



ASIA-PACIFIC ANTITRUST REVIEW 2023

GCR's *Asia-Pacific Antitrust Review 2023* delivers specialist intelligence to help readers – in-house counsel, government agencies and private practitioners – navigate increasingly complex competition regimes across the Asia-Pacific region.

Evolving legislation and enforcement tactics continue to transform the landscape, as highlighted by recent amendments to China's Anti-monopoly Law and an uptick in private antitrust cases in Japan; meanwhile, the Korea Fair Trade Commission has updated its Guidelines on Merger Filing to expedite the review process.

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Japan: Amendments to Anti-monopoly Act increase JFTC's capacity to pursue and settle cases

Kentaro Hirayama

Hirayama Law Offices

In summary

Recent amendments to Japan's Anti-monopoly Act gave the Japan Fair Trade Commission powers to formally accept voluntary commitments from companies suspected of having infringed the law. The commission has recently been actively investigating foreign entities' anticompetitive conduct and all cases have been settled by either informal settlements or formal commitments.

Discussion points

- Settlement in cartel and non-cartel conduct cases
- Options for negotiating commitments and disclosures
- Strategies to manage fines or monetary payments
- Measures to manage non-monetary settlement requirements
- Special settlement considerations when the settling party is a foreign entity

Referenced in this article

- Anti-monopoly Act and its amendments
- Japan Fair Trade Commission and its Commitment Guidelines
- Cooperation Guidelines



Settlement in non-cartel conduct cases

Introduction of commitment procedure

Recent amendments to the Anti-monopoly Act¹ (AMA), which took effect on 30 December 2018, gave the Japan Fair Trade Commission (JFTC) powers to formally accept voluntary commitments from companies suspected of having infringed the AMA.² The amendment will allow the JFTC to terminate its formal investigations, which are typically opened by surprise inspections, without reaching a formal finding of infringement and thus without any risk of being appealed by the companies to judicial courts. The introduction of this formal commitment procedure has brought the JFTC's powers in line with those of other competition authorities in the European Union and the United States. Based on the JFTC's guidelines published in 2018 (the Commitment Guidelines), the procedure appears to follow almost the same course as that in the European Union and the United States.

Japanese antitrust specialists anticipate that the introduction of the formal commitment procedure has made it easier for the JFTC to pursue a broader range of cases than was previously possible, in particular as the JFTC now has a more comprehensive range of choices in concluding its investigations. This flexibility is likely to facilitate the JFTC's ambition to take on more investigations involving complex theories of harm, including online platform business and digital advertising. The commitment procedure was applied to two cases in the 2019 financial year, six in the 2020 financial year and two in the 2021 financial year.

Commitment negotiation

If the JFTC decides to invite companies under investigation for commitment negotiations, it will notify this intention in a written letter to the companies, setting out an overview of the JFTC's concerns. Companies then have 60 days from notification to offer commitments.

The JFTC will have sole discretion as to whether it initiates the procedure. In practice, however, companies under investigation are allowed to proactively approach the JFTC to explore the possibility of commitment negotiations.

¹ Act No. 54 of 1947, as amended.

² Until December 2018, the JFTC lacked the official power to end investigations by accepting commitments from parties and could therefore resolve cases in principle only through findings of infringement, by either issuing cease-and-desist orders or imposing fines. However, in cases where a company voluntarily ceases the act under investigation, alternative measures such as warnings and terminations of investigation are also used. These alternative measures have been used even after the formal commitment procedure comes into effect.



Applicability of commitment procedure

The Commitment Guidelines made it clear that the following cases will not be eligible for the commitment procedure:

- hardcore cartels (ie, bid rigging and price fixing);
- a repeated offence (a second anticompetitive conduct within 10 years); or
- an infringement that is malicious and thus should be subject to criminal penalties.

In practice, therefore, the commitment procedure will be applied to the first offender of non-cartel single-firm conduct (eg, abuse of superior bargaining position and resale price maintenance).

