

International Comparative Legal Guides



Cartels & Leniency 2020

A practical cross-border insight into cartels & leniency

13th Edition

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Group Publisher
Rory Smith

Publisher
Bianca Carter

Senior Editors
Caroline Oakley
Rachel Williams

Sub-Editor
Jenna Feasey

Creative Director
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Cartels & Leniency 2020

13th Edition

Contributing Editors:

**Geert Goeteyn, Matthew Readings & Elvira Aliende Rodriguez
Shearman & Sterling LLP**

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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith

Group Publisher

International Comparative Legal Guides

Japan

Nagashima Ohno & Tsunematsu



Yusuke Kaeriyama



Takayuki Nakata

1 The Legislative Framework of the Cartel Prohibition

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

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the “Antimonopoly Act”) is the primary legal basis of the cartel prohibition. Cartel offences that are in violation of the Antimonopoly Act can be subject to criminal and/or administrative sanctions.

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

A cartel is prohibited as an “unreasonable restraint of trade” under the Antimonopoly Act. Article 2, paragraph 6 of the Antimonopoly Act provides as follows:

the term “unreasonable restraint of trade” as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

1.3 Who enforces the cartel prohibition?

The Japan Fair Trade Commission (the “JFTC”) enforces the cartel prohibition. If the JFTC believes that a cartel offence should be criminally prosecuted, the JFTC will file an accusation with the Public Prosecutor’s Office, and the Public Prosecutor’s Office will criminally prosecute the cartellists.

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

The basic procedural steps for administrative procedures (which are aimed at imposing administrative sanctions) are different from those for criminal procedures (which are aimed at imposing criminal penalties).

Administrative Procedures

The JFTC typically opens an investigation by conducting a dawn raid: an unannounced search of business premises. After reaching

the view that there was a cartel based on relevant evidence collected, the JFTC issues a notice to cartellists regarding the commencement of its opinion-hearing process. The JFTC then allows cartellists to review the evidence it has gathered to establish a violation of the Antimonopoly Act, and holds an opinion-hearing process, where the JFTC will hear the opinion of the cartellists. After these procedures, the JFTC will typically issue an order for the payment of an administrative surcharge (i.e., administrative fine), and issue a cease and desist order against the cartellists. The JFTC’s decision is subject to review by a court.

Criminal Procedures

If an investigation is commenced as a criminal procedure, the JFTC and the Public Prosecutor’s Office tend to cooperate in conducting the dawn raid and any subsequent investigation. After collecting the relevant evidence, the JFTC files a criminal accusation with the Public Prosecutor’s Office. The Public Prosecutor’s Office will then indict the cartellists, and after undergoing the relevant court proceedings, a competent court will impose criminal penalties on the cartellists.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences. With regard to the sector-specific exemptions, certain joint activities are exempted from the cartel prohibition under sector-specific laws such as the Insurance Business Act, the Marine Transportation Act, and the Civil Aeronautics Act.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Yes. As long as the relevant market which was affected by the cartel conduct involves the Japanese market, such conduct can run afoul of the Antimonopoly Act. The JFTC tends to take an expansive view on whether the relevant market involved the Japanese market. For example, in the *Cathode Ray Tube* (“CRT”) cartel case, the JFTC fined CRT makers located outside of Japan, alleging that they fixed the price of CRTs and sold them to CRT television makers located in Southeast Asian countries. The JFTC argued that the relevant market involved Japan, regardless of the fact that neither the cartelised products, i.e., CRTs, nor the finished product incorporating the cartelised products, i.e., CRT televisions, had entered the Japanese market, because the Japanese parent companies of CRT television makers were negotiating the prices and other trading terms with CRT makers. The JFTC’s decision was upheld by the Supreme Court in 2017.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

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

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

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

As far as administrative investigations are concerned, the JFTC can exercise the investigatory powers referred to in the summary table above on the basis of internal administrative decisions. Namely, the JFTC does not need any prior warrant to conduct a dawn raid or any other investigatory measures mentioned in question 2.1. Lawyers' attendance is not required for the JFTC to lawfully conduct a dawn raid or to carry out interviews with individuals. The JFTC's dawn raid typically takes one whole day. The JFTC has extensive authority to gather any potentially relevant evidence. Please refer to question 2.6 with regard to attorney-client privilege.

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

No, there are no such powers.

2.4 Are there any other significant powers of investigation?

No, there are no such powers.

