

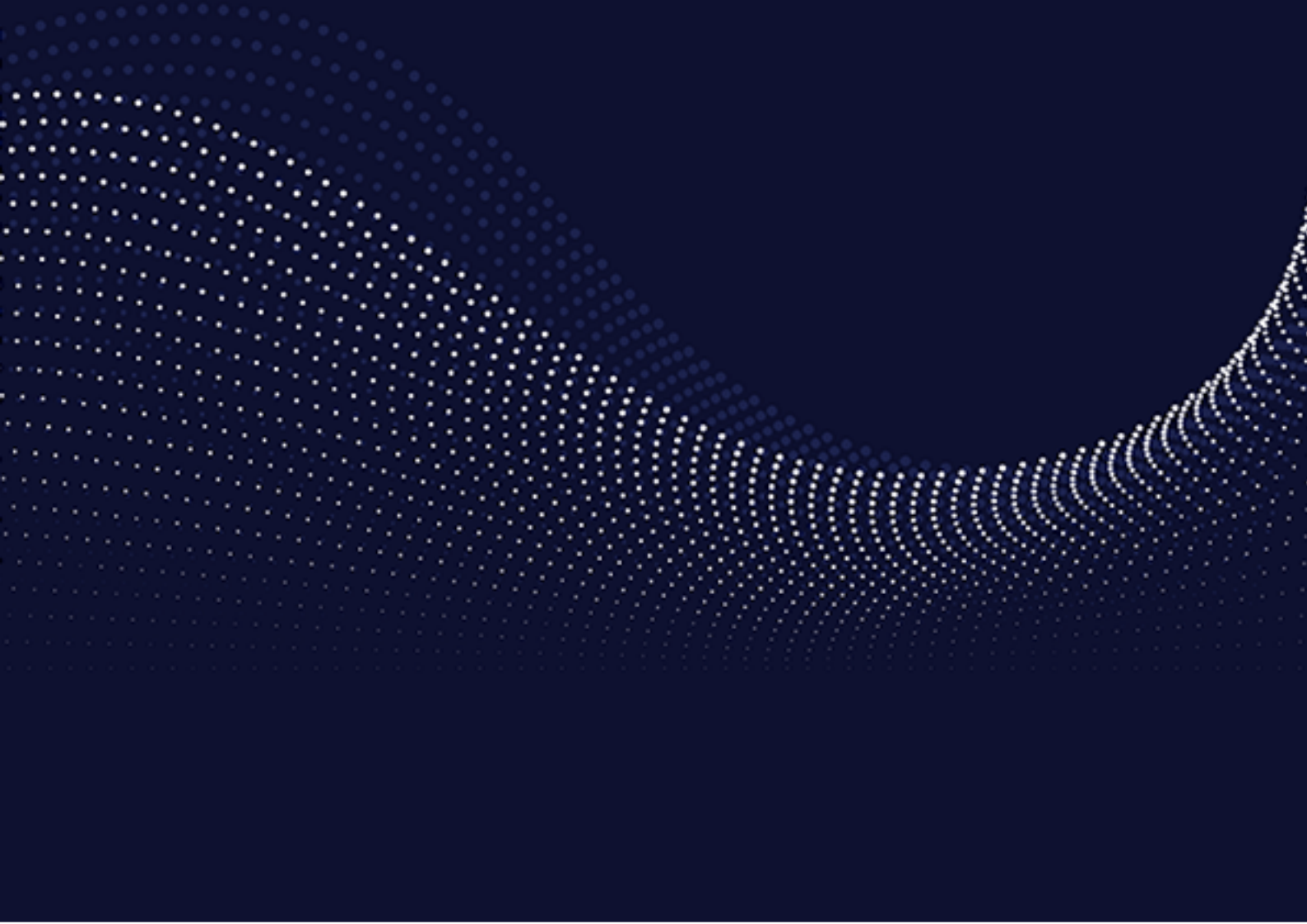
# CARTEL REGULATION

## Japan

Contributing Editor

**Neil Campbell**

McMillan LLP



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# Contributors

## Japan

NAGASHIMA OHNO & TSUNEMATSU

### Nagashima Ohno & Tsunematsu

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**Kaoru Hattori**

kaoru\_hattori@noandt.com

**Yoshitoshi Imoto**

yoshitoshi\_imoto@noandt.com

**Ryohei Tanaka**

ryohei\_tanaka@noandt.com

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## LEGISLATION AND INSTITUTIONS

### Relevant legislation

#### What is the relevant legislation?

Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) is the piece of legislation that prohibits cartels. In addition to the prohibition of cartels and the administrative and criminal sanctions under the AMA, collusion in a public bid could also be subject to imprisonment or a fine, or both, under the Criminal Code.

