

Competition law in Japan: overview

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A Q&A guide to competition law in Japan.

The Q&A gives a high level overview of merger control, restrictive agreements and practices, monopolies and abuse of market power, and joint ventures. In particular, it covers relevant triggering events and thresholds, notification requirements, procedures and timetables, third party claims, exclusions and exemptions, penalties for breach, and proposals for reform.

To compare answers across multiple jurisdictions visit the *Competition law Country Q&A tool*.

This Q&A is part of the PLC multi-jurisdictional guide to competition and cartel leniency. For a full list of jurisdictional Competition Q&As visit www.practicallaw.com/competition-mjg.

For a full list of jurisdictional Cartel Leniency Q&As, which provide a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities in multiple jurisdictions, visit www.practicallaw.com/leniency-mjg.

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Merger control

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction?

Regulatory framework

Merger control in Japan is regulated under the Japanese Antimonopoly Act (*Act No. 54 of 1947, as amended*) (AMA). The AMA:

- Prohibits mergers and acquisitions that may substantially restrain competition in the fields of trade (relevant markets).
- Sets out the notification requirements for certain transactions.

Regulatory authority

Merger control in Japan is regulated by the Japan Fair Trade Commission (JFTC), which has primary jurisdiction over the enforcement of merger control and broad enforcement powers. The JFTC was established as an independent administrative office and is composed of a chairman and four commissioners (*see box, The regulatory authority*). The JFTC is the sole regulator for competition in Japan.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

If the following transactions exceed certain thresholds (*see below, Thresholds*), the JFTC must be notified (*Articles 10, 15, 15-2, 15-3 and 16, AMA*):

- Mergers.
- Business transfers (that is, where the selling company assigns its entire business or a significant part of its business/fixed assets to the receiving company).
- Corporate splits (or demergers).
- Joint share transfers (that is, where the participating companies become the subsidiaries of a new company).
- Share acquisitions (including joint ventures).

If an M&A scheme involves more than one of the above transactions (for example, an acquirer merges with a target after acquiring shares in the target), the JFTC will separately analyse each step of the transaction and may require separate filings for each step.

The JFTC must also be notified when a:

- Joint venture satisfies the thresholds for a share acquisition (*see Question 37*).
- Partnership (including a limited liability partnership), formed under Japanese law or under foreign laws, acquires shares of another company and satisfies the thresholds for a share acquisition.

Transactions involving the internal reorganisation of companies within a combined business group generally do not require notification.

Where a merger is notified, the JFTC must decide within the Phase I and Phase II review period whether it will clear (with or without conditions) or prohibit the merger (*see Question 4*).

With regard to mergers which do not exceed the notification thresholds, the JFTC can open an investigation into the merger and order remedial measures against the merger even after the closing of the transaction. There is no limitation period for the JFTC to take such action.

Thresholds

Domestic turnover (that is, the total amount of the sales of goods and services supplied in Japan during the latest fiscal year) is used as a decisive factor in calculating the thresholds. Domestic turnover includes sales from direct imports into Japan, irrespective of whether the company has a presence in Japan.

The thresholds for each type of transaction are as follows.

Share acquisitions (including joint ventures). The thresholds are based on both domestic turnover and the percentage of shares held in the target. To meet the notification requirement:

- The aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed JPY20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed JPY5 billion.
- The acquisition must result in the acquirer holding either:
 - more than 20% of the total voting rights of the shares of the target; or
 - more than 50% of the total voting rights of the shares of the target.

Therefore, an acquisition that increases a shareholding from 19% to 21% requires a notification, but an acquisition that increases a shareholding from 21% to 49% does not.

Mergers and joint share transfers. The thresholds are based on domestic turnover. To meet the notification requirement:

- The aggregate domestic turnover of the combined business group of one of the merging companies, or of one of the companies intending to conduct the joint share transfer, must exceed JPY20 billion.
- The aggregate domestic turnover of the combined business group of one other participating company must exceed JPY5 billion.

Business transfers. The thresholds are based on domestic turnover. To meet the notification requirement:

- The aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed JPY20 billion.
- Separate thresholds are applied for the transferring corporation, depending on whether the transfer includes the whole business or a substantial part of the business (or the whole or a substantial part of fixed assets used for the business). In the former case (the whole of the business), a threshold of JPY3 billion in domestic turnover applies to the transferring corporation. In the latter case (a substantial part of the business), a threshold of JPY3 billion in domestic turnover attributable to the target business applies.

