

Japan Steps Up Enforcement of the Antimonopoly Law Against Cartels

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If your organization maintains international operations in Japan or businesses that affect Japanese commerce, it is now more important than ever to make sure that your company and its executives are in compliance with Japan's Antimonopoly Law. On February 18, the Japan Fair Trade Commission (JFTC) levied its largest combined cartel fine in history, totaling ¥11.7 billion (approx. \$125 million), against two companies in the domestic PVC pipe industry. This historic fine comes on the heels of the JFTC's initiation, in late January, of its first international cartel investigation in nearly two years. Moreover, the Japanese governing party recently re-approved a proposed amendment to the Antimonopoly Law that would increase the maximum jail terms for individuals convicted of price-fixing or bid-rigging from three to five years.

These developments may mark the beginning of the next chapter in the revamping of Japan's cartel enforcement efforts, a movement that has been led by JFTC chairman Kazuhiko Takeshima. Three years ago, under Mr. Takeshima's leadership, the JFTC introduced a leniency program modeled after the U.S. Department of Justice Antitrust Division's famed leniency program. The Japanese business community was skeptical of the JFTC's efforts to create a leniency program based on self-disclosures, because it viewed whistle-blowing as contrary to Japanese corporate culture. The program has taken off, however, yielding more than 150 leniency applications, with more than a dozen of these emanating from leniency applications received in the program's first two years.

Importantly, the program has quickly gained the attention and acceptance of the Japanese business community, as leading companies such as Mitsubishi Heavy Industries and Kawasaki Heavy Industries have submitted leniency applications under the program. Despite the initial skepticism, the JFTC's leniency program has effectively demonstrated that, when the stakes are high, cartel members will betray their co-conspirators in favor of gaining favorable leniency with the government.

On the horizon, look for the JFTC to try to increase its reputation in the international cartel enforcement community by continuing to focus on prosecutions of leading multinational corporations and achieving longer prison sentences for executives prosecuted if the new amendment to the Antimonopoly Law is finally enacted. Although the JFTC's enforcement efforts have progressed swiftly under Mr. Takeshima, it has yet to send anyone to jail for participating in cartel conduct and, as many observers believe, it is still seeking respect from other competition authorities around the globe as an active and aggressive enforcement agency. As Mr. Takeshima himself has noted, the JFTC "will continue actively pursuing international cases that exert a major influence on the Japanese market in cooperation with overseas competition authorities."

Japan's proposal for increased penalties for individuals convicted of participating in illegal price-fixing, bid-rigging, or other cartel-like activities is the most recent example of international efforts to deter cartel-like conduct. Last October Australia introduced a draft law that would criminalize cartels and allow for maximum jail terms of up to 10 years. In the current economic climate, watch for other countries to seek increased penalties for cartel conduct—in terms of increased prison terms and criminal fines—as they continue to crack down on global cartel activity.

There are at least two reasons to believe that the global recession may cause an increase in cartel activity and enforcement efforts around the world. First, cartel activity can be expected to increase as pressure mounts on individual executives and business managers to keep their businesses afloat. These increased pressures may lead to increased temptation for executives and business managers to try to eliminate market uncertainties by colluding with their competitors. Second, the poor global economy may make it far easier for competition authorities to detect cartel activity. As companies continue to downsize or fail, disgruntled former employees may step forward to blow the whistle on their former employers' and/or competitors' anticompetitive activities. The JFTC and other competition authorities are poised to capitalize on the disclosure of any such information in their efforts to aggressively pursue prosecutions of international cartels.

These developments highlight the growing need for companies operating in the international marketplace to ensure that they have in place effective antitrust compliance programs to educate their executives and employees on the “dos and don'ts” of competing properly in this highly regulated arena, to help prevent antitrust violations, and to help limit any potential criminal penalties against the corporation and its officials if violations occur.

If you have questions about the recent developments under Japan's Antimonopoly Law and their potential impact on international businesses, or if you would like to discuss potential antitrust compliance issues and concerns, please contact one of Morgan Lewis's knowledgeable antitrust counselors:

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