

# **A Brief Overview of Criminal Cartel Enforcement in Japan**

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## **Summary**

Japan has both a criminal enforcement route for cartel enforcement, as well as an enforcement route by way of a civil administrative process. For many years, the Japan Fair Trade Commission (JFTC) has favored the civil process, where the main methods used for enforcement are issuing of cease and desist orders and surcharge payment orders. As such, there have been only a handful of criminal cartel cases in Japan to date. However, in line with the global trend towards stricter cartel enforcement, the use of the criminal enforcement route seems to be gradually gaining traction in Japan as well. To further support this, in 2013 amendments have been made to Japan's Anti-Monopoly Act (AMA) to raise the statutory criminal fines, increase maximum prison terms and grant stronger investigative power to the JFTC.

## **Statutes and Enforcement Authority**

### Statutes

The main statute for cartel enforcement in Japan is the "Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)", or simply the "Anti-Monopoly Act" (AMA).<sup>1</sup>

Under the AMA, cartels are prohibited as "Unreasonable Restraint of Trade" (Article 3)<sup>2</sup>, which is defined as "such business activities, by which any entrepreneur, by contract, agreement or any other means irrespective of its name, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." (Article 2(6))<sup>3</sup>

The sanctions provided by the AMA for conduct that falls within the "Unreasonable Restraint of Trade" are administrative orders and criminal sanctions.

More specifically, as for administrative orders, the JFTC may issue cease and desist orders (Article 7(1))<sup>4</sup> and may also issue surcharge payment orders for certain conduct that pertains to the price of

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<sup>1</sup> A translation of the AMA can be found in the JFTC website available at: [https://www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index.html](https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html). The excerpts of the Articles of the AMA appearing in the footnotes below are also from this website.

<sup>2</sup> Article 3 of the AMA provides in pertinent part as follows: "No entrepreneur shall effect ... unreasonable restraint of trade."

<sup>3</sup> "Unreasonable Restraint of Trade" under the AMA covers both price fixing and bid-rigging. Besides this, for bid-rigging in a public auction or bid setting, Article 96-3(2) of the Penal Code provides that the individual may be imprisoned up to 2 years or subject to a criminal fine up to 2.5 million JPY. Further, if a government official leads/assists the bid-rigging, the official may face imprisonment up to 5 years or a criminal fine up to 2.5 million JPY under "the Act on Elimination and Prevention of Involvement in Bid-Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc." However, in this article I will focus only on the AMA.

<sup>4</sup> Article 7(1) of the AMA provides in pertinent part as follows: "In the case that there exists any act in violation of the provisions of Article 3 ..., the Fair Trade Commission may, pursuant to the procedures as provided in Section 2 of Chapter VIII, order the relevant entrepreneur to cease and desist from the said acts, transfer a part

goods or services. The basic amount of the surcharge payment will be calculated as 10% of the sales of the relevant goods or services for a period up to 3 years prior to the date the conduct ceased (Article 7-2(1))<sup>5</sup>.

As for criminal sanctions, the AMA provides that: criminal fines up to 5 million JPY and/or imprisonment up to 5 years (Article 89 and 92)<sup>6</sup> may be imposed on individuals; criminal fines up to 500 million JPY may be imposed on companies and other entities (Article 95)<sup>7</sup>; and criminal fines up to 5 million JPY may be imposed on top management of a company (Article 95-2)<sup>8</sup>.

### Enforcement Authority

The JFTC has the sole authority to impose the administrative orders. However, with respect to criminal sanctions, the JFTC only has the authority to file criminal accusations with the Public Prosecutors General (Article 96 (1))<sup>9</sup>. The Public Prosecutors Office, an extraordinary organ of the Ministry of Justice, then exercises sole discretion as to prosecution.

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of his/her business, or take any other measures necessary to eliminate such acts in violation of the said provisions.”