Corporate splits. Generally, the thresholds for these transactions are the same as for mergers and joint share transfers (*see above*). However, in some cases the thresholds may be lower.

The JFTC has the authority to review any M&A transaction under the substantive test (*see Question 7*), irrespective of whether the thresholds for notification are met. The JFTC can also investigate transactions that have not been notified, including foreign-to-foreign transactions (for example, BHP Billiton's attempt to take over Rio Tinto through a hostile bid).

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is mandatory if a transaction meets the applicable thresholds (*see Question 2, Thresholds*).

Timing

Following notification, a 30-day waiting period applies, during which the JFTC may request additional information (such as reports, data and so on).

Formal/informal guidance

The parties to the transaction can consult with the JFTC prior to the formal notification, but only regarding non-substantive issues, such as how to complete the notification form.

The JFTC does not provide notifying parties with any conclusion on substantive issues before formal notifications at the pre-notification stage. In practice, however, the JFTC generally accepts arguments from notifying parties on substantive issues and in some cases conducts interviews with third parties (for example, competitors and customers of the parties), before formal notifications.

Responsibility for notification

The acquiring party is responsible for notification in:

- Share acquisitions.
- Business transfers.

Both parties are jointly responsible for notification in:

- Mergers.
- Joint share transfers.

For corporate splits, the splitting company is responsible for notification under the AMA, but in practice the JFTC requires joint filings.

Relevant authority

All notifications must be made to the Merger and Acquisitions Division, Economic Affairs Bureau of the JFTC (*see box, The regulatory authority*).

Form of notification

Standard notification forms are available on the JFTC's website (only in Japanese).

The standard forms must be used for notification. There are different forms for different types of transaction.

Filing fee

No filing fee is required.

Obligation to suspend

Generally, the parties must wait 30 calendar days for the JFTC to complete its investigation (reports, data and so on can be requested during this period). During this period, the parties must not complete (close) their transaction (*see Question 4*).

In some cases, the review process can be accelerated by submitting a written request to the JFTC. On receiving the request, the JFTC may shorten the waiting period if the parties can evidence that the notified merger will not substantially restrain competition in any relevant market (*Merger Guidelines*).

Procedure and timetable

4. What are the applicable procedures and timetable?

The JFTC's investigation has the following stages:

- **Phase I.** This phase, in which the JFTC will review the notification, lasts 30 calendar days (Waiting Period). The parties must suspend their transaction until the end of this period. At the end of the 30 days, the JFTC will either approve the merger (with or without conditions) or open a Phase II investigation.
- **Phase II.** In complex cases, the JFTC may request additional information from the parties. The Phase II investigation will last 90 calendar days from receipt of all additional information.

The Waiting Period will not be extended even if the JFTC's investigation moves to Phase II. However, in practice the parties generally suspend the transaction until the Phase II investigation is completed. This means that a closing of the transaction would generally be extended to the completion of the JFTC's Phase II review. At the end of its Phase II investigation, the JFTC will either clear the transaction (with or without conditions) or prohibit the transaction (by issuing a cease and desist order (that is, an order issued by JFTC to recover the competition in the certain fields of trade (relevant markets) (see *Question 9*)).

During the Phase I and Phase II investigation, the JFTC does not have the power to stop the clock.

For an overview of the notification process, see flowchart, *Japan: merger notifications*.

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

If the review moves to Phase II (see *Question 4*), the JFTC will disclose a short summary of the proposed merger. Unless the JFTC makes such a disclosure, third parties remain unaware that a merger has been notified.

In addition to the above, the JFTC may select to publicise cases where:

- The JFTC has conducted the Phase II investigation.
- The JFTC has cleared the merger subject to conditions (remedies).

The JFTC has discretion to make public other cases not falling within one of the above categories.

Procedural stage

The JFTC discloses a short summary of the proposed merger immediately after the Phase II review starts, unless notifying parties request the JFTC to keep the merger confidential. In such circumstances, the JFTC will discuss with the notifying parties as to when the JFTC will disclose the merger. The JFTC discloses its detailed analysis of the merger after the clearances thereof.

