

# Overview

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## The Japan Enforcement Agency

The substantive provisions of Japan's competition rules are contained in the Antimonopoly Act of Japan (AMA). The Japan Fair Trade Commission (JFTC) is the principal enforcement agency – it was established as an independent administrative office with broad enforcement powers and is composed of a chairman and four commissioners. The AMA comprises four major categories of regulations:

- the prohibition of unreasonable restraint of trade (eg, cartels and bid rigging);
- the prohibition of private monopolisation;
- the prohibition of unfair trade practices; and
- regulations on business combination (eg, via mergers and acquisitions).

The JFTC is the sole enforcement agency, except in the case of criminal investigations where the public prosecutor's office is in charge of criminal prosecutions upon the JFTC's submission of a criminal accusation to the prosecutor general.

## Recent developments

### Cartels

The JFTC issued formal administrative orders (cease-and-desist and surcharge orders) for four cartel or bid-rigging cases in 2015. Each of these four cases are relevant to the Japanese domestic market only. The amount of surcharges levied in cartel cases is calculated as the base rate (which is basically 10 per cent but differs according to conditions, increased to 15 per cent if any cartel activity is repeated within 10 years of an earlier finding of a breach in respect of the same matter) of the sales amount of the relevant products or services by the party fined for the period of infringement, extending up to three years from the date such conduct ceased. Surcharges imposed for cartel or bid-rigging conduct, as well as abuse of superior bargaining position, totalled ¥17.1 billion in the 2014 fiscal year (ending 31 March 2015).

Regarding criminal investigations, the JFTC found a criminal violation of the AMA in the bearings cartel case and filed criminal accusations with the prosecutor general in June 2012 against three companies, as well as

seven individuals of the three companies accused. No criminal accusations were filed against the immunity applicant company and its employees. By February 2013, two companies and five individuals were convicted. A trial went on in relation to one company and two individuals who pleaded not guilty, but all of them were also convicted in February 2015. The company reportedly appealed the judgment immediately.

The JFTC also opened its investigation into the Hokuriku Shinkansen bid-rigging case in September 2013. In March 2014, criminal accusations were filed against eight equipment companies and eight individuals, and by 15 November 2014 all the defendant companies and individuals were convicted. Penalties varying from ¥120 million to ¥160 million were imposed on the defendant companies. In addition to criminal sanctions, in October 2015, the JFTC levied a total of ¥1.03 billion in surcharges against seven companies. In 2015, no new criminal accusation was filed with the prosecutor general by the JFTC.

The JFTC has reiterated its policy of continuing tough, high-impact enforcements, as well as strengthening cooperation with foreign authorities for the purpose of deterring infringements. The JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union and Canada. In addition, in 2015 the JFTC executed a memorandum of understanding with the National Development and Reform Commission in China. Also in 2015, the JFTC executed a Cooperation Agreement with the Australian Competition and Consumer Commission based on the free trade agreement between Australia and Japan. This agreement is the first second-generation agreement for the JFTC with a foreign authority. Under these agreements, various levels of information exchanges and discussions can be made between the participating authorities. The JFTC is entitled to exchange information with other authorities as well, based on conditions set out in the AMA.

### Leniency

In 2014, 61 leniency filings were made. According to a JFTC press release, leniency applicants received immunity or a reduction in surcharges in four out of

seven cartel cases in which the JFTC issued a formal administrative order in the 2014 fiscal year.

Under the leniency programme in Japan, a maximum of five companies (or groups of companies) will be granted immunity from, or a reduction of, surcharges by identifying the alleged facts in detail and submitting relevant evidence. The first applicant to come forward before the start of a JFTC investigation is granted full immunity, the second is granted a 50 per cent reduction, and the third, fourth and fifth are granted a 30 per cent reduction. Any applicants after the start of a JFTC investigation are granted the same 30 per cent reduction. The JFTC has no discretion in determining the order of leniency applicants or the percentage of reduction granted for cooperation.

#### Private monopolisation

In January 2015, the JFTC issued a cease-and-desist order against JA Fukui Prefectural Economic Federation of Agricultural Cooperatives for private monopolisation by controlling business activities of other entrepreneurs (Private Monopolisation by Control) because it controlled the bids for facilities for drying, husking and storage of grains in the Fukui prefecture area through designating successful bidders. Although the calculation method for surcharge amount levied in Private Monopolisation by Control cases are the same as cartel cases under the AMA, no surcharge was imposed in this case since no relevant sales amount had been generated by the violator. This is the first case in 17 years where the JFTC issued a formal administrative order against Private Monopolisation by Control.

