

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by
Japan****5 June 2018**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm

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Japan

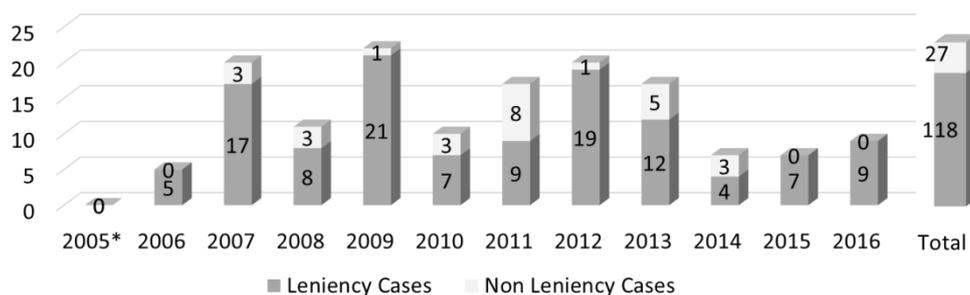
1. 1. Introduction

1. Leniency programme in Japan has been successfully functioning as a tool for cartel detection and investigation since its introduction in January 2006; Japan Fair Trade Commission (JFTC) has received successful leniency applications in more than 80 percent of the cartel cases where JFTC took legal measures from FY 2006 to FY 2016¹ (see chart 1). Also, an average of about 100 leniency applications per year has been submitted to JFTC during the same period of time (see chart 2). JFTC has not experienced any significant decrease in the number of leniency applications thus far, including applications in cross-border cartel cases.

2. In the meantime, JFTC has experienced difficulties in ensuring incentives for cartelists to cooperate with its investigation and granted that there is still room for improvement. Specifically, immunity and reduction rates under Japanese leniency programme are all fixed and decided merely by the order of applications, as described in section 2.1 below. In other words, leniency applicants can receive immunity or a certain reduction in surcharges regardless of the value of information they submit or the degree of cooperation with investigations by JFTC. Therefore, there are concerns that the leniency applicants may not be motivated to further cooperate with JFTC's investigation.

3. This contribution paper is organised as follows: first, it illustrates the outline of Japanese leniency programme and its elements contributing to the efficiency and effectiveness in section 2. Then, challenges which we have been facing in implementing leniency programme and possible solutions are analysed and described in section 3. Section 4 briefly summarises the important factors and improvements for the efficient and effective leniency programme.

Figure 1. Number of cartel cases where leniency applications were filed



Note: From January 4, 2006 (introduction of leniency programme) to March 31, 2006 (end of FY2005)

¹ Basically, names of successful leniency applicants are publicly disclosed on JFTC's website at the same time as the legal measure is taken place and published.

Table 1. Number of leniency applications²

FY	2005*	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
No.	26	79	74	85	85	131	143	102	50	61	102	124	1062

Note: From January 4, 2006 (introduction of leniency programme) to March 31, 2006 (end of FY2005)

2. Japanese leniency programme and its key elements

2.1. Outline of Japanese leniency programme (see chart 3)

4. This section overviews Japan's leniency system under the Antimonopoly Act (AMA)³.

5. As a general rule, Japan's leniency programme is applicable to companies, not natural persons, subject to surcharges. Types of infringements covered by the leniency programme are so-called hard core cartels such as price fixing and bid rigging. JFTC grants immunity or reductions of surcharges to up to five applicants in each case. The first applicant company before JFTC starts its investigation can receive full immunity from surcharges. The second applicant will be granted a reduction of 50 percent and the third to fifth applicants will get 30 percent reduction as long as they submit applications before JFTC starts its investigation, while applicants after the investigation start date can receive only 30 percent reduction regardless of the application order.

6. Also, although the leniency programme in Japan is basically designed for surcharges, the first applicant company and its officers before JFTC starts its investigation can avoid criminal accusation in accordance with JFTC's policy on criminal accusation⁴.