Automatic confidentiality

The JFTC and its staff members are subject to confidentiality obligations (*Article 39, AMA*). Although there is no specific category of information that must automatically be kept confidential, business secrets and/or personal information are generally protected.

Confidentiality on request

When the JFTC publicises its investigation in its selected cases, the notifying parties have an opportunity to:

- Review the draft publication.
- Request a redaction of certain business secrets.

In all other cases, all the material submitted to the JFTC is kept confidential, irrespective of whether or not the parties request confidentiality.

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

Third parties have no formal or legal right to make representations, access documents or be heard. However, if there is a possible breach of the AMA, third parties can submit a complaint to the relevant JFTC division.

Interventions by interested parties in JFTC proceedings have not historically been common. However, this has started to change, as exemplified by the interventions made by Japanese steel manufacturers before the JFTC in relation to the proposed BHP Billiton/Rio Tinto joint venture case.

Document access

Third parties have no formal or legal right to access the notification files.

Be heard

If a merger review moves to Phase II, the JFTC will:

- Disclose a short summary of the notification.
- Invite opinions and comments from third parties for 30 calendar days from the date of that disclosure.

Substantive test

7. What is the substantive test?

The Merger Guidelines explain the criteria against which the JFTC will examine the competition impact of a transaction. These criteria include the geographic market, safe harbour and substantive test.

Geographic market

Depending on the international nature of the business, the geographic market can be wider than the geographical boundaries of Japan (*Merger Guidelines*). Therefore, where the merging entities face competition from foreign imports, the transaction is less likely to have an impact on competition because the widening of the actual geographical market will dilute its share of the Japanese national market.

Safe harbour

The Merger Guidelines set out certain safe harbour criteria by applying the Herfindahl–Hirschman Index (HHI). The HHI measures market concentration levels, and the safe harbour criteria for a horizontal concentration are met (such that the JFTC will not consider the merger as raising competition concerns) if, after the transaction, the HHI is either:

- Not more than 1,500.
- Between 1,500 and 2,500, where the increase in the HHI is not more than 250.
- More than 2,500, where the increase in the HHI is not more than 150.

Substantive test

The JFTC can prohibit a merger if it results in a "substantial restraining of competition". If the safe harbour criteria are not met, the factors below are generally considered by the JFTC in applying this substantive test:

- The position of the company group and the competitive situation, such as the:
 - market share and ranking;
 - competition among the parties in the past;
 - market share differences from competitors; and
 - competitors' excess capacity and degree of differentiation.

- The likelihood of competing imports, including the:
 - degree of institutional barriers;
 - degree of import-related transportation costs;
 - existence of problems in distribution; and
 - degree of substitutability between the imported product and the company group's product.
- Barriers to entry in the relevant market, including:
 - institutional barriers to entry;
 - barriers to entry in practice; and
 - substitutability between entrants' products and the company group's products, and the potential for market entry.
- Competitive pressure from related markets (such as competing goods, geographically neighbouring markets, and so on).
- Competitive pressure from users (such as competition among users, ease of changing suppliers, and so on).
- Overall business capabilities.
- Efficiencies resulting from the transaction.
- Financial condition of the party's company group (also known as the "failing company defence").

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

In principle, the remedies that the JFTC will impose as a condition of clearance of a transaction should be structural, for example the transfer of a business (*Merger Guidelines*). However, in a market featuring a rapidly changing market structure (for example, through technological innovations), there may be cases where it is appropriate to adopt certain types of behavioural measures.

Remedies can be offered by the parties and accepted by the JFTC at any time during the JFTC's review period. If a notifying party and the JFTC reach an agreement on remedies, the notifying party is likely to be requested to submit a Report of Change to incorporate the remedy into the original notification.

In practice, compliance with remedies is not monitored by the JFTC or other entities. The JFTC can, however, penalise the parties for breaches of the offered remedies that have been incorporated into the original notification.

9. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Where there is a failure to notify correctly, the JFTC can:

- Issue a criminal fine of up to JPY2 million. If not paid, the fine is compulsorily collected through the seizure of property proceeding.
- Issue a cease and desist order to prohibit a merger (even after the parties have implemented the merger), if the merger may substantially restrain competition in the relevant markets. Where the order is not complied with, the JFTC can impose a maximum of two years' imprisonment with work or criminal fine up to JPY3 million.
- File civil proceedings to nullify the merger, within six months of the date the merger is implemented. However, this is not the case with share acquisitions and business transfers.

