



# RECENT DEVELOPMENTS IN JAPANESE CARTEL ENFORCEMENT – TIME FOR A CHANGE?



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## I. INTRODUCTION

This year, the Japan Fair Trade Commission (“JFTC”) celebrated the 10 year anniversary of the leniency system in Japan. As of March 2016, there had been a total 938 applications since the system’s introduction in January 2006.

The leniency system has become one of the main drivers of the Japanese cartel enforcement system, and indeed, today the JFTC considers the leniency system as a key investigative tool. Of the 938 applications as of March 2016, there were 136 cases where the JFTC issued a formal order and also where leniency application was possible, therefore in roughly 80 percent of those cases where it was possible, applications were made (at least 109 in total). Leniency applications were made in all 12 cases where the total surcharge payment order (administrative fine) imposed exceeded 10 billion JPY. In addition, leniency applications were made in all five cases where the JFTC had sought criminal enforcement. Beyond the domestic sphere, the system has also enabled the JFTC to coordinate with other competition agencies such as the U.S. DOJ and the EU Commission with respect to international cartel cases.

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## II. GENERAL TRENDS

Cartel enforcement by the JFTC may appear to have somewhat weakened in the past few years, with the JFTC only issuing formal orders for seven cases for each of the fiscal years (“FY”) 2014 and 2015. In the three years prior to 2014, it had been issuing orders for 15 to 20 cases annually. With respect to leniency, we have seen a similar trend. Whereas there were more than 100 applications made annually between FY 2010 to FY 2012, the number had declined to 50 and 61 respectively for FY 2013 and FY 2014.

However, this may not be an ongoing trend. In FY 2015 the number of leniency applications jumped to 102. The JFTC has also reiterated that cartel enforcement remains the agency’s main enforcement priority.

## III. OVERVIEW OF RECENT CASES

Despite the relative slowdown, the JFTC has been continuing its enforcement efforts. Here is an overview of recent cases brought by the JFTC mainly focusing on the developments in the last fiscal year (from April 2015 to March 2016) with some comments on some more recent developments.

### A. *JFTC Administrative Cases*

Under the Anti-Monopoly Act (“AMA”), cartel enforcement can be achieved through either an administrative route or a criminal route. However, in practice, enforcement by way of administrative orders (cease-and-desist orders and/or surcharge payment orders (or administrative fines)) has been the predominant method of enforcement by the JFTC. In FY 2015, the JFTC issued formal administrative orders for two cartel cases and five bid-rigging cases (four of which concerned public procurement).

#### 1. Cartels – The Capacitor Cartel

The JFTC issued cease-and-desist orders and surcharge payment orders against manufacturers selling aluminum electrolytic capacitors and tantalum electrolytic capacitors on March 30, 2016. The total amount of surcharge payment orders imposed in these two cases was approximately 6.7 billion JPY (roughly \$60 million USD). These cases are the first time the JFTC issued its orders concerning the capacitor cartel. Following the JFTC case on ocean shipping in 2014, the capacitor cartel case demonstrates the JFTC is continuing pursuit of international cartels.

#### 2. Bid-Rigging – Enforcement Focused on Domestic Cases

The JFTC issued cease-and-desist orders and surcharge payment orders against the participants bidding for snow-melting equipment works for the Hokuriku Shinkansen (or the “bullet-train”) ordered by the Japan Railway Construction, Transportation and Technology Agency on October 19, 2015. This follows a criminal accusation filed in 2014 on the same case which led to criminal fines for the companies and prison sentences for the individuals



(however, all prison sentences for individuals were suspended).<sup>2</sup>

The JFTC issued cease-and-desist orders and surcharge payment orders against manufacturers selling poly aluminum chloride ordered by the local governments in the Tohoku district, the Niigata district and the Hokuriku district, on February 5, 2016. The total amount of surcharge payment orders imposed for these three cases was approximately 1.6 million JPY (roughly \$14,000 USD).

