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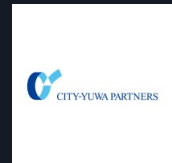
Country Comparative Guides 2025

Japan

Cartels

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Japan.

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Japan: Cartels

1. What is the relevant legislative framework?

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947, 'AMA') is the comprehensive competition law in Japan. The core parts of the AMA are (a) 'unreasonable restraint of trade,' which regulates horizontal restraints, (b) merger regulation, and (c) 'unfair trade practices,' together with vertical restraints and abuse of superior bargaining position. Notwithstanding the title of the AMA, 'private monopolization' is rarely enforced.

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 the AMA). Unreasonable restraint of trade includes cartelization, price fixing, bid rigging and market allocation, but does not include resale price maintenance which is stipulated as one of unfair trade practices.

Unreasonable restraint of trade may cause (a) a cease and desist order by Japan Fair Trade Commission ('JFTC') (Article 7 of the AMA), (b) a surcharge payment order by JFTC (Article 7-2 of the AMA), (c) potential criminal sanction on individuals and/or a company through an indictment by a public prosecutor (Article 89 and 95 of the AMA) and (d) civil actions by private parties or local governments (Article 25 of the AMA and general torts claim under Article 709 of the Civil Code).

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

In addition, the Criminal Code (the offence of collusion, Article 96-6, Paragraph 2) may be applied to a cartel infringement. But the following discussion focuses on the AMA.

2. To establish an infringement, does there need to have been an effect on the market?

Yes. Unreasonable restraint of trade requires a substantial restraint of competition in any particular field of trade (the so-called relevant market). There is no per se illegal concept in Japan.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Even though an act (e.g., a market division agreement) is carried outside Japan, if it has the effect of restricting competition in the Japanese market and violates the AMA, the AMA may be applied to that act.

4. Which authorities can investigate cartels?

JFTC and public prosecutor's office can investigate cartels. JFTC conducts administrative investigation and issues administrative orders including a cease-and-desist order and/or a surcharge payment order. In the case JFTC files an accusation with the Prosecutor General, the special investigative squad of the Tokyo District Public Prosecutors Office considers whether they will file for a criminal indictment. JFTC is the primary investigation authority in Japan because JFTC rarely files an accusation, and the public prosecutors cannot indict suspects without an accusation by JFTC.

5. How do authorities typically learn of the existence of a potential cartel and to what extent do they have discretion over the cases that they open?

JFTC initiates investigations when it believes there are facts that violate the provisions of the AMA, based on information it collects on its own, as well as reports from the public (including whistleblowers), leniency applications, and information obtained through fact-finding investigations. As many of the cases in which a surcharge payment order was imposed have involved applications for leniency, it seems that applications for leniency are still the main source of information for JFTC. JFTC sometimes suspects cartels based on external factors such as a high winning bid rate in public tenders,

but this does not seem to be very effective.

6. What are the key steps in a cartel investigation?

JFTC officials conduct administrative investigations in the form of dawn raids. They order to submit documents and materials and produce documents or information under the penalty of a fine. JFTC officials will take the original document, but they will allow copies of the original document to be made in order to avoid obstacles to business, and they will wait for the copying process to be completed. JFTC will then request additional documents and conduct voluntary interviews with employees and directors. JFTC can order interviews with the sanction of non-compliance fine, but JFTC always requests voluntary cooperation. JFTC will continue the investigation until it is satisfied. JFTC does not often use the method of setting milestones and deadlines, as Western authorities do. Therefore, interview might be conducted multiple times especially in the case when the person disagrees with JFTC's argument.

An attorney is generally not allowed to attend the interview. In addition, JFTC staff prepare statement drafts 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 reject to sign, but JFTC can continue to interview. JFTC tends to obtain a comprehensive statement of confession and does not easily give up on the signature from the interviewee because the court system traditionally emphasizes importance on confession. Therefore, investigation sometimes takes a year or more.

JFTC will have a formal hearing date before issuing a cease-and-desist order and/or a surcharge payment order. Parties may review and copy the relevant evidence submitted by JFTC and submit a counter-argument brief.

Although criminal procedures are very rare in Japan, JFTC has power to gather documents and materials in the case JFTC considers that JFTC should file an accusation. If necessary, JFTC can obtain search and seizure warrants from a court for the process of criminal investigation. After filing an accusation, JFTC must hand over the retained objects and/or materials to the public prosecutor. In the case of public prosecutor commencing a criminal investigation, generally prosecutors conduct their own hearing from suspects and third-party witnesses and make their statement. Prosecutors also prepare a draft statement and request the interviewee to sign on it. The statement before prosecutors has a

special treatment as an exception of hearsay rule under some circumstance. Public prosecutors conduct criminal investigation with search warrants, and they can arrest suspects with an arrest warrant. Criminal suspects have privilege against self-incrimination.

