



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Japan: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Japan.

This Q&A is part of the global guide to Cartels. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/cartels/>



Country Author: Nishimura & Asahi

The Legal 500



Jiro Abe, Partner

j_abe@jurists.co.jp

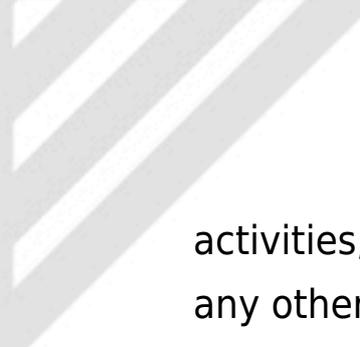


**Mitsutoshi Sugihara,
Counsel**

m_sugihara@jurists.co.jp

1. **What is the relevant legislative framework?**

The relevant legislation concerning cartels is the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947, “Antimonopoly Act”). More specifically, cartels are regulated as “unreasonable restraint of trade” under Article 2, paragraph 6 of the Antimonopoly Act, and unreasonable restraint of trade is defined as “business



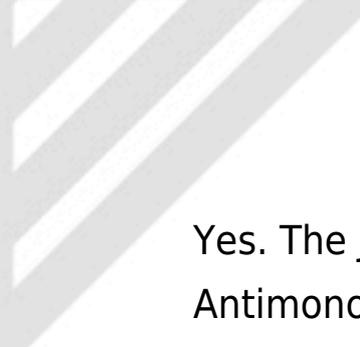
activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities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

There are industry-specific exemptions in sectors such as aviation and maritime, where exemptions from cartel legislation under the Antimonopoly Act are granted conditional to the fulfilment of certain requirements such as relevant regulators’ approval.

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

Yes. As quoted under Section 1.1 above, the Antimonopoly requires cartel activities to cause a substantial restraint of competition in a particular field of trade.

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



Yes. The Japanese Supreme Court has found that Japanese Antimonopoly Act can be applied to cartels that took place outside of Japan so long as such conduct would distort free competition in the domestic Japanese market (Supreme Court decision, December 12, 2017).

4. Which authorities can investigate cartels?

There are two types of cartel investigations conducted by the authorities, which are administrative procedures and criminal procedures. The administrative procedures are typically conducted by the Japan Fair Trade Commission (the “JFTC”). As for criminal procedures, the JFTC often cooperates with the Public Prosecutors Office to investigate cartel activities.

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

Cartel investigations are typically opened with a dawn raid by the JFTC. In addition to and following the dawn raid, the JFTC normally requests the submission of relevant materials from the target entity and/or relevant individuals and also conducts interviews with relevant individuals. If the JFTC believes that there was a cartel infringement, the JFTC will send drafts of cease and desist orders and surcharge payment orders to the infringing undertaking. In practice, it often takes more than 12



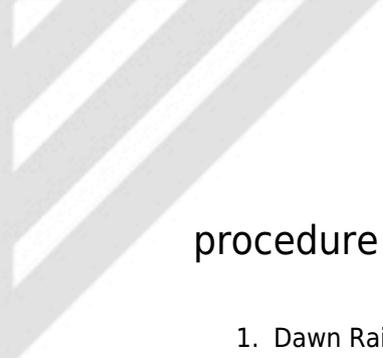
months from the JFTC's initial dawn raid until the JFTC's issuing of the draft orders.

Simultaneously to the issuing of the draft orders by the JFTC, a hearing date (normally within 2-4 weeks from the issuing of the draft orders) will be set for the infringing undertaking to submit oral and/or written opinions and evidence concerning the draft orders. The allegedly infringing undertakings are also allowed to review and copy the relevant evidence used by the JFTC. Details of the administrative procedures are available under the JFTC's "*Guidelines on Administrative Investigation Procedures under the Antimonopoly Act*".

In the case of criminal procedures, the JFTC will typically file a criminal accusation against the infringing undertaking to the Public Prosecutors Office following the above administrative procedures, and the Public Prosecutors Office will bring an indictment against the allegedly infringing undertaking in the competent court.

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

Investigative powers of the Japanese relevant authorities differ depending on whether the investigation is an administrative



procedure or a criminal procedure.

1. Dawn Raid and Seizure

a) Administrative Procedure

The JFTC has the power to enter the subject party's premises, review documents and other objects and to order the subject party to submit documents and other relevant evidence.