The above criminal penalties can be imposed on individuals working for the companies who should have notified the JFTC, as well as on companies concerned.

In theory, the JFTC can take more than one of the above measures in any one case. However, the JFTC does not generally take this approach in practice.

Implementation before approval or after prohibition

The Waiting Period is 30 days, irrespective of whether JFTC Investigation moves onto Phase II (see *Question 4*).

If the parties implement a merger before the 30-day period for investigation is over, this is subject to the same penalty as a failure to notify (that is, a criminal fine of up to JPY2 million) (*Article 91-2, item 6, AMA*).

It is possible for parties to implement a merger after the 30-day period and before the JFTC grants its formal approval (see *Question 4*). However, the JFTC can still order a cease and desist order requiring the parties to take some measures (for example, structural measures such as the transfer of business or business restructure).

If the parties implement a merger after a cease and desist order becomes final and definitive, the following criminal penalties apply:

- For an individual, a maximum of two years' imprisonment with work and/or criminal fines up to JPY3 million.
- For a company, criminal fines of up to JPY300 million.

If not paid, the fine will be collected pursuant to the proceedings stated in the National Tax Collection Act.

Failure to observe

If a party fails to observe a decision, the JFTC can:

- Issue a cease and desist order.
- Order the parties to take structural measures to restore the competitive situation in relevant markets (for example, through a transfer of business or a business restructure).

Failure to comply with an order leaves the parties subject to the same penalties as implementing the transaction after its prohibition (see above, *Implementation before approval or after prohibition*).

10. Is there a right of appeal against any decision? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal and procedure

If a party objects to a cease and desist order, it can request an administrative hearing at a JFTC tribunal within 60 days of receiving the order.

If a party is dissatisfied with the decision made by the JFTC tribunal, it can appeal the decision to the Tokyo High Court within 30 days of the effective date of the tribunal's decision. Further appeals to the Supreme Court are also available.

This system of appeal may be subject to reform in the near future (see *Question 39*).

Third party rights of appeal

Third party rights of appeal are not recognised in the AMA.

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Merger clearance from the JFTC does not mean that restrictive provisions in any agreements are automatically cleared. The JFTC will review restrictive agreements separately, as an unreasonable restraint of trade and unfair trade practice (see *Question 13*).

Regulation of specific industries

12. What industries (if any) are specifically regulated?

The AMA does not specifically regulate any industries in terms of merger control. However, there are specific regulations for certain industries such as finance, broadcasting and telecommunications.

Restrictive agreements and practices

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Restrictive agreements and practices are regulated by the JFTC under the AMA. In this regard, there are two types of prohibited conduct:

- **Unreasonable restraint of trade (Article 3, AMA).** This prohibits activities which restrict competition, such as cartel or bid-rigging agreements between parties. For these activities, both administrative and criminal penalties can be imposed (see Question 24).
- **Unfair trade practices (Article 19, AMA).** The types of conduct classified as unfair trade practices are specified in Article 2, paragraph 9 of the AMA and the JFTC Public Notice No.15 of 1982 (Unfair Trade Practices). Such conduct includes restrictive agreements and practices. For these activities, only administrative penalties can be imposed (see Question 24).

A horizontal agreement or practice can amount to an unreasonable restraint of trade as well as an unfair practice. However, vertical agreements are generally treated solely as unfair trade practices.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The regulations apply to all agreements, including any:

- Implicit (tacit) agreements.
- Informal practices.

Exemptions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Certain exemptions for restrictive agreements and practices are provided in the AMA. These exemptions relate to:

- **Intellectual property rights.** Legitimate use of intellectual property rights under the Copyright Act, Patent Act, Utility Model Act, Design Act and Trademark Act is exempt.
- **Partnerships.** Conduct by certain partnerships formed under specific legislation, such as the Agricultural Co-operatives Act (*Act No. 132 of 1947, as amended*) and the Small and Medium-Sized Enterprise Co-operatives Act (*Act No. 181 of 1949, as amended*) is exempt. However, this exemption does not cover the use of unfair trade practices which results in a substantial restraint of competition in a particular field of trade (such as price cartels to raise prices).
- **Resale price maintenance.** Certain categories of goods designated by the JFTC (such as books, newspapers and music CDs) are exempt.
- **Industry-specific exemptions.** These also stipulate certain exemptions for specific industries such as aviation and maritime trade.