<sup>5</sup> Article 7-2(1) of the AMA provides in pertinent part as follows: “In the case that any entrepreneur effects an unreasonable restraint of trade ... , and such act falls under any of the following items, the Fair Trade Commission shall order the said entrepreneur, pursuant to the procedures as provided in Section 2 of Chapter VIII, to pay to the national treasury a surcharge of an amount equivalent to an amount calculated by multiplying the sales amount of the relevant goods or services calculated pursuant to the method provided by a Cabinet Order ... , for the period from the date on which the entrepreneur effected the business activities constituting the said act to the date on which the business activities constituting the said act were discontinued (in the case that such period exceeds three years, the period shall be the three years preceding the date on which the business activities constituting the said act were discontinued; hereinafter referred to as "period of implementation") by ten percent (three percent in the case of retail business, or two percent in the case of wholesale business); provided, however, that in the case the amount thus calculated is less than one million yen, the Commission shall not order the payment of such a surcharge:

- (i) Pertaining to consideration of goods or services; or
- (ii) Substantially restraining any of the following with respect to goods or services and thereby affecting the consideration:
  - (a) Supply or purchase volume;
  - (b) Market share; or
  - (c) Transaction counterparties”

<sup>6</sup> Article 89 (1) of the AMA provides in pertinent part as follows: “Any person who falls under any of the following items shall be punished by imprisonment with work for not more than five years or by a fine of not more than five million yen:

- (i) Any person who, in violation of the provisions of Article 3, has effected ... unreasonable restraint of trade “; Further Article 92 provides in pertinent part as follows: “Any person who has committed any of the crimes provided in Articles 89 ... may, according to the circumstances, be punished by cumulative imposition of both imprisonment with work and a fine.”

<sup>7</sup> Article 95(1) of the AMA provides in pertinent part as follows: “When a representative of a juridical person, or an agent, an employee or any other worker of a juridical person or of an individual has, with regard to the business or property of the said juridical person or individual, committed a violation of the provisions in any of the following items, not only the offender shall be punished but also the said juridical person or individual shall be punished by the fine as prescribed in the respective items:

- (i) Article 89: Fine of not more than five hundred million yen....”

<sup>8</sup> Article 95-2 of the AMA provides in pertinent part as follows: “In the case of a violation of item (i) of paragraph (1) of Article 89 ... , the representative of the relevant juridical person ... who has failed to take necessary measures to prevent such violation despite the knowledge of a plan for such violation or who has failed to take necessary measures to rectify such a violation despite the knowledge of such a violation, shall also be punished by the fine as prescribed in the respective articles.”

<sup>9</sup> Article 96(1) of the AMA provides in pertinent part as follows: “Any crime under Articles 89 ... inclusive shall be considered only after an accusation is filed by the Fair Trade Commission.”

In relation to the criminal enforcement of cartels, the JFTC has adopted a policy to provide guidance on what kind of cases are likely to be considered for criminal enforcement. According to the policy, the JFTC will file criminal accusations to actively seek criminal penalties on violations that: (a) substantially restrain competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid rigging, group boycotts and private monopolization (these examples constitute serious cases that are likely to have a widespread influence on the national economy); or (b) involve firms or industries that are repeat offenders or do not take the appropriate measures to eliminate a violation, and for which the administrative measures of the JFTC are not considered sufficient to meet the aims of the Antimonopoly Act.<sup>10</sup>

Further, the policy provides that the JFTC and the prosecutorial authorities will hold “the Conference of Criminal Accusation” at the time criminal accusations are considered and exchange opinions and information on concrete problems of each case.<sup>11</sup> This is designed to insure the most legitimate and coordinated criminal accusations.

Finally, it should be noted that 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.<sup>12</sup> The AMA provides how an adjustment should be made between a criminal fine and a surcharge payment order.<sup>13</sup>

## **Practice and Recent Developments**

The AMA has had provisions for criminal enforcement of cartels ever since it was enacted in 1947. However, in practice, criminal sanctions were not used for cartel enforcement for quite a long time. It was only in 1974 that the JFTC filed its first (and second) criminal accusation. Further, even after that, the JFTC did not file another criminal accusation for nearly 20 years (in 1991). As of March 2018, the JFTC has filed criminal accusations for cartels in only 19 cases since 1947.<sup>14</sup>

Starting in the 1990s, the JFTC began to take a stricter position on the enforcement of the AMA<sup>15</sup>, and in line with this, the use of criminal enforcement was considered as one option. The adoption of the JFTC policy on enforcement of criminal cartels referred to above was one of the outcomes. After this

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<sup>10</sup> See “The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations” available at: ([https://www.jftc.go.jp/en/legislation\\_gls/antimonopoly\\_rules\\_files/legislation\\_guidelinesamapdfpolicy\\_on\\_criminalaccusation.pdf](https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf))

<sup>11</sup> *Id.*

<sup>12</sup> For example in a criminal accusation case concerning a cartel on industrial machinery bearings and automotive bearings, the JFTC has issued surcharge payment orders to 3 companies in the total of 13.3 billion JPY. The JFTC press release is available at: [https://www.jftc.go.jp/en/pressreleases/yearly-2013/march/130329\\_2.html](https://www.jftc.go.jp/en/pressreleases/yearly-2013/march/130329_2.html).