Under the administrative procedure, the subject party's legal counsel are normally permitted to monitor the JFTC's dawn raid, and the JFTC will, in principle, allow the subject party to take copies of the documents produced to the JFTC.

b) Criminal Procedure

Subject to a valid warrant, the JFTC has the power to use force to enter the subject party's premises and seize relevant documents and evidence. In principle, legal counsel's attendance at the dawn raid is not permitted in the case of a criminal procedure.

2. Interviews



For both administrative procedures and criminal procedures, the JFTC has the power to conduct compulsory interviews with individuals relevant to the investigation. Attendance by legal counsel to the interview is not permitted and recording and memo taking by the interviewee during the interview are likewise prohibited.

3. Request for reporting

For both administrative procedures and criminal procedures, the JFTC has the power to request that the subject party report and/or explain relevant facts, etc. concerning the issues subject to the investigation.

7. 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?

In Japan, there is no attorney-client privilege. Therefore, email communications, legal advice and other correspondence between the subject party and its legal counsel (external or in-house) may be subject to seizure by the JFTC. As explained in further detail below, the introduction of a system where documents created by legal counsel will be subject to privilege under certain conditions is currently pending.

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

Under the current Japanese leniency system, a maximum of 5 parties may be granted leniency positions. Leniency positions are, in principle, decided by the timing of the leniency filing. Also, the immunity and reduction of surcharges granted to the leniency applicant vary depending on the timing of the leniency application and whether the leniency application was made before or after the JFTC's commencement of the cartel investigation, as outlined below.

1. Before the start of the JFTC's Investigation

Leniency Position	Immunity from / Reduction of Surcharges
First Applicant	Full immunity + De facto immunity from criminal prosecution
Second Applicant	50% reduction of surcharges
Third Applicant	30% reduction of surcharges
Fourth Applicant	30% reduction of surcharges conditional to submission of reports and materials that include facts other than those already ascertained by the JFTC
Fifth Applicant	

2. After the start of JFTC's Investigation

An undertaking may make a leniency application even after the JFTC's commencement of a cartel investigation (typically a dawn raid), subject to the fulfilment of all of the following conditions:

a) Application is made within 20 days from the start of the



JFTC's investigation,

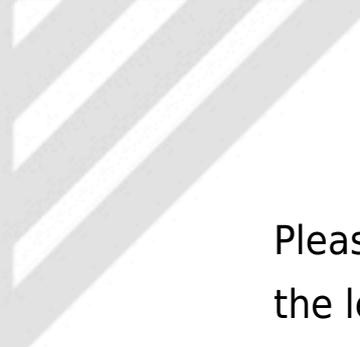
b) The number of total leniency applications already received, including the applications made prior to the JFTC's investigation, is 5 parties or less,

c) The number of total leniency applicants who had already applied after the start of the JFTC's investigation is 3 parties or less, and

d) The applicant submits reports and materials that include facts other than those already ascertained by the JFTC

An applicant who fulfils the above criteria will receive a 30% reduction of the applicable surcharges.

For example, if there are 4 parties that had secured leniency positions prior to the JFTC's commencement of its investigation, only 1 party will be eligible to obtain a leniency reduction after the JFTC's commencement of the investigation. Also, if there are no leniency applicants prior to the JFTC's commencement of the investigation, only 3 parties are eligible to receive the leniency reduction, and full immunity is not granted, even to the first applicant.



Please refer to 9 below for expected reforms concerning the leniency system.

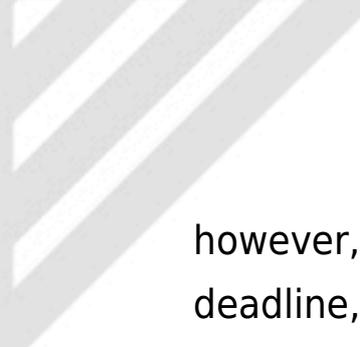
9. **What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?**

Please refer to 3.1.

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

In the case of a leniency application made prior to the JFTC's commencement of its investigation, an applicant is required to submit an application report (Form 1) that provides minimum information about the cartel activities concerning the application by way of facsimile to the JFTC. This Form 1 will secure the applicant's tentative leniency applicant position.

Once the JFTC receives the Form 1, the JFTC will notify the applicant of: a) the tentative position of the leniency application and b) the deadline for submitting a detailed report of the cartel activities (Form 2). The deadline for submitting the Form 2 is normally about 2 weeks from the JFTC's notification, however, there are no clear rules. The successful submission of the Form 2 will secure and confirm the applicant's leniency position,



however, if the applicant fails to submit the Form 2 within the deadline, such applicant will be required to re-submit and start the process from Form 1.