Exclusions and statutes of limitation

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

There are no statutory provisions excluding small agreements. There are also no exclusions for medium- and small-sized companies, retailers or wholesalers.

Statutes of limitation

The statutory limitation period is five years, starting from the date on which the parties stop any violating conduct. The limitation period cannot be suspended, even if the JFTC opens an investigation.

Notification

17. What are the notification requirements for restrictive agreements and practices?

Notification

There is no formal notification process for restrictive agreements and practices.

Informal guidance/opinion

The JFTC has two types of procedure for prior consultation:

- **Informal prior consultation procedure.** Under this procedure, applications are accepted both orally and in writing, and determinations are given orally to applicants. The name of the applicant and the contents of the consultation are generally kept secret.
- **Formal prior consultation procedure.** Under this procedure, the JFTC provides its opinion on the individual case in writing. In most cases, after the formal prior consultation procedure, the name of the applicant and the contents of the consultation are publicised. This procedure is rarely used.

Responsibility for notification

There is no formal notification process for restrictive agreements and practices.

Parties to the contemplated restrictive agreement can request the JFTC to conduct an informal or formal consultation (*see above, Informal guidance/opinion*). However, the JFTC does not accept such requests after the parties have entered into the agreement.

Relevant authority

The Consultation and Guidance Office (the trade practice department of the JFTC) is responsible for prior consultation on restrictive agreements and practices.

Form of notification

No specific form is provided for prior consultation.

Filing fee

There is no filing fee for prior consultation.

Investigations

18. Who can start an investigation into a restrictive agreement or practice?

Regulators

The JFTC can start an investigation on its own initiative.

Third parties

The JFTC accepts third party reports of anti-competitive conduct and may commence an investigation based on such a report.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

Complainants or other third parties have no formal or legal right to make formal representations during an investigation. However, the JFTC generally accepts informal representations from third parties and takes these into consideration in the course of its investigation.

Document access

Complainants and other third parties have no formal or legal right to access documents during the course of the JFTC's investigation. However, after the administrative hearing has commenced (*see Question 26*), interested parties can request the JFTC's permission to inspect or copy the hearing record, which may include materials submitted by the JFTC defendants and other third parties (*see Question 21*).

Be heard

Complainants and other third parties have no formal or legal right to be heard during the course of an investigation.

20. What are the stages of the investigation and timetable?

There are two types of investigative procedures available to the JFTC, which are the:

- Administrative procedure.
- Criminal procedure.

The basic procedural steps for both procedures are as follows:

- Preliminary investigations based on various sources, such as leniency applications and complaints. The JFTC also conducts preliminary investigations based on the JFTC's own intelligence.
- Commencement of a formal investigation. The JFTC's formal investigation usually begins by conducting on-site inspections at the premises of target companies and on-site interviews with executives and employees.
- Issuance of a report order against target companies and third parties, and interviews with executives and employees of target companies and third parties.
- After the JFTC has concluded investigations, it issues and sends a draft order (similar to the European Commission's Statement of Objections) to the target companies and gives them an opportunity to submit opinions and relevant materials. The JFTC will examine these opinions and, if necessary, make amendments to the draft order.
- The JFTC, at its discretion, can issue cease and desist orders and surcharge payment orders.

The differences between the administrative proceedings and the criminal proceedings mainly exist in relation to their procedures (*see Question 22*) and sanctions (*see Question 24*).

21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The JFTC does not publicise the details of a potential violation during its investigation, and will only publically release the contents of an order after it is issued. The JFTC publicises a copy of all the cease and desist orders issued, but the JFTC does not publicise a copy of all the surcharge payment orders issued (*see Question 26*).

During the investigation, third parties cannot access the file. However, after the administrative hearing procedure has commenced, interested parties can request the JFTC's permission to inspect or copy the hearing record, which may include materials submitted by defendants and other third parties. In disclosing such documents, the JFTC may, at its own discretion, redact business secrets and personal information.

An interested party includes the competitors and those who are considering filing a claim against the violating company.

Automatic confidentiality

The JFTC and its staff members are subject to confidentiality obligations under the AMA (see *Question 5*).

