

# Cartel Regulation 2021

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# Cartel Regulation 2021

**Contributing editor**

**Neil Campbell**  
McMillan LLP

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Lexology Getting The Deal Through is delighted to publish the twenty-first edition of *Cartel Regulation*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology 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 new chapters on Argentina, Bulgaria, France and Spain.

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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.

Lexology 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, Neil Campbell of McMillan LLP, for his continued assistance with this volume.



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## LEGISLATION AND INSTITUTIONS

### Relevant legislation

#### 1 | 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 Japan Fair Trade Commission (JFTC) may take against the activities of government officers involved in public bid rigging.

### Relevant institutions

#### 2 | 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. 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.

Collusion in a public bid under the Criminal Code is subject to the investigation by the Public Prosecutors' Office.

### Changes

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

On 19 June 2019, the amendment to the Antimonopoly Law (2019 Amendment) was enacted by the national diet and, on 26 June 2019, was promulgated. The regime of cartel regulations (ie, administrative sanctions and the leniency programme) will substantially change when the 2019 Amendment becomes fully effective. The effective date for most of the major changes will be 25 December 2020, while some of them became effective as of 26 July 2019 and 1 January 2020, respectively.

Apart from the foregoing, no fundamental legislative amendment to the substantive law under the Antimonopoly Law or major 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, the amendment to the Antimonopoly Law that became effective as of 1 April 2015 abolished the JFTC's administrative proceedings and the JFTC orders are now 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 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.

Furthermore, the commitment procedure, the system to resolve alleged violations of Antimonopoly Law voluntarily by consent of a defendant company, was introduced on 30 December 2018, pursuant to the amendment to the Antimonopoly Law included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws. 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, the Antimonopoly Law provides that such commitment procedure does not apply to cartel conducts.

### Substantive law

#### 4 | 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 only prohibits 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 in rebuttal thereof.

### Joint ventures and strategic alliances

#### 5 | To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The joint ventures on a contract basis and strategic alliances among competitors are subject to the latter part of article 3 of the Antimonopoly Law and are prohibited if they substantially restrain the competition in the relevant market.

The JFTC seems to have 'per se illegal' approach to handling investigations and deciding cartel and bid rigging cases. However, the JFTC has also taken a 'rule of reason' approach towards joint ventures formed on a contract basis and strategic alliances among competitors, similar to business combinations, according to the JFTC's report on the prior consultations that are made public in each fiscal year. This was confirmed in the Report of Study Group on Business Alliance, which was made public as of 10 July 2019 by the Competition Policy Research Center, an organisation of the JFTC consisting of JFTC officers and academics. While the JFTC has no guidelines for the joint ventures on a contract basis and strategic alliances among competitors, the Report provides the basic framework for reviewing business alliances for research and development, technology use, standardisation, procurement, production, logistics, and sales.

## APPLICATION OF THE LAW AND JURISDICTIONAL REACH

### Application of the law

#### 6 | Does the law apply to individuals, corporations and other entities?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) applies to the conduct of 'entrepreneurs', which includes both corporations and individuals. Trade associations are also subject to the prohibition under the Antimonopoly Law.

### Extraterritoriality

#### 7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

The Antimonopoly Law contains no provision expressly setting forth the jurisdiction of the Japan Fair Trade Commission (JFTC). 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. The Supreme Court supported this conclusion. 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 therefor also 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.

### Export cartels

#### 8 | 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.

### Industry-specific provisions

#### 9 | Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Antimonopoly Law apply all of the business and there are no industry-specific infringements under the Antimonopoly Law. Having said, there are certain guidelines dealing with the cartels formed by trade associations, such as those of agricultural cooperatives.

There are systems which allow a cartel to be exempt from the Antimonopoly Law due to the applicable business affairs laws (eg, the joint operation of non-life insurance, airlines and maritime transport). However, there are no industry-specific defences.

