of which depends on whether the plaintiff may prove the causal relationship between the damages and the violation, if the plaintiff argues that indirect sales is within the scope of the damages.

In a suit for indemnification of damages or a counterclaim under the provisions of article 25, the Antimonopoly Law does not allow the defendant to deny its negligence or wilfulness for the violation of the Antimonopoly Law.

See question 18 for further information about private damage claims.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

No class action is available with regard to violations of the Antimonopoly Law. Each plaintiff must file its complaint individually.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

An immunity (ie, 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.

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, 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.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Leniency is available for subsequent parties after the first to report, as follows:

- 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.

No immunity from the criminal accusation is available for the second and subsequent applicants.

26 Going in second

What is the significance of being the second cooperating party? 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.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

No deadline is provided under the Antimonopoly Law with regard to an application (ie, marker) with Form 1. However, the Antimonopoly Law limits the number of the applicants who may enjoy the immunity or decrease in the amount of administrative surcharges; the applicant must file as soon as possible before another applicant files an application.

With regard to the submission of detailed information and admission of conduct in violation of the Antimonopoly Law (Form 2) and evidence, the JFTC sets the deadline, usually two weeks. All or at least a substantial part of the information must be submitted to the JFTC in order for leniency to be granted.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Full cooperation is required for the JFTC to grant the leniency (ie, all of the relevant information must be disclosed and all of the evidence available to the applicant must be produced for the JFTC). If the JFTC requires statements, oral statements by individuals are permitted. The level of cooperation is the same for all applicants (eg, the first and subsequent applicants). However, if the information or evidence is inconsistent, the JFTC will further investigate the case before granting leniency to applicants.

Cooperation with the JFTC regarding its investigation, other than those for leniency, has no legal effects.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

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 leniency applicants under the Antimonopoly Law.

The JFTC made a public announcement that the JFTC shall disclose the names of the applicants to which administrative surcharge is exempted or reduced and the exemption or reduced ratio thereof under the leniency program if the JFTC issues an administrative surcharge payment order for the case involving such an applicant on or after 1 June 2016. Before 31 May 2016, only when the applicants so desired the JFTC would make such information public so that the applicants may request to shorten the period for the suspension of the transactions with the relevant ministries and local governments.

The JFTC requests the applicants to keep the application and contact with the JFTC therefor in strict confidentiality, so that the JFTC may successfully investigate the case.

The JFTC allows applications with an oral explanation in certain circumstances, while an application must be filed in written form (see question 32). However, it can be difficult to go through the entire process of the leniency application with no written materials.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

In June 2018, the amendment to the Criminal Procedure Law introduced the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law. The system allows for a public prosecutor to enter into a plea bargaining agreement with a suspect or a defendant (an individual or corporate entity) to drop or reduce criminal charges or agree to predetermined punishment if such suspect or defendant provides certain evidence or testimony in relation to certain types of crimes, including cartels and bid riggings, of other individuals or corporate entities. Defence lawyers are required to be involved in negotiations on the terms of a plea bargaining agreement and the defence lawyers' consent to the terms of agreement must be obtained.

Apart from the foregoing, no plea bargains, settlements or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are permitted. Note that the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws will introduce the commitment procedure in which an entrepreneur that received a notice from the JFTC regarding alleged violation of the Antimonopoly Law may devise a plan to take necessary measures to cease such an alleged violation and file a petition for approval of such plan with the JFTC, and if such plan is approved, the JFTC determines not to render a cease-and-desist order and administrative surcharge payment order against the petitioner; however, such commitment procedure will not apply to cartel conducts.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The administrative surcharge that is exempted or reduced is imposed on an entrepreneur, mainly a corporate defendant. While individuals who are first in line may be exempted from a criminal accusation, there is no such treatment for later applicants. The Antimonopoly Law does not distinguish between former employees and current employees; however, the JFTC will usually investigate the current employees of defendant corporations.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Leniency Rules make anonymous prior consultation available. A corporation contacting the JFTC for leniency will be informed of the expected order (marker) of the leniency application if it reports to the JFTC in order 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 and materials. The applicant will be required to submit the evidence and 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 that submitted its initial report to request its application for the leniency programme by fax earlier than other entrepreneurs.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No ongoing policy discussions are publicly available with regard to the leniency programme.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The JFTC has a policy whereby it will provide plaintiffs with access to certain investigation records which the JFTC collects during its investigation, upon the request by a court if a damage suit is filed in the court, except for certain information such as trade secrets and private information.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

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

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

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

37 Payment of penalties and legal costs

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

Yes. However, the payment of legal fees and expenses to defend such 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 criminal penalties on behalf of individual officers or employees.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No. Neither criminal fines nor administrative surcharges are tax-deductible. Income tax is not imposed on the compensation awarded to plaintiff due to the conduct in violation of the Antimonopoly Law.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

To our knowledge, there are no formal rules that are publicly available. However, we are under the impression that the JFTC is concentrating on activities that affect the Japanese market or customers. It is not clear whether the JFTC would enforce the Antimonopoly Law with regard to indirect sales as distinct from direct sales.

In private damage suits before the Japanese judicial courts, the amount of damage may be reduced by the court if the defendant proves that the overlapping damage has already been recovered by the same claimant through the proceedings in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

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
Koki Yanagisawa

eriko_watanabe@noandt.com
koki_yanagisawa@noandt.com

JP Tower, 2-7-2, Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan

Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
www.noandt.com

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