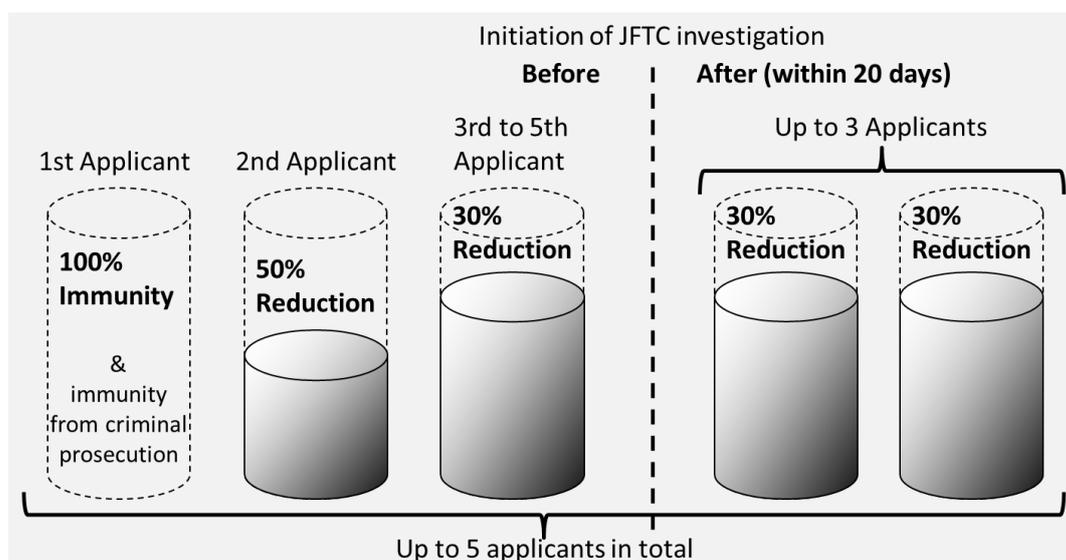
7. The general principle is first-come-first-served. The main characteristic of Japan's leniency system is that JFTC has no discretion to determine immunity and reduction rates by taking into account, for example, the degree of cooperation by applicants or added value of evidence submitted.

² See annual reports of JFTC. Available at http://www.jftc.go.jp/en/about_jftc/annual_reports/index.html (English)

³ See Article 7-2 (10) to (18).

⁴ "The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations", available at http://www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.files/2015policy_on_criminalaccusation.pdf (English)

Figure 2. Outline of Japanese leniency programme



2.2. Key elements to the successful leniency programme

8. There are some key factors which make Japan's leniency programme effective and efficient. Given that the benefits of implementing leniency programme for competition authorities can be classified as 1) detection, uncovering cartels that would otherwise go undetected, and 2) more efficient investigation, collecting information or evidence with cooperation of companies, the important factors contributing to effectiveness and efficiency of the leniency programme are A) incentives for submitting application, and B) incentives for cooperation with JFTC's investigation. Japanese leniency programme is able to offer both incentives; however, there is a need to put a little more emphasis on B).

2.2.1. Marker system

9. **Marker system**, which was already discussed in Working Party No. 3 in December 2014, is provided in order to increase incentives for companies to self-report and use the leniency programme, by lowering the initial barrier to apply and providing predictability and certainty of the process. In addition, any company which intends to apply for leniency can receive a prior consultation with JFTC before submitting an application so that it can be informed of the expected order of application. This prior consultation contributes to greater predictability and certainty.

2.2.2. Leniency for subsequent applicants

10. Japanese leniency programme also provides **lenient treatment for subsequent applicants**, which OECD also discussed in December 2012. JFTC accepts the second and continuous leniency applicants and it has even expanded the maximum number from three to five in 2010 amendment, in order to encourage more self-reports and information gathering. JFTC can detect cartels by the first application; however, sometimes it is not enough to draw the whole picture of the case with the evidence from the first application.

In such situations, information and evidence from other cartel members, i.e. subsequent applicants, is necessary. In addition, rewarding subsequent applicants also generates investigation efficiency. Indeed, JFTC can receive information and evidence from more companies through the leniency procedure without carrying out full investigations to them.

2.2.3. Substantial advantages for the first applicant

11. While leniency for subsequent applicants is important, there should be **substantial advantages for the first applicant**. If the reductions offered to subsequent applicants are too high, companies would be satisfied with the second or third reduction rates and would not like to be the first one to self-report. Therefore, there is a significant gap in rewards between the first and later applicants under Japanese leniency programme as shown in Section 2.1. Only the first applicant can be granted 100 percent reduction and immunity from criminal prosecution. Also, JFTC sets higher requirements for later applicants (i.e. fourth and fifth applicants and any applicants after investigation start date), which means that, they are required to submit information and evidence unknown to JFTC. This is to make it more attractive for companies to apply as early as possible. It is important to ensure that reductions for subsequent applicants do not undermine incentives to come in the first place for leniency.