In the Form 2, the leniency applicant is required to provide information such as: details of the cartel activity, names and titles of employees and members involved in the cartel activity, names of other cartel members, names and titles of individuals involved in the cartel activity from those other cartel members and other information concerning the cartel activities. The applicant shall also provide materials and evidences relating to the information provided under the Form 2.

There is no marker available for leniency applications made after the JFTC's commencement of its investigation.

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

The JFTC may require the leniency applicants to provide additional reports and information to the JFTC and failure to comply with these requests may result in losing the leniency position. However, unlike in some other jurisdictions such as in the US or the EU, in practice, once the applicant leniency position is secured by Form 2, the level and burden of

cooperation is relatively light, compared to other jurisdictions under the current leniency system.

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

Yes. Although it is not clearly provided under the legislation, the JFTC has clarified in its policy guideline that it will not pursue criminal accusations against the first position leniency applicant*.

*“The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations” (JFTC)

13. **Is there an ‘amnesty plus’ programme?**

No.

14. **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 are no settlement procedures in Japan.

As for plea bargaining, amendments to the criminal justice system were passed into law in June 2016, and a new plea bargaining system was instituted on 1 June, 2018. Under the new plea bargaining system, suspects or defendants can negotiate with the public prosecutor, and if they agree to cooperate with the public prosecutor in an investigation or trial in relation to crimes committed by others, the public prosecutor will offer favourable treatment in return, such as promising not to prosecute a suspect or recommending a favourable sentence for a defendant etc. It should be noted that the Japanese plea bargaining system does not contain a bargaining system whereby a public prosecutor provides favourable treatment to a defendant if he or she admits guilt. Rather, a public prosecutor can give credit to a suspect or a defendant only when he/she cooperates with a public prosecutor in relation to crimes committed by others.

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

N/A.

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

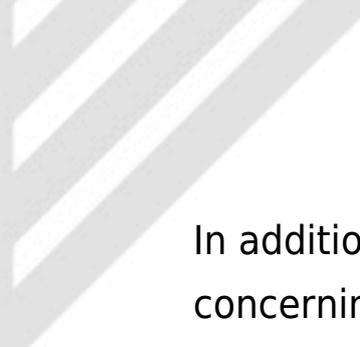
The Japanese government has entered into bilateral agreements concerning cooperation in competition issues with other competition authorities such as those in the US, the EU, Canada and Australia. The JFTC also cooperates with authorities in other jurisdictions through economic cooperation agreements.

In practice, the JFTC requests an undertaking for a waiver prior to sharing information with other authorities, however, even where these are obtained, in practice, the JFTC only provides information to other authorities and not actual evidence.

17. **What are the potential civil and criminal sanctions if cartel activity is established?**

There are administrative sanctions and criminal sanctions against illegal cartel activities.

For administrative sanctions, the JFTC will generally impose cease and desist orders and surcharge payment orders against the subject cartelists. See 6.2 for the details of the surcharges.



In addition to the orders by the JFTC, in the case of bid riggings concerning public procurements, many government authorities (including local government authorities) have policies and/or rules to ban the cartelists from future bidding processes for a certain period of time.

Concerning criminal sanctions, an individual who takes part in a cartel can be subject to imprisonment of 5 years or less and/or a fine of 5 million Japanese yen or less. Also, an undertaking which takes part in a cartel can be subject to a fine of 500 million Japanese yen or less.

The JFTC has a policy of pursuing criminal sanctions only against vicious and serious cases which are considered to have a widespread influence on people's livings and/or those cases involving repeat offenders, etc., and criminal sanctions are only seen in limited cases.

- 18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?**

Surcharges are calculated by multiplying the revenues of the products subject to the cartel activities during the cartel period



by the relevant surcharge rate. When the duration of the cartel activity is more than 3 years, the period will be limited to the 3 years prior to the end of the cartel activity.

The surcharge rate is usually 10%, however, a rate of 3% applies to retail business operators and a rate of 2% to wholesale business operators. Also, additional 50% increase in surcharge is applicable to certain repeat offenders and parties who lead the cartels. Further, there are special rules for small and medium-sized undertakings and parties who withdrew from cartel activities.

Under the Antimonopoly Act, the surcharges are calculated by applying the relevant calculation formula as provided above, and unlike in some other jurisdictions, the JFTC does not have wide discretion in calculating the surcharges. However, as discussed in 9 below, there is legislation pending which would grant the JFTC wider discretion in deciding the surcharge amounts.

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

No. The infringing party will be solely responsible for the surcharges and fines.

