

Trends and Developments

Contributed by:

Akira Inoue

Baker McKenzie (Gaikokuho Joint Enterprise) see p.27

Cartel Legislation and Regulatory Regime

Relevant legislative framework

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No 54 of 14 April 1947 or AMA) is the primary legislation governing competition in Japan. Regardless of the title, private monopolisation, which is close to Section 2 of the Sherman Act of the USA, is rarely enforced. The core aspects of the AMA are:

- unreasonable restraint of trade which regulates horizontal restraint;
- merger regulation; and
- unfair trade practices together with vertical restraint and abuse of superior bargaining position.

Unreasonable restraint of trade is defined as “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” (Article 2 (6) of AMA). Unreasonable restraint of trade includes cartelisation, price fixing, bid rigging and market allocation, but does not include resale price maintenance, which is stipulated as one of the unfair trade practices.

Unreasonable restraint of trade may result in:

- cease and desist orders issued by the Japan Fair Trade Commission (JFTC) (Article 7 of the AMA);
- surcharge payment orders issued by the JFTC (Article 7-2 of the AMA);
- potential criminal sanctions on individuals and/or a company through an indictment by a public prosecutor (Article 89 and 95 of the AMA); and
- civil actions by private parties or local governments (Article 25 of the AMA and general torts claim under the Civil Code Article 709).

There are some industry-specific and small-enterprise exemptions. For example, in the transportation sector, small partnerships such as agricultural co-operatives are exempt from cartel regulation under strict conditions. However, these exemptions are very narrow and difficult to apply, to the extent that sometimes companies misunderstand the exemption and are thereby sanctioned by JFTC.

Extraterritorial application

On 12 December 2017, the Supreme Court of Japan ruled that agreements made outside Japan can be subject to surcharge payment orders where the agreement infringes free economic competition in Japan. The surcharge is calculated only according to domestic sales.

Conduct of a Cartel Investigation

Competition authorities

There are two investigative authorities, the JFTC and the public prosecutor’s office. The JFTC conducts administrative investigation and issues administrative orders, including cease and desist orders and/or surcharge payment orders. Should the JFTC file an accusation with the Prosecutor

General, the special investigative squad of the Tokyo District Public Prosecutors Office considers whether it will file for a criminal indictment.

The JFTC is the primary investigation authority in Japan because it rarely files an accusation and the public prosecutors cannot themselves indict suspects.

Cartel investigation

Dawn raids

JFTC officials conduct administrative investigations in the form of dawn raids. Despite COVID-19 restrictions, where the Japanese government instructed in-person meetings to be avoided as much as possible, the JFTC instigated a dawn raid to expose a potential cartel, though dawn raids have been rare during the pandemic.

Documents and interviews

After a dawn raid, the JFTC orders the submission of documents and materials with the threat of a non-compliance fine. JFTC officials will take the original documents, but they will allow copies to be made in order to avoid possible business interruption and will wait for the copying process to finish. Following this, the JFTC requests additional document submission and conducts voluntary interviews of employees and directors, again with the threat of non-compliance fines. The JFTC continues the investigation until it is satisfied, therefore an interview might be conducted multiple times, especially when an individual disagrees with the JFTC's argument.

Under the AMA, there are no specific clauses prohibiting an attorney's attendance, but the JFTC would never allow an attorney to attend the interview. In addition, JFTC personnel prepare a draft statement and request the interviewee to sign the document. Sometimes, such drafts do not precisely reflect the contents of the interview and include a broad confession.

The interviewee might refuse to sign, but in such case the JFTC can simply continue the interview. The JFTC tends to obtain a comprehensive statement of confession and does not easily give up on obtaining a signature as the court system traditionally emphasises the importance of the confession. As a result, investigations can sometimes take a year or more.

Hearings

The JFTC will hold a formal hearing before issuing a cease and desist order and/or a surcharge payment order. Parties can review and copy the relevant evidence disclosed by the JFTC together with draft of said order(s) and submit a counter-argument brief. It should be noted that parties may only be allowed to use a copy of the relevant evidence to appeal the JFTC's order to the Tokyo District Court.

Criminal proceedings

Though criminal procedures are very rare in Japan, the JFTC has the power to gather documents and materials in the case JFTC considers that the JFTC should file an accusation. If necessary, the JFTC can obtain search and seizure warrants from a court for the process of criminal investigation. After filing an accusation, the JFTC must hand over the retained objects and/or materials to the public prosecutor's office.

Should the public prosecutor's office commence a criminal investigation, prosecutors will generally conduct interrogation of suspects and third-party witnesses, forming statements, drafts of which the interviewees are asked to sign.