Therefore, key steps for a lawyer are to advise the interviewee to carefully review the statement and not to sign the statement in JFTC and in front of the public prosecutors if the interviewee disagrees with the contents, as it will be very strong evidence against the interviewee himself/herself and the company.

7. What are the key investigative powers that are available to the relevant authorities?

See above. When JFTC conducts an interview, it is done face-to-face. This can be a great burden for the employees who are called in.

8. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Based on the Rules on Investigation by JFTC, any documents containing records of confidential communications between a client and an attorney regarding legal opinions on suspected conduct eligible for surcharge reduction, which have been ordered to be submitted in the course of administrative investigation by JFTC and which are confirmed by the assessing officer to meet certain conditions, will be promptly returned to the company without investigators' access to the contents. Please note that this does not apply to foreign lawyers or in-house lawyers who are in an employment relationship with a business. It is also inconvenient to have to separate and store documents and data that are subject to the privilege of confidentiality before conducting an on-site inspection. Therefore, if you are asked whether there is an attorney-client privilege like in the US, it would be better to answer "no" to avoid any misunderstandings.

9. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

The AMA grants full immunity from surcharges to the first applicant. To obtain full immunity, the first applicant must commit a violation, submit reports and materials to JFTC before JFTC initiates a forced administrative/criminal investigation.

A formal application is required. First, the applicant should send a document called Form 1 to a specific email account to determine its ranking. This Form 1 is very short. Then, the applicant must promptly conduct internal investigations and interviews and submit Form 2 with full evidence and detailed explanation of conduct related to cartelization. If this Form 2 is submitted by the start of the investigation and by the notified deadline by JFTC, the first applicant who submitted Form 1 will get full immunity.

A single company group can jointly file to obtain the first applicant position.

10. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

The second applicant who applies and submits Form 2 before the start of the investigation can obtain a 20% reduction in the surcharge. The third to fifth applicants can obtain a 10% reduction if they apply and submit Form 2 before the investigation starts. The sixth or later applicant can obtain a 5% reduction if they apply and submit Form 2 before the investigation starts. After JFTC commences the investigation, up to 3 applicants (limited to those ranked in the top 5 including the applicant before the investigation starts) can file for leniency by submitting Form 3 to obtain a 10% reduction. Applicants other than those applying for the 10% reduction can file for leniency by submitting Form 3 for a 5% reduction.

In addition, applicants who apply before the start of the investigation may receive up to a 40% reduction depending on the level of cooperation with JFTC. Applicants who apply after the investigation has started may receive up to a 20% reduction depending on the level of cooperation with JFTC. At the time of writing this article, the maximum reduction rate is being applied to applicants who provide the information requested by JFTC.

11. Are markers available and, if so, in what circumstances?

Yes. When the applicant files Form 1 to JFTC, JFTC notifies about the tentative ranking. After the applicants complete Form 2 which includes details of the violation and evidence related to the cartelization conduct by the notified deadline, the ranking is fixed.

12. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

JFTC may consider that a Form 2 or Form 3 report is not sufficient. Leniency applicants are required to provide additional reports and information to JFTC as requested by JFTC, and failure to comply with such requests may result in the loss of the reduction of the surcharges. Because the duty of confidentiality has never been lifted, listed companies and other organizations sometimes have difficulty explaining themselves to their stakeholders.

13. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Yes. JFTC announced that as one of the practices of JFTC, it will not pursue criminal accusations against the first applicant and its directors/employee. They do not distinguish between current and former directors/employees.

14. Is there an 'amnesty plus' programme available in respect of evidence provided to prove additional infringements?

No.

15. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

There is no settlement procedure with a government authority for cartels in Japan. If the government decides to give up enforcement after litigation commences, it will simply drop the case or not appeal to a higher court. When the government abandons the execution, it does not give orders and does not appeal the unfavorable judgment.

Please note that a so-called 'plea-bargaining' system was introduced on June 1, 2018. However, this is not an actual plea-bargaining system because suspects will negotiate with the public prosecutor and disclose other person's crime to reduce the suspects' criminal liability such as reduction of sentence. Therefore, even if suspects admit guilt, they will not be promised a reduced sentence. There are four published cases and one of

them is Mr. Carlos Ghosn's case. This is an agreement between a defense attorney and the public prosecutor and court approval is not required.

16. What are the key pros and cons for a party that is considering entering into settlement?

There is no settlement procedure for cartels in Japan. The 'plea-bargaining' mentioned in 15 is related to criminal procedures in general, but it has never been applied to cartels, and there is little prospect of it being applied frequently in the future. For that reason, it has almost no potential for use, without even considering the pros and cons. We also do not get the impression that JFTC places much importance on settlements reached in other jurisdictions.

17. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

JFTC has bilateral agreements for cooperation with other jurisdictions' competition regulatory authorities including the US, the EU, Canada, South Korea, Singapore, China, Australia and India.