#### Unfair trade practices

As to abuse of superior bargaining position, which is prohibited as an unfair trade practice under the AMA, no new order was issued by the JFTC in 2015. Since the enforcement of amendments to the AMA commenced in January 2010 that subjected abusers of a superior bargaining position to a surcharge, there have been five cases where a surcharge order was imposed and all cases were appealed. In June 2015, the decision was made on an appeal that partly annulled the cease-and-desist order and surcharge order against Toys“R”Us-Japan in December 2011 and reduced the amount of surcharge from ¥369 million to ¥222 million. This is the first decision on an appeal among the five cases appealed. The base rate for calculating the amount of surcharges for the abuse of a superior market position is 1 per cent of the sales amount of the relevant products for the period of infringement, extending up to three years from the date such conduct ceased.

#### Mergers

The total number of merger notifications for the 2014 fiscal year was 289. The JFTC cleared 275 cases without Phase II review, and among those the 30-day waiting period, where the notified transaction shall not be closed, was shortened in 119 cases. Among the 289 cases, only three transitioned to Phase II review (including *Zimmer/Biomet* and *Oji Holdings/Chuetsu Pulp & Paper*), all of which were cleared subject to conditions. There were no formal prohibition decisions in the 2014 fiscal year.

Mergers, business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) are subject to prior notification under the AMA if they exceed certain thresholds. Amendments to the AMA, which became effective in January 2010, have introduced mandatory notification of foreign-to-foreign mergers between undertakings that have no Japanese subsidiary or branch office in Japan but that have substantial domestic turnover in Japan. In 2015, in the case of *Zimmer, Inc* and *Biomet, Inc*, both US companies, the JFTC exchanged the relevant information with the European Commission and the US Federal Trade Commission, respectively.

#### Enforcement of the 2013 AMA Amendment and amendments of Guidelines

Under the 2013 AMA Amendment, effective on 1 April 2015, parties dissatisfied with the JFTC's administrative orders are able to appeal the orders to the Tokyo district court instead of requesting the JFTC hearings. In relation to this amendment, for the purposes of keeping investigation procedure transparent and showing the JFTC officials a model investigation procedure, the JFTC published the Guidelines Relating to the Investigation Procedure under AMA in December 2015. In March 2015, the JFTC amended a part of the Guidelines Concerning Distribution System and Business Practices for the purpose of clarification of the criteria for the JFTC judgment on illegality of vertical conduct and the justifiable reasons for resale price maintenance. In addition, in December 2015, the JFTC published the draft partial amendment of the Guidelines for the Use of Intellectual Property under AMA. This amendment is to clarify the JFTC policy in case of litigation for suspension of use of standard essential patent brought by the holder of such patent. The amendment became effective in January 2016.



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Setsuko Yufu is a senior partner at Atsumi & Sakai, with more than 30 years' experience in cross-border transactions and corporate practice, including antitrust and competition law. She is especially experienced in international cartel investigations and is ranked as a leading individual in relation to antitrust and competition law in the *Legal 500* 2016 and *Chambers Asia-Pacific* 2016 publications. She is also ranked as 'Highly recommended' in GCR 100 2016. After qualifying at the Japan Federation of Bar Associations, she studied at the Europa Instituut in the University of Amsterdam and worked in a leading global law firm in Brussels from 1986 to 1987. She serves as a board member of the EU Studies Association – Japan and is noted for her comprehensive knowledge of EU competition law. In 2015 she was elected as a board member of the Japan Competition Law Forum.



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Atsumi & Sakai was established in 1994 as a boutique firm focusing mainly on finance law. Since then, the firm has developed and broadened its legal experience in finance as well as a wide range of corporate and dispute resolution disciplines, including antitrust and competition law, such as cartel investigations and merger controls. The firm also advises on antitrust and competition law aspects of various transactions, including licensing, franchise and distributorship arrangements. Recently, Atsumi & Sakai has become increasingly active in the field of international cartel investigations including private enforcement, extradition issues, and merger controls. Many of the firm's junior lawyers have extensive international experience in Asian, EU and American jurisdictions.



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