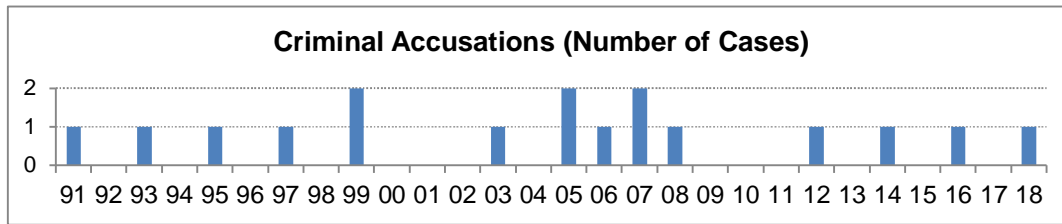
<sup>13</sup> Article 7-2(19) and Article 51 of the AMA provides for the methods of the adjustment which is in short to deduct half the amount of criminal fine from the surcharge payment amount.

<sup>14</sup> A summary of cases where the JFTC has filed criminal accusations since the enactment of the AMA could be found in the Japanese page of the JFTC website available at: [https://www.jftc.go.jp/dk/dk\\_qa\\_files/hansokuitiran.pdf](https://www.jftc.go.jp/dk/dk_qa_files/hansokuitiran.pdf). Further, similar charts can be found in the JFTC’s annual reports which are available at: <https://www.jftc.go.jp/soshiki/nenpou/index.html>. However, as of August 2019, the English page of the JFTC website available at: [https://www.jftc.go.jp/en/about\\_jftc/annual\\_reports/index.html](https://www.jftc.go.jp/en/about_jftc/annual_reports/index.html) provides only outlines of the annual reports and these do not include the charts described above.

<sup>15</sup> The AMA has been amended accordingly. The 1991 amendment raised the basic rate for surcharge payment orders from 2% to 6% (which was further raised to 10% in 2005). The 1992 amendment increased the maximum criminal fine for companies and other entities from 5 million JPY to 100 million JPY, which was further increased to 500 million JPY in 2002.

policy was adopted, the JFTC has become more proactive in the criminal enforcement area, resulting in criminal accusations of 17 cases during the period from 1991 to 2018 (Figure 1).<sup>16</sup>

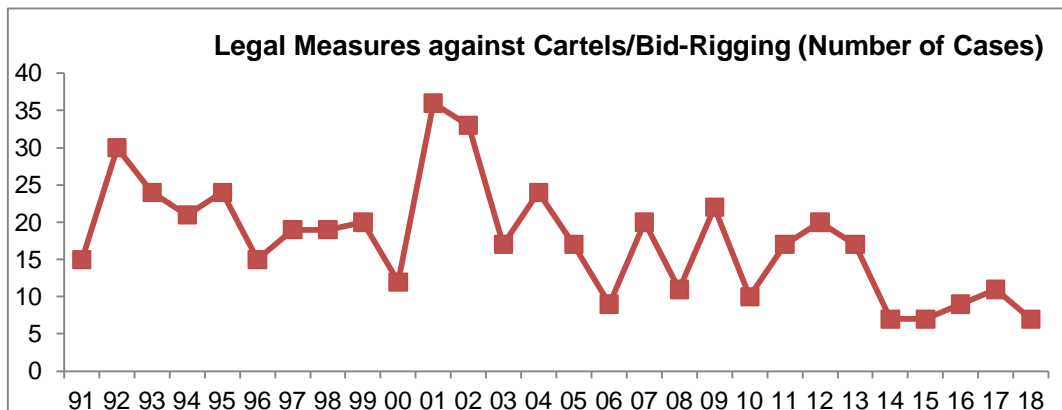
**Figure 1**



These numbers may appear low; however, considering the fact that from 1947 to 1990 – the forty or so years preceding the chart above - there were only two criminal accusations filed for cartel cases, the JFTC continuing to steadily file criminal accusations since 1991 clearly shows that criminal enforcement has been gaining traction as one route of cartel enforcement.