The JFTC issued cease-and-desist orders and surcharge payment orders against the participants bidding for the grain elevator works ordered by the agricultural cooperatives, etc. in Hokkaido, on February 10, 2016. The total amount of surcharge payment orders imposed was approximately 671 million JPY (roughly \$5.8 million USD). This case is one example of the JFTC's growing efforts to clamp down on the agricultural sector.

As noted before, the total number of cases remains relatively low. And except for the capacitor cartel case, all cases were domestic which appears to reflect the JFTC's focus on sectors closely related to the national economy.

#### *B. JFTC Criminal Accusations<sup>3</sup>*

The JFTC filed a criminal accusation for a bid-rigging case concerning the disaster restoration paving works for the Great East Japan Earthquake ordered by the Tohoku branch of East Nippon Expressway Company Ltd. on February 29, 2016.

With respect to criminal cartel enforcement, the JFTC adopted a policy back in 1990 which provides guidance on the kinds of cases likely to be considered for criminal enforcement. The policy basically states that the JFTC will file criminal accusations with the Public Prosecutors Office to actively seek criminal penalties in cases involving serious violations of the AMA which are likely to have a widespread influence on the national economy such as hard-core cartels; involving firms or industries that are repeat offenders or that fail to take the appropriate measures to eliminate a violation and where the administrative measures of the JFTC are not considered sufficient. Since the adoption, the JFTC has become more proactive in criminal enforcement, resulting in criminal accusations in 15 cases during the period from 1991 to 2015. The JFTC has filed criminal accusations at a steady pace roughly every one or two years, and this trend is likely to continue.

#### *C. Tokyo High Court Cases*

In early 2016, the Tokyo High Court heard three appeals to JFTC hearing orders regarding the cathode-ray tube ("CRT") cartel case. The CRT cartel case was the first case where the JFTC had imposed a surcharge payment order against a foreign company in an international cartel case, and as the subject matter related to the sale of CRTs manufactured by companies

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<sup>2</sup> In Japan, even in the event the JFTC decides that a certain case should be considered for criminal enforcement and a criminal accusation is filed, the JFTC may also issue an administrative order. The AMA provides for how an adjustment should be made between a criminal fine and a surcharge payment order.

<sup>3</sup> Under Japanese law, the Public Prosecutor has the sole authority to decide whether or not to prosecute a criminal cartel case. Therefore, while the JFTC could commence investigation of a case, in the event it deems it appropriate to have the case handled through the criminal enforcement process, it has to file a criminal accusation with the Public Prosecutors Office. Then a public prosecutor will decide whether or not to prosecute the case at the criminal court.



located outside of Japan to television manufacturers also located outside of Japan, there was a question of whether the Tokyo High Court would decide on extraterritoriality. However, the Court dismissed all three appeals, affirming the JFTC's conclusion that the parent companies of the television manufactures should be essentially regarded as the purchaser. As these parent companies were all located in Japan, the Court did not decide on the issue of extraterritoriality.

#### *D. Developments in FY 2016*

As of July 2016, there has been only one case, a bid-rigging case, where the JFTC has issued a formal order. On July 12, 2016, the JFTC issued cease-and-desist orders and surcharge payment orders (total of approximately 430 million JPY (roughly \$4.2 million USD)) against the participants bidding for communication equipment ordered by the Tokyo Electric Company. The case demonstrates the JFTC's continuing pursuit of bid-rigging cases in the domestic market.

#### *E. Ongoing Investigations*

The JFTC does not make its investigations public, but according to press reports, the JFTC has conducted dawn raids for alleged bid-rigging concerning military equipment ordered by the Self Defense Ministry of Japan and alleged cartel activity concerning components for Hard Disk Drives. There also have been reports that the JFTC has conducted dawn raids for alleged bid-rigging for the communication equipment ordered by the Chubu Electric Company and alleged bid-rigging concerning several other disaster restoration paving works following the Great East Japan Earthquake.