Confidentiality on request

There is no statutory rule concerning confidentiality on request by the parties or third parties. However, in practice, any party can request that information it provides to the JFTC be kept confidential. The JFTC retains the discretion to decide whether such requested information will be kept confidential.

Publicity and confidentiality

22. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

Administrative proceedings

The JFTC conducts investigations and can order on-site inspections. During an on-site inspection, the JFTC can:

- Enter the business offices of target companies (that is, businesses under investigation) or other necessary sites, such as the private premises of employees, and inspect documents and other materials.
- Order companies and persons in possession of documents to submit documents and other materials to the JFTC, to be kept at the JFTC's premises.

Criminal proceedings

In addition to the JFTC's investigations, public prosecutors can conduct their own investigations. However, target companies and their employees cannot be indicted unless this is requested by the JFTC. During an on-site inspection conducted in the course of a criminal investigation, the JFTC can:

- Inspect, search and seize materials in accordance with a warrant issued by a court judge.
- Seize original documents and materials, including IT equipment held at:
 - company offices; and
 - private premises, such as employees' homes.

When investigating IT equipment, the JFTC generally does not remove original equipment (for example, hard disk drives) and prefers to make copies of stored data instead.

Settlements

23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?

There is no formal procedure for reaching a settlement with the JFTC.

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The JFTC can issue the following orders in the administrative proceedings:

- Cease and desist orders.
- Surcharge payment orders (see *below, Fines*).

- Informal warnings.

The JFTC can also petition the Tokyo High Court to order an interim prohibitory injunction.

Fines

There are the following sanctions against companies:

- **Administrative surcharge.** The period of infringement is used for the basic surcharge calculation (base rate). If the infringing period is:
 - less than three years, the surcharge is up to 10% of the total sales of the relevant products during the period of infringement;
 - more than three years, the surcharge is up to 10% of the total sales of the relevant products during the last three years.

The base rate of the surcharge can be increased up to 20% in the case of ringleaders and repeated violators.

If certain conditions under the AMA are met, parties can submit a leniency application to either:

- have the amount of the surcharge reduced; or
- be exempt from the surcharge.

See below, *Immunity/leniency*.

Lower surcharge rates apply to medium- and small-sized companies, retailers and wholesalers.

- **Criminal fine.** The maximum fine for a company is JPY5 million. A reduction or exemption by way of a leniency application is not available (see below, *Immunity/Leniency: Criminal proceedings*). There are no fining or sentencing guidelines.
Administrative and criminal sanctions can be applied separately. If not paid, the administrative surcharge will be compulsorily collected.

Personal liability

In criminal cases, the maximum prison term is five years and the maximum fine is JPY5 million. In judgments imposing prison terms of no longer than three years, probation is possible at the court's discretion. There are no fining or sentencing guidelines.

In essence, the personal liability does not attach to individual directors or managers. In exceptional circumstances where a CEO was aware of violations and did not take necessary measure to cease such violations, the CEO can also be deemed liable (subject to the maximum fine of JPY5 million).

Immunity/leniency

Administrative proceedings. Since 2006, a leniency/immunity programme has been available to companies, but not individuals. By declaring its participation in a cartel, a company can be granted an immunity from, or a reduction in, its administrative surcharges.

Companies (or a group of companies) are granted immunity/leniency in the following order:

- The first applicant to apply for leniency before the start of a JFTC investigation is granted full immunity.
- The second applicant to apply for leniency before the start of a JFTC investigation is granted a 50% reduction.
- The third, fourth and fifth applicants to apply before the start of a JFTC investigation and all the applicants after the start of a JFTC investigation are granted a 30% reduction.

However, only five applicants in total can apply for leniency. As to the applicants after the start of a JFTC investigation, only three applicants can apply for leniency, even if the total number of applicants does not exceed five. Once all the application slots have been filled, the JFTC cannot offer any kind of leniency to other companies, irrespective of whether or not they make a useful contribution to the JFTC's investigations.

Joint applications. As of January 2010, the amended AMA introduced a joint application scheme, where companies belonging to the same corporate group can apply for leniency as if they were a single entity. The joint applicants will benefit from the same reduction or immunity in respect of administrative surcharges (that is, first-in corporate groups will be granted immunity, the others a reduction).