### Relevant institutions

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

The Japan Fair Trade Commission (JFTC) is the sole enforcement agency to investigate cartels under the AMA. In addition to the JFTC's administrative procedures, the Public Prosecutors' Office is in charge of criminal procedures for cartels regulated under the AMA if the JFTC files a criminal accusation with the Public Prosecutors' Office.

As for collusions in a public bid, a criminal offence under the Criminal Code, the Public Prosecutors' Office has the authority to investigate such offences on its own initiative and indict a defendant to a criminal court.

### Changes

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

In 2019, an amendment to the AMA (the 2019 Amendment) was enacted. It became fully effective on 25 December 2020.

The important changes under the 2019 Amendment are the increase in the amount of administrative surcharge that the JFTC can impose and the improvement of the leniency programme.

The increase in the administrative surcharge is achieved by extending the maximum period subject to the surcharge from three years to 10 years and broadening the scope for the basis of the surcharge calculation.

Under the new leniency programme, the reduction rate is determined not only by the order in which an applicant applies for leniency, but also by the applicant's degree of cooperation with the JFTC's investigation. In addition, to protect a leniency applicant's communication with its lawyers to ensure effective cooperation to maximise the reduction rate, the JFTC has established something akin to a clawback procedure, through which the JFTC has to return to the alleged cartelists documents and data containing confidential communications between the alleged cartelists and their lawyers. The investigators engaged in the investigation of the relevant case cannot have access to such documents or data.

## **Substantive law**

### **What is the substantive law on cartels in the jurisdiction?**

Under the AMA, an agreement or understanding among competitors to eliminate or restrict competition or that substantially restrains competition in a particular field of trade is prohibited as an unreasonable restraint of trade.

Cartels and bid rigging are typical examples of unreasonable restraint of trade. Agreements that cover topics such as price-fixing, production limitation, and market and customer allocation are typical examples of cartels.

For cartel cases, the JFTC seems to have enforced the AMA as though the law prescribes that cartels are per se illegal. The JFTC has not accepted any arguments by defendant companies that a cartel is not illegal because it did not substantially restrain competition.

## **Joint ventures and strategic alliances**

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

Joint ventures on a contractual basis and strategic alliances among competitors are also subject to the cartel laws. They are prohibited if they substantially restrain competition in the relevant market.

Although the JFTC seems to have adopted a per se illegal approach in cartel and bid rigging cases, the JFTC has taken a rule of reason approach towards joint ventures formed on a contractual basis and strategic alliances among competitors.

## **APPLICATION OF THE LAW AND JURISDICTIONAL REACH**

## **Application of the law**

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

Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) governs conduct by entrepreneurs, the definition of which includes both corporations and individuals who operate a commercial, industrial, financial or other business. Trade associations are also subject to the AMA.

## **Extraterritoriality**

### **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 AMA contains no provision expressly setting forth the jurisdictional scope 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 take place.

### **Export cartels**

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

Export cartels among exporters filed with the relevant ministries under the Export and Import Transaction Law are exempted from the AMA if the relevant conduct does not involve unfair trade practices under the AMA.

### **Industry-specific provisions**

**Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?**

The AMA applies to all businesses and there are no industry-specific infringements under it. However, there are certain guidelines that deal with the cartels formed by certain trade associations, such as agricultural cooperatives.

There are systems to exempt cartels from the AMA based on the applicable sector-specific regulations governed by other ministries (eg, the joint operation of non-life insurance companies, airlines and maritime transport entities). However, there are no industry-specific defences.

### **Government-approved conduct**

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

The system that permits exemptions from the AMA based on applicable sector-specific regulations governed by other ministries, in principle, requires approval from the relevant minister as well as consent from and notice to the JFTC. Other than those exemptions explicitly provided for under the applicable laws, there is no defence on the basis of approval from ministries and governmental agencies.