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

In the cases of administrative procedures, the JFTC officials will carry out searches of business premises. In the cases of criminal procedures, staff from the Public Prosecutor's Office will also carry out searches of business premises and/or residential premises. They will not usually wait for legal advisors to arrive.

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

Currently, there is no attorney-client privilege in Japan and therefore any correspondence between outside/in-house counsel and the client or any advice from outside/in-house counsel to the client may be seized by the JFTC.

That said, amendment to the Antimonopoly Act and related legislation was approved by the Diet on June 19, 2019 ("Amendment"). The Amendment is planned to be effectuated within a year-and-a-half from the said date, i.e., by the end of 2020, and it will introduce the attorney-client privilege for the advice provided by outside/in-house counsel to some extent.

The outline of the privilege to be introduced is that correspondence between the clients and the lawyers will be protected from the submission order by the JFTC under Article 47 of the Antimonopoly Act in the process of administrative investigation procedure under certain circumstances. Correspondence between in-house counsel and clients will be also protected under limited circumstances. The details of the rule will be provided in the relevant regulations to be drafted by the JFTC.

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

There are no other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

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

There are sanctions for the obstruction of investigations provided for under the Antimonopoly Act. Namely, the Antimonopoly Act provides criminal penalties of imprisonment of up to one year or a fine of up to JPY 3 million for an individual who obstructs the JFTC's investigations. In addition, the Antimonopoly Act provides criminal penalties of a fine of up to JPY 3 million for any corporation which obstructs the JFTC's investigation (please note, the maximum amount of fine for corporation is planned to be raised to JPY 200 million in accordance with the Amendment).

As far as the authors are aware, these sanctions have never been used by the JFTC.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under the Antimonopoly Act, two possible sanctions are stipulated: administrative sanctions and criminal sanctions. The JFTC usually chooses administrative sanctions; only very limited cases with wide-spread influence on people's livelihoods are subject to criminal sanctions.

Administrative Sanctions

There are two types of administrative sanctions: cease and desist orders; and surcharge payment orders. The JFTC has the authority to order cartelists to cease and desist the prohibited acts or to take any other measures necessary to restore competition in the relevant market. The JFTC also has the authority to issue surcharge payment orders that require the cartelists to pay a surcharge as a penalty for breaching the Antimonopoly Act. The amount of surcharge is calculated in accordance with the relevant formula, which is, in general, the relevant revenue (i.e., the revenue derived from the cartelised products/services for up to three years) multiplied by the statutory surcharge rate (basically 10%) minus the leniency discount, if applicable. After the Amendment is effectuated, (i) economic benefits received in return for not supplying the target goods/services (rewards for bid rigging, etc.), (ii) the revenue generated by operations closely related to the cartelised product/service (such as subcontract orders), and (iii) the revenue of certain group companies (wholly-owned subsidiaries, etc.) that receive instructions and information from the cartelists will be added to the basis of calculation. Additionally, calculation term can be extended to 10 years utmost. Currently, reduced surcharge rates of 2% for wholesale operators and 3% for retail businesses are applied, but such treatment for certain type of business operators is planned to be abolished in the Amendment. There are special rules for small and medium-sized enterprises, recidivists, ringleaders, etc.

Criminal Sanctions

Companies can be subject to a criminal fine of up to JPY 500 million for their involvement in a cartel under the Antimonopoly Act.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Individuals can be subject to imprisonment of up to five years and/or a criminal fine of JPY 5 million if they were involved in a cartel. A person who was sentenced to imprisonment is disqualified as a director of a company under the Companies Act unless the person has completed the imprisonment period or the sentence is suspended.

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

No, fines cannot be reduced on these bases.

3.4 What are the applicable limitation periods?

The applicable limitation period is five years for the cease and desist orders and surcharge payment orders. Such limitation period will be extended to seven years when the Amendment becomes effective.

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

It is generally understood that a company may pay the legal fees for a former or current employee, but a company may not pay financial penalties on behalf of such an employee.

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

It may be possible in theory, but the authors are not aware of any relevant precedent.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company will not be held liable for cartel conduct of a subsidiary under the Antimonopoly Act, as long as it is not itself involved in the cartel.

4 Leniency for Companies

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

There is a leniency programme for companies.