2.2.4. Confidentiality of leniency information

12. **Protecting confidentiality of leniency information** is one of the most important elements for maintaining incentives for submitting applications. Companies can be discouraged to apply for leniency if there is possibility that leniency information is disclosed to third parties or used against them in private civil actions. Therefore materials obtained through the leniency programme are strictly kept confidential by JFTC unless applicants consent to disclosure. In addition to the duty of secrecy in the AMA (Article 39), Article 220 of the Code of Civil Procedure provides that a holder of a document can refuse to submit it to a court if it contains a secret in relation to a public officer's duties, which is, if submitted, likely to harm the public interest or substantially hinder the performance of its public duties. Leniency materials are considered to fall into the category of these documents so that JFTC can refuse to submit them to courts.

13. Besides, JFTC allows applicants to provide information orally in the leniency procedure. This reflects consideration for protecting leniency applicants from court orders to submit documents or discovery process in relation to civil damages actions in foreign countries.

2.2.5. Transparent procedure

14. It is necessary to have **transparency and certainty** in the leniency procedure and the consequence. Leniency applicants need to be informed of what they can receive in return for applying and providing cartel information or evidence, and what they should exactly do in order to be granted leniency. JFTC has published transparent process and conditions for granting leniency in AMA and written rules on leniency⁵.

⁵ "Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges". Available at http://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules.files/immunity.pdf (English)

15. Also, reduction rates under Japanese leniency programme are all fixed and JFTC has no discretion as explained in section 2.1. This non-discretionary system contributes greatly to transparency and certainty of leniency, however, it also accompanies a problem of little incentives for further cooperation of applicants with JFTC's investigation; this point will be discussed in section 3.

2.2.6. Interaction with other enforcement policies

16. Alignment of the leniency programme with criminal prosecution and consideration on private litigations were already explained above. Besides, a relationship between *the leniency programme and debarment from participating in public tenders* will be described here as another important feature of Japanese system.

17. Public procurement agencies in national and local governments in Japan have their procurement policies based on the model by the national government. In those policies they usually stipulate debarment from participating in public tenders for a certain period of time against companies involved in bid-riggings, and at the same time, reduction of the debarment period in a manner consistent with JFTC's leniency programme. More specifically, first successful leniency applicant can also avoid being excluded from public tenders and subsequent applicants can reduction of the debarment period. In this respect, consistency of Japanese leniency programme with debarment rules is maintained in order to preserve incentives for leniency application.

2.2.7. Proactive enforcement activities

18. More importantly, leniency incentives can also be raised from factors outside of leniency programme itself. *Strong cartel enforcement by a competition authority* is a prerequisite of an effective leniency policy. In other words, companies would not come forward to use leniency system without any fear of being severely penalised, or without recognising those risks of conducting cartels and not applying for leniency.

19. In this regard, JFTC has a strong ability to detect cartels by its own authority (ex-officio detection). Through its complaint system, JFTC receives reports regarding competition law violations from the public such as consumers, employees and competitors. The average number of the complaint reports is around 8,000 per year⁶. JFTC has been utilizing leniency applications, complaints and ex-officio detection as cartel detection tools, and about 40 percent of the cartel cases have been triggered by other means than leniency, even after the introduction of the leniency programme (from FY 2006 to FY 2016). Also, JFTC has actively enforced competition law and policies; it has been equipped with a sufficient investigative capacity and has been proactively tackling cartel cases. Approximately 10 billion JPY surcharges have been imposed in around 10 cases per year on average, in a variety of different sectors⁷. There is a high risk for cartelists to be detected and imposed vigorous penalties, which lead to the significant number of leniency applications.

⁶ Supra note 2.

⁷ Supra note 2.

3. Challenges of Japanese leniency programme and possible solutions

20. Japanese leniency system seems to be successful in detecting and investigating cartels. However, JFTC has also experienced difficulties in relation to cooperation with its investigation and discussed for future improvement. This section will explain the main challenges and possible solutions to them.

3.1. Challenges of Japanese leniency programme

21. One of the obstacles to ensuring incentives for companies to cooperate with JFTC's investigation is *the limitation to the number of successful leniency applicants* (up to five) *and the application period* (twenty business days from the date when JFTC starts the investigation); companies which could not fit into the limitation and companies which could not apply during the period have no incentives to provide JFTC with information.