## **INVESTIGATIONS**

### **Steps in an investigation**

**What are the typical steps in an investigation?**

When the Japan Fair Trade Commission (JFTC) discovers a potential cartel, the JFTC first conducts an internal feasibility study and determines whether it will formally initiate an investigation. Once it decides to investigate, the first step by the JFTC is typically a dawn raid. Recently, the JFTC has issued written requests for information instead of a dawn raid, especially in cases where the relevant enterprise is a foreign company.

### **Investigative powers of the authorities**



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

### Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) as part of the compulsory investigation of criminal offences, typically where the suspects have repeatedly violated the AMA or where the suspects fail to comply with a cease-and-desist order and it is difficult to correct their conduct through the JFTC's administrative measures.

If, as the result of the investigation, the JFTC is convinced that the alleged conduct constitutes a criminal offence, it will file a criminal accusation with the Public Prosecutors' Office.

### Administrative investigations by the JFTC

If necessary, the JFTC may do the following during an administrative investigation on a compulsory basis:

- order persons involved in a case or any other relevant person to testify or to produce documentary evidence;
- order experts to give expert testimony;
- issue production orders; and
- conduct a dawn raid.

The JFTC usually conducts dawn raids in cartel or bid rigging cases. The presence of a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct a dawn raid.

The JFTC removes originals of documents and materials held at the company's office during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntary basis.

It is usual for the JFTC to question implicated employees at the same time as the dawn raids (either at the site or the JFTC's office) and, after the completion of the review of materials and collection of information from other persons, to request such persons to respond to questions.

Further, the JFTC usually issues an order requesting certain information and a production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that such information or documents (or both) be submitted on a voluntary basis.

## INTERNATIONAL COOPERATION

## **Inter-agency cooperation**

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

Yes. The Japan Fair Trade Commission (JFTC) has close relationships with most of the authorities in major jurisdictions. For example, it signed with its US counterparts the Agreement Concerning Cooperation on Anticompetitive Activities. Similar agreements exist with the European Commission and Canada.

Moreover, the JFTC has also concluded memoranda on cooperation with competition authorities in China, the Philippines, Vietnam, Brazil, India and Korea.

The JFTC may also exchange its views with other competition authorities without disclosing confidential information that the JFTC seized during its investigations to the extent that the discussions do not breach its confidential obligation as a public servant. If the JFTC discovers alleged cartel conduct through a leniency application, the JFTC may ask the applicant to issue a waiver to allow the JFTC to operate an extensive information exchange with other competition authorities.

## **Interplay between jurisdictions**

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

Although the JFTC tends not to make public announcements with regard to the scope and degree of the information exchanged with other competition authorities pursuant to international agreements for individual cartel cases, there have been a number of cases in which the competition authorities have apparently coordinated their investigations on a global basis.

# **CARTEL PROCEEDINGS**

## **Decisions**

**How is a cartel proceeding adjudicated or determined?**

If the Japan Fair Trade Commission (JFTC) preliminarily believes that the alleged conduct constitutes a cartel and that criminal sanctions are appropriate, it files a criminal accusation with the Public Prosecutors' Office. Criminal sanctions under Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) will be imposed on the corporation and individuals through the criminal procedures in the same manner as in other criminal cases.

If the JFTC preliminarily determines that the alleged conduct constitutes a cartel and intends to issue a cease-and-desist order or a surcharge payment order for the administrative surcharge, or both, the JFTC is required to provide the defendant company with an opportunity to submit its opinion against the JFTC's preliminary fact findings and the legal

evaluation of the facts. The JFTC will take into account such an opinion if it proceeds to issue a cease-and-desist order or a surcharge payment order.

### **Burden of proof**

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

In a criminal case, the burden of proof lies with the public prosecutors, who must prove that the alleged cartel constitutes a violation of the AMA beyond reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging the JFTC's administrative decisions), the JFTC must prove the same by the preponderance of evidence standard.

### **Circumstantial evidence**

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

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

### **Appeal process**

#### **What is the appeal process?**

After the JFTC issues a cease-and-desist order, a surcharge payment order for an administrative surcharge, or both, the defendant corporation has six months after the order is served to file a complaint with the Tokyo District Court to seek a judgment to quash the order. A judgment rendered by the Tokyo District Court can be further appealed to the Tokyo High Court. Tokyo High Court's judgment can be referred to the Supreme Court and can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

The judicial court shall not be bound by the JFTC's findings of fact and a defendant company may submit new evidence to the judicial court proceedings under the current AMA.