Current legislation stipulates that, when companies file a leniency application before the official initiation of a JFTC investigation (i.e., dawn raid), the first applicant is eligible to receive 100% immunity from any subsequent surcharge payment order, the second applicant is eligible to receive a 50% reduction and other applicants receive a 30% reduction (up to five applicants in total). When companies file a leniency application after the official initiation of a JFTC investigation, they are eligible to receive a 30% reduction (up to three applicants after the dawn raid or up to five applicants including the applicants before the official initiation of the investigation). If the leniency application is completed and the applicant complies with certain requirements such as ongoing cooperation with the JFTC, the reward granted accordingly to the applicant (i.e., immunity or amount of reduction) is automatically determined in accordance with the law.

After the Amendment is effectuated, when companies file a leniency application before the official initiation of a JFTC investigation, the first applicant is eligible to receive 100% immunity from any subsequent surcharge payment order (same as the current legislation), the second applicant is eligible to receive a 20% reduction, the third to fifth applicants receive a 10% reduction and the sixth or subsequent applicants will receive a 5% reduction. When companies file a leniency application after the official initiation of a JFTC investigation, they are eligible to receive a 10% reduction up to three applicants after the dawn raid or up to five applicants including the applicants before the official initiation of the investigation, and subsequent applicants will receive a 5% reduction. With regard to the second and after applicants before the official initiation of a JFTC investigation, a 40% reduction utmost may be added to the foregoing percentages, depending on and considering the degree of cooperation by the applicants to the investigative process. With regard to the applicants after the official initiation of a JFTC investigation, such potential addition to the reduction percentage amount shall be 20% at the maximum. Such additional

reduction amount shall be finally determined by an agreement between the JFTC and the company concerned after discussion.

The JFTC's policy is not to file a criminal accusation for an officer or employee of the first-in leniency applicant, but other leniency applicants may be subject to a criminal penalty. The leniency applications will not have any impact on civil liability.

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

Yes. A marker status will be granted if an applicant files "Form I" with the JFTC before the official initiation of a JFTC investigation. Form I must include: the goods/services involved in the cartel; an outline of the cartel (e.g., type of cartel and participants); and the beginning and end dates of the cartel. On the other hand, a marker will not be granted to applicants after the official initiation of a JFTC investigation.

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

No. While some information required in the leniency application can be provided to the JFTC orally, the application itself must be in written form.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

A leniency application will generally be treated confidentially unless and until the JFTC issues formal orders in connection with the relevant cartel. Namely, when the JFTC issues formal orders in connection with the relevant cartel, the JFTC will make public which companies applied for leniency and what reward each of the leniency applicants received.

As for the extent to which the documents provided by leniency applicants will be disclosed to private litigants, the JFTC has a policy not to provide the documents to private litigants to avoid discouraging any potential leniency applicant from tipping off the JFTC. However, a court may order the JFTC to produce such documents under certain circumstances.

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

A leniency applicant must cooperate with the JFTC by providing the JFTC with accurate and complete information in response to the JFTC's request throughout the administrative proceedings.

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

There are no such policies in Japan.

5 Whistle-blowing Procedures for Individuals

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

Any individual may report cartel conduct to the JFTC in its individual capacity. The Antimonopoly Act does not provide for leniency or immunity for an individual whistle-blower or any relevant procedures, but the Whistle-blower Protection Act prohibits companies from retaliating against employees who report corporate wrongdoings to the authorities.

6 Plea Bargaining Arrangements

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

The Code of Criminal Procedure was amended in June 2018 to introduce a plea bargaining system, which allows for a prosecutor to enter into a formal plea bargaining agreement with a suspect or defendant to drop or reduce criminal charges or agree to pre-determined punishment if such suspect or defendant provides certain evidence or testimony in relation to certain types of crimes, including cartel conduct. In contrast to the plea bargaining system in the U.S., this system is only available to individuals/companies who provide evidence or testimony in relation to the crimes of other individuals or corporate entities. In other words, cooperation by a suspect or a defendant on his or her own offences does not entitle that person/entity to use the new system in relation to such offence.

Additionally, the Commitment Procedure has been introduced since December 30, 2018 as Japan ratified Trans-Pacific Partnership Agreement. However, the Commitment Procedure is not applicable to hard core cartels.