On the other hand, for the period from 1991 to 2018 the JFTC issued administrative orders on average approximately 17 cases per year (Figure 2).<sup>17</sup> Although the number of cases has been somewhat low for the last 5 years (2014-2018) compared to the years before that (1991-2013), the lowest remains at 7 cases (2014, 2015 and 2018) and that is still much higher than the number of criminal accusations above. While there seems to be no clear trend in terms of the number of cases that the JFTC has taken legal measures, this confirms that the main stream of cartel enforcement is the administrative route.

**Figure 2**



## **Outcomes of Criminal Cartel Enforcement**

In the last 28 years, all of the criminal accusation cases were prosecuted and none were acquitted by the court. The courts have imposed criminal fines for companies and prison sentences and/or criminal fines for individuals. The highest criminal fine imposed on a company so far is 640 million JPY<sup>18</sup>. As for prison sentences for individuals, the maximum term imposed is 4 years, however, it should be noted that in all cases concerning individuals the prison sentences<sup>19</sup> were suspended for a certain

<sup>16</sup> *Supra* note 14.

<sup>17</sup> According to the JFTC annual reports from 1991 to 2017, the JFTC had issued an administrative order in from 7 to 36 cartel cases per year, and the average is 17.06. The annual report for 2018 has not been issued as of August 2018. However, a summary of the JFTC's enforcement action in fiscal year 2018 is available at: <https://www.jftc.go.jp/houdou/pressrelease/2019/jun/kanki/190605honbun.pdf> (only in Japanese). According to this summary the number of cases for 2018 is 7.

<sup>18</sup> As there were 4 separate counts, the total amount of fine imposed by the court exceeds the statutory maximum amount which is the maximum for one count of violation.

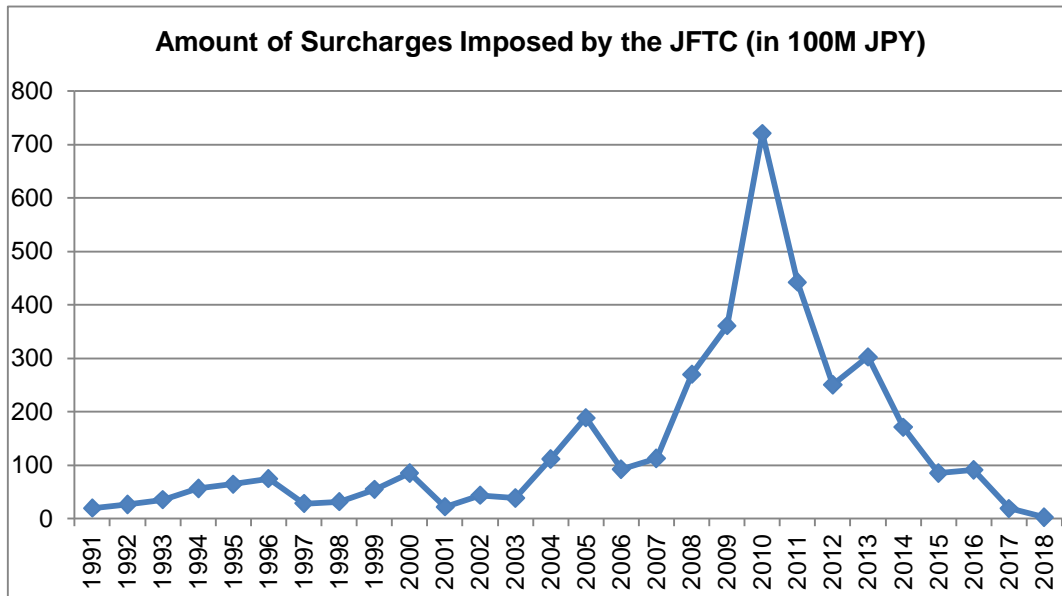
<sup>19</sup> *See supra* note 14.

period (2 to 5 years), in which case the individual need not actually serve jail time so long as he/she does not commit another crime during that period.