The statement of prosecutors has a special treatment as an exception of the hearsay rule, under some circumstance. Public prosecutors can also arrest suspects with an arrest warrant. Criminal suspects have privilege against self-incrimination.

Legal privilege and the leniency programme

The JFTC introduced new guidelines on 7 June 2020, pursuant to the June 2019 amendments to the AMA. The amendments include not only the introduction of legal privilege but also updates to the leniency programme for entities that cooperate with the JFTC's antitrust investigations.

In order to qualify for legal privilege, the designated documents and data must contain or reflect confidential communications regarding legal advice related to the alleged violation of unreasonable restraint of trade under investigation. Confidentiality protections do not apply to internal communications with in-house counsel, internal notes or internal investigations conducted by the entity itself. Importantly, the guideline states that the protections do not apply to communications with foreign attorneys, including those who are registered to practise in Japan.

The entity must also take steps to ensure that the documents and data are treated as confidential internally. Specifically, the entity must label qualifying documents and data confidential as "Specific Communication Under the Rules on Investigations by the JFTC", store the documents and data in a location separate from non-privileged documents, and limit access to the documents and data within the company to a need-to-know basis.

Once the entity under investigation identifies the documents and data it seeks to protect, it files an application and the documents and data are to be placed in a sealed envelope and delivered to a "Determination Officer", an official within the JFTC Secretariat who is unrelated to the investigation at issue. The entity must also submit a log summarising the documents and data in question. If the Determination Officer determines that the designated documents and data qualify for confidentiality protection, the documents and data will be returned to the entity without JFTC

investigators ever accessing them. If the documents and data are deemed not to qualify, they will be sent to JFTC investigators. The entity can file a petition to appeal the Determination Officer's decision and can further appeal the outcome of that petition in district court.

Leniency

Overview of the leniency system

An enterprise wishing to apply for immunity from surcharges must contact the JFTC by email. The enterprise can either initially apply for a marker or immediately proceed to making a formal application to the JFTC. Applicants must use forms made available by the JFTC for this purpose. Form 1 is for applicants to use before the JFTC begins its investigation (before a dawn raid), and is supplemented by Form 2. Form 3 is for applications made after the investigation has started. The forms must be completed in Japanese.

First applicant

The AMA grants full immunity from surcharges to the first applicant. To obtain full immunity, the first applicant must admit violation of the AMA, submit reports (which include factual details of the cartel, an overview of the leniency application, and supporting materials) to the JFTC before the JFTC initiates a forced administrative or criminal investigation.

Further, the applicant shall submit a Form 1 document to a specific email address to secure the first applicant ranking. Following this, the applicant must promptly conduct internal investigations and interviews, and submit Form 2 with full evidence and a detailed explanation of the conduct related to cartelisation.

Form 1 must be submitted to the Leniency Officer by email and works as a marker. A leniency applicant that submits Form 1 receives a notice about the provisional order of priority together with the deadline for submitting Form 2 (typically

two weeks from the submission of Form 1). The leniency applicant can then secure its ranking by submitting Form 2 together with the relevant materials by the deadline. If Form 2 is submitted by the start of the investigation and by the notified deadline, the first will get full immunity.

It should be noted that the JFTC announced that it will not, in principle, pursue criminal accusations against the first applicant and its directors or employee. They do not distinguish between current and former directors or employees.

Subsequent applicants

Through the 2019 amendment to the AMA, the basic reduction rate of the second applicant filing for leniency before investigation becomes 20%, and the rate for the third, fourth and fifth applicants becomes 10%. The sixth or later applicants will have a 5% basic reduction. In addition, applicants can obtain an additional reduction of up to 40% based on the extent of their co-operation.

Applicants who file after the investigation can obtain a 10% (first three applicants) or 5% basic reduction, and a further reduction of up to 20% based on co-operation. The JFTC expects that the amendment will provide strong incentives for co-operation in order to obtain a more favourable reduction.

Even after the submission of Forms 2 or 3, leniency applicants need to provide additional reports and information to the JFTC and a failure to do so may result in losing the position.

According to the JFTC's guideline of 2 September 2020, the JFTC will decide the additional reduction of surcharge payment by taking into consideration whether the content of the company's report is detailed and concrete, includes all the relevant materials contributing to revealing the truth of the case as stipulated in the

guidelines (eg, the content of the agreement, participants in the cartel, the time when the cartel started, the amount of sales of goods or services subject to the cartel), and is corroborated by the materials submitted by the company.

Confidentiality of application

The JFTC's leniency rule requires applicants to keep the application confidential. As such, a listed company sometimes faces difficulty when a stock exchange or a shareholder demands an explanation for the leniency application.