It is said that JFTC only provides information to other authorities but does not provide actual evidence such as statements. However, Japanese practitioners have their doubts because they have observed that other competition regulatory authorities have knowledge about the exact language of the statements.

18. What are the potential civil and criminal sanctions if cartel activity is established? How often are civil sanctions and/ or criminal penalties imposed in practice following a finding of an infringement?

Civil: Actual, single damage. Perhaps for this reason, the use of civil lawsuits related to cartels in Japan is extremely rare.

Administrative: The rate of surcharge payment order is usually 10% of affected domestic sales for up to ten years. There is an exception of a rate of 4% applicable if the violating company and its group companies are all small and medium-sized enterprises. In addition, repeat offenders or a leader of the cartel will be subject to 50% increase. In case a leader is also a repeat offender, it will be subject to 100% increase.

Criminal: individual – maximum 5 years imprisonment or 5-million-yen criminal fine, company – maximum 500-million-yen criminal fine. Please note that there is no person who has actually gone to prison. The court always grants suspension of execution of the sentence to individuals.

The frequency with which civil or criminal penalties are actually imposed after infringements are detected has increased compared to the past, but is still less than 10%.

19. What factors are taken into account when the fine is set? Does the existence of an effective corporate compliance strategy impact the determination of the fine? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

Japan has a fixed formula to calculate surcharges and when the applicant successfully submits Form 2 or Form 3 documents with enough explanation and evidence, then JFTC cannot take into account other factors such as cooperation or hostile attitude. However, as discussed in 3.2 above, JFTC can consider cooperation in deciding additional surcharge reduction. The existence of corporate compliance strategies, as discussed in the US, has little effect on the decision of surcharge payment amount. The surcharge (totaling approximately 100 billion yen) imposed on a major domestic power generation companies in 2022 for its cartel was an extremely high amount, and it was a purely domestic case.

20. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

No.

21. Are private actions and/or class actions available for infringement of the cartel rules?

A plaintiff can seek actual, single damage against the infringer. There are no double or treble damages claim and class action system in Japan. Also, a plaintiff must bear the attorney fee even if it wins the lawsuit.

22. What type of damages can be recovered by claimants and how are they quantified?

Please see above. Only actual, single damages claim is

available in Japan. In addition, a plaintiff must prove the damages amount wherein it is difficult to calculate the exact amount. Therefore, when local governments make an agreement with a private party through bidding, which typically faces the risk of cartelization or bid-rigging, the governments insert a liquidated damages amount clause for cartels (such as 10-20% of total price in the case of cartelization). In addition, a general tort claim can also seek reasonable attorney fee of around 5-10% of the final amount of the judgement. Please note that this amount does not depend on the actual attorney fee that has been incurred. In Japan, cartels are considered to be a tort claim, and it is generally thought that tort claims for damages are not sufficient compensation in Japan.

23. On what grounds can a decision of the relevant authority be appealed?

A party who is issued a cease and desist order and/or surcharge payment order by JFTC can appeal to the Tokyo District Court. A party can allege any ground to deny the order including fact findings, interpretation of law, procedural problem, amount of surcharge etc.

For criminal case, this is a formal criminal procedure. Public prosecutors indict at district court, and a party not satisfied with the verdict can appeal to high court. In Japan, public prosecutors can also appeal for overturning of the acquittal verdict of district court.

24. What is the process for filing an appeal?

A party files an appeal to the Tokyo District Court within 6 months from the date on which it received JFTC's order. For a criminal case, a defeated party can file an appeal to the higher court within 14 days from the date of verdict.

25. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and

sanctions/level of fine)?

On October 31, 2024, JFTC found that four major domestic non-life insurance companies and one non-life insurance agency had formed a cartel and issued a surcharge payment order totaling over 2 billion yen. This case showed the difficulty of complying with the law, as sales representatives had been communicating with each other beyond the scope of what could be legally implemented in the implementation of joint insurance.

26. What are the key recent trends (e.g. in terms of fines, sectors under investigation, any novel areas of investigation, applications for leniency, approach to settlement, number of appeals, impact of hybrid working in enforcement practice – e.g. dawn raids of domestic premises, 'hybrid' in-person/virtual dawn raids, access to personal devices, etc.)??

JFTC's crackdown on cartels has been slow, and JFTC is focusing on the protection of vulnerable parties and the enforcement of abuse of superior bargaining position. There has been no progress in new investigative methods, such as online interviews and investigations into digital devices. Civil lawsuits have also remained slow, and the only civil lawsuits attracting attention are those related to abuse of superior bargaining position.

27. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

There are no plans for legal amendments or major rulings regarding cartels. On the other hand, the legal amendments targeting major tech companies have already begun, and the Subcontract Act is being revised to further focus on the protection of vulnerable groups. JFTC appears to be trying to achieve political goals as one of Japan's central government agencies rather than as a competition law authority.

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