22. The other is *a rigidity* of the leniency programme. Leniency applicants can obtain immunity or certain amount of reductions regardless of the degree of cooperation or quality of evidence submitted. Therefore, applicants are discouraged from cooperating more positively and submitting more valuable evidence. In fact, JFTC has ever confronted leniency applicants who were reluctant to cooperate with its investigations; for example, an employee of a leniency applicant company refused to answer questions related to information in the leniency materials during JFTC's interview. In another example, an applicant company intentionally reported only a part of its cartel infringement.

3.2. Possible improvements

3.2.1. Expansion of the limit of leniency applications

23. It seems to be desirable *to abolish the current limitation on the number of leniency applicants and to extend the application period*, in order to provide a wide range of companies with opportunities to use the leniency programme and submit evidence voluntarily. In the meantime, it is appropriate to sustain the substantial advantages for the first applicant and the gradation in rewards for later applicants, for the purpose of maintaining incentives to apply for leniency as early as possible.

3.2.2. Flexible reduction rates

24. *Flexibility in applying reduction rates* would be the most desired improvement for Japanese leniency programme, in order to prevent non-cooperative attitudes by applicants (explained in section 3.1) and to resolve cartel cases efficiently and effectively. Leniency applicants shall submit information relating to the alleged conduct, respond to JFTC's additional requests for information and shall not submit false information even under the current leniency programme. However, it does not always mean that they provide valuable information. In general, companies will not voluntarily submit any information which would be a disadvantage to them, unless there are some benefits in return for that.

25. Thus, JFTC needs to be able to decide the level of reduction for each applicant within a certain scope according to the degree of cooperation and the value of information voluntarily submitted. More specific factors for consideration could be, for example, the

time at which evidence was submitted, the extent to which it added value to the information already in JFTC's possession, or the degree to which it contributed to JFTC'S case establishment.

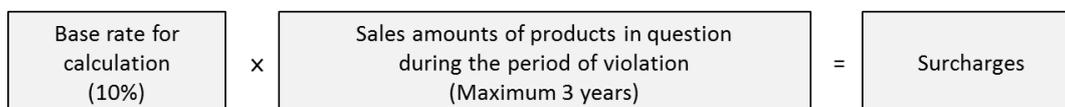
3.2.3. *Obligation of continuous cooperation*

26. Another appropriate measure to deter applicants' non-cooperative behaviour would be to stipulate explicitly in the law that applicants have ***an obligation of continuous cooperation***, which includes providing JFTC promptly with all relevant information and evidence relating to the alleged conduct which are available to them. Also, any breach of the obligation should disqualify leniency so as to secure full compliance.

3.2.4. *Strengthening of potential surcharges*

27. As mentioned above, possibility of strong penalty is an essential prerequisite of an effective leniency policy. In this regard, the current administrative fining system under the AMA has a room for expansion. For instance, the basic amount of the surcharge is computed by multiplying base rate, which is usually 10 percent, by the sales amount of relevant products or services during the period of violation, up to 3 years (see chart 4). It would be desired ***to abolish the 3-year upper limit for the calculation period*** so that the level of surcharges will rise and the potential surcharges which "would be" imposed on leniency applicants will be more significant.

Figure 3. Surcharge calculation formula under the AMA⁸



3.2.5. *Report of the Study Group on the Antimonopoly Act (April 2017)⁹*

28. The possible improvements of the leniency programme explained in this section 3.2 have been suggested in the Report released in April 2017 by "The Study Group on the Antimonopoly Act" from the viewpoint of increasing incentives on companies to cooperate with JFTC's investigation. The Study Group, which consists of experts from a wide variety of fields, was convened in February 2016 by JFTC in order to reconsider the administrative fining system from their professional views.

29. These ideas for improvement are now under JFTC's internal consideration; it is not assured that whether they will be incorporated in the AMA, however, it is moving towards the direction of more effective leniency programme which can lead to more efficient cartel investigation by encouraging more cooperation of companies.

⁸ See Article 7-2 (1) of the AMA.

⁹ Available at <http://www.iftc.go.jp/en/pressreleases/yearly-2017/April/170425.html> (English)

4. Summary

30. Leniency programme in Japan has been effectively utilised in terms of the number of applications and the significance of its role in cartel enforcement. It can be said that Japan has not experienced difficulties in promoting the use of leniency programme, including cross-border leniency applications. The key elements mentioned above seem to contribute to the success so far. However, there are still some points to be improved in the current leniency system, especially in relation to enhancing incentives on cooperation. JFTC expects the improvement of the leniency programme from the standpoint of encouraging more cooperation of companies, aiming at more efficient investigation.