Criminal proceedings. For criminal proceedings, the JFTC has publicised a policy paper stating that it will not request the indictment of the first leniency applicant if the applicant applies for leniency before the start of the JFTC's investigation. It also states that the JFTC will not request the indictment of employees of the first leniency applicant who co-operate with the JFTC's investigation.

Impact on agreements

Agreements which contain provisions in breach of the AMA are not automatically void. However, in the case of a material breach, such agreements may be considered void in a civil judgment.

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

Private actions to claim damages for losses suffered as a result of a prohibited restrictive agreement or practice are usually made under Article 25 AMA or Article 709 of the Civil Code. Under these rules:

- Any business entity that has committed a violation of the AMA is liable for damages suffered by another party (*Article 25, AMA*).
- A person who has intentionally or negligently infringed any right or legally protected interest of another is liable to compensate any resultant losses (*Article 709, Civil Code*).

Special procedures/rules

Article 25 action. Businesses bringing a claim based on Article 25 are not required to prove the defendant's wilful or negligent violation of the AMA (although this is still required for general tort claims based on Article 709 of the Civil Code). However, they must prove the:

- Amount of damages.
- Existence of a causal relationship between the losses and the illegal conduct.

General tort claims. Persons who violate the rights of another must pay the damages resulting from their actions (*Article 709, Civil Code*). Article 709 claims can be brought without a final decision of the JFTC concluding that the defendant has violated the AMA.

Injunctive relief. As well as seeking damages, a claimant can seek injunctive relief from the court against certain unfair trade practices that are prohibited by the AMA (*Article 24, AMA*). However, for injunctive relief to be granted, the claimant must be at risk of suffering "material damage" as a result of anti-competitive conduct. Therefore, injunctive relief is rarely granted.

Class actions

Class actions are not available.

26. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

At first instance, the JFTC's orders can be appealed before the JFTC commissioners through the administrative hearing procedure. Appeals must be brought before the commissioners within 60 calendar days of receiving the JFTC's written transcript of the order.

Further appeals to the Tokyo High Court and the Supreme Court are also possible.

In almost all cases, the JFTC's findings are upheld by both administrative hearings at the JFTC and subsequent appeal courts.

Third party rights of appeal

The right of appeal is generally available to the addressee of the order only. In general, there is no third party right of appeal.

Monopolies and abuses of market power

Scope of rules

27. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Monopolies and abuses of market power are regulated by the JFTC under the AMA. When demonstrating breaches of the AMA, it is not necessary to explicitly prove "dominance" or "market power". Instead, a breach can be ascertained if the relevant conduct has the "effect of substantially restraining competition" (*Article 2, paragraph 5, AMA*).

Private monopolisation (that is, excluding and controlling behaviour that has the effect of substantially restraining competition, which is defined by various factors, including the conditions of competition in the market and the circumstances of the competitors) is also prohibited (*Article 3, AMA*).

28. How is dominance/market power determined?

The AMA does not define "dominance" or "market power". However, the JFTC will prioritise investigations into cases where the party has (solely or jointly) 50% or more of the market share in a relevant market (*JFTC Guidelines*).

29. Are there any broad categories of behaviour that may constitute abusive conduct?

Two types of monopolistic conduct are prohibited (*Article 2, paragraph 6, AMA*):

- **Exclusionary conduct.** This type of conduct involves excluding the business activities of other companies, where the effect is to substantially restrain market competition. This covers, for example, predatory pricing, exclusive dealing, tying, refusal to supply and/or discriminatory treatment.
- **Controlling conduct.** This type of conduct involves controlling the business activities of other entrepreneurs, where the effect is to substantially restrain market competition. For example, this may comprise holding shares in a company or dominance in certain fields of trade (relevant markets).

Exemptions and exclusions

30. Are there any exemptions or exclusions?

There are no statutory exemptions/exclusions for monopolies or abuses of market power.

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

Notification

There is no formal process for notifying monopolies or abuses of market power to the JFTC (*see also Question 17*).

Guidance/opinion

This is the same as the formal/informal prior consultation procedure for restrictive agreements and practices (*see Question 17, Guidance/opinion*).

Investigations

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

There are no procedural differences between investigations into monopolies and abuses of market power, and investigations into restrictive agreements and practices (*see Questions 18 to 21 and Question 23*).

33. What are the regulator's powers of investigation?

The regulator's power of investigation into monopolies and abuses of market power are the same as for investigations into restrictive agreements and practices (see *Question 22*).