## **SANCTIONS**

### **Criminal sanctions**

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

Cartel activity is subject to a criminal fine of up to ¥500 million for a corporation. For individuals (such as officers, directors or employees who played a central role in a cartel), such conduct is subject to imprisonment with hard labour for up to five years or a fine of up to ¥5 million, or both.

### **Civil and administrative sanctions**

#### **What civil or administrative sanctions are there for cartel activity?**

## Administrative sanctions

Cartel activities are subject to a cease-and-desist order and an administrative surcharge from the Japan Fair Trade Commission (JFTC).

### Cease-and-desist order

The JFTC can order members of a cartel to cease and desist the cartel activities or to take any other measures necessary to eliminate the cartel activities.

The cease-and-desist order is effective upon service to its recipient. The recipient must comply with the terms of the order even if it is challenging the order, unless the enforcement of such an order is suspended by a decision by the court.

### Administrative surcharge

The amount of the administrative surcharge is calculated by taking the sum of the following:

- 10 per cent (or 4 per cent for certain small-sized entrepreneurs) of the sales amount of the goods or services subject to the cartel for the period of the cartel;
- 10 per cent (or 4 per cent for certain small-sized entrepreneurs) of the amount of consideration paid to businesses closely related to the goods or services subject to the cartel, such as the manufacturing, sale or managing of all or part of the relevant goods or services; and
- an amount equivalent to the monetary or any other property income from another person obtained by the participant in the cartel in relation to the failure to supply or purchase the goods or services subject to the cartel.

For cartel members that have repeatedly been found in violation of Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA) by engaging in a cartel or a private monopolisation and have been subject to an administrative surcharge within the past 10 years, the administrative surcharge amount increases by 50 per cent. The 50 per cent increase in the administrative surcharge also applies to certain first-time violators if its wholly owned subsidiary has engaged in a cartel or a private monopolisation within the past 10 years, or it merged with a company or acquired the relevant business from another company that has engaged in a cartel or private monopolisation within the past 10 years.

In addition, the administrative surcharge amount will increase by 50 per cent if a participant in a cartel played a leading role, including such activities as:

- designating prices, volumes to be supplied, volumes to be purchased, market shares or customers; or
- demanding, requesting or soliciting other cartel members to join or not to withdraw from the cartel, conceal or falsify evidence, submit false material to the JFTC or not to apply for leniency.

Further, if the entrepreneur that played a leading role in the cartel has repeatedly acted in violation of the AMA by engaging in a cartel or a private monopolisation within the past 10 years, the administrative surcharge will be doubled instead of an increase by 50 per cent.

The statutory limitation is seven years from the termination of cartel activities.

## Private actions

A party (such as a competitor or a customer) who is harmed by a cartel may initiate a civil action to recover damages.

### **Guidelines for sanction levels**

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

Criminal sentencing principles or guidelines of the public prosecutor's office are not publicly available. However, it is understood that the criminal penalties on defendant companies and individuals for violating the AMA seem to be based on:

- the scale of the conduct (including the size of the business and market, and the number and corporate rankings of the individual participants);
- the scale of its effects (effects on the business and the market); and
- the duration and maliciousness of the conduct (including whether the participants played a leading role and whether taxpayers' money was involved).

### **Compliance programmes**

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

There are no guidelines on the evaluation of compliance programmes in Japan. Having an adequate compliance programme in place at the time of the cartel conduct does not seem to reduce criminal penalties or administrative surcharges.

### **Director disqualification**

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

Due to the disqualification provisions under the Company Act, individuals involved in cartel activities are prohibited from serving as corporate directors or officers if they are sentenced to imprisonment or imprisonment with hard labour and have not completed their sentences,

or their sentences are under appeal but not yet overturned (excluding individuals for whom the execution of the sentences is suspended).

### **Debarment**

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

Each ministry, governmental agency and other public body has its own rules that set forth the requirements to take part in procurement procedures. The rules may vary and may not always be publicly available. However, based on our experience, we understand that many public procurement procedure rules contain a clause that prevents entrepreneurs from participating in procurement procedures for a certain period of time if they are found to have taken part in a cartel.