### **IV. CHANGE TO THE LENIENCY SYSTEM**

While, there have been no changes to the substance of the system, the JFTC recently announced, on May 25, 2016, that for leniency applications made after June 1<sup>st</sup>, 2016, it will make public the name of the applicant and the discount rate when it issues a press release of its formal order. The previous practice was that the JFTC would only make such information public if the applicant had made such a request. While it appears that in the vast majority of the leniency cases such consent was given, apparently there were some cases where the applicant chose not to do so. Nevertheless, the JFTC has decided to change its practice for the purpose of increasing transparency, and we have yet to see how this might affect future leniency applications.

### **V. ABOLISHMENT OF THE JFTC HEARING PROCEDURE**

In April 2015, a new system was introduced for procedures challenging orders issued by the JFTC pursuant to the amendment of the AMA. The amendment abolished the JFTC's previous hearing procedure where the JFTC tribunal had heard challenges to orders issued by the JFTC. The old hearing procedure was replaced by a new system where challenges to the JFTC's cease-and-desist orders and surcharge payment orders will be reviewed by the judicial court and shall be subject to the exclusive jurisdiction of the Tokyo District Court. While we



have yet to see a decision rendered by a district court under the new system, the involvement of a first instance judicial court might bring about a more robust development of legal theories based on case law.

In addition, changes have been made with respect to the appellate court procedure as well. Under the previous hearing procedure, in the event that a party chose to further challenge a decision made by the JFTC, this appeal would be heard by the Tokyo High Court. Further, the AMA required that in these circumstances, the Tokyo High Court give deference to the decision made by the JFTC and there were also limitations on the submission of new evidence to the Tokyo High Court. However, under the new system, such restraints have been abolished allowing the Tokyo High Court greater leeway to hear appeals. Again, we have yet to see an actual case to test this new procedure.

## VI. PROGRESS IN TERMS OF DUE PROCESS

### A. *Introduction of a New Hearing Procedure Prior to Issuing a Formal Order*

The amendment to the AMA also introduced a new procedure called, “Procedures for Hearing of Opinions” where the JFTC hearing officer will conduct a hearing for opinions from the party prior to the issuing of a cease-and-desist order and/or a surcharge payment order. Even before this amendment, the AMA had provided the party an opportunity to express its opinions on the JFTC’s draft order and to submit evidence. However, the amendment requires a neutral hearing officer to preside over the process, thus further clarifying the process, and granting the party certain rights (although limited) to review and copy evidence that supports the findings by the JFTC.

### B. *Enhancement of Due Process during the Investigation Stage*

With respect to the investigation procedure, the JFTC has published “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” in order to ensure the appropriateness of its administrative investigation procedures. The Guidelines clarify the standard steps and key points to note in the JFTC’s administrative investigation procedures. While the main purpose of the Guidelines is to inform the JFTC officers engaged in case investigations, the Guidelines were made public to enhance the transparency of the JFTC’s investigation procedures and contribute to the smooth progress of case investigations. However, as the Guidelines are not much more than a confirmation of the JFTC’s previous practices, there is room for more work yet to be done to this end, as discussed further below.

## VII. PROPOSED REFORMS

The JFTC has been arguing that the current surcharge payment system, which is the main method of deterrence of cartels in Japan, is rigid and lacks flexibility. Under the current system, the amount of surcharge payment is calculated by multiplying a statutorily fixed rate to the party’s turnover of the relevant product, and the JFTC has no discretion to adjust the amount of the fine. Further, with respect to leniency, the discount rate is fixed according to the “rank” of the leniency applicant which is basically determined by the timing of the filing of



the application. Provided the applicant meets the statutory requirements by making the application and providing certain information, the rank and the discount rate are fixed. The JFTC claims that these procedures prevent the JFTC from evaluating the timing and additional value of the evidence provided by the leniency applicant to determine the discount rate, and also prevents the JFTC from taking into consideration the degree of cooperation of the applicant to determine the amount of any fine. The JFTC also claims that the current system provides less incentive for a leniency applicant to cooperate, and this results in a less effective leniency system compared to other jurisdictions.