### Government-approved conduct

#### 10 | Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

The systems which permit exemptions from the application of the Antimonopoly Law based on applicable business affairs laws, in principle requires approval from the relevant minister and consent from and notice to the JFTC. Other than those exemptions explicitly provided under the applicable laws, there is no defence due to the approval from the ministries and governmental agencies. There are precedents in which the JFTC has enforced the Antimonopoly Law against companies that colluded and agreed to prices they would file with the relevant government agencies for their approval in the regulated industries.

## INVESTIGATIONS

### Steps in an investigation

#### 11 | What are the typical steps in an investigation?

When the Japan Fair Trade Commission (JFTC) discovers an alleged violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 the 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.

### Investigative powers of the authorities

#### 12 | 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.

When, 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 investigations by the JFTC

The JFTC may, on a compulsory basis, if necessary, during an investigation:

- 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 an ex officio basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid rigging case. 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. The Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of seized material, 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. Corporations can also be subject to a fine of up to ¥3 million.

## INTERNATIONAL COOPERATION

### Inter-agency cooperation

- 13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Yes. 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 with Canada in 2005.

Moreover, Japan signed economic partnership agreements with various countries, such as Australia, Chile, Malaysia, Mexico, the Philippines, Singapore and Thailand.

The Japan Fair Trade Commission (JFTC) has also concluded memoranda on cooperation with competition authorities such as China, the Philippines, Vietnam, Brazil and Korea.

The JFTC may also exchange information with other competition authorities to some extent.

### Interplay between jurisdictions

- 14 | 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 a number of 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

### Decisions

- 15 | How is a cartel proceeding adjudicated or determined?

If the Japan Fair Trade Commission (JFTC), as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 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 the order. The Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court. An appeal against a judgment rendered by the Tokyo High Court can be referred to the Supreme Court and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled. 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. 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 the 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 in 2015, 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 under the current Antimonopoly Law.

### Burden of proof

16 | 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 an alleged cartel constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), 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'.

### Circumstantial evidence

17 | 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.

### Appeal process

18 | What is the appeal process?

After the JFTC conducts an administrative investigation and issues a cease-and-desist or a payment order for the administrative surcharge, or both, the defendant corporation has six months after the order is served to file a complaint with the Tokyo District Court seeking a judgment to quash the order. A judgment rendered by the Tokyo District Court can be appealed to the Tokyo High Court. An appeal against a

judgment rendered by the Tokyo High Court can be referred to the Supreme Court, and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled. There is a question whether the JFTC, having issued an order, has standing to file an action to quash its own order.

The JFTC or a plaintiff must prove that the alleged facts are 'highly probable' in order to meet the burden of proof in the aforementioned judicial proceedings.

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. 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 the JFTC, pursuant to the Antimonopoly Law before the amendment.

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## SANCTIONS

### Criminal sanctions

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

For an unreasonable restraint of trade, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 work to restore roads after the East Japan Earthquake. In March 2018, the Japan Fair Trade Commission (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.

## Civil and administrative sanctions

### 20 | 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 acts and to take any other measures necessary to eliminate such acts. The statutory limitation for the JFTC to issue cease-and-desist orders under the current Antimonopoly Law is five years after the conduct ceased. Under the amendment to the Antimonopoly Law (2019 Amendment) effective as of 25 December 2020, the statutory limitation will be seven 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 judicial proceedings for an appeal (administrative proceedings for a case commenced before the 2015 amendment to the Antimonopoly Law) 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 under the current Antimonopoly Law, (ie, before elements of the 2019 Amendment become effective on 25 December 2020).

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

- Large-sized corporations:
  - manufacturers, etc: 10 per cent;
  - retailers: 3 per cent; and
  - wholesalers: 2 per cent.
- Small and medium-sized corporations (SMEs):
  - manufacturers, etc: 4 per cent;
  - retailers: 1.2 per cent; and
  - wholesalers: 1 per cent.

On and after 25 December 2020, the rate of an administrative surcharge under the Antimonopoly Law will be:

- Large-sized corporations: 10 per cent; and
- SMEs: 4 per cent (the scope of SMEs will be limited.)

An administrative surcharge at a rate of 150 per cent of the respective rates set out above is imposed on entrepreneurs 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. Note that the decrease of administrative surcharge rate by 20 per cent in certain circumstances (such as the withdrawal from the cartel at an early stage) under the current Antimonopoly Law will be abolished under the 2019 Amendment, effective of 25 December 2020.