Settlement

There is no settlement procedure in Japan. If the JFTC decides to give up on enforcement after litigation commences, it will simply drop the case or not appeal to a higher court. When the JFTC abandons a case, it does not give orders nor appeal the unfavourable judgment.

A new so-called plea-bargaining system was introduced on 1 June 2018. However, this is not a true plea-bargaining system as suspects will negotiate with the public prosecutor and disclose other person's crimes to reduce their criminal liability, such as a reduction of sentence. Therefore, even if suspects admit guilt, they will not be promised a reduced sentence.

It is worth noting that commitment proceedings were introduced to the AMA in December 2018 where, so long as the suspected party reaches a commitment with the JFTC which includes admission of suspected facts and necessary measures to prevent re-occurrence of suspected violation, the JFTC will not issue an administrative surcharge and/or cease and desist order. However, the commitment proceeding would not be applicable to a cartel violation case.

Inter-agency Co-operation

The JFTC has entered into international co-operation agreements on the enforcement of com-

petition laws with the USA, the EU and Canada. Furthermore, the JFTC is proactively co-operating with competition authorities in several jurisdictions. Memoranda on competition have been made with a number of countries and the partnership agreements to which Japan is a party include competition-related provisions. This is the case with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which came into force in December 2018, and the Economic Partnership Agreement between the EU and Japan, which came into force in February 2019.

In March 2017, the JFTC entered into a co-operation arrangement with the Authority for Fair Competition and Consumer Protection of Mongolia, and did the same in May 2017 with Canada. In December 2017, it exchanged opinions with the competition authorities in the People's Republic of China (the Ministry of Commerce (MOFCOM), the National Development and Reform Commission and the State Administration for Industry and Commerce (SAIC)).

The main impetus for the JFTC's co-operation with other competition authorities is the exchange of information collected through investigations and enforcement activities in order to deal with suspected violations. The JFTC exchanges information and discusses the progress of investigations subject to general rules on confidentiality. The JFTC can require leniency applicants to submit a waiver of confidentiality, allowing it to disclose information to another competition authority. In practice, the JFTC does not disclose evidence obtained from non-public sources.

Sanctions

Civil

Only actual, single damages claims are available in Japan. In addition, a plaintiff must prove the value of the damages where it is difficult to cal-

culate the exact amount. Therefore, when local governments make an agreement with a private party through bidding, which typically faces the risk of cartelisation or bid rigging, the governments insert a liquidated damages amount clause for cartels (such as 10% of total price in the case of cartelisation). In addition, a general tort claim can also seek a reasonable attorney fee of around 5–10% of the final amount of the judgment. This amount is not related to the actual attorney fee that has been incurred.

Administrative

The rate of surcharge payment order is usually 10% of affected domestic sales for up to ten years. There is also an exception for small companies, for which the basic rate is 4%. In addition, repeat offenders or the leader of the cartel or investigation obstruction will be subject to a 50% increase of the surcharge. If the leader is also a repeat offender, it will be subject to 100% increase.

Criminal

Individuals are subject to a maximum of five years' imprisonment or a JPY5 million criminal fine. Companies are subject to a maximum JPY500 million criminal fine. Thus far, no one has actually gone to prison. The court always grants a suspension of execution of the sentence to individuals.

Appeal Process

The recipient of a cease and desist order and/or surcharge payment order from the JFTC can appeal to the Tokyo District Court. A party can allege any ground to deny the order, including fact findings, interpretations of law, procedural problems, and amount of surcharge. This filing must be within six months from the date on which the JFTC's order was received.

For a criminal case, a defeated party can file an appeal to a higher court within 14 days from the

date of the verdict. Public prosecutors indict at district courts, and a party not satisfied with the verdict can appeal to high courts. In Japan, public prosecutors can also appeal the overturning of an acquittal verdict of a district court.

Recent Trend and Cases

Recently, the four largest construction companies in Japan were caught in the bid rigging of the construction of stations of a linear motor train and, after a criminal investigation and criminal accusation by the JFTC, a criminal complaint was filed through a criminal procedure, which is very rare in Japan. What is amazing here is that all four companies and two individuals have been indicted, including the company that appears to be the first leniency applicant. It should be noted that this is the first case where the JFTC made (against its own policy, as noted above) a criminal accusation against the first leniency applicant.

Based on plea bargaining, the Tokyo District Prosecutor Office decided not to file a criminal indictment against three individuals who admitted the charge and co-operated, whilst the two companies to which those three individuals belonged and two individuals who denied the charge were indicted. In December 2018, the Tokyo District Court ordered that JPY200 million should be imposed on the first leniency applicant, whilst JPY180 million should be imposed on another company based on the consideration that this company was late to participate in the bid rigging with the other three companies and never took part in the three known-of cartel meetings.