### **Parallel proceedings**

**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?**

Both administrative surcharge and criminal penalties can be imposed on the same entrepreneur based on the same conduct. If both are imposed on the same entrepreneur for the same conduct, an amount equivalent to 50 per cent of the criminal fine shall be deducted from the administrative surcharge.

A plaintiff may bring a civil action in court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed.

## **PRIVATE RIGHTS OF ACTION**

### **Private damage claims**

**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?**

Damages available to plaintiffs of private damages claims are limited to actual damages that have a causal relationship with the cartel conduct. Treble damages or punitive damages are not available under Japanese laws.

As in any civil tort cases, the plaintiff bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- the amount of damages (including very modest lawyers' fee);

- a legally sufficient causal relationship between the damages and the cartel conduct; and
- the negligence or wilfulness of the defendant.

Indirect purchasers or purchasers who acquired affected products from non-cartel members may file an action against cartelists. However, whether a court would award damages depends on whether they can prove the causal relationship between the damage and the cartel conduct. Given the lack of precedents, it is unclear how one can prove the causal relationship between the damage to indirect purchasers or purchasers who acquired affected products from non-cartel members and the cartel conduct. That said, a court could possibly award damages based on damages claims brought by the plaintiffs if the plaintiffs can prove that the cartel members foresaw or should have foreseen that the price increase would be passed on to indirect purchasers or parallel increases.

### **Class actions**

**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?**

Class actions are not possible. Each plaintiff must file its complaint individually.

That said, multiple claimants may bring claims before the civil court proceedings by filing a complaint as co-plaintiffs if the rights or obligations that are the subject matter of the lawsuit are common to the co-plaintiffs, are based on the same factual or statutory cause of action, or are of the same kind or based on the same kind of factual or statutory cause of action. Also, a plaintiff may appoint another co-plaintiff as the representative of the plaintiff under the appointed party system provided by the Civil Procedure Law.

## **COOPERATING PARTIES**

### **Immunity**

**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?**

Yes. The leniency programme provides immunity from administrative surcharges to the first applicant that filed a report to the Japan Fair Trade Commission (JFTC) before the JFTC has initiated its investigation and a reduction in the same for the applicants that filed reports later.

Significant changes to the leniency programme took effect on 25 December 2020. If an applicant entirely ended its cartel conduct and completed its application prior to 25 December 2020, the leniency programme before the amendment will apply. Otherwise, the amended leniency programme will apply.

The leniency programme exempts the first applicant before the initiation of an investigation by the JFTC from the administrative surcharge. Furthermore, securing the first application before the initiation of an investigation by the JFTC in effect functions as an exemption

from criminal sanctions because of the JFTC's exclusive right to decide whether to file an accusation with the Public Prosecutors' Office. However, the immunity application will not relieve the first applicant of any civil liability.

### **Subsequent cooperating parties**

**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?**

Significant changes to the leniency programme took effect on 25 December 2020. If an applicant entirely ended its cartel conduct and completed its immunity or leniency application with the JFTC prior to 25 December 2020, the leniency programme before the amendment will apply. Otherwise, the amended leniency programme will apply.

Under the amended leniency programme:

- the second applicant that filed before the initiation of an investigation by the JFTC will receive a 20 per cent base reduction of the administrative surcharge;
- the third through fifth applicants that filed before the initiation of an investigation by the JFTC will receive a 10 per cent base reduction of the administrative surcharge;
- the sixth and subsequent applicants that filed before the initiation of an investigation by the JFTC will receive a 5 per cent base reduction of the administrative surcharge, meaning that there is no limitation on the number of leniency applicants in this category; and
- up to three applicants (who must be within the fifth if counted together with all of the preceding applicants) that filed on or after the initiation of an investigation by the JFTC will receive a 10 per cent base reduction of the administrative surcharge – otherwise, applicants that filed on or after the initiation of an investigation by the JFTC will receive a 5 per cent base reduction of the administrative surcharge.

On top of the base reduction, depending on the level of cooperation with the JFTC investigation, the second and subsequent applicants that filed for leniency before the initiation of an investigation by the JFTC may further receive a reduction of up to 40 per cent, while applicants that filed for leniency on or after the initiation of an investigation by the JFTC may further receive a reduction of up to 20 per cent.