An adjustment is 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 halving the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates are increased by 50 per cent if a corporation played a leading role by having:

- planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law;

- requested another corporation to commit such conduct 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 has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the Antimonopoly Law provides that the administrative surcharge rate be doubled.

On and after 25 December 2020, if a corporation played a leading role in the conduct constituting an unreasonable restraint of trade by having requested another corporation to obstruct a JFTC investigation (eg, conceal or disguise evidence), the administrative surcharge rate will also be increased by 50 per cent. If such a corporation had committed a conduct constituting an unreasonable restraint of trade in violation of the Antimonopoly Law within the past 10 years, the rate will be doubled.

The 150 per cent rate will also be applied to:

- the parent company that owns 100 per cent of the shares of a company that committed the aforementioned conduct within the past 10 years; or
- the company that acquired the business from a company that committed the aforementioned conduct within the past 10 years.

If any such company played a leading role in the conduct constituting an unreasonable restraint of trade, the administrative surcharge rate will be doubled.

The number of defendant companies on which the JFTC has imposed administrative surcharge orders since 2014 has been:

- 128 in the 2014 fiscal year;
- 31 in the 2015 fiscal year;
- 32 in the 2016 fiscal year;
- 32 in the 2017 fiscal year;
- 18 in the 2018 fiscal year; and
- 37 in the 2019 fiscal year.

The total amounts of administrative surcharges paid in each year since 2014 were approximately:

- ¥17 billion in the 2014 fiscal year;
- ¥8.5 billion in the 2015 fiscal year;
- ¥9.1 billion in the 2016 fiscal year;
- ¥1.9 billion in the 2017 fiscal year;
- ¥0.3 billion in the 2018 fiscal year; and
- ¥69 billion in the 2019 fiscal year.

#### 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 24 of the Antimonopoly Law are not available for the unreasonable restraint of trade.

### Guidelines for sanction levels

**21** 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 on defendant companies (ie, fines) and individuals for violating the Antimonopoly Law, (ie, servitude and fines) seem to be based on:

- the scale of the conduct (including the size of the business and market, and the number and levels of participants);
- the scale of its effects (effects on the business and the market); and
- the duration and maliciousness of the conduct (including whether the participant was ringleader or not).

### Compliance programmes

**22** Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Unlike in the United States, there is no guidelines on evaluation of compliance programme in Japan and criminal penalties do not seem to be reduced, even if the organisation had a compliance programme in place at the time of the violation of the Antimonopoly Law.

### Director disqualification

**23** Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Under the Companies Act, individuals involved in cartel activity in violation of the Antimonopoly Law are prohibited from serving as a corporate director if they are sentenced to imprisonment or a more severe penalty and have not completed their sentence, or the sentence still applies to them (excluding individuals for whom execution of the sentence is suspended).

### Debarment

**24** Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Each ministry and governmental agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, many corporations that have been subject to investigation by the JFTC on the suspicion of being in a cartel, or that the JFTC has rendered orders on, were suspended and such corporations were restricted from participating in bids presided over by the government agencies. The time period of suspensions seems to differ, depending on the government agency imposing it.

### Parallel proceedings

**25** Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and 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 also made a public announcement that it will not file a criminal accusation against the corporation, corporate officer or employee of the 'first in' who has been fully cooperative with the JFTC during an investigation. 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 officer or employee thereof, are exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

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 and whether administrative or criminal investigations are ongoing.

## PRIVATE RIGHTS OF ACTION

### Private damage claims

**26** Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? 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 Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (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 Japan Fair Trade Commission (JFTC) regarding the amount of damages caused by such violations. Note that neither compensation for punitive damages nor triple damages are allowed. An indirect purchaser may file an action.

The damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- the amount of damages;
- the legally sufficient 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 are 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.