**Recent Developments towards an Even Stricter Enforcement**

Cartel enforcement has been one of the main focuses of the JFTC’s fundamental policy of prompt and effective law enforcement. Although we have seen a slowdown in the recent few years, the amount of surcharges imposed by the JFTC has been generally increasing in the long term (with a significant increase after the leniency system was introduced in 2005). This general trend suggests that the JFTC’s enforcement efforts has been successful so far (Figure 3).<sup>20</sup>

**Figure 3**



The policy of vigorous cartel enforcement has also been adopted for criminal enforcement as well. In order to support such policy, several amendments were made to the AMA. To enhance the JFTC’s ability to collect evidence to achieve aggressive criminal accusations, the 2005 amendment has authorized the JFTC to use compulsory measures for criminal investigations, namely the officers of the JFTC may inspect, search and seize based on court-issued warrants. Further, the 2009 amendment has increased the maximum jail term for unreasonable restraint of trade from the previous 3 years to the current 5 years.

These amendments have undoubtedly enabled the JFTC to further aggressively pursue criminal enforcement, and the most recent amendment increasing maximum penalties for cartels may lead to individuals actually serving jail time for their sentences.

**Looking into the Future**

As described above, the JFTC is in the course of actively enforcing the AMA, and the provisions for criminal cartel enforcement have been used as one important route for such aggressive enforcement during the past 28 years. Further, the AMA has been amended along the way to allow the JFTC to act

<sup>20</sup> These figures can be found in the JFTC annual reports and the summary, *supra* note 17. The surcharge payment order was introduced in 1977, and the calculation rate was increased in 1991 and further increased in 2005. *See supra* note 15.

even more aggressively. The next question would be how far the JFTC would go from here. In other words, would the JFTC go as far as the U.S. DOJ and consider imprisonment of individuals as a key to effective deterrence?<sup>21</sup> This question has become very topical especially after the U.S. DOJ aggressively sent numerous Japanese nationals to US prisons in relation to the auto parts cartel.<sup>22</sup>

Between 2008 and 2012, the JFTC had not filed a criminal accusation. So, when the JFTC filed a criminal accusation case in June 2012<sup>23</sup> (its first criminal accusation case after the 2009 amendment of the AMA increasing the maximum jail term for individuals), the outcome drew attention. However, the outcome was basically in line with previous practice that no individual was sentenced to serve actual jail time. And this trend remains the same to date.

Japanese authorities do not yet view imprisonment of individuals as a key tool for an effective enforcement. In addition, the Public Prosecutors Office and the courts may not consider incarcerating a first time offender of the AMA to be in line with their respective sentencing standards. These sentencing standards have formed over a long period of time through consideration of the appropriate sanctions for various types of criminal offenses. As such, while the sentencing level seems to be gradually increasing together with the amendments to the AMA, it might take some time before an individual will actually be sentenced to serve jail time in Japan for a cartel offence.

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<sup>21</sup> For example see Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett Speech, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, Antitrust Division of the U.S. Department of Justice (March 2012) available at: <https://www.justice.gov/atr/speech/deterrence-and-detection-cartels-using-all-tools-and-sanctions> (“Monetary sanctions on corporations, even combining criminal fines with civil damages, are unlikely to be sufficient to deter cartels. Serious sanctions on culpable individuals therefore are required, and they are provided by the imprisonment of convicted individuals.”)

<sup>22</sup> Based on the press releases of the U.S. DOJ available at: <https://www.justice.gov/atr/press-releases> Prior to 2011, only 2 Japanese nationals had actually served in U.S. prison for an antitrust violation. However, since September 29, 2011 when the first plea agreement with individuals regarding the auto parts case was announced, more than 30 Japanese nationals have entered into plea agreements with the DOJ to serve in U.S. prison in relation to the auto parts investigation alone (as of May 2018).

<sup>23</sup> The JFTC filed a criminal accusation on June 14, 2012, regarding a price-fixing cartel case concerning industrial machinery bearings and automotive bearings. The JFTC filed a criminal accusation with the Public Prosecutor-General against manufacturers and distributors of those products etc., which formed and implemented agreements to raise the selling prices of those products. The JFTC press release is available at: <https://www.jftc.go.jp/en/pressreleases/yearly-2012/jun/individual-000486.html> .