Market test

The JFTC may conduct a market test and seek comments on proposed commitments from the public to determine whether they are sufficient to address the JFTC's concerns and are capable of being implemented in practice. Having said that, a market test is not mandatory as it is in the European Union, and the JFTC has not yet provided additional guidance in its Commitment Guidelines on the circumstances in which a market test would be appropriate or necessary. The JFTC has not conducted any market tests to date.

Requirement for commitment offer

To be accepted by the JFTC, an offer of commitments by companies under investigation must be both sufficient to address the JFTC's concerns and feasible enough to be implemented in practice.

The Commitment Guidelines indicate that there are cases where reimbursements of damages to companies affected by an infringement would be appropriate and abuse of superior position is listed as an example for that. As the JFTC cannot order reimbursement to companies if it has issued a formal cease-and-desist order, this reimbursement by way of negotiated commitment would be worth noting from the viewpoint of enhancement of victim relief.

Publication of commitment decision

When the JFTC takes a commitment decision, it announces the decision and provides a concise summary of the commitments, which is usually a document of several pages. This decision does not amount to a finding of any infringement,



which would mean that the JFTC's decision would be unlikely to be useful to plaintiffs in follow-on damages litigation.

Settlement in cartel conduct cases

Introduction of cooperation discount system

Amendments to the AMA that took effect on 25 December 2020 introduced a cooperation discount scheme by way of agreement with the JFTC for cartel and bid-rigging cases by amending the JFTC's leniency regime, which the JFTC introduced in 2006.

In the negotiations, the applicant explains the contents of the materials and report that it intends to submit under the cooperation discount scheme. The JFTC then assesses the extent to which the applicant would contribute to the investigation (discussed below), suggests a reduction rate range and asks for the applicant's consent. Upon reaching an agreement, the applicant submits the reports and materials to the JFTC.

As part of its obligation to cooperate with the JFTC's investigations, the applicant needs to respond to the JFTC's additional requests and submit supplemental materials and reports as requested.

Process for negotiating cooperation discount

To be eligible for the cooperation discount, a company first needs to file a leniency application and then an application for negotiation within 10 days of the receipt of confirmation from the JFTC that the leniency application has been accepted.

Since an application for negotiation can only be submitted by a company that has filed a leniency application with an adequate amount of report information and evidence, the JFTC's guidelines on the cooperation discount require a company to submit a sufficient leniency application.

The applicant explains the contents of materials it intends to submit under the cooperation discount and enters into agreement on the range of reduction rate.

As it plans to enter into agreements with companies at a very early stage of its investigations, the JFTC suggests a range for the reduction rate rather than offering a specific reduction rate and asks for the applicant's continued cooperation with its investigation.



Options for negotiating commitments and disclosures

Non-cartel conduct cases

The Commitment Guidelines provide examples of possible remedies, including:

- commitment to cease suspected conduct;
- notification to customers and users of cessation of the alleged conduct;
- maintenance of a competition law compliance programme;
- withdrawal of, or revisions to, terms and conditions with customers;
- divestiture of business; and
- financial restitution for alleged victims.

Companies will typically be required by the JFTC to submit annual reports for three consecutive years that set out the status of implementation of the agreed commitments.

The commitment system can be beneficial for investigated companies in that they can avoid formal declarations by the JFTC of its findings of infringements and accompanying administrative fines, and thus can potentially escape follow-on litigation by alleged victims. Having said that, we should be careful of the risk that the JFTC may endeavour to secure a broader scope of potentially anticompetitive conduct even if it does not have sufficient evidence to demonstrate a violation, in which case the companies under investigation would likely end up offering broader and excessive commitments, which may include compensation for damage to victims.

Companies under investigation, therefore, need to carefully consider the pros and cons of entering into commitment negotiations with the JFTC to minimise financial and reputational damage.

Announcement of commitment decisions by the JFTC include descriptions of potentially anticompetitive conduct, which may help plaintiffs in follow-on damages litigation to demonstrate infringements in a civil court. Companies will therefore need to proactively engage with the JFTC before publication to make sure that the publication does not lead to an implicit finding of infringement.