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

The penalties for monopolies or abuses of market power are the same as those for restrictive agreements and practices (see *Question 24*).

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

This is the same as for investigations into restrictive agreements and practices (see *Question 25*).

EU law

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

Joint ventures

37. How are joint ventures analysed under competition law?

There is no formal definition of a joint venture in the AMA, but a notification must be made if a transaction satisfies the thresholds for share acquisitions (see *Question 2, Thresholds*).

Unlike EU law, Japanese law does not make a distinction between full-function and non-full-function joint ventures.

In addition, joint ventures between competitors may be considered unlawful restrictive agreements or practices, even if they do not fall within the relevant triggering thresholds under the merger regime (see *Question 13*).

Inter-agency co-operation

38. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The JFTC can exchange information with foreign competition authorities (*Article 43-2, AMA*). In addition, the JFTC has entered into bilateral co-operation agreements with the US and the European Commission. These agreements contain provisions for the exchange of information in relation to infringements of competition law.

However, disclosure of confidential investigative information and evidence is a violation of the government officials' secrecy obligations and is subject to criminal sanctions (see *Questions 2 and 5*). Therefore, JFTC officials generally cannot exchange information and data which contains business secrets. This is subject to an important exception where the JFTC can exchange confidential information when examining a leniency application (including the contents of the leniency application), if the leniency applicant granted permission to the relevant authorities.

Proposals for reform

39. Are there any proposals for reform of competition law?

In March 2010 the Cabinet Office publicised a bill to amend the AMA with the aim of abolishing the current administrative hearing procedure (see *Questions 10 and 26*) in favour of a more detailed judicial appeal procedure. However, the bill did not pass in the 2010, 2011 and 2012 Diet sessions and finally was quashed in November 2012.

There are no other proposals for reform of the AMA.

Online resources

W www.jftc.go.jp/sosiki/houreiiindex.html

Description. A website maintained by the JFTC providing up-to-date legislation and rules in Japanese.

W www.jftc.go.jp/en/legislation_guidelines/index.html

Description. English language translations of the legislation and rules. The translations are for guidance only and some translations do not reflect recent amendments. The website is maintained by the JFTC.

The regulatory authority

Japan Fair Trade Commission (JFTC)

Head. Ms Michiyo Hamada (Deputy-chairman of the JFTC)

The former Chairman retired on 26 September 2012, and a new Chairman has not yet been appointed by the Diet.

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Outline structure. The JFTC is an independent administrative commission consisting of the Chairman and four commissioners. These members are appointed from among experts in law or economics by the Prime Minister with the consent of the Parliament. The JFTC is unique in that it performs its duties as an independent administrative commission without being directed or supervised by other ministers. The JFTC Secretariat includes the International Affairs Division, Economic Affairs Bureau, Investigation Bureau and Local Offices.

Responsibilities. The JFTC is responsible for the positive implementation of competition policies as a policy enforcement agency.

Procedure for obtaining documents. The JFTC's website provides information in relation to the JFTC, the AMA, guidelines, policies and past orders and decisions.

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Professional qualifications. Japan, 2002

Areas of practice. Competition and Anti-Trust.

Recent transactions

- JFTC investigator, managing a number of large international cartel investigations and a large abuse of dominance case (July 2007 to June 2010).
- Advising on merger notifications to various competition authorities including Japan, China, the European Commission, EU member states and the US.
- Advising on international and domestic cartel cases.
- Advising on a predatory pricing case and an abusive conduct case.

Languages. English and Japanese.

Professional associations/memberships

- Non-governmental adviser for the International Competition Network (ICN).
- Japan Competition Law Forum (JCLF).
- Japan Association of Economic Law.
- Dai-ni Tokyo Bar Association.

Publications

- The Merger Control Review, Second Edition (Law Business Research, 2011).
- 2011 Antitrust Year In Review (Japan chapter) (ABA International Law Section, International Antitrust Committee, April 2012).
- Cease and desist order and surcharge payment orders against manufacturers of marine hose (Fair Trade Institute, 2008).

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Products: Competition, Competition multi-jurisdictional guide, PLC Cross-border, PLC EU Competition Law, PLC UK Corporate, PLC UK Law Department, PLC UK Public Sector, PLC US Antitrust, PLC US Law Department

Series: Country Q&A

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