7 Appeal Process

7.1 What is the appeal process?

Administrative Sanctions

The JFTC's formal orders (i.e., cease and desist orders and/or surcharge payment orders) can be appealed before the Tokyo District Court within six months from the date of such orders, by the addresses of such orders. The Tokyo District Court is entitled to decide on both the facts and the law and can substitute its own decision to that of the JFTC. The judgment of the Tokyo District Court can be appealed before the Tokyo High Court, and can ultimately be appealed before the Supreme Court under certain circumstances.

Criminal Sanctions

The appeal process in antitrust cases is the same as in any criminal proceedings. The defendant must file a notice of appeal with the

competent high court within 14 days of the entry of judgment of the district court. The judgment of the competent high court may be appealed before the Supreme Court under certain circumstances.

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

An appeal does not automatically suspend a company's requirement to pay the administrative fine ordered by the JFTC. A competent court may, upon petition by the company, stay the JFTC's order only when there is an urgent necessity to avoid serious damages.

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

Yes, cross-examination of witnesses is allowed.

8 Damages Actions

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

A private party may bring a damages action for loss suffered as a result of cartel conduct before a competent district court. A plaintiff may bring either a stand-alone action under the general tort law, or a follow-on action under Article 25 of the Antimonopoly Act. In contrast to regular tort actions, the plaintiff is not required to show intent or negligence on the part of the cartelist under Article 25 of the Antimonopoly Act. In other words, Article 25 establishes strict liability for antitrust violations. In addition, Article 25 grants the plaintiff a three-year statute of limitations period to bring an action, starting from the date of the JFTC's formal orders. However, actions based on Article 25 are not flexible in the sense that they must be based on violations established by the JFTC's formal orders. Plaintiffs cannot add other claims or sue parties other than the addressees of the JFTC order. In addition, the JFTC's order does not bind the court in a civil action, and accordingly, even in the follow-on damages actions, plaintiffs must prove an antitrust violation.

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

No, class-action and representative claims are not allowed.

8.3 What are the applicable limitation periods?

The applicable limitation period under Article 25, for the follow-on damages action, is three years from the date of the JFTC's formal order becoming final.

As for the stand-alone damages action under the general tort law, the applicable limitation period is 20 years after the wrongdoing ceased or three years after the plaintiff becomes aware of the wrongdoing and damages, whichever comes earlier.

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

The law does not explicitly provide for a passing on defence in civil damages claims. However, given that any direct or indirect purchaser in the supply chain can obtain compensation for the actual harm suffered, the proof of the plaintiff passing on the whole or part of the overcharge resulting from a cartel conduct down to the supply chain would reduce the amount of damages.

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

Article 61 of the Code of Civil Procedure provides the "loser pays" principle.

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

There have been many successful civil damages claims in bid rigging cases that involved public bids.

9 Miscellaneous

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

As described in question 6.1, the Commitment Procedure has been introduced on December 30, 2018.

In addition, as described in questions 2.6, 3.1 and 4.1, the Amendment with regard to administrative surcharge and the attorney-client privilege is planned to be effectuated by the end of 2020.

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

This is not applicable.



Yusuke Kaeriyama is a partner at Nagashima Ohno & Tsunematsu. He is a competition law specialist and represents clients before the Japan Fair Trade Commission and competition authorities in various jurisdictions. He has been involved in a large number of high-profile merger cases. He has also advised on cartel cases and other behavioural cases in various industries. He holds an LL.B. from the University of Tokyo (2003) and an LL.M. with merit in competition law from King's College London (2009). He previously spent time working in the competition group of Slaughter and May in London (2009–2010) as a visiting attorney and for the Japan Fair Trade Commission, where he was a chief investigator handling cartel cases and other behavioural cases.

Nagashima Ohno & Tsunematsu
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku, Tokyo 100-7036
Japan

Tel: +81 3 6889 7332
Email: yusuke_kaeriyama@noandt.com
URL: www.noandt.com/en



Takayuki Nakata is an associate at Nagashima Ohno & Tsunematsu. Since joining the firm, he has worked on a number of corporate transactions, including cross-border and domestic mergers and acquisitions. He also has a wide range of experience in advising foreign and Japanese companies on competition law issues. He received an LL.B. from the University of Tokyo in 2014.

Nagashima Ohno & Tsunematsu
JP Tower, 2-7-2 Marunouchi
Chiyoda-ku, Tokyo 100-7036
Japan

Tel: +81 3 6889 7454
Email: takayuki_nakata@noandt.com
URL: www.noandt.com/en

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Vertical Agreements and Dominant Firms