Cartel conduct cases

The Cooperation Guidelines make it clear that the JFTC will use the following criteria to assess the extent of an applicant's contribution and determine the reduction rate:

- the degree of specificity and detail of the report and materials;
- whether the report and materials include all relevant information that would contribute to the investigation; and



- whether the evidence submitted by the company supports the contents of the report.

As to the degree of specificity of the report, the Cooperation Guidelines list various factors, including the following, as information that contributes to the JFTC's investigations:

- goods or services targeted in the violation;
- manner of the violation;
- participants of the violation;
- duration of the violation;
- status of implementation of the violation; and
- volume of affected commerce, which will be a basis for calculating administrative fines.

Based on these factors, the JFTC will determine the degree of an applicant's contribution to the investigation using three categories: low, medium or high. For example, companies that applied for the cooperation discount after the JFTC's inspections would receive 5, 10 or 20 per cent discounts based on their degree of contribution. It is therefore necessary for companies to negotiate with the JFTC by offering their plan of cooperation in detail, so that they can secure the maximum reduction rate.

Strategies to manage fines or monetary payments

Non-cartel conduct cases

Under article 25 of the AMA, any party found by the JFTC to be engaging in unfair trade practices or private monopolisation will be requested to compensate those injured by said party after the JFTC's cease-and-desist order becomes final. Courts will rely on the JFTC's findings in its judgments and the defendant cannot challenge these findings.

A party may therefore wish that the JFTC terminate its investigation through a commitment proceeding rather than a cease-and-desist order. This is because, if the JFTC terminates its investigation through a commitment decision, the parties can escape a finding of a violation of the AMA because commitment decisions will not refer to the fact that the AMA was violated by the party.

Cartel conduct cases

To manage and minimise administrative fines, it is necessary for companies under investigation to proactively discuss with the JFTC the scope of investigations and finding of infringement. Although applicants for the cooperation discount are



required to cooperate with the JFTC's investigations, this does not necessarily mean that the applicants will be required to admit to all infringements that the JFTC claims to exist. The applicants therefore should maintain communication with the JFTC's investigators to better understand what the JFTC's fact-finding will be and also raise issues promptly to avoid excessively broad findings of infringements and increased administrative fines.

In addition to administrative fines, parties found by the JFTC to be engaged in cartels and bid rigging are liable to indemnify those injured by such parties under article 25 of the AMA after a cease-and-desist order or an order to pay an administrative fine has been finalised. Although plaintiffs can also file damages suits under article 709 of the Civil Code before the JFTC's orders become final, the plaintiff needs to prove the defendant's infringements. The courts will rely on the JFTC's findings in the order under article 25 of the AMA and the defendant cannot challenge these findings. Discussions with the JFTC as to the scope of infringement will therefore be necessary to minimise monetary payments arising from civil damage claims.

Measures to manage non-monetary settlement requirements

Non-cartel conduct cases

Companies that have settled with the JFTC through commitments will in practice be required to annually report the status of implementation of the commitments for three consecutive years from the date of the decision.

The Commitment Guidelines do not specify monitoring trustees and there has been no case to date where monitoring trustees have been appointed, which contrasts sharply with practice in the European Union where monitoring trustees plays a crucial role in the enforcement of commitments.

In cases of failure to comply with commitment decisions, the JFTC is unable to penalise companies that have failed to comply with their commitments. In these cases, the JFTC can only revoke its commitment decision and resume its earlier investigation.

Cartel conduct cases

Companies that have received a cease-and-desist order from the JFTC will in practice be required to annually report the status of implementation of the commitments for three consecutive years from the date of the commitment decisions.



The AMA does not specify monitoring trustees and there has been no case to date where the monitoring of trustees was appointed pursuant to the JFTC's commitment decisions.

Failure to comply with a cease-and-desist order is subject to criminal sanctions, although there has been no such case to date.