Further to this, in March 2021, the Tokyo District Court ordered that a criminal fine of JPY250 million should be imposed on the remaining two cartel participants respectively. In December 2020, the JFTC ordered an administrative surcharge payment order totalling JPY4.3 billion

against the two cartel member companies that secured the construction project based on bid rigging with two other companies. Due to a leniency application having been filed, the amount of surcharge was reduced by 30% respectively.

Also, in December 2020, the JFTC held a criminal investigation against four drug wholesalers and seven individuals on the suspicion that they had committed bid rigging in connection with orders from an independent administrative agency which held a public bidding for each group of drug (classified by drug companies and usage thereof) with respect to a procurement by 57 hospitals. At the time of writing, it is not yet known when the Tokyo District Prosecutor Office will file an indictment against them.

International and domestic cartel cases

For the last several years, cartels have only been caught in domestic cases and the last international cartel enforcement by the JFTC was in February 2018, when the JFTC ordered a surcharge payment order of JPY1 billion against companies which participated in a hard disk suspension drive. The compensation for the road construction case was the largest amount in the AMA's history, totalling around JPY40 billion, which was ordered in 30 July 2019.

A surcharge payment order against canned beverage companies was also large, around JPY25 billion in total. It should be noted that the JFTC discovered the alleged conducts in the process of reviewing a proposed merger between two of the manufacturers. This is the first known cartel investigation in Japan which began during a pre-merger review.

The following are other representative examples of recent domestic cartel cases.

- In June 2019, the JFTC issued a cease and desist order and a surcharge payment order

JAPAN TRENDS AND DEVELOPMENTS

Contributed by: Akira Inoue, Baker McKenzie (Gaikokuho Joint Enterprise)

- to a manufacturer for a price-fixing arrangement in relation to generic lanthanum carbonate hydrate orally disintegrating tablets. The total amount of the surcharge amounted to JPY1.37 million.
- In June 2019, the JFTC issued a cease and desist order and a surcharge payment order to two manufacturers for price-fixing arrangements in relation to sales of modified asphalt paving. The total amount of the surcharge amounted to JPY3.14 billion.
 - In July 2019, the JFTC issued a cease and desist order and a surcharge payment order to three water treatment business companies for bid rigging in relation to sales of modified asphalt for paving. The total amount of surcharge amounted to JPY74.18 million.
 - In July 2019, the JFTC issued a cease and desist order and a surcharge payment order to two manufacturers for price-fixing arrangements in relation to sales of asphalt mixture. The total amount of surcharge amounted to JPY39.9 billion.

Recently, however, the JFTC has been focused on IT companies, but it has not been that successful. Furthermore, these IT companies are not direct competitors, so they are not subject to unreasonable restraint of trade.

Baker McKenzie (Gaikokuho Joint Enterprise) is one of the largest and oldest foreign joint enterprises in Japan, and one of its leading international law firms. As a member firm of Baker McKenzie, clients can be provided comprehensive, specialised legal services related to domestic and international finance, M&A, general corporate, antitrust, major projects, intellectual property, international tax, litigation and arbitration, labour, environmental, pharmaceutical and real estate matters. The Tokyo office's

approximately 150 professionals include Japanese lawyers, registered foreign lawyers and foreign qualified lawyers, as well as certified public accountants, tax attorneys, patent attorneys, judicial scriveners, administrative scriveners and economists able to deploy the most innovative, standard-setting legal solutions to a full range of issues. With over 6,000 lawyers across 77 offices in 46 countries globally, the firm has an ability to provide clients with seamless cross-border legal and consulting services.

AUTHOR



Akira Inoue is a partner at Baker McKenzie's Tokyo office, and has been handling cross-border antitrust cases for more than 20 years. Most recently, he successfully secured

compliance credit for only the second time in the history of US antitrust practice and won a 40% criminal fine reduction. He is further distinguished as the sole member of the steering committee of the Cartel Task Force at Baker McKenzie from the Asia Pacific region. Thus far, he has published ten books and 102 articles on antitrust and competition law. He has been recognised for his expertise by leading publications.

Baker McKenzie (Gaikokuho Joint Enterprise)

Ark Hills Sengokuyama Mori Tower 28F
1-9-10 Roppongi
Minato-ku
Tokyo 106-0032
Japan

Tel: 81 3 6271 9900
Fax: 81 3 5549 7736
Email: Yu.Sakakibara@bakermckenzie.com
Web: www.bakermckenzie.co.jp

Baker McKenzie.