### Class actions

#### 27 | Are class actions possible? If so, 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.

Under the Civil Procedure Law, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may file a complaint as co-plaintiffs. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes. Also, each plaintiff or defendant may appoint another plaintiff or defendant as a representative of each plaintiff/defendant under the 'appointed party system' provided by the Civil Procedure Law. Multiple claimants may use these schemes in bringing competition law claims before the civil court proceedings.

Additionally, qualified consumer organisations are entitled to file an action for an injunction for lawsuits under the Consumer Contract Law and injunctions under article 10 of the Law against Unjustifiable Premiums and Misleading Representations. Under the new system introduced in 2016, consumer organisations qualified by the Japanese government may file a lawsuit seeking compensation for damage under consumer contracts. In such actions, the plaintiffs may assert the defendants' violation of the Antimonopoly Law.

## COOPERATING PARTIES

### Immunity

#### 28 | Is there an immunity programme? If so, 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 Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law).

The immunity and the leniency programme under the current Antimonopoly Law is as follows.

If an entrepreneur committing an unreasonable restraint of trade voluntarily and independently reports the existence of a cartel and provides related materials to the Japan Fair Trade Commission (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:

- the first applicant which filed before the initiation of an investigation – total immunity;
- the second applicant which filed before the initiation of an investigation – 50 per cent deducted;
- the third through to the fifth applicant which filed before the initiation of an investigation – 30 per cent deducted; and
- up to three applicants which filed after the initiation of an investigation – 30 per cent deducted.

The maximum number of leniency applicants is five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if the total number of applicants (including those before the dawn raid) is five or less. A joint application for leniency may be made by multiple corporations within the same business group.

The first-in corporation is 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 officers or employees thereof, are 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.

On and after 25 December 2020, the JFTC will determine the rate of reduction taking account of the degree of the cooperation by the applicants, while the current leniency programme provide the immunity and reduction only in accordance with the orders of application, and in addition, the limitation of the number of applicants who may enjoy the benefit of leniency programme is abolished.

The rate of reduction for leniency applications made before a dawn raid will be changed to:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

However, the second and subsequent applicants may receive a rate of reduction of up to 40 per cent, depending on the level of cooperation with the JFTC investigation.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, the 5 per cent rate will apply. In any event, companies that submit applications after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC investigation.

### Subsequent cooperating parties

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

A leniency application is required for each good or service that is a target of the cartels, therefore separate orders of application apply to each good or service. The amendment to the Antimonopoly Law (the 2019 Amendment) does not change this basic approach.

The current Antimonopoly Law sets the maximum number of leniency applicants to five. However, from 25 December 2020, there will be no limitation of the number of applicants.

The current leniency programme only provides immunity and reductions in accordance with the order of applications received. Under the 2019 Amendment's leniency programme, the JFTC will determine the rate of reduction by taking the degree of cooperation provided by an applicant into account.

The rates of reduction for leniency applications made before a dawn raid will also change to the following:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

The second and subsequent applicants can receive a rate of reduction of up to 40 per cent, depending on the level of cooperation they provide to the JFTC.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, 5 per cent will apply. In any event, applicants after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC.

A joint application for leniency may be made by multiple corporations within the same business group.

Neither the current Antimonopoly Law nor the 2019 Amendment provides immunity from a criminal accusation to the second and subsequent applicants.

### Going in second

- 30** How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A leniency programme is available for subsequent parties after the first to report.

While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' and subsequent parties may be exempted from the administrative surcharge, or have it reduced by 100 per cent, if it applies as first-in for leniency for another cartel case (eg, one involving different products). There is no exemption from criminal and civil liability for the second in and subsequent parties.

### Approaching the authorities

- 31** 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 current Antimonopoly Law limits the number of 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 a deadline for submission – 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. On and after 25 December 2020, it is also important to complete an efficient internal investigation, as this may provide more evidence that may be used to secure a larger reduction to the administrative surcharge since the JFTC will determine the rates of reduction by taking the applicant's cooperation into account.

### Cooperation

- 32** 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 that are seeking partial leniency?

Full cooperation is required for the JFTC to grant 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.

On and after 25 December 2020, the degree of cooperation with the JFTC investigation will be an important factor in the JFTC's determination regarding reducing the administrative surcharge.