Special settlement considerations when the settling party is a foreign entity

The JFTC has recently been actively investigating foreign entities' anticompetitive conduct and all cases have been settled, either by informal settlements or, after the introduction of the formal commitment procedure at the end of 2018, by formal commitments.

Illustrative examples include the *Airbnb* case in 2018 and the *Amazon Japan* case in 2020. These cases are a clear indication of the JFTC's appetite for investigating foreign entities and their local subsidiaries, which foreign companies should take note of in operating businesses in Japan.

Amazon Japan

In the *Amazon Japan* case, the JFTC inspected Amazon Japan's offices located in Tokyo in March 2018, with a suspicion that the company had been abusing its superior position over suppliers of goods sold by Amazon Japan to consumers on its website.

According to the JFTC's announcement of the commitment decision dated 10 September 2020, Amazon Japan had made various requests to suppliers whose business position was inferior to its own. Suppliers had been asked to reduce the sales price to Amazon Japan without any reason other than to improve the company's profitability. Notwithstanding that there were no reasons attributable to the suppliers, Amazon Japan had been returning excess goods to the suppliers without justification.

Amazon Japan offered a proposal for commitments that included cessation of the above demands and payment of ¥2 billion to 1,400 suppliers. The JFTC accepted this commitment offer as sufficient.



Airbnb

In the *Airbnb* case, the JFTC inspected Airbnb Japan's offices located in Tokyo in November 2017, with a suspicion that Airbnb had been unduly foreclosing competing operators of accommodation and vacation rental platforms, and that the conduct may have amounted to private monopolisation or unfair trade practices, both of which are prohibited under the AMA.

According to the JFTC's announcement of the termination of its investigation dated 10 October 2018, Airbnb had concluded contracts with operators of booking management services concerning the use of application programming interface software (an intermediary that enables data coordination among software via the internet) and access to Airbnb's booking data, which actually included restriction on the booking management services operators' sharing of data with operators of accommodation and vacation rental platforms that had been competing with Airbnb.

Airbnb informally offered voluntary measures, which included cessation of the above-mentioned restrictions, and the JFTC accepted this offer as sufficient. As this investigation was closed before the formal commitment procedure became effective, a commitment decision was not available to the JFTC.

**Kentaro Hiramaya**

Hiramaya Law Offices

Kentaro Hiramaya's practice focuses on competition law. He has counselled clients in a number of domestic and international cartels; unfair trade practices such as most-favoured-nation clauses, predatory pricing and abuse of standard essential patents; and merger filings, including high-profile Phase II cases.

His skill and experience in competition and antitrust law are widely recognised. In 2016, he was the only Japanese attorney named in GCR's 40 under 40 list of the world's leading antitrust lawyers under the age of 40. His firm is introduced in GCR 100 as one of the recommended domestic Japanese competition law firms.

Mr Hiramaya worked for the Japan Fair Trade Commission from July 2007 to June 2010. During that time, he was a case manager in the *Marine Hose Investigation* case, among other high-profile international cartel cases, and led an abuse of dominance case. During these worldwide parallel investigations, he collaborated with foreign competition authorities in information exchanges and the coordination of simultaneous dawn raids, among other engagements. Following his return to private practice, he serves as an associate professor at the University of Tsukuba, one of Japan's oldest national universities. He is a member of the Japan Bar Association's antitrust committee.



Hirayama Law Offices is a boutique antitrust and competition law firm that advises clients on a wide range of antitrust matters, including transactions and agency investigations. The firm's clients include a wide range of domestic companies – often industry leaders – as well as Japanese subsidiaries of top-tier global companies. Hirayama Law Offices is introduced in GCR 100 as one of the recommended Japanese competition law firms.

Tokyo Tatemono Yaesu Building, 3rd Floor
1-4-16 Yaesu Chuo-ku
Tokyo 103-0028
Japan
Tel: +81 3 6823 5318

[Kentaro Hirayama](#)
info@hirayamalaw.com

www.hirayamalawoffices.com