As opposed to an immunity application, the second and subsequent applications cannot enjoy any exemption from criminal sanctions. Also, the second and subsequent applications will not relieve those applicants of any civil liability.

### **Going in second**

**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.



There is no immunity plus or amnesty plus concept under Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (AMA). There is no exemption or mitigation from criminal and civil liability for the second or subsequent parties.

### **Approaching the authorities**

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

No deadline is provided under the AMA with regard to an application for immunity. However, for the second and subsequent applicants to be eligible for leniency before the initiation of an investigation, they need to file an application as soon as possible and complete the application by submitting detailed information and related materials before the JFTC initiates its investigation (typically through a dawn raid). If the initiation of the investigation occurs before the completion of the application, such an application will not be treated as leniency before the initiation of an investigation.

Furthermore, as for a leniency application after the initiation of an investigation by the JFTC, the applicant must complete the application within 20 business days from the date on which the JFTC initiated its investigation.

### **Cooperation**

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

Full cooperation is required for the JFTC to grant immunity (ie, all relevant information must be disclosed and all evidence available to the immunity applicant must be produced for the JFTC). There is no difference in the required level of cooperation between the immunity applicant and the second or subsequent leniency applicants.

That said, the degree of cooperation has now become a significant factor for second and subsequent applicants for them to enjoy the statutorily designated maximum discount on administrative surcharges. More specifically, they need to demonstrate that their reports satisfy the following qualitative cooperation elements as much as possible:

- specific and detailed;
- comprehensive with regard to the items listed in the leniency applicants' reporting rules such as the goods or services in question, how the collusive conduct occurred and was implemented, participants, temporal scope of the conduct and so forth; and
- supported by evidence and materials submitted by them.

The JFTC will determine the discount rate depending on how many qualitative cooperation elements the list above that the second and subsequent applicants have satisfied through

their reports. The table below shows the cooperation credit rates (on top of the base reduction rate):

Number of elements satisfied	Applicants before the initiation of investigation by the JFTC	Applicants after the initiation of investigation by the JFTC
3	40 per cent	20 per cent
2	20 per cent	10 per cent
1	10 per cent	5 per cent

### Confidentiality

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

There is no specific confidentiality rule in cases of immunity and leniency. Before the JFTC publicises a case result, the JFTC tends to accept the entrepreneur’s secret designation relatively broadly. There is no difference as to the level of confidentiality protection between an immunity applicant and subsequent cooperating parties.

Furthermore, upon the publication of orders, the JFTC discloses the names of the immunity and leniency 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 a surcharge payment order.

### Settlements

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?

The Criminal Procedure Law introduced the plea bargaining system for certain types of crimes including violation of the AMA in 2018. Defence lawyers of a criminal suspect or a criminally indicted defendant are required to be involved in negotiations on the terms of a plea agreement and the defence lawyers' consent to the terms of the plea agreement must be obtained. Because the plea bargaining system is only for criminal cases, it does not apply to the JFTC's administrative investigations.

Apart from the foregoing, no settlements, commitment procedure or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are permitted.

### **Corporate defendant and employees**

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

If immunity is granted to a corporate defendant, its current and former directors, officers or employees who were involved in the cartel conduct of such a corporate defendant may also be exempt from criminal accusations. Individuals are not subject to the administrative surcharge regardless of whether their company is an immunity applicant or a leniency applicant.

There is no distinction of treatment under the AMA between former employees and current employees.

### **Dealing with the enforcement agency**

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

A party who is considering filing an application for immunity or leniency can make a prior consultation on an anonymous basis with the JFTC by at least identifying the specific goods or services for which a collusive agreement might have been formed. If the party asks the JFTC about the expected rank (marker) of the leniency application, the JFTC discloses the expected rank. If that party files an application before the JFTC initiates its investigation, that party may use a very simple format for the purposes of the marker. The JFTC will inform the applicant of the deadline for submission of evidence and materials to complete the application. The applicant must complete the report using another reporting format with supporting evidence and materials before the designated deadline. When the JFTC officially decides to initiate the investigation, it will issue documents to the applicants that filed before the initiation of the investigation describing the provisional ranks of their applications.