The amendments to the Rules on Reporting and Submission of Materials for Leniency will effective as of 25 December 2020.

### Confidentiality

- 33** 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 JFTC officials in general, it does not contain specific provisions with regard to the confidentiality of leniency applicants.

The JFTC made a public announcement that it will disclose the names of the applicants for which administrative surcharges do not apply or have been reduced, and the exemption or reduced ratio thereof under the leniency programme if it issues an administrative surcharge payment order for a case involving the applicant on or after 1 June 2016.

Before 31 May 2016, the JFTC would make such information public only when the applicants desired it, so that applicants may request a shorter period of suspension from doing business with the 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. However, it can be difficult to go through the entire process of the leniency application with no written materials.

### Settlements

- 34** Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) 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 rigging, 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 in 2018 that was included in the Act to Amend the Trans-Pacific Partnership Agreement Related Laws introduced 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. If such plan is approved, the JFTC will determine to not render a cease-and-desist and administrative surcharge payment orders against the petitioner. However, such a commitment procedure does not apply to cartel conduct.

### Corporate defendant and employees

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

The administrative surcharge that can be waived or reduced is imposed on corporate defendants. While an individual who is 'first in' may be exempt from criminal accusations, 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.

### Dealing with the enforcement agency

36 | 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, must 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 requesting its application the leniency by fax.

## DEFENDING A CASE

### Disclosure

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

The Japan Fair Trade Commission (JFTC) is required to provide a defendant company with an opportunity to submit its opinion against the JFTC's allegations before the JFTC issues a cease-and-desist or an administrative surcharge payment order. During such procedures, the defendant company may request the JFTC allow the defendant company to review or make photocopies of the evidence that supports

the JFTC's fact findings (eg, notebooks and diaries seized during a dawn raid, or statements signed by the officers and others during interviews) before the closure of the process under the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) and applicable rules.

### Representing employees

38 | 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 or representation?

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.

### Multiple corporate defendants

39 | 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 to the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law), it seems that representing multiple suspected companies will raise an ethical issue.

### Payment of penalties and legal costs

40 | 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.

### Taxes

41 | Are fines or other penalties tax-deductible? Are private damages payments 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.

### International double jeopardy

42 | 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, regardless of whether in Japan or outside Japan, 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.

## Getting the fine down

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

The JFTC has no discretion to reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (as the leniency programme). Therefore, to reduce the amount of the administrative surcharge, the suspected corporation must cease the cartel conduct as soon as it is found and produce evidence to show that the corporation ceased such conduct before the investigation, and, if possible, file an application for the leniency programme as the first in and, on and after 25 December 2020, fully cooperate with the JFTC investigation.

## UPDATE AND TRENDS

### Recent cases

#### 44 | What were the key cases, judgments and other developments of the past year?

There are no remarkable cases regarding cartels or bid rigging. Since the fiscal year 2019, there were only domestic and small and typical price cartel and bid rigging cases.

Most of the major changes in the 2019 Amendment to the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law) will become effective on 25 December 2020, which will change the regime of cartel regulations. Major changes contained in the 2019 Amendment apply to the leniency programme, the calculation of administrative sanctions, and the amount of the criminal penalty for obstructing a JFTC investigation.

### Leniency programme

Under the current Antimonopoly Law, the leniency programme provided immunity and reduction only in accordance with the order of application. On and after 25 December 2020, however, the JFTC will be able to determine the reduction rate, taking account of both the orders of application and the degree of the cooperation by the applicants with the Japan Fair Trade Commission (JFTC) investigation. Moreover, a limitation of the number of applicants who may enjoy the benefit of the leniency programme will also be abolished.

The rates of reduction for leniency applications made before a dawn raid will change to the following:

- first applicant – 100 per cent;
- second applicant – 20 per cent;
- third through 5th applicant – 10 per cent; and
- sixth applicant or thereafter – 5 per cent.

The second and subsequent applicants can receive a rate of reduction of up to 40 per cent, depending on the level of cooperation they provide to the JFTC.