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

A party may bring a law suit against cartelists to recover damages arising from the relevant cartel activities. However, in practice, the number of civil law suits claiming damages from the cartelists are limited compared to some other jurisdictions such as the US. Also, in practice, most of such law suits brought by private parties are settled within the court proceedings. There is no class action system in Japan.

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

A party who suffered damages from a cartel can claim damages against the cartelists based on general tort law (Article 709 of the Civil Law), Article 25 of the Antimonopoly Act or unjustified enrichment (Article 703 of Civil Law). In all of the above claims, the burden of proof to establish the amount of damage caused by the cartel activities is borne by the plaintiffs.

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



A party who receives cease and desist orders and/or surcharge payment orders from the JFTC can bring an appeal before the Tokyo District Court, and both the claimant and the JFTC may further appeal to the Tokyo High Court and the Supreme Court following the lower court decisions. In practice, many appeals have been made on various grounds such as the facts concerning the cartel activities in question, amount of revenue that was used by the JFTC as the basis of the surcharge amount and surcharge rate applied by the JFTC.

In the case of criminal sanctions, the defendant may bring an appeal before the higher courts, as in any other criminal proceedings.

23. What is the process for filing an appeal?

In the past, a party subject to the JFTC's orders was required to first bring its claims before the JFTC's administrative hearing procedure, prior to raising the claim before the courts. However, the amended relevant procedures effective from April 1, 2015 allow the parties to directly bring an appeal against the JFTC's orders before the Tokyo District Court. Under the new appeal system, a party is required to file an appeal to the Tokyo District Court within 6 months from the date on which it received the JFTC's order.

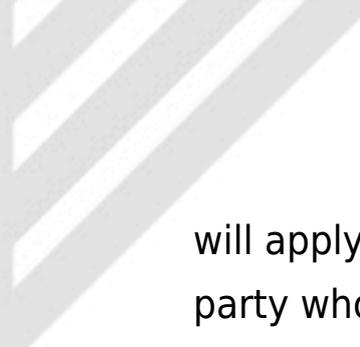
24. **What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

From the practitioner's point of view, in the past few years, it appears that the JFTC is focusing more on domestic cartel and bid rigging cases involving large public projects such as the road pavement case concerning recovery work from the earthquake in 2011, and the maglev (new high speed railway) construction case, rather than international cartel cases.

Some important reforms are expected relating to cartel regulations. New law bills concerning the reform were approved by the Japanese Cabinet and were sent to the parliament for further discussions and approval. An outline of the anticipated reforms is as follows:

(i) Reform in calculation of cartel surcharges

As discussed in 6.2 above, under the current Antimonopoly Act, the cartel duration period used for the calculation of surcharges is limited to a maximum of 3 years, however, under the new laws, the period will be extended to 10 years. Also, the favourable surcharge rates for retail business and wholesale business operators will be abolished and the normal rate of 10%



will apply. Similarly, the leniency measures which applied to a party who had withdrawn from cartel activities will be abolished.

(ii) Reform in leniency program

As discussed in 3.1 above, under the current Antimonopoly Act, the number of leniency applicants eligible to receive full immunity or reduction in surcharges is limited to 5, however, the new law will abolish this limitation in the number of leniency applicants.

Under the new leniency program, the first leniency applicant will receive full immunity from surcharges, which is the same as under the current program. However, for the applicants after the first applicant, in addition to the reduction rates decided based on the timing of the leniency application, the applicants will be eligible to receive a reduction of up to 40% depending on the level of cooperation they provide to the JFTC's investigation. This new system is intended to increase the undertakings' incentive to cooperate with the JFTC's investigation.

The chart below summarizes the reduction rates granted to the leniency applicants under the new system:

Start of the JFTC's Investigation	Leniency Position	Surcharge Reduction	Additional Reduction based on Level of Cooperation
Before	1	100%	-
	2	20%	
	3-5	10%	Up to 40%
	6 th and after	5%	
After	Up to 3 Parties	10%	
	4 th and after	5%	Up to 20%

(iii) Attorney-Client Privilege

The reform plans to introduce limited attorney-client privilege concerning confidential communications between an undertaking and its legal counsel concerning unreasonable restraint of trade, including cartel activities. However, the privilege is limited to cases concerning unreasonable restraint of trade and attorney-client privilege will not be recognized in other types of Antimonopoly Act violations. Further, the privilege is only applicable to the JFTC's administrative investigations, and will not apply to criminal investigations. Although this reform plan is a positive step forward since attorney-client privilege is currently not recognized in Japan, it should be noted that the scope of protection is still quite limited compared to other jurisdictions such as the US and the EU.

25. **What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to**

settlement, number of appeals, etc.)?

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

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