Based on this understanding, in February 2016 the JFTC set up the “Study Group on the Anti-Monopoly Act.” In July 2016, the JFTC published the Study Group’s interim report titled “Summary of Issues Concerning the Modality of the Administrative Surcharge System”<sup>4</sup> and reached out for public comments. The report sets out various issues that the Study Group intends to consider further, and we are yet to see to what extent there will actually be changes to the current system.

## VIII. CHALLENGES – ENHANCING DUE PROCESS

In 2014, the Japanese Government (the “Cabinet Office”) set up an “Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act,” for the purpose of enhancing fairness and transparency in the JFTC’s administrative investigation process. After discussing and examining the JFTC’s current investigation procedures and addressing such issues as the possibility of introducing a right to have an attorney present at dawn raids and at interviews conducted by the JFTC, and the possibility of introducing attorney-client privilege; the Advisory Panel published its report in December, 2014<sup>5</sup>. While the business community and attorneys had hoped that meaningful measures to enhance due process in the JFTC’s administrative investigation procedure would be proposed by the Advisory Panel, the outcome failed to meet such expectations: for example, neither of the above items (i.e. the right to have an attorney present at dawn raids and interviews conducted by the JFTC, and attorney-client privilege) were recommended. A marginal improvement was the JFTC putting in writing its investigation practice and publishing it as the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” as mentioned above. This outcome was met by disappointment in the business community and among defense attorneys.

However, the Advisory Panel did leave some room for discussion that might lead to progress in the near future. In its conclusion, the Advisory Panel stated that:

[It] did not come to the conclusion that attorney-client privilege, presence of an attorney during deposition<sup>6</sup>, and other rights to defense should be allowed, due mainly to a concern that the JFTC’s fact-finding ability is affected. However, if

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<sup>4</sup> English translation is available at: [http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713\\_2.files/160713\\_2.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713_2.files/160713_2.pdf).

<sup>5</sup> English translation is available at: <http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf>.

<sup>6</sup> The translation in FN 4 uses the term “deposition,” however, the original term covers both voluntary interviews and compulsory interrogations, so the use of the term “deposition” might be misleading.



discretionary surcharge or other systems for securing incentives to cooperate in the JFTC's investigation and disincentives not to cooperate in or obstruct it are introduced, companies will be further encouraged to provide cooperation. As a result, a situation that impairs the fact-finding ability, which is concerned under the current circumstances, will be less likely to arise. Thus, if strengthening the right to defense is to be considered in ways other than the one to be implemented under the current system by the Advisory Panel, the Advisory Panel concluded that it is appropriate to conduct studies concurrently on the possibility of introducing the above systems.

Essentially, the Advisory Panel concluded that rather than strengthen the rights of defendants by simply adding new processes (such as attorney-client privilege) to the current system, policymakers should consider introducing these measures concurrently with broader systematic changes designed to secure cooperation and disincentivize obstruction in JFTC investigations.

There remain controversies over whether it is sensible to take the view that there should be a trade-off between enhancement of due process during the course of an investigation procedure and strengthening of the fact-finding ability of the JFTC. However, given that the JFTC has set up the "Study Group on the Anti-Monopoly Act" to explore the possibility of modifying the current surcharge payment order system including the possibility of introducing a discretionary surcharge system, we might see further developments with respect to enhancing of due process in the near future.

## IX. CONCLUSION

This article has outlined a number of cartel enforcement developments in Japan in the past year or two, and there are likely to be more to come. Although the JFTC has not brought a high number of new cartel enforcement cases in the past few years, the JFTC is far from dormant. It has maintained a watchful eye on its main policy priority rigorous cartel enforcement – and alongside bringing new cases, the JFTC has been very proactive in introducing new reforms to further strengthen and bring efficiency to its enforcement efforts. Now is a critical time for lawyers and businesses to carefully monitor any legal and policy developments, as well as keeping a close eye on whether due process and procedural fairness are ensured and enhanced along the way.