On the other hand, applicants after the JFTC initiates the investigation must use a more detailed report format from the outset. It is typically the case that applicants, after the JFTC initiates the investigations, file an application as soon as possible with the JFTC and then supplement the application with the supporting evidence and materials on a rolling basis, but by no later than the statutorily provided deadline of 20 business days from the investigation start date.

## DEFENDING A CASE

### **Disclosure**

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

When the Japan Fair Trade Commission (JFTC) provides a defendant company with an opportunity to submit its opinion against the JFTC's findings of fact and the legal evaluation of the facts before the JFTC issues a cease-and-desist order or a surcharge payment order, the defendant company may request that JFTC allow the defendant company to review or transcribe the evidence that supports the JFTC's findings of fact (eg, diaries seized in the course of a dawn raid or statements signed by an implicated individual during interviews). Some of the evidence has redacted portions to keep the business secrets of the holder of the evidence and the identity of the individuals confidential.

### **Representing employees**

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

Yes. Unless there is a conflict of interest or a difference in the defence strategy between the corporation and its employee or employees, the counsel who represents the corporation may also represent that corporation's employees during the process of investigation by the JFTC. However, in practice, if it becomes likely that the case will evolve into a criminal case, key persons who were directly involved in the conducts should be represented by independent counsel.

### **Multiple corporate defendants**

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

Unless a conflict of interest exists, it is theoretically possible. However, it has become very difficult to jointly represent multiple suspected companies due to lawyers' ethical rules because the conflict typically arises when each of the corporate defendants considers whether to file an immunity or a leniency application and consults with their common counsel.

### **Payment of penalties and legal costs**

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

A corporation may pay legal fees and expenses to defend its employees. However, it could trigger the liability of the management of the corporation under the shareholders' derivative suits unless such a payment is for the purpose of and results in the mitigation of the

company's liability. A company may not bear the criminal penalties on behalf of individual directors, officers or employees.

### **Taxes**

#### **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 a plaintiff due to conduct in violation of Law No. 54 of 1947 Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade.

### **International double jeopardy**

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

There are no such rules in Japan that take into account any penalties imposed in other jurisdictions.

In private damages claims 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 proceedings in other jurisdictions.

### **Getting the fine down**

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

To lower the fine, the suspected corporation must cease the cartel conduct and any dubious information exchange with its competitors as soon as possible to avoid any additional surcharge exposure in the future. If the suspected corporation finds that the conduct in question actually constitutes cartel activity, it needs to seriously consider filing an application for immunity or leniency. Once it files an application with the JFTC, applicants need to fully cooperate with the JFTC's investigation.

## **UPDATE AND TRENDS**

### **Recent cases**

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

In March 2023, the Japan Fair Trade Commission (JFTC) issued cease-and-desist orders and surcharge payment orders in connection with a market allocation cartel case in the electricity retail sector. Four of the former regional giant power companies and their subsidiaries, who used to be given regional monopoly in their respective regions before the deregulation of the

electricity retail sector, were involved. Chugoku Electric Power Co was fined approximately ¥70.7 billion, which is the highest ever fine to be charged to one company. Chubu Electric Power Co and its subsidiary Chubu Electric Power Miraiz Company were fined approximately ¥27.5 billion in total, and Kyushu Electric Power Co was fined approximately ¥2.8 billion. Kansai Electric Power Co was not fined as it was the first leniency applicant. Chugoku, Chubu and Kyushu have announced that they will file a lawsuit to challenge the JFTC's orders. This case has drawn much attention not only because the amount of administrative surcharges charged was very high, but also because those companies and their executives now face serious shareholders' derivative lawsuit risks.

In February 2023, the JFTC announced that it filed an accusation with the Prosecutor General regarding alleged bid rigging concerning the Tokyo 2020 Olympics and Paralympics and their respective test matches, and Tokyo Public Prosecutor's Office then indicted six companies including the advertisement giant Dentsu, six individuals who handled tendering of bids in the respective six companies, and one individual who placed orders at Tokyo Olympic and Paralympic Organisation Committee. Major advertisement company ADK Marketing Solution is reported to be the leniency applicant. This case is important because the case moved to criminal prosecution, which is not common in Japan.

### **Regime reviews and modifications**

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.