If applications are made after a dawn raid, a maximum of three companies (a maximum of five companies including applicants before a dawn raid) can receive a rate of reduction of 10 per cent. Otherwise, the 5 per cent rate will apply. In any event, companies that submit applications after a dawn raid may receive a rate of up to 20 per cent, depending on the degree of cooperation they provide to the JFTC.

### Calculation of administrative surcharge

The calculation method (ie, sales for the goods or services by the cartel multiplied by the cartel's active period minus immunity or a reduction under the leniency programme) is the same as under the current Antimonopoly Law prior to the 2019 Amendment. However, there are a number of changes to the basis of the calculation method that enabling the JFTC to substantially increase the amount of the administrative surcharge to strengthen the enforcement of the Antimonopoly Law.

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First, with regard to the 'cartel period', the statutory limitation will be seven years (increased from five years under the current Antimonopoly Law) and the duration of the cartel period will be from the most recent activity to 10 years before the JFTC's dawn raid (increased from three years under the current Antimonopoly Law).

Second, with regard to the changes in 'sales for the goods or services by the cartel', the unjust gains owing to the infringements (eg, the financial gains as a reward for not supplying the goods or services subject to the cartel, and the sales of subsidiaries belonging to the same group as the defendant company and receiving instructions or information from the defendant company) will be added to the 'sales for the goods or services by the cartel'.

Third, with regard to the rates used for calculating the administrative surcharge, a number of changes are to be made, including:

- the rates for wholesalers and retailers will be abolished;
- the scope of a small and medium-sized corporation that is subject to the decreased rate will be limited;
- the rate for early termination of a cartel will be abolished; and
- the higher rate for a bid leader will be applied to a defendant company obstructing a JFTC investigation (eg, concealing or disguising of the evidence by the defendant).

In relation to the change in the calculation of administrative surcharges under the 2019 Amendment, the relevant government ordinance on the Antimonopoly Law and the Rules on Administrative Investigations will be amended effective as of 25 December 2020.

### Increase to the criminal penalty for obstructing a JFTC investigation

An individual obstructing the investigation will be subject to the criminal penalty of ¥3 million (changed from ¥0.2 million) and a criminal penalty of ¥200 million will be introduced for the company to which such an individual obstructing the investigation belongs.

### Protection of communication between licensed lawyers and clients

The JFTC introduced a new system where JFTC investigators are prevented from immediately accessing confidential communication between licensed lawyers and their clients regarding legal advice on unreasonable restraint of trade (ie, cartels), if certain conditions are met. Under this system, JFTC officers who are independent from the investigation review the lawyer-client communications and determine

whether the investigation's JFTC officers should be granted access to it. No amendment to the Antimonopoly Law has been made regarding this, but the JFTC will make those guidelines public.

### **Regime reviews and modifications**

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

### **Coronavirus**

46 | What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

While the JFTC publicly announced their understanding towards cooperation among competitors in times of crisis after the Tōhoku earthquake and tsunami in 2011, there have been no changes in the laws, regulations and enforcement of the Antimonopoly Law.

# Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Japan	
Is the regime criminal, civil or administrative?	Administrative, criminal and includes civil (private action).
What is the maximum sanction?	Criminal: servitude of up to five years and fines of up to ¥5 million for individuals, and ¥500 million for corporations (for large enterprises). Administrative: surcharge of, in principle, 10 per cent of sales of cartel goods/services over the cartel period up to the previous three years. Civil: the amount of damage; no triple damage.
Are there immunity or leniency programmes?	Yes, effective 4 January 2006. Amended as of 1 January 2010. A further amendment is expected upon the amendment of the Antimonopoly Law effective sometime in 2019 or 2020.
Does the regime extend to conduct outside the jurisdiction?	Yes, the Japan Fair Trade Commission may challenge conduct affecting the Japanese market.
Remarks	Amendment to the Antimonopoly Law regarding the reform of the administrative proceeding became effective as of 1 April 2015. Amendment to the Criminal Procedure Law regarding the introduction of the plea bargaining system for certain types of crimes including violation of the Antimonopoly Law (eg, cartel) became effective as of 1 